INTERROGATING THE NONINCORPORATION OF THE GRAND JURY CLAUSE

Roger A. Fairfax, Jr.†

With the Supreme Court's recent incorporation—in Ramos v. Louisiana*—of the Sixth Amendment's jury unanimity requirement to apply to the states, the project of "total incorporation" is all but complete in the criminal procedure context. Virtually every core criminal procedural protection in the Bill of Rights has been incorporated through the Due Process Clause of the Fourteenth Amendment to constrain not only the federal government, but also the states—with one exception. The Fifth Amendment's grand jury right now stands alone as the only federal criminal procedural right the Supreme Court has permitted states to ignore. In one of the earliest incorporation decisions following the ratification of the Fourteenth Amendment, the Court held that the right to grand jury indictment enshrined in the Fifth Amendment was not a requisite of due process and, therefore, could be dispensed with in state criminal proceedings. The decision, which predated the Court's selective incorporation jurisprudence that eventually applied every other criminal procedural right to the states, triggered a rapid decline in the prestige of the grand jury in American legal culture over more than a century. More recently, the grand jury justifiably has come under fire for its role in the shameful trend of decisions in tragic cases involving police killings of African Americans, fueling calls for the abolition of the grand jury altogether. Despite the significant headwinds facing the grand jury, however, there are critical and impactful roles for it to play in the protection of individual liberty, in the infusion of community wisdom into the criminal process, and in the pursuit of important societal goals, including racial justice. This Article argues that it is time to interrogate the nonincorporation of the grand jury right, applying the touchstones of modern incorporation jurisprudence, including history, constitutional logic, and—despite criticisms of its value and*

† Dean and Professor of Law, American University Washington College of Law. A.B., Harvard; M.A., University of London; J.D., Harvard. I would like to thank the editors of *Cardozo Law Review* and research assistant Kristin Powell for their valuable help with this Article. I would also like to thank Andrea Dennis, Lisa Fairfax, Michael Pinard, Ira Robbins, Jenia Turner, and participants in the SMU Dedman School of Law Faculty Forum, and the Criminal Law Research Collective for their comments on earlier drafts. This Article is dedicated to the memory of Philip B. Heymann, James Barr Ames Professor, Harvard Law School (1932–2021).

efficacy—policy considerations animated by the grand jury's enduring relevance and its prospective impact in the criminal legal system and beyond.

TABLE OF CONTENTS

INTRODUCTION

With the Supreme Court's recent incorporation, in *Ramos v. Louisiana*, of the Sixth Amendment's jury unanimity requirement to apply to the states, the aim of total incorporation in the criminal procedural rights context is all but complete.[1] Virtually every core criminal procedural protection in the Bill of Rights—from the right to a petit jury to the protection against excessive fines—has been incorporated through the Due Process Clause of the Fourteenth Amendment to constrain not only the federal government, but also the states—with one exception. In *Hurtado v. California* (1884), one of the earliest incorporation decisions following the ratification of the Fourteenth Amendment, the Court held that the right to grand jury indictment enshrined in the Fifth Amendment was not a requisite of due process and, therefore, could be dispensed with in state criminal proceedings.[2]

This new regime inexorably altered the picture of state administration of criminal justice, permitting states to lodge power to force an individual to answer to serious criminal charges with an individual prosecutor or magistrate judge, rather than a grand jury. *Hurtado* resulted in diminished respect for the usefulness and value of the grand jury in the federal and state systems alike. For nearly 140 years since the decision, the American legal culture has treated the grand jury protection as a legal fiction—a mere procedural speedbump in the criminal legal process. At the same time, in recent years, the grand jury has come under fire for its failings in cases involving police officers who

1 *See* Ramos v. Louisiana, 140 S. Ct. 1390 (2020).

2 Hurtado v. California, 110 U.S. 516, 538 (1884).

have killed African Americans in the line of duty.[3] This troubling trend—seen in the grand jury declinations in the cases involving officers who killed Breonna Taylor, Tamir Rice, Michael Brown, and Eric Garner—even has led to characterizations of the grand jury as an obstacle to racial justice and prompted calls for its abolition.[4]

Despite these headwinds—and against the odds—the grand jury has endured as a significant, if not enigmatic, feature of the American criminal legal system, with grand jury indictment still required as a matter of state law for serious offenses in nearly half of the fifty states, and throughout the federal system under the Fifth Amendment.[5] The grand jury is unique in our legal culture. It features a body of laypeople who, working in secret and ostensibly insulated from popular passions, external influence, or governmental control,[6] are equipped with the ability to inject popular wisdom into the machinery of the criminal legal system. The grand jury, properly understood, is more than a protection for the defendant; it is an expression of the community's authority to influence the initiation of proceedings leading toward one of the State's most solemn and intrusive activities—the deprivation of life or liberty. This function of the grand jury is not distinct from the individual liberty interests that animate Bill of Rights and incorporation jurisprudence; rather it is intertwined with those interests. The community's participation in state criminal justice machinery, like with the petit jury, *is* the defendant's right. They are one in the same.

Nevertheless, as the Supreme Court deployed its theory of selective incorporation to apply to the states every single other criminal procedural right in the Bill of Rights, the grand jury has been left in a sort of jurisprudential limbo. Although the Supreme Court held in 1884 that the grand jury right was not incorporated to apply to the states,[7]

---

3 *See, e.g.*, Roger A. Fairfax, Jr., *The Grand Jury and Police Violence Against Black Men*, *in* POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT 210 (Angela J. Davis ed., 2017).

4 *See, e.g.*, *id.* at 210, 228; Roger A. Fairfax, Jr., *The Grand Jury's Role in the Prosecution of Unjustified Police Killings—Challenges and Solutions*, 52 HARV. C.R.-C.L. L. REV. 397, 410–11 (2017) [hereinafter Fairfax, *Grand Jury's Role*]; Roger A. Fairfax, Jr., *Should the American Grand Jury Survive Ferguson?*, 58 HOW. L.J. 825, 826 & n.8 (2015) [hereinafter Fairfax, *Grand Jury Survive*].

5 *See* U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger."); FED. R. CRIM. P. 7(a)(1); *Ramos*, 140 S. Ct. at 1435 (Alito, J., dissenting).

6 *See* 2 SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 4:15 (2d ed. 2020); Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 753 (2016). *But see, e.g.*, Fairfax, *Grand Jury's Role*, *supra* note 4, at 408–09 (noting the "[o]utsized [r]ole" played by the prosecutor in many grand juries).

7 *Hurtado*, 110 U.S. at 538.

this decision predated the era of selective incorporation and employed logic that the Court later rejected when incorporating other criminal procedure rights. Consequently, the legal culture has vacillated between full embrace of the grand jury to treating it with outright contempt. Now, with all other Bill of Rights criminal procedural protections having been incorporated, it may be time to decide once and for all whether the grand jury deserves enough respect to require states to utilize it, or whether it should be jettisoned altogether.[8]

This Article interrogates the nonincorporation of the right to grand jury indictment. Part I traces the arc of Supreme Court incorporation doctrine, illuminating the dialectic between the "fundamental fairness," selective incorporation, and the total incorporation approaches, and mining a taxonomy of "incorporation touchstones" set forth in modern incorporation cases. Part I demonstrates that although the selective incorporation approach won the initial jurisprudential battle, the total incorporation approach is on the verge of winning the war in the context of criminal procedural rights. Part II scrutinizes the Supreme Court's nineteenth-century decision not to incorporate the grand jury right to apply to the states, illuminating the ruling's flawed methodology and assumptions and characterizing the decision as an example of "pragmatic procedural federalism" rather than pure constitutional analysis. In Part III, this Article interrogates the contemporary case for incorporation of the grand jury right, examining the merits of the incorporation of the grand jury with reference to the modern incorporation touchstones—including history, constitutional logic, and policy considerations. Part III applies those touchstones and seeks to answer the central question regarding the case for incorporation of the grand jury right: whether the grand jury right—and, by extension, the grand jury itself—is worth keeping, much less imposing on the states. This Part considers the grand jury right as a matter of normative policy, with particular attention paid to the enduring relevance of the grand jury, and new challenges to the grand jury's standing in the wake of disappointing outcomes in cases such as those involving the police killings of Breonna Taylor, Tamir Rice, Michael Brown, Eric Garner, and others.

---

[8] *See Ramos*, 140 S. Ct. at 1435 (Alito, J., dissenting) ("If we took the same approach to the *Hurtado* question that the majority takes in this case, the holding in that case could be called into question."). A number of other scholars have considered the place of the grand jury right among other nonincorporated rights. *See, e.g.*, Roger A. Fairfax, Jr., *Testing Charges*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 59, 65 (Ronald F. Wright, Kay L. Levine & Russell M. Gold eds., 2021); F. Andrew Hessick & Elizabeth Fisher, *Structural Rights and Incorporation*, 71 ALA. L. REV. 163, 205–06 (2019); Suja A. Thomas, *Nonincorporation: The Bill of Rights After* McDonald v. Chicago, 88 NOTRE DAME L. REV. 159, 185–89 (2012).

I. THE ARC OF INCORPORATION DOCTRINE

A. *Trans-Substantive Principles*

The Bill of Rights, ratified in 1791, initially constrained only the power of the federal government.[9] However, the Civil War and the subsequent amendments to the U.S. Constitution altered the relationship between the federal government and the states.[10] After the ratification of the Fourteenth Amendment, there were questions regarding whether the constraints on government power found in the first ten amendments to the Constitution were binding on the various states. In other words, would the Bill of Rights be incorporated through the Fourteenth Amendment to apply to the states? Two provisions of the Fourteenth Amendment were particularly relevant—the Privileges and Immunities Clause[11] and the Due Process Clause.[12]

Although there has been debate over whether the Privileges and Immunities Clause provides an alternative—and, as some have argued, exclusive—basis for applying Bill of Rights provisions to the states,[13] it is the Due Process Clause that has been embraced by the Court as the vehicle for incorporation of Bill of Rights provisions to the states.[14]

1. Baseline Features of Incorporation Doctrine

In *McDonald v. City of Chicago*,[15] which held that the Second Amendment's right to bear arms was incorporated to apply to the states,

---

9 *E.g.*, Barron v. City of Baltimore, 32 U.S. 243 (1833); Livingston v. Moore, 32 U.S. 469, 551–52 (1833) ("[I]t is now settled that [the amendments in the Bill of Rights] do not extend to the states."); Timbs v. Indiana, 139 S. Ct. 682, 687 (2019) ("When ratified in 1791, the Bill of Rights applied only to the Federal Government.").

10 *See, e.g.*, *Timbs*, 139 S. Ct. at 687; McDonald v. City of Chicago, 561 U.S. 742, 754 (2010) ("The constitutional Amendments adopted in the aftermath of the Civil War fundamentally altered our country's federal system.").

11 U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."). *See generally* Slaughter-House Cases, 83 U.S. 36 (1872).

12 U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").

13 *See, e.g.*, *McDonald*, 561 U.S. at 754–59. *But see, e.g.*, *Ramos*, 140 S. Ct. at 1423–25 (Thomas, J., concurring) (rooting for incorporation of the right to jury unanimity in the Privileges and Immunities Clause).

14 *See, e.g.*, *McDonald*, 561 U.S. at 754–59 ("For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause.").

15 561 U.S. 742.

the Court illuminated several features animating the arc of its jurisprudence regarding whether the Fourteenth Amendment constrained states from infringing liberties found in the Bill of Rights. First, the Court declared that it had "viewed the due process question as entirely separate from the question whether a right was a privilege or immunity of national citizenship."[16]

Next, the Court noted that its determination of whether a particular right was incorporated to apply to the states through the Due Process Clause was not a function of whether the right was found in the Bill of Rights.[17] Rather, the inquiry was whether the nature of the right was such that it would be "included in the conception of due process of law."[18] The term "due process," the *McDonald* Court explained, had been defined in various ways. In its 1908 case, *Twining v. New Jersey*,[19] the Court had explained due process as "immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard."[20] The Court had, in its 1934 case, *Snyder v. Massachusetts*,[21] attached to due process those rights "so rooted in the traditions and conscience of our people so as to be ranked as fundamental."[22] Just a few years later, the Court, in *Palko v. Connecticut*,[23] referenced "those rights that are "the very essence of a scheme of ordered liberty" and essential to "a fair and enlightened system of justice."[24]

The third feature of the incorporation doctrine noted in *McDonald* was the Court periodically "having asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular protection."[25] This "civilized system" inquiry, the *McDonald* Court explained, led the Court to hold that the Due Process Clause incorporated the Fifth Amendment's Takings Clause in its 1897 case,

---

16 *Id.* at 759 (citing Twining v. New Jersey, 211 U.S. 78, 99 (1908)).

17 *Id.* at 760 ("While it was 'possible that some of the personal rights safeguarded by the first eight Amendments against National action [might] also be safeguarded against state action' . . . this was 'not because those rights are enumerated in the first eight Amendments.'" (alteration in original) (quoting *Twining*, 211 U.S. at 99)).

18 *Id.* at 759 (quoting *Twining*, 211 U.S. at 99).

19 211 U.S. 78.

20 *Id.* at 102 (quoting Holden v. Hardy, 169 U.S. 366, 389 (1898)).

21 291 U.S. 97 (1934).

22 *Id.* at 105.

23 302 U.S. 319 (1937).

24 *Id.* at 325.

25 McDonald v. City of Chicago, 561 U.S. 742, 760 (2010) (quoting Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968)).

Chicago, B. & Q.R. Co. v. City of Chicago,[26] because the protection against government taking of private property without just compensation is "a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice."[27] By that same token, the Court had determined in *Twining* that the privilege against compelled self-incrimination was not a requisite of due process, as the right "has no place in the jurisprudence of civilized and free countries outside the domain of the common law."[28]

The *McDonald* Court also highlighted that the rights contained in the Bill of Rights had no special status in its incorporation jurisprudence.[29] In other words, the Court had demonstrated that it had no qualms about excluding from the confines of the Due Process Clause a particular right found in the Bill of Rights. Thus, as the *McDonald* Court pointed out, although the First Amendment's free speech, free press, free assembly, and free religion provisions and the Sixth Amendment's assistance of counsel protection were deemed to be included within due process—and therefore incorporated,[30] the Fifth Amendment's privilege against incrimination and the right to grand jury indictment were not.[31]

The final feature of incorporation jurisprudence amplified in *McDonald* is that rights that were incorporated through the Fourteenth Amendment's Due Process Clause to apply to the states did not necessarily apply equally, or in the same manner that they applied to the federal government.[32] One cited example of this phenomenon was the Court's 1942 decision in *Betts v. Brady*,[33] in which the Sixth Amendment right to counsel—which applied in all federal criminal cases—was incorporated to apply only in state cases in which "want of counsel . . . result[ed] in a conviction lacking in such fundamental fairness."[34] Also in 1949, the Court, in *Wolf v. Colorado*,[35] incorporated

---

26 166 U.S. 226 (1897).

27 *McDonald*, 561 U.S. at 760 (quoting *Chicago, B. & Q.R. Co.*, 166 U.S. at 238).

28 Twining v. New Jersey, 211 U.S. 78, 113 (1908).

29 *McDonald*, 561 U.S. at 761.

30 *See id.* (first citing Gitlow v. New York, 268 U.S. 652, 666 (1925) (freedom of speech and press); then citing Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 707 (1931) (freedom of speech and press); then citing Powell v. Alabama, 287 U.S. 45 (1932) (assistance of counsel in capital cases); then citing De Jonge v. Oregon, 299 U.S. 353 (1937) (freedom of assembly); and then citing Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise of religion)).

31 *Id.* (citing *Twining*, 211 U.S. at 113; Hurtado v. California, 110 U.S. 516 (1884)).

32 *Id.*

33 316 U.S. 455 (1942).

34 *Id.* at 473.

35 338 U.S. 25 (1949).

the Fourth Amendment, which it deemed to be a requisite of due process, to apply to the states, but it declined to incorporate the exclusionary rule.[36]

2. Total Incorporation

Justice Hugo Black subscribed to the theory that all of the protections in the Bill of Rights were incorporated through the Fourteenth Amendment.[37] As Justice Black wrote in his lengthy dissent in *Adamson v. California*:

> I would follow what I believe was the original purpose of the Fourteenth Amendment—to extend to all the people of the nation the complete protection of the Bill of Rights. To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution.[38]

This theory of "total" or "complete" incorporation was a marked departure from the selective incorporation approach that would soon emerge.[39] Although Justice Black never persuaded a majority of the Court, at the end of the day, he recognized that his theory may have lost the battle, but ultimately won the war:

> I want to emphasize that I believe as strongly as ever that the Fourteenth Amendment was intended to make the Bill of Rights applicable to the States. I have been willing to support the selective incorporation doctrine, however, as an alternative, although perhaps less historically supportable than complete incorporation. The selective incorporation process, if used properly, does limit the Supreme Court in the Fourteenth Amendment field to specific Bill of Rights' protections only and keeps judges from roaming at will in their own notions of what policies outside the Bill of Rights are

---

36 *Id.* at 27–28.

37 *See, e.g.*, *McDonald*, 561 U.S. at 761–62. Justice Black argued forcefully throughout his tenure that the Privileges and Immunities Clause of the Fourteenth Amendment was meant to overturn *Barron v. Baltimore*, 32 U.S. 243 (1833), and incorporate all of the provisions of the Bill of Rights, but he also analyzed incorporation more broadly under the Due Process Clause. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 162–71 (1968) (Black, J., concurring); Adamson v. California, 332 U.S. 46, 68–92 (1947) (Black, J., dissenting), *overruled in part by* Malloy v. Hogan, 378 U.S. 1, 6 (1964).

38 *Adamson*, 332 U.S. at 89 (Black, J., dissenting).

39 Justice Black and Justice Frankfurter had heated rhetorical battles over the merits of the total incorporation theory. *See, e.g.*, Justin Collings, *The Supreme Court and the Memory of Evil*, 71 STAN. L. REV. 265, 294–97 (2019); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1012 (1998).

> desirable and what are not. And, most importantly for me, the selective incorporation process has the virtue of having already worked to make most of the Bill of Rights' protections applicable to the States.[40]

3. Selective Incorporation

By the 1960s, the selective incorporation doctrine with which Justice Black eventually made his peace had come to define the Court's approach. Unlike its halting approach in the late nineteenth century and early twentieth century, the Court, by the 1960s, consistently and methodically incorporated Bill of Rights protections to apply to the states.[41] This was particularly so in the criminal procedure area, in which the Court incorporated the right to counsel,[42] the right to jury trial,[43] the right to a speedy trial,[44] the privilege against self-incrimination,[45] the right of confrontation,[46] the right to compulsory process,[47] the warrant requirement,[48] the exclusionary rule,[49] and the protection against double jeopardy.[50] Notably, a number of these decisions overruled or otherwise departed from previous decisions not to incorporate rights.[51]

In addition to incorporating nearly all of the protections in the Bill of Rights,[52] by the 1960s, the Court also had sharpened its definition of

---

40 *Duncan*, 391 U.S. at 171 (Black, J., concurring).

41 *See McDonald*, 561 U.S. at 763.

42 Gideon v. Wainwright, 372 U.S. 335, 340–42 (1963), *overruling* Betts v. Brady, 316 U.S. 455 (1942).

43 *Duncan*, 391 U.S. at 147–48.

44 Klopfer v. North Carolina, 386 U.S. 213 (1967).

45 Malloy v. Hogan, 378 U.S. 1, 4–6 (1964), *overruling* Twining v. New Jersey, 211 U.S. 78 (1908).

46 Pointer v. Texas, 380 U.S. 400, 403–04 (1965).

47 Washington v. Texas, 388 U.S. 14, 18 (1967).

48 Aguilar v. Texas, 378 U.S. 108 (1964).

49 Mapp v. Ohio, 367 U.S. 643 (1961), *overruling* Wolf v. Colorado, 338 U.S. 25 (1949).

50 Benton v. Maryland, 395 U.S. 784 (1969), *overruling* Palko v. Connecticut, 302 U.S. 319 (1937).

51 *See, e.g.*, *id.*; Malloy v. Hogan, 378 U.S. 1, 4–6 (1964), *overruling* Twining v. New Jersey, 211 U.S. 78 (1908); Gideon v. Wainwright, 372 U.S. 335, 341 (1963), *overruling* Betts v. Brady, 316 U.S. 455 (1942); *cf.* Duncan v. Louisiana, 391 U.S. 145, 155 (1968) (characterizing as dicta statements in prior decisions that jury trial right is not a requisite of due process).

52 *See* Timbs v. Indiana, 139 S. Ct. 682, 687 (2019) ("With only 'a handful' of exceptions, this Court has held that the Fourteenth Amendment's Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States."); McDonald v. City of Chicago, 561 U.S. 742, 764 (2010) ("The Court eventually incorporated almost all of

what qualified a particular right for incorporation through the Fourteenth Amendment. Gone was the notion that the Court would judge a right's incorporation-worthiness—as it had done in *Hurtado* with the grand jury—by whether, *in the abstract*, a "civilized system [can] be imagined that would not accord the particular protection."[53] Rather, the inquiry was to be whether the protection was one of the "fundamental principles of liberty and justice which lie at the base of all our [American] civil and political institutions,"[54] is "basic in our [American] system of jurisprudence,"[55] is "a fundamental right, essential to a fair trial,"[56] and is "fundamental to the American scheme of justice."[57]

Additionally, by the 1960s, the Court had "decisively held that incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'"[58] This was a repudiation of the "dual-track" incorporation theory espoused by Justice Powell.[59] The dual-track approach implicitly endorsed "the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights,'"[60] in which the Court applied rights in different ways "depending on whether the claim was asserted in a state or federal court."[61] However, the dual-track view never commanded a majority of the Court and had never been embraced in its jurisprudence.[62] Thus, today, all of the criminal

---

the provisions of the Bill of Rights."); *id.* at 764 n.12 (collecting cases); *see also id.* at 765 ("Only a handful of the Bill of Rights protections remain unincorporated."); *id.* at 765 n.13 (collecting cases).

53 *Duncan*, 391 U.S. at 149 n.14 (noting that "recent cases applying provisions of the first eight Amendments to the States represent a new approach to the 'incorporation' debate").

54 *Id.* at 148 (quoting Powell v. Alabama, 287 U.S. 45, 67 (1932)).

55 *Id.* at 149 (quoting *In re* Oliver, 333 U.S. 257, 273 (1948)).

56 *Id.* (first quoting *Gideon*, 372 U.S. at 343–44; then quoting *Malloy*, 378 U.S. at 6; and then quoting Pointer v. Texas, 380 U.S. 400, 403 (1965)).

57 *Id.* ("Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee.").

58 McDonald v. City of Chicago, 561 U.S. 742, 765 (2010) (quoting *Malloy*, 387 U.S. at 10).

59 *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1398 (2020) ("Justice Powell doubled down on his belief in 'dual-track' incorporation—the idea that a single right can mean two different things depending on whether it is being invoked against the federal or a state government.").

60 *Malloy*, 387 U.S. at 10–11; *see also McDonald*, 561 U.S. at 765.

61 *McDonald*, 561 U.S. at 765 (quoting *Malloy*, 387 U.S. 10–11).

62 *See Ramos*, 140 S. Ct. at 1398 & n.32 (noting that the dual-track view had been rejected by the Court, including in *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019)); *see also* Johnson v. Louisiana, 406 U.S. 356, 395–96 (1972) (Brennan, J., dissenting).

procedural protections in the Bill of Rights that have been incorporated apply in equal measure in the state and federal systems.[63]

B. *Modern Incorporation Touchstones*

Very recently, the Court had the opportunity to affirm the current state of incorporation doctrine in the context of two criminal cases—*Timbs v. Indiana* (2019)[64] and *Ramos v. Louisiana* (2020).[65] Both cases illuminate the Court's current thinking on incorporation doctrine, particularly in the context of criminal procedural protections. Importantly, they provide guideposts for how the Court might analyze the case for incorporation of the only remaining core criminal procedural protection found in the Bill of Rights—the right to grand jury indictment.[66]

---

63 *See Timbs*, 139 S. Ct. at 687 ("Incorporated Bill of Rights guarantees are enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment. Thus, if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires." (internal citations and quotation marks omitted)). It should be noted that, until the Court's decision in *Ramos*, there was one remaining right that was applied differently in state and federal courts. In *Apodaca v. Oregon*, the Court declined to incorporate the jury unanimity requirement to apply to the states, despite the fact that the Sixth Amendment's jury trial right had been incorporated. Apodaca v. Oregon, 406 U.S. 404 (1972), *abrogated by Ramos*, 140 S. Ct. 1390. *Apodaca* was a fractured decision, and the result permitting states to ignore the unanimity requirement was not universally viewed as "an endorsement of the two-track approach to incorporation." *McDonald*, 561 U.S. at 766 n.14; *see also Timbs*, 139 S. Ct. at 687 n.1. In any event, in *Ramos*, the Court overturned *Apodaca* and held that the Sixth Amendment's jury unanimity requirement applies to state proceedings, thus incorporating the jury right in its entirety, with an identical application in state and federal courts. *Ramos*, 140 S. Ct. at 1408.

64 139 S. Ct. 682.

65 140 S. Ct. 1390.

66 It is now settled that the Excessive Bail Clause of the Eighth Amendment has been incorporated through the Fourteenth Amendment to apply to the states. *See McDonald*, 561 U.S. at 764 & n.12. However, the Court has never explicitly held this. *See, e.g.*, Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 82 (2008) ("It can be argued that the Supreme Court signaled its willingness to incorporate [the right against excessive bail] against the states through the Fourteenth Amendment in 1971, although it has not technically done so thus far."). In its 1971 case, *Schilb v. Kuebel*, 404 U.S. 357 (1971), the Court stated in dictum that "the Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment." *Id.* at 365. Although some courts assumed this dictum signaled that the Excessive Bail Clause had been incorporated, see, e.g., United States v. Juanico, No. CR 14-3095, 2015 WL 10383206, at *6 n.1 (D.N.M. Dec. 16, 2015), *aff'd*, 658 F. App'x 906 (10th Cir. 2016) ("The Supreme Court has incorporated the Excessive Bail Clause's substantive safeguards against the states."), others did not. *See, e.g.*, Martin v. Diguglielmo, 644 F. Supp. 2d 612, 618

After *McDonald*, which—as discussed above—updated the Court's articulation of its incorporation doctrine, nearly another decade would pass before the Court took the opportunity to address one of the "handful of the Bill of Rights protections [that] remain unincorporated."[67] Of these five remaining unincorporated rights, only two—the Third Amendment's quartering of soldiers provision and the Seventh Amendment's civil jury trial provision—were not related to the criminal process.[68] Of the other three unincorporated criminal procedural protections, the Fifth Amendment's Grand Jury Clause and the Sixth Amendment's jury unanimity requirement had been determined by the Court not to be incorporated to apply to the states.[69] Thus, only the Eighth Amendment's Excessive Fines Clause had not been addressed previously by the Court.

1. *Timbs v. Indiana* (2019)

The Court took up the Excessive Fines Clause in the 2019 case of *Timbs v. Indiana*.[70] *Timbs* involved a defendant who was sentenced to home detention, probation, and payment of fees and costs after pleading guilty to narcotics distribution and conspiracy charges in an

(W.D. Pa. 2008) ("To the best of this Court's knowledge, the Supreme Court of the United States has never held that the Eighth Amendment prohibition on excessive bail applies to the States via the incorporation doctrine of the Fourteenth Amendment's substantive due process clause."). However, in its 2010 *McDonald v. City of Chicago* decision, the Supreme Court clarified its position that the Excessive Bail provision had been incorporated—by including it in a footnote listing previously incorporated provisions of the Bill of Rights. *See McDonald*, 561 U.S. at 764 n.12 (listing the Excessive Bail Clause of the Eight Amendment among rights that have been incorporated).

67 *McDonald*, 561 U.S. at 765 & n.13.

68 *See id.* at 765 n.13. Although the Excessive Fines Clause also applies to civil forfeiture proceedings, these are often parallel to, or in connection with, criminal proceedings. *See, e.g.*, *Timbs*, 139 S. Ct. at 686 ("Like the Eighth Amendment's proscriptions of 'cruel and unusual punishment' and '[e]xcessive bail,' the protection against excessive fines guards against abuses of government's punitive or criminal-law-enforcement authority." (alteration in original)); *id.* at 687 ("Directly at issue here is the phrase 'nor excessive fines imposed,' which 'limits the government's power to extract payments, whether in cash or in kind, "as punishment for some offense."'" (quoting United States v. Bajakajian, 524 U.S. 321, 328 (1998)) (internal quotations and citations omitted)). Indiana attempted to have the Court reconsider its prior decision in *Austin v. United States*, 509 U.S. 602 (1993), in which it held unanimously that the Excessive Fines Clause applies to civil in rem forfeitures if such forfeitures "are at least partially punitive." *Timbs*, 139 S. Ct. at 689. The Court declined to revisit *Austin* because the State had not properly raised the question before the Court. *Id.* at 690.

69 *See* Apodaca v. Oregon, 406 U.S. 404 (1972), *abrogated by Ramos*, 140 S. Ct. 1390; Hurtado v. California, 110 U.S. 516 (1884); *see also McDonald*, 561 U.S. at 765 n.13.

70 139 S. Ct. 682.

Indiana state court.[71] The State brought a civil suit against the defendant for the forfeiture of a Land Rover vehicle the defendant had purchased with money unrelated to his criminal conduct but that, as the State persuaded the state court, was used to commit the crimes. However, the state court concluded that the $42,000 value of the vehicle was so much greater than the maximum $10,000 monetary fine for the defendant's crime of conviction that a forfeiture "would be grossly disproportionate to the gravity of Timbs's offense, hence unconstitutional under the Eighth Amendment's Excessive Fines Clause."[72] The Indiana Supreme Court reversed, holding "that "the Excessive Fines Clause constrains only federal action and is inapplicable to state impositions."[73]

The Court, in an opinion written by Justice Ginsburg, reaffirmed the modern understanding of the state of incorporation doctrine set forth in *McDonald* a decade earlier. The Court reiterated that the touchstone is not whether a protection conceivably could be absent from a rational system of justice in the abstract; rather, it is whether the protection is essential to the American tradition. As Justice Ginsburg wrote, "A Bill of Rights protection is incorporated, we have explained, if it is 'fundamental to our scheme of ordered liberty,' or 'deeply rooted in this Nation's history and tradition.'"[74] The Court also reminded that the "dual-track" incorporation theory had no traction in its jurisprudence:

> Incorporated Bill of Rights guarantees are "enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." Thus, if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires.[75]

Against this backdrop, the Court traced the "venerable lineage" of the Excessive Fines Clause back to the thirteenth century's Magna Carta,[76] which ultimately proved ineffective in preventing the monarchical use of "large fines to raise revenue, harass their political foes, and indefinitely detain those unable to pay."[77] The subsequent English Bill of Rights provision "that 'excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual

---

71 *Id.* at 686.

72 *Id.*

73 *Id.*

74 *Id.* at 687 (quoting *McDonald*, 561 U.S. at 767).

75 *Id.* (quoting *McDonald*, 561 U.S. at 765).

76 *Id.*

77 *Id.* at 688.

Punishments inflicted,'"[78] would inspire not only the Eighth Amendment to the United States Constitution, but also similar guarantees in colonial compacts and state constitutions at the time of the founding.[79]

By the postbellum era, the Court noted, constitutional excessive fines provisions were found in all but two of the thirty-seven states.[80] The need for that protection was made more acute during the Reconstruction Era as Southern states enacted Black Codes, one common feature of which was to impose "draconian fines for violating broad proscriptions on 'vagrancy' and other dubious offenses,"[81] and then "[w]hen newly freed slaves were unable to pay imposed fines, States often demanded involuntary labor instead."[82] Indeed, as the Court explained, this Southern use of fines to reinstate conditions of slavery was a key concern of Congress when debating the Fourteenth Amendment.[83]

Noting that evidence of the fundamental nature of the protection against excessive fines can be found in the fact that, today, every single state has such a constitutional provision,[84] the Court then turned from mining history to extolling the logic behind the right, observing that without this protection, excessive fines can be weaponized for purposes of political retribution or unfairly supplementing state coffers without political scrutiny.[85] The Court concluded that "the historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is overwhelming. Protection against excessive punitive economic sanctions secured by the Clause is, to repeat, both 'fundamental to our scheme of ordered liberty' and 'deeply rooted in this Nation's history and tradition.'"[86] This was made clear as the basis

---

78 *Id.* (citing English Bill of Rights, 1 W. & M. ch. 2, § 10, in 3 Eng. Stat. at Large 441 (1689)).

79 *Id.*

80 *Id.* ("An even broader consensus obtained in 1868 upon ratification of the Fourteenth Amendment. By then, the constitutions of 35 of the 37 States—accounting for over 90% of the U.S. population—expressly prohibited excessive fines." (citing Calabresi & Agudo, *supra* note 66, at 82)).

81 *Id.* at 688–89.

82 *Id.* at 689; Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 AKRON L. REV. 671, 681–85 (2003).

83 *Timbs*, 139 S. Ct. at 689 (citing CONG. GLOBE, 39th Cong., 1st Sess. 443 (1866)).

84 *Id.*

85 *Id.*

86 *Id.* (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010)). The Court also rejected Indiana's argument "that the Excessive Fines Clause cannot be incorporated if it applies to civil *in rem* forfeitures." *Id.* at 690. Indiana's position was that the specific application of the Excessive Fines Clause to civil in rem forfeitures "is neither fundamental nor deeply rooted." *Id.* at 689. Noting that Indiana's argument "is inconsistent with the approach we have taken in cases

for the holding that the Eighth Amendment's Excessive Fines Clause is incorporated to apply to the states: "This safeguard, we hold, is 'fundamental to our scheme of ordered liberty,' with 'dee[p] root[s] in [our] history and tradition.' The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment."[87]

2. *Ramos v. Louisiana* (2020)

After the *Timbs* Court incorporated the Excessive Fines Clause, only two unincorporated criminal procedural rights remained—the Fifth Amendment right to grand jury indictment and the Sixth Amendment right to jury unanimity in criminal cases—and both previously had been considered for incorporation by the Court some ninety years apart.[88] As the Court reconsidered jury unanimity in *Ramos v. Louisiana*,[89] it had a clear modern articulation of its incorporation framework to apply—whether, as a matter of history, tradition, logic, and policy, the right was fundamental to the American scheme of justice. However, as the Court previously had permitted nonunanimous state verdicts to stand,[90] the *Ramos* Court also was confronted with the doctrine of stare decisis.[91]

In *Ramos*, the petitioner had been convicted of a serious offense by a nonunanimous jury, with ten jurors voting for conviction and two

concerning novel applications of rights already deemed incorporated," *id.* at 690, Justice Ginsburg explained that "[i]n considering whether the Fourteenth Amendment incorporates a protection contained in the Bill of Rights, we ask whether the right guaranteed—not each and every particular application of that right—is fundamental or deeply rooted." *Id.* Thus, for example, the Court's acknowledgement in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), a case invalidating a state law prohibiting registered sex offenders from using certain social media, that the First Amendment's Free Speech Clause applied to the states did not necessitate the Court to "inquire whether the Free Speech Clause's application specifically to social media websites was fundamental or deeply rooted." *Timbs*, 139 S. Ct. at 690. The Court also used the example of *Riley v. California*, 573 U.S. 373 (2014), which, in holding that warrantless searches of cell phones generally violate the Fourth Amendment, did not separately consider whether the application of the Fourth Amendment to cell phones was incorporated. *See Timbs*, 139 S. Ct. at 690–91.

87 *Timbs*, 139 S. Ct. at 686–87 (alterations in original) (citation omitted) (quoting *McDonald*, 561 U.S. at 767). *See generally* Suja A. Thomas, Response, *What* Timbs *Does Not Say*, GEO. WASH. L. REV. ON THE DOCKET (Mar. 7, 2019), https://www.gwlr.org/what-timbs-does-not-say [https://perma.cc/AB6J-X4R6].

88 *See* Apodaca v. Oregon, 406 U.S. 404 (1972); Hurtado v. California, 110 U.S. 516 (1884).

89 140 S. Ct. 1390 (2020).

90 *See Apodaca*, 406 U.S. 404; Johnson v. Louisiana, 406 U.S. 356 (1972).

91 *See Ramos*, 140 S. Ct. at 1404–05.

jurors voting to acquit.[92] Ramos was sentenced to life in prison without parole.[93] Right at the outset of the majority opinion, written by Justice Gorsuch, the Court did what it failed to do in *Apodaca* and interrogated the underlying racist origin and racial impact of nonunanimous juries. The Court described a Louisiana constitutional convention just before the turn of the twentieth century, the purpose of which was to advance white supremacy.[94] Among the measures adopted were mechanisms—such as poll taxes, a literacy test, a property ownership requirement, and a grandfather clause—all designed to suppress the African American vote.[95] In addition, in an effort to evade federal scrutiny of its systematic exclusion of African Americans from jury service, "the convention delegates sculpted a 'facially race-neutral' rule permitting 10-to-2 verdicts in order 'to ensure that African-American juror service would be meaningless.'"[96] The Court also noted that, in Oregon, the only other state permitting nonunanimous jury verdicts, the rule could be "traced to the rise of the Ku Klux Klan and efforts to dilute 'the influence of racial, ethnic, and religious minorities on Oregon juries.'"[97]

With that background established,[98] the Court proceeded to answer the question "whether the Sixth Amendment right to a jury trial—as incorporated against the States by way of the Fourteenth Amendment—requires a unanimous verdict to convict a defendant of a serious offense."[99] The Court first explored what is meant by the language "trial by an impartial jury" in the Sixth Amendment.[100] Explaining that the language must have "meant *something*,"[101] the Court noted the incongruity of assuming a hollow meaning of the right but having strict requirements regarding from where the jurors must be drawn.[102] The Court also asserted that the fact that the jury right is

92 *Id.* at 1393–94.

93 *Id.* at 1394.

94 *Id.* (noting that "[a]ccording to one committee chairman, the avowed purpose of that convention was to 'establish the supremacy of the white race'").

95 *See id.*

96 *Id.*

97 *Id.*

98 *Id.* ("[N]o one before us contests any of this; courts in both Louisiana and Oregon have frankly acknowledged that race was a motivating factor in the adoption of their States' respective nonunanimity rules.").

99 *Id.* Interestingly, although the Court had long assumed that the Sixth Amendment contained a unanimity requirement—regardless of whether it was incorporated to apply to the states—it had never definitively held as such. *See id.* at 1396–97; *id.* at 1397 n.22 (collecting cases); *id.* at 1399–1400 (casting skepticism on—but not definitively rejecting—Louisiana's argument that the Court's many statements that the jury right required unanimity were dicta).

100 *Id.* at 1395.

101 *Id.*

102 *Id.*

found in both Article III of the original Constitution and in the Sixth Amendment further supported the notion that "[t]he text and structure of the Constitution clearly suggest that the term 'trial by an impartial jury' carried with it *some* meaning about the content and requirements of a jury trial."[103]

The Court then explained that unanimity was one of those requirements of a jury trial—part of what jury trial meant at the time of the adoption of the Sixth Amendment. Relying on history stretching back to fourteenth-century England, Blackstone's explication of the common law, and American state practice in the founding era, in which six states had unanimity provisions in their constitutions, the Court described a backdrop to the stature of the jury unanimity requirement when the Sixth Amendment was drafted and ratified.[104] The Court also pointed to the endorsement of the unanimity requirement in post-founding treatises and in more than a dozen opinions of the Supreme Court stretching back to the late nineteenth century.[105]

Having made its case that unanimity is an essential feature of the Sixth Amendment jury trial right, the Court also reaffirmed that rights applying to the federal government, if incorporated to apply to the states, apply in the same manner:

> There can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally. This Court has long explained that the Sixth Amendment right to a jury trial is "fundamental to the American scheme of justice" and incorporated against the States under the Fourteenth Amendment. This Court has long explained, too, that incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government. So if the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court.[106]

The *Ramos* majority then analyzed and critiqued *Apodaca v. Oregon*[107] and *Johnson v. Louisiana*,[108] companion cases in which the

---

103 *Id.*; *see also* U.S. CONST., art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury."); *id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.").

104 *See Ramos*, 140 S. Ct. at 1395–96.

105 *See id.* at 1396–97.

106 *Id.* at 1397 (first citing Duncan v. Louisiana, 391 U.S. 145, 148–50 (1968); and then citing Malloy v. Hogan, 378 U.S. 1, 10–11 (1964)).

107 406 U.S. 404 (1972).

108 406 U.S. 356 (1972).

Court first addressed jury unanimity in 1972.[109] The Court was severely divided in the cases and, as the *Ramos* majority noted, four dissenting Justices endorsed the incorporation of the unanimity requirement against the states.[110] On the other hand, the four-Justice plurality "reframed the question" before the Court as concerning the importance of unanimity's function in modern society and determined that a cost-benefit analysis militated against striking down the Louisiana or Oregon nonunanimity rules.[111] The ninth and deciding vote from Justice Powell permitted him to employ his "dual-track incorporation" theory—still inconsistent with Court precedent—to decide that the Sixth Amendment jury right contained a unanimity requirement but that this feature was not incorporated against the states.[112]

After dissecting *Apodaca* and *Johnson*, the *Ramos* Court took on Louisiana's argument that the drafting history of the Sixth Amendment evinces a conscious decision to dispense with the common law requirement of jury unanimity.[113] The Court considered Louisiana's observation that James Madison's original proposed Sixth Amendment language included unanimity, and the House approved it, but that the Senate subsequently dropped the unanimity language.[114]

However, as the Court highlighted, other language—such as the right of challenge and "other "accustomed requisites"—also was removed.[115] According to the Court, the deletion could simply have meant it was seen as surplusage—too obvious to have to mention.[116] Furthermore, if dropping the "unanimity for conviction" language meant what Louisiana asserts, this would lead to the nonsensical conclusion that all "accustomed requisites" were scuttled as well.[117]

The Court then attacked the reasoning—adopted by the four-Justice plurality in *Apodaca*—that unanimous juries do not provide sufficient value to warrant inclusion in the jury right, arguing that it ignores the racial animus behind the rules,[118] that the stated desire to

---

109 *See Ramos*, 140 S. Ct. at 1397–98.

110 *Id.* at 1397.

111 *Id.* at 1398.

112 *Id.*

113 *Id.* at 1400.

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.* at 1401.

avoid hung juries is not significant enough,[119] and that we should not subject ancient guarantees to cost-benefit analyses.[120]

Despite dispatching the arguments in favor of affirming *Apodaca*, the Court still had to grapple with the question of whether the doctrine of stare decisis counseled leaving the decision intact.[121] The Court concluded that it is, at best, unclear that *Apodaca* established clear precedent by a controlling majority, noting Justice Powell's endorsement of the unanimity requirement but his rejection of its incorporation under his discredited dual-track incorporation theory.[122]

In the final section of its lengthy opinion, the Court noted that even if *Apodaca* had precedential effect, there is no support on the current Court for the position that it was rightly decided.[123] Explaining that "when it revisits a precedent this Court has traditionally considered 'the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision,'"[124] the Court examined the four traditional guideposts for overturning precedent.

First, the Court asserted that the quality of the reasoning was poor, and that, indeed, "*Apodaca* was gravely mistaken."[125] The Court noted that there was no analysis of the historical meaning of the Sixth Amendment jury right, no consideration of the Court's many statements requiring unanimity, and no consideration of the racist origins of the rule.[126] The Court then noted the lack of consistency with related decisions, given that *Apodaca* "sits uneasily with 120 years of preceding case law."[127] Additionally, the legal developments since *Apodac*a was decided—with dual-track incorporation having been "roundly rejected"[128] and the Court repeatedly referring to the

---

119 *Id.* The Court also pointed out that hung juries are not necessarily detrimental. *Id.* ("But who can say whether any particular hung jury is a waste, rather than an example of a jury doing exactly what the plurality said it should—deliberating carefully and safeguarding against overzealous prosecutions?").

120 *Id.* at 1402 ("When the American people chose to enshrine that right in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses.").

121 *See id.*

122 *See id.* at 1402–04 ("[S]tripped from any reasoning, [*Apodaca*'s] judgment alone cannot be read to repudiate this Court's repeated pre-existing teachings on the Sixth and Fourteenth Amendments.").

123 *Id.* at 1404–05 ("Even if we accepted the premise that *Apodaca* established a precedent, no one on the Court today is prepared to say it was rightly decided, and *stare decisis* isn't supposed to be the art of methodically ignoring what everyone knows to be true.").

124 *Id.* at 1405 (quoting Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1499 (2019)).

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.*

unanimity requirement—militated in favor of overturning the decision.[129]

The last of the four guideposts—the reliance interests on the decision—received the most attention from the Court, which noted that neither State was claiming "prospective economic, regulatory, or social disruption" if the decision were overturned,[130] nor were they suggesting "that nonunanimous verdicts have 'become part of our national culture.'"[131] Therefore, the Court concluded, there are only two potential reliance interests implicated by the overruling of *Apodaca*. The first is that it may be necessary to retry many defendants if *Apodaca* is overruled, but the Court reminded that "new rules of criminal procedure[] usually do [impose a cost]."[132] The other identified reliance interest was in finality of final judgments and the concern that such finality will be undermined by prisoners bringing collateral attacks on otherwise final convictions.[133] However, the Court responded that the *Teague v. Lane* decision, which governs retroactivity, is a "demanding" rule, and in any event, the issue was not before the Court, nor should it have been at this stage.[134]

Finally, the majority rejected the dissent's argument that this issue was of "little practical importance" because Louisiana "abolished" nonunanimous verdicts and Oregon was on the verge before certiorari was granted in *Ramos*.[135] The Court noted that the new Louisiana law is prospective, and, thus, pre-2019 offenses were still subject to nonunanimous verdicts.[136] Additionally, fourteen states had noted that they would welcome the ability "to 'experiment' with nonunanimous juries."[137] Furthermore, the Court made clear, those subject to nonunanimous juries in Louisiana, Oregon, and elsewhere consider this of great practical importance.[138] The Court concluded by asserting that the reliance interests of states in avoiding one-time need to retry

---

129 *See id.* at 1405–06.

130 *Id.* at 1406.

131 *Id.* (quoting Dickerson v. United States, 530 U.S. 428, 443 (2000)).

132 *See id.* (first citing United States v. Booker, 543 U.S. 220 (2005); then citing Crawford v. Washington, 541 U.S. 36 (2004); and then citing Arizona v. Gant, 556 U.S. 332 (2009)).

133 *Id.* at 1407.

134 *Id.* Indeed, the Supreme Court subsequently decided that the jury unanimity rule does not apply retroactively to cases pending on federal collateral review. *See* Edwards v. Vannoy, 141 S. Ct. 1547 (2021).

135 *Ramos*, 140 S. Ct. at 1407.

136 *Id.*

137 *Id.* (quoting Brief of Amici Curiae State of Utah et al. Supporting Respondent, *Ramos*, 140 S. Ct. 1390 (No. 18-5924), 2019 WL 4054628, at *1).

138 *See id.* at 1408.

defendants cannot outweigh the reliance interests of the American people on the Sixth Amendment guarantee.[139]

II. *HURTADO* AND PRAGMATIC PROCEDURAL FEDERALISM

With the decision in *Ramos*, the project of selective incorporation—and the aim of total incorporation—is nearly complete. Notwithstanding the battle between selective incorporation and total incorporation theories, we have almost arrived at the place that Justice Black's total incorporation theory would have ordained. With one exception, every single criminal procedural protection contained in the Bill of Rights has been incorporated to apply to the states.[140] The right

---

139 *Id.*

140 *See Ramos*, 140 S. Ct. 1390 (incorporating the right to jury unanimity); Timbs v. Indiana, 139 S. Ct. 682 (2019) (incorporating the prohibition on excessive fines). The Supreme Court in *McDonald v. City of Chicago*, which was decided a decade before *Ramos* and *Timbs*, explained the state of play on incorporation at the time, prior to those decisions. *See* 561 U.S. 742, 765 n.13 (2010) ("In addition to the right to keep and bear arms (and the Sixth Amendment right to a unanimous jury verdict), the only rights not fully incorporated are (1) the Third Amendment's protection against quartering of soldiers; (2) the Fifth Amendment's grand jury indictment requirement; (3) the Seventh Amendment right to a jury trial in civil cases; and (4) the Eighth Amendment's prohibition on excessive fines. We never have decided whether the Third Amendment or the Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause. *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 276 n.22 (1989) (declining to decide whether the excessive-fines protection applies to the States); *see also* Engblom v. Carey, 677 F.2d 957, 961 (2d Cir. 1982) (holding as a matter of first impression that the 'Third Amendment is incorporated into the Fourteenth Amendment for application to the states')."); *see also id.* at 766 n.14 ("There is one exception to this general rule. The Court has held that although the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials, it does not require a unanimous jury verdict in state criminal trials. *See* Apodaca v. Oregon, 406 U.S. 404 (1972); *see also* Johnson v. Louisiana, 406 U.S. 356 (1972) (holding that the Due Process Clause does not require unanimous jury verdicts in state criminal trials). But that ruling was the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation. In *Apodaca*, eight Justices agreed that the Sixth Amendment applies identically to both the Federal Government and the States. *See Johnson*, 406 U.S. at 395 (Brennan, J., dissenting). Nonetheless, among those eight, four Justices took the view that the Sixth Amendment does not require unanimous jury verdicts in either federal or state criminal trials, *Apodaca*, 406 U.S. at 406 (plurality opinion), and four other Justices took the view that the Sixth Amendment requires unanimous jury verdicts in federal and state criminal trials, *id.* at 414–15 (Stewart, J., dissenting); *Johnson*, 406 U.S. at 381–82 (Douglas, J., dissenting). Justice Powell's concurrence in the judgment broke the tie, and he concluded that the Sixth Amendment requires juror unanimity in federal, but not state, cases. *Apodaca*, therefore, does not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government. *See Johnson*, 406 U.S. at 395–96 (Brennan, J., dissenting) ('In any event, the affirmance must not obscure that the majority of the Court remains of the view that, as in the case of every specific of the Bill of Rights that extends to the States, the Sixth Amendment's jury trial guarantee, however it is to be construed, has identical application against both State and Federal Governments' (footnote omitted)).").

to grand jury indictment is the sole outlier—because of the Court's 1884 decision in *Hurtado v. California*,[141] which predated the era of selective incorporation.[142] Faced with the question of whether a state could, consistent with due process, dispense with the grand jury as a means of initiating a serious criminal prosecution, the Court answered in the affirmative:

> Tried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law.[143]

The ultimate consequence of *Hurtado* was a grand jury with much weaker prestige and standing in the American legal culture than before the decision. Even on the federal level, where the grand jury is secured by the explicit constitutional command of the Fifth Amendment, there were attempts to abolish the grand jury.[144] And many states, free in the aftermath of *Hurtado* to sidestep the grand jury, permitted criminal cases to begin by prosecutor's information rather than grand jury indictment.[145] Today, as Justice Alito noted in his *Ramos* dissent, "*Hurtado* remains good law and is critically important to the 28 States that allow a defendant to be prosecuted for a felony without a grand jury indictment."[146]

---

141 110 U.S. 516 (1884); *see also Ramos*, 140 S. Ct. at 1435 (Alito, J., dissenting) ("Even now, our cases do not hold that *every* provision of the Bill of Rights applies in the same way to the Federal Government and the States. A notable exception is the Grand Jury Clause of the Fifth Amendment, a provision that, like the Sixth Amendment jury-trial right, reflects the importance that the founding generation attached to juries as safeguards against oppression.").

142 *See McDonald*, 561 U.S. at 765 n.13 ("Our governing decisions regarding the Grand Jury Clause of the Fifth Amendment and the Seventh Amendment's civil jury requirement long predate the era of selective incorporation."); *see also id.* at 784 n.30 ("[C]ases that predate the era of selective incorporation held that the Grand Jury Clause of the Fifth Amendment and the Seventh Amendment's civil jury requirement do not apply to the States.").

143 *Hurtado*, 110 U.S. at 538.

144 *See, e.g.*, Roger A. Fairfax, Jr., *Grand Jury Innovation: Toward a Functional Makeover of the Ancient Bulwark of Liberty*, 19 WM. & MARY BILL RTS. J. 339, 346 (2010) [hereinafter Fairfax, *Grand Jury Innovation*]; Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 MINN. L. REV. 398, 428–30 (2006) [hereinafter Fairfax, *Jurisdictional Heritage*].

145 *See, e.g.*, *McDonald*, 561 U.S. at 784 n.30 ("As a result of *Hurtado*, most States do not require a grand jury indictment in all felony cases, and many have no grand juries." (citing U.S. DEPT. OF JUST., STATE COURT ORGANIZATION 2004, at 213, 215–17, tbl.38 (2006), http://bjs.ojp.usdoj.gov/content/pub/pdf/sco04.pdf [https://perma.cc/BQA7-GENE])).

146 *Ramos*, 140 S. Ct. at 1435 (Alito, J., dissenting).

A. *The Nonincorporation of the Grand Jury Clause*

The State of California, in its 1879 constitution, made grand jury indictment optional for serious offenses.[147] Under the state constitution and the relevant state procedural law, a magistrate could hold over a defendant for prosecution if sworn testimony, reduced to writing, persuaded the magistrate that there was "sufficient cause" that the crime had been committed by the defendant.[148] During the magistrate's examination, the accused was permitted to be present and defendant's counsel could cross-examine the witnesses.[149] The law provided further that when a magistrate had examined the evidence and committed the defendant for further proceedings, the prosecutor was bound to file an information formally charging the defendant with the offense.[150] Although the information was required to "be in the name of the people of the state of California, and subscribed by the district attorney, and shall be in form like an indictment,"[151] the criminal prosecution ultimately could be initiated without intervention of, or review by, the grand jury.[152]

Joseph Hurtado was charged by information with first-degree murder in February 1882.[153] Although the aforementioned magistrate procedure was followed prior to the filing of the information, there had been no grand jury review of the charges.[154] Hurtado pleaded not guilty to the murder charge, and he was convicted at trial and sentenced to death.[155] He appealed on the ground that the California procedure permitting the serious criminal charge to be lodged pursuant to a prosecutor's information rather than a grand jury indictment contravened the Fifth and Fourteenth Amendments to the United States Constitution.[156] The California Supreme Court affirmed the conviction, relying on its recent precedent concluding that, whether or not "proceeding by indictment secures to the accused any superior rights

147 *Hurtado*, 110 U.S. at 517 ("Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law.") (quoting CAL. CONST. art. 1, § 8 (1879)).

148 *Id.* (citing CAL. PENAL CODE § 872 (West 1872)).

149 *See id.*

150 *See id.* at 517–18 (citing CAL. PENAL CODE § 809).

151 *Id.* (quoting CAL. PENAL CODE § 809).

152 *See id.*

153 *Id.* at 518.

154 *Id.*

155 *Id.*

156 *Id.* at 518–19.

and privileges,"[157] the state procedure permitting prosecution by information was consistent with due process.[158] The California Supreme Court also had relied upon a recent Wisconsin Supreme Court case addressing the question:

> [The Fourteenth Amendment's] design was not to confine the states to a particular mode of procedure in judicial proceedings, and prohibit them from prosecuting for felonies by information instead of by indictment, if they chose to abolish the grand jury system. And the words "due process of law" in the amendment do not mean and have not the effect to limit the powers of state governments to prosecutions for crime by indictment; but these words do mean law in its regular course of administration, according to prescribed forms, and in accordance with the general rules for the protection of individual rights. Administration and remedial proceedings must change, from time to time, with the advancement of legal science and the progress of society; and, if the people of the state find it wise and expedient to abolish the grand jury and prosecute all crimes by information, there is nothing in our state constitution and nothing in the fourteenth amendment to the constitution of the United States which prevents them from doing so.[159]

1. The *Hurtado* Majority and Procedural Flexibility

On appeal to the United States Supreme Court, Hurtado argued that the Fourteenth Amendment did, indeed, require—specifically—grand jury indictment.[160] The term "due process of law," Hurtado maintained, encompasses the procedures and institutions—traced back to the Magna Carta and eventually integrated into the Constitution of the United States—that protect fundamental rights and liberties.[161] The grand jury, under this view, was one such institution, and, therefore, was a requisite of due process made mandatory by the Fourteenth Amendment and could not be dispensed with by the States.[162] Hurtado's position on the essential nature of the grand jury found support from a

---

157 *Id.* at 520 (quoting Kalloch v. Super. Ct. of S.F., 56 Cal. 229, 241 (1880)).

158 *Id.*

159 *Id.* at 520–21 (quoting Rowan v. State, 30 Wis. 129, 149 (1872)).

160 *Id.* at 521.

161 *Id.*

162 *See id.* (noting petitioner's argument "that one of these institutions is that of the grand jury, an indictment or presentment by which against the accused in cases of alleged felonies is an essential part of due process of law, in order that he may not be harassed and destroyed by prosecutions founded only upon private malice or popular fury").

prominent jurist, Chief Justice Shaw of the Massachusetts Supreme Judicial Court, who wrote in the case of *Jones v. Robbins*:

> The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a grand jury, in case of high offences, is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty.[163]

Chief Justice Shaw went on to rely upon Lord Coke, Blackstone, and others to support the conclusion that grand jury indictment was an essential ingredient of due process.[164] The *Hurtado* Court, however, rejected this construction urged by the petitioner. The Court expressed skepticism that the authorities relied upon by Chief Justice Shaw militated in favor of Hurtado's view of the grand jury right and pointed to other authorities supporting the notion that due process does not specifically require the right to grand jury indictment.[165]

Perhaps the most compelling feature of the *Hurtado* majority can be found in its explanation that a fixed and static notion of what specific procedures are necessary to supply due process would serve as an obstacle to progress and innovation:[166]

> But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.
>
> This would be all the more singular and surprising, in this quick and active age, when we consider that, owing to the progressive development of legal ideas and institutions in England, the words of *Magna Charta* stood for very different things at the time of the separation of the American colonies from what they represented originally.[167]

The Court noted that the Magna Carta did not refer to juries as they were known by the nineteenth century, but rather to

---

163 Jones v. Robbins, 74 Mass. 329, 344 (1857) (holding that giving a magistrate authority to try a felony offense without grand jury intervention violated the State's Declaration of Rights).

164 *See id.* at 346–47.

165 *See Hurtado*, 110 U.S. at 522–38.

166 *See id.* at 527–28 ("The principles, then, upon which the process is based, are to determine whether it is 'due process' or not, and not any considerations of mere form. Administrative and remedial process may be changed from time to time, but only with due regard to the landmarks established for the protection of the citizen." (citation omitted)).

167 *Id.* at 529.

"constitutional judges in the court of exchequer."[168] Further, the grand jury, as the Court explained, at its origins had few of the features associated with it by the time of the ratification of the Fourteenth Amendment. For example, the twelfth-century grand jury was a purely accusatory body, and its accusation was tantamount to conviction and was a prerequisite to a trial by ordeal and possible mutilation and exile.[169] The Court concluded that

> [w]hen we add to this that the primitive grand jury heard no witnesses in support of the truth of the charges to be preferred, but presented upon their own knowledge, or indicted upon common fame and general suspicion, we shall be ready to acknowledge that it is better not to go too far back into antiquity for the best securities for our "ancient liberties."[170]

The Court also employed the canon of construction that words and terms are not meant to be superfluous, absent evidence to the contrary.[171] Under this approach, the fact that the Fifth Amendment's Grand Jury Clause is immediately followed by the Due Process Clause[172] is strong evidence that due process was not meant to include the right to grand jury indictment.[173] The Court found further support in the fact that the Fourteenth Amendment used the term "due process" and did not include explicit reference to the grand jury right.[174] The Court concluded that the use of the term "due process" in the Fourteenth Amendment "was used in the same sense and with no greater extent" than in the Fifth Amendment,[175] "and that if in the adoption of that amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the states, it would have embodied, as did the fifth amendment, express declarations to that effect."[176]

The Court noted that informations were used at common law for misdemeanors other than treason, and that California's information

---

168 *Id.*

169 *Id.*

170 *Id.* at 530.

171 *Id.* at 534–35.

172 *See* U.S. CONST. amend. V ("[N]or be deprived of life, liberty, or property, without due process of law.").

173 *See Hurtado*, 110 U.S. at 534 ("According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous. The natural and obvious inference is that, in the sense of the constitution, 'due process of law' was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case.").

174 *See id.* at 534–35.

175 *Id.* at 535.

176 *Id.*

procedure "carefully considers and guards the substantial interest of the prisoner,"[177] alluding to the right of cross-examination of witnesses, the right to counsel, and the right of the defendant to be present.[178] The Court also minimized the importance of the information procedure, stating that "[i]t is merely a preliminary proceeding, and can result in no final judgment, except as the consequence of a regular judicial trial, conducted precisely as in cases of indictments."[179]

In conclusion, the Court held as consistent with due process of law "the substitution for a presentment or indictment by a grand jury of the proceeding by information after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution."[180]

2. Harlan's Dissent and Rights Primacy

Justice Harlan was no stranger to powerful dissents.[181] Although his most famous and consequential dissent would be drafted a dozen years later,[182] Harlan's dissent in *Hurtado* is a tour de force in its own right. In a lengthy and scholarly dissenting opinion, Harlan rejected the majority's view "that the state may, consistently, with due process of law require a person to answer for a capital offense, except upon the

---

177 *Id.* at 538.

178 *See id.*

179 *Id.* On this point that the process begun by information provided the same protections as those provided by grand jury indictment, the Court quoted Blackstone's description of the information procedure:

> And as to those offenses in which informations were allowed as well as indictments, so long as they were confined to this high and respectable jurisdiction, and were carried on in a legal and regular course in his majesty's court of king's bench, the subject had no reason to complain. The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the prosecution had originally been by indictment.

Id. (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *310).

180 *Id.*

181 *See, e.g.*, PETER S. CANELLOS, THE GREAT DISSENTER: THE STORY OF JOHN MARSHALL HARLAN, AMERICA'S JUDICIAL HERO (2021). However, it should be noted that while Harlan is often celebrated for his support of a "color-blind" constitutionalism, scholars have examined his troubling views on racial equality, particularly as related to Chinese immigrants. *See, e.g.*, Eric Schepard, *The Great Dissenter's Greatest Dissents: The First Justice Harlan, the "Color-Blind" Constitution and the Meaning of His Dissents in the* Insular Cases *for the War on Terror*, 48 AM. J. LEGAL HIST. 119 (2006); Gabriel J. Chin, *The* Plessy *Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996); Earl M. Maltz, *Only Partially Color-Blind: John Marshall Harlan's View of Race and the Constitution*, 12 GA. ST. U. L. REV. 973 (1996).

182 *See* Plessy v. Ferguson, 163 U.S. 537 (1896) (Harlan, J., dissenting).

presentment or indictment of a grand jury."[183] He first emphasized that the concept of "due process of law" is ancient, and "antedates the establishment of our institutions."[184] Harlan traced the phrase through the various enumerations of rights in England, in the American colonies, in the state constitutions, and ultimately into both the Fifth and Fourteenth Amendments to the United States Constitution.[185]

Harlan stressed that due process has the same meaning whether referencing constraints on the federal government or state governments:

> "Due process of law," within the meaning of the national constitution, does not import one thing with reference to the powers of the states and another with reference to the powers of the general government. If particular proceedings, conducted under the authority of the general government, and involving life, are prohibited because not constituting that due process of law required by the fifth amendment of the constitution of the United States, similar proceedings, conducted under the authority of a state, must be deemed illegal, as not being due process of law within the meaning of the fourteenth amendment. The words "due process of law," in the latter amendment, must receive the same interpretation they had at the common law from which they were derived, and which was given to them at the formation of the general government.[186]

As to what is the unitary meaning of due process for the restraint of both federal and state power, Harlan argued that the inquiry begins with the Constitution itself to determine whether the proposed process contravenes it.[187] In the absence of such a conflict, Harlan explained,

> we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.[188]

Harlan acknowledged the existence of English precedents on both sides of the question of whether prosecution by information was sufficient to satisfy due process,[189] but emphasized that, given that

---

183 *Hurtado*, 110 U.S. at 539 (Harlan, J., dissenting).

184 *Id.*

185 *See id.* at 539–41.

186 *Id.* at 541.

187 *See id.* at 542 (quoting Murray v. Hoboken Land & Improvement Co., 59 U.S. 272, 276–77 (1855)).

188 *Id.* Harlan also cited a number of authorities for the proposition that "due process of law" was equivalent to "law of the land" in Magna Carta. *See id.* at 543 (collecting authorities).

189 *See id.* at 543.

petitioner Hurtado had been charged with capital murder, the query is "whether, according to the settled usages and modes of proceeding to which, this court has said, reference must be had, an information for a *capital* offense was, prior to the adoption of our constitution, regarded as due process of law."[190] For that proposition, Harlan cited several authorities,[191] including Blackstone, who asserted:

> [S]o tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the king of any capital offense, unless by a unanimous voice of twenty-four of his equals and neighbors; that is, by twelve at least of the grand jury, in the first place, assenting to the accusation, and afterwards by the whole petit jury of twelve more finding him guilty upon his trial.[192]

This and similar statements from Erskine, Hawkins, Bacon, and others were, for Justice Harlan, clear and convincing evidence "that, according to the settled usages and modes of proceeding existing under the common and statute law of England at the settlement of this country, information in capital cases was not consistent with the 'law of the land' or with due process of law."[193] Furthermore, Harlan maintained, this was the understanding of those in the founding generation.[194]

Then, taking the majority to task for its conclusion that the right to jury indictment is not a requisite of due process in a capital case, Harlan noted that the Framers' inclusion of the grand jury right in explicit terms in the Fifth Amendment demonstrated that the protection "was essential to protection against accusation and unfounded prosecution, and therefore was a fundamental principle in liberty and justice."[195] Harlan also highlighted the complete absence of authority—in England or in America—supporting the use of the information in a capital case.

In addition, Harlan questioned the majority's superfluity argument that the Framers would not have included the grand jury right in the Fifth Amendment, which also contains the Due Process Clause, if they believed that the grand jury protection was, in fact, a requisite of due process.[196] Thus, the majority's reasoning goes, the Fourteenth Amendment's Due Process Clause also cannot be thought to

---

190 *Id.* (emphasis added).

191 *See id.* at 543–45 (collecting authorities).

192 *Id.* at 544 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *306).

193 *Id.* at 545.

194 *Id.* ("Such was the understanding of the patriotic men who established free institutions upon this continent.").

195 *Id.* at 546.

196 *See id.* at 547–48.

contemplate the grand jury right.[197] Harlan noted that, if one were to take that argument to its logical conclusion, it would lead to absurd results:

> If the presence in the fifth amendment of a specific provision for grand juries in capital cases, along-side the provision for due process of law in proceedings involving life, liberty, or property, is held to prove that "due process of law" did not, in the judgment of the framers of the constitution, necessarily require a grand jury in capital cases, inexorable logic would require it to be likewise held that the right not to be put twice in jeopardy of life and limb, for the same offense, nor compelled in a criminal case to testify against one's self—rights and immunities also specifically recognized in the fifth amendment—were not protected by that due process of law required by the settled usages and proceedings existing under the common and statute law of England at the settlement of this country. More than that, other amendments of the constitution proposed at the same time expressly recognize the right of persons to just compensation for private property taken for public use; their right, when accused of crime, to be informed of the nature and cause of the accusation against them, and to a speedy and public trial, by an impartial jury of the state and district wherein the crime was committed; to be confronted with the witnesses against them; and to have compulsory process for obtaining witnesses in their favor. Will it be claimed that none of these rights were secured by the "law of the land" or "due process of law," as declared and established at the foundation of our government? Are they to be excluded from the enumeration of the fundamental principles of liberty and justice, and, therefore, not embraced by "due process of law?"[198]

---

197 *See id.* at 547.

198 *Id.* at 547–48. Harlan also suggested that the fact that the grand jury and other due process rights were enumerated was a function of the Framers' desire to ensure that Congress would not infringe them, with the "catch-all" Due Process Clause serving as added protection for unenumerated due process rights. As Harlan explained:

> It seems to me that too much stress is put upon the fact that the framers of the constitution made express provision for the security of those rights which at common law were protected by the requirement of due process of law, and, in addition, declared, generally, that no person shall "be deprived of life, liberty, or property without due process of law." The rights, for the security of which these express provisions were made, were of a character so essential to the safety of the people that it was deemed wise to avoid the possibility that congress, in regulating the processes of law, would impair or destroy them. Hence, their specific enumeration in the earlier amendments of the constitution, in connection with the general requirement of due process of law, the latter itself being broad enough to cover every right of life, liberty, or property secured by the settled usages and modes of proceedings existing under the common and statute law of England at the time our government was founded.

Id. at 550.

Harlan closed the loop by pointing out that under the majority's approach, a state would not run afoul of the Fourteenth Amendment's Due Process Clause if it "dispens[ed] with petit juries in criminal cases, and permitt[ed] a person charged with a crime involving life to be tried before a single judge, or even a justice of the peace, upon a rule to show cause why he should not be hanged."[199] The grand jury, Harlan asserted, was no less important a protection than was the petit jury,[200] and, therefore, the majority's reasoning should be thought equally unsound in the context of the grand jury right as it is would be in the petit jury right.[201]

The dissent also dismissed the majority's implication that a shift from grand jury indictment to prosecution by information, represented procedural innovation or progress contemplated by a flexible understanding of due process,[202] highlighting the importance of the lay grand jury in providing a barrier between the defendant and the burdens of trial.[203] Harlan observed that, in the California system, because the prosecutor must act on the magistrate's decision to approve the charges, "nothing stands between the citizen and prosecution for his life except the judgment of a justice of the peace."[204] The fact that the grand jury is composed not of judges or prosecutors, but of *lay* individuals not beholden to the government, was also cited by Harlan as a distinctive feature of the grand jury protection.[205] In addition, Harlan emphasized that the grand jury's secrecy, which insulates it from interference and public sentiment, is a feature that enhances its ability to protect members of marginalized or unpopular groups.[206] Harlan concluded by recognizing that, at the time of the Fourteenth

---

199 *Id.* at 548.

200 *See id.* at 549 ("I submit, however, with confidence, there is no foundation for the opinion that, under *Magna Charta* or at common law, the right to a trial by jury in a capital case was deemed of any greater value to the safety and security of the people than was the right not to answer, in a capital case, upon information filed by an officer of the government, without previous inquiry by a grand jury. While the former guards the citizen against improper conviction, the latter secures him against unfounded accusation.").

201 *See id.*

202 *See id.* at 553 ("It is difficult, however, to perceive anything in the system of prosecuting human beings for their lives, by information, which suggests that the state which adopts it has entered upon an era of progress and improvement in the law of criminal procedure.").

203 *See id.* at 551–52.

204 *Id.* at 554.

205 *Id.*

206 *See id.* at 554–55 ("In the secrecy of the investigations by grand juries, the weak and helpless—proscribed, perhaps, because of their race, or pursued by an unreasoning public clamor—have found, and will continue to find, security against official oppression, the cruelty of mobs, the machinations of falsehood, and the malevolence of private persons who would use the machinery of the law to bring ruin upon their personal enemies.").

Amendment, all thirty-seven states either explicitly or implicitly prohibited prosecution by information in capital cases.[207]

Harlan's scholarly dissenting opinion concluded with a passage summarizing the majority's approach:

> So that the court, in this case, while conceding that the requirement of due process of law protects the fundamental principles of liberty and justice, adjudges, in effect, that an immunity or right, recognized at the common law to be essential to personal security, jealously guarded by our national constitution against violation by any tribunal or body exercising authority under the general government, and expressly or impliedly recognized, when the fourteenth amendment was adopted, in the bill of rights or constitution of every state in the Union, is yet not a fundamental principle in governments established, as those of the states of the Union are, to secure to the citizen liberty and justice, and therefore is not involved in due process of law as required by that amendment in proceedings conducted under the sanction of a state.[208]

As such, Harlan declared, his "sense of duty constrains [him] to dissent from this interpretation of the supreme law of the land."[209]

B. *Taking Inventory of* Hurtado*, Due Process, and the Non-Essentialism of the Grand Jury Right*

1. Predating the Era of Selective Incorporation

There are a number of observations to be made about the *Hurtado* decision. First, the case presented a matter of first impression for the Supreme Court—whether the explicit criminal procedural constraints on the federal government found in the Bill of Rights were incorporated through the Fourteenth Amendment's Due Process Clause to constrain the States. Thus, *Hurtado* stood for much more than whether the grand jury right was necessary to due process; it was a harbinger of the judicial philosophy that would pervade the Court's decisions on the incorporation of other protections in the Bill of Rights.

However, the *Hurtado* decision was not the first of the selective incorporation decisions. The better view is that *Hurtado* was an

---

207 *See id.* at 557 ("It may be safely affirmed that, *when that amendment was adopted*, a criminal prosecution, by information, for a crime involving life, was not permitted in any one of the states composing the Union.").

208 *Id.* at 557–58.

209 *Id.* at 558.

antecedent of the era of selective incorporation,[210] and it did not reflect the application of the various "touchstones" that eventually developed in the Court's incorporation jurisprudence.[211] Although the Court eventually would move in fits and starts toward selectively incorporating nearly all of those rights in the criminal context,[212] it has remained faithful to *Hurtado*'s estimation of the necessity—or lack thereof—of grand jury indictment to the provision of due process.[213]

2. Weighing the Value of Procedural Mechanisms for Protection of Defendants

The Court, in *Hurtado*, credited as consistent with due process a procedure by which a magistrate initiates criminal charges only after considering sworn testimony reduced to writing and subject to cross-examination by defendant's counsel with the defendant given a right to be present. Some might find this procedure just as protective, if not more protective, of the defendant's rights as the grand jury. The grand jury operates under the direction of the prosecutor, rather than under *Hurtado*'s "neutral" magistrate.[214] Unlike the procedure approved in *Hurtado*, the defendant has no right nor ability to cross-examine witnesses before the grand jury, nor is defense counsel even present. Of course, the grand jury traditionally does not permit the defendant to be present for its secret proceedings, whereas the *Hurtado* procedure is presumably done in open court.

One might be tempted to conclude that the *Hurtado* procedure, in addition to being more efficient and less costly from the State's perspective, is a superior protection for the defendant. Certainly, the prerogative of present counsel, oversight of a magistrate rather than a

---

210 *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 765 n.13 (2010) ("Our governing decisions regarding the Grand Jury Clause of the Fifth Amendment and the Seventh Amendment's civil jury requirement long predate the era of selective incorporation.").

211 *See supra* Section I.B; *infra* Part III.

212 *See supra* Section I.A.

213 *See, e.g.*, *In re* Oliver, 333 U.S. 257, 283–84 (1948) (Frankfurter, J., concurring) ("Under the Fourteenth Amendment, a State may surely adopt as its own a procedure which was the established method for prosecuting crime in nearly half the States which ratified that amendment. And so, it may abolish the grand jury, or it may reduce the size of the grand jury, and even to a single member. A State has great leeway in devising its judicial instruments for probing into conduct as a basis for charging the commission of crime. It may, at the same time, surround such preliminary inquiry with safeguards, not only that crime may be detected and criminals punished, but also that charges may be sifted in secret so as not to injure or embarrass the innocent.").

214 *Cf.* David E. Steinberg, *Zealous Officers and Neutral Magistrates: The Rhetoric of the Fourth Amendment*, 43 CREIGHTON L. REV. 1019 (2010).

prosecutor, cross-examination, and the presence of the defendant are features the grand jury lacks. However, the grand jury, as discussed below,[215] is composed of lay individuals, not government officials.[216] These grand jurors, who are meant to represent a cross-section of the community, are positioned to inject community wisdom and common sense into the determination of the worthiness of a criminal prosecution.[217] This nature of the grand jury has historically led it to sometimes turn back prosecutions even when there is technically sufficient evidence to support proceeding to trial. These features associated with the unique role of the grand jury are lost in a prosecution-by-information procedure.[218]

If the prosecution-by-information procedure is not superior to the grand jury, then the justification for straying from the established mechanism is weakened.[219] This is not to suggest that there is no space between the threshold for due process and the protections offered by the grand jury. Surely, after *Hurtado*, a procedural mechanism that falls short of the grand jury's protection, but exceeded the minimum required for due process, would be deemed acceptable under the Fourteenth Amendment.[220] It is a matter for reasonable debate whether the grand jury or the *Hurtado* procedure is more protective of the defendant's rights and more closely aligned with due process of law.

However, it is not entirely clear that the prosecution-by-information process approved as a substitute for the grand jury in

---

215 *See infra* Section III.B.

216 *See* Hurtado v. California, 110 U.S. 516, 554–55 (1884) (Harlan, J., dissenting).

217 *See, e.g.*, Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 745 (2008).

218 Nor is the potential value added by the grand jury limited to the defendant. The grand jury's common law and statutory power to compel testimony and evidence make it a potent tool of the government in the exercise of its investigative prerogative. *See, e.g.*, Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury's Shield*, 98 J. CRIM. L. & CRIMINOLOGY 1171, 1172 (2008). The grand jury also has the ability to seek to ferret out illegal conduct on its own, without the direction of a prosecutor. *See, e.g.*, Hale v. Henkel, 201 U.S. 43, 59–66 (1906); Renee B. Lettow, *Reviving Federal Grand Jury Presentments*, 103 YALE L.J. 1333 (1994); *see also* Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1193–94 (1995).

219 *Cf.* Dickerson v. United States, 530 U.S. 428 (2000). There is evidence that the grand jury is thought to be a superior protection than the prosecution by information subject to a subsequent preliminary hearing with counsel and defendant present, a neutral judicial officer presiding, and the right to cross-examine witnesses and present evidence. *See* FED. R. CRIM. P. 5.1(a)(2) (providing that a grand jury indictment obviates the need for a preliminary hearing); *see also* Kaley v. United States, 571 U.S. 320, 328–29 (2014).

220 *See* Kalloch v. Super. Ct. of S.F., 56 Cal. 229, 241 (1880) ("It may be questionable whether the proceeding by indictment secures to the accused any superior rights and privileges; but certainly a prosecution by information takes from him no immunity or protection to which he is entitled under the law."); *see also Hurtado*, 110 U.S. at 520 (citing *Kalloch*, 56 Cal. at 241).

Hurtado has, in fact, been required by the Court in the 140 years since.[221] The Court, in a 1913 case, *Lem Woon v. United States*,[222] held that a preliminary hearing is not required when a serious crime is prosecuted by information.[223] As such, a prosecutor could, consistent with due process, initiate a prosecution for a serious offense without any judicial or grand jury review whether there is sufficient cause for the prosecution.[224]

3. Death Is Different

Another notable feature of *Hurtado* is that it dealt with a *capital* case. The significance of the fact that the crime at issue was first-degree murder cannot be overstated. Death is different.[225] For purposes of charging, the universe can be divided into four categories: (1) petty offenses and infractions, which sometimes have no prosecutor involvement and rarely feature judicial review of the charges prior to adjudication; (2) misdemeanors, which generally may be charged by information with or without subsequent judicial review of the charges prior to adjudication; (3) noncapital felonies, which must be charged by grand jury indictment (which can be waived) in the federal system under the Fifth Amendment, and, as a matter of state law, in a little

---

221 It was not simply that grand jury indictment was not required for the initiation of a prosecution to comport with due process. Instead, it was that a grand jury could be substituted with: (1) a robust preliminary hearing; (2) where the defendant is represented by counsel; (3) who could challenge the government's evidence; (4) before a judicial officer; (5) who certified that the government has established probable cause. *See Hurtado*, 110 U.S. at 538 ("[W]e are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law.").

222 229 U.S. 586 (1913).

223 *Id.* at 590.

224 *But see* Albright v. Oliver, 510 U.S. 266, 292 (1994) (Stevens, J., dissenting) ("In *Hurtado v. California*, we decided that the Due Process Clause does not compel the States to proceed by way of grand jury indictment when they initiate a prosecution. In reaching that conclusion, however, we noted that the substance of the federal guarantee was preserved by California's requirement that a magistrate certify 'to the probable guilt of the defendant.' In accord with *Hurtado*, I would hold that Illinois may dispense with the grand jury procedure only if the substance of the probable-cause requirement remains adequately protected." (internal citations omitted)).

225 *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 188 (1976) ("[D]eath is different in kind from any other punishment imposed under our system of criminal justice."); Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring); FED. R. CRIM. P. 7(a)(1)(A) ("An offense (other than criminal contempt) must be prosecuted by an indictment if it is punishable . . . by death.").

fewer than half of the states;[226] and (4) capital crimes, which must be prosecuted by grand jury (and cannot be waived) in the federal system under the Fifth Amendment, and, as a matter of state law, in those states both requiring grand jury indictment and having capital punishment.[227]

The fact that the *Hurtado* Court permitted prosecution by information after magistrate commitment is remarkable. It essentially relegated capital offenses to the same tier as misdemeanors for the purpose of the required process due to a defendant before being put to trial. Had the case involved a noncapital felony offense, there might have been room in subsequent cases to argue that due process required grand jury indictment when a defendant's life is at stake. However, *Hurtado*'s blessing of the magistrate approval and information process used in that capital case helped seal the fate of grand jury incorporation in the Court's jurisprudence going forward.

C. *Reading* Hurtado *as "Pragmatic Procedural Federalism"*

Perhaps the most significant takeaway from *Hurtado* is that it can be read as an example of "pragmatic procedural federalism."[228] Under this conception, the Court endorsed the view that states could develop adjudicatory criminal procedures consistent with due process even when those procedures departed from established—or even ancient—procedures explicitly secured by the Federal Constitution. Importantly, *Hurtado* does not stand for the proposition that *any* form of initiation of criminal prosecution passes constitutional muster.[229] Rather, the Court said that the command of the Fifth Amendment's Grand Jury Clause is not binding on the States, and that states need not provide for grand jury indictment in even a capital case, *as long as* the substitute procedure is adequate.

In *Hurtado*, the Court emphasized this procedural flexibility:

---

226 *See* U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces."); BEALE ET AL., *supra* note 6, at §§ 8:2, 8:3.

227 *See* FED. R. CRIM. P. 7(a)(1); BEALE ET AL., *supra* note 6, §§ 8:1, 8:3.

228 This term derives from "pragmatic federalism, a term that has been used as part of a "taxonomic scheme for connecting federalism more directly with democracy." Robert Justin Lipkin, *Federalism as Balance*, 79 TUL. L. REV. 93, 161–62 (2004). The term "pragmatic federalism" has been employed in the literature on, inter alia, presidential review prerogatives, *see, e.g.*, John O. McGinnis, *Presidential Review as Constitutional Restoration*, 51 DUKE L.J. 901, 931 & n.214 (2001), and environmental law. *See, e.g.*, Alice Kaswan, *Climate Adaptation and Land Use Governance: The Vertical Axis*, 39 COLUM. J. ENV'T L. 390 (2014).

229 *See Albright*, 510 U.S. at 292 (Stevens, J., dissenting).

> It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government. This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law.[230]

The Court's adherence to the notion that states should be free to experiment with procedures that fit evolving needs is quite familiar today.[231] Courts have highlighted the fact that our system of federalism provides a "laboratory" of sorts for testing different procedural methods, assuming, of course, they comport with fundamentals of due process.[232] The genesis of this approach can fairly be traced to *Hurtado*,[233] which led to the decision in *Maxwell v. Dow*,[234] in which the Court emphasized state procedural flexibility and noted that the right

---

230 Hurtado v. California, 110 U.S. 516, 530 (1884). Indeed, this was a central theme of the majority's assertion that the conception of due process is not limited to the procedural mechanisms in use at the time of Magna Carta:

> There is nothing in *Magna Charta*, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.

Id. at 531. In his *Hurtado* dissent, Justice Harlan acknowledged the majority's embrace of flexibility but disagreed that dispensing with the grand jury represented progress. *See id.* at 553 ("It is difficult, however, to perceive anything in the system of prosecuting human beings for their lives, by information, which suggests that the state which adopts it has entered upon an era of progress and improvement in the law of criminal procedure.").

231 *See, e.g.*, County of Riverside v. McLaughlin, 500 U.S. 44, 53 (1991).

232 *See id.*

233 As Justice Rutledge wrote in *In re Oliver*, a 1948 case involving the Michigan "one-man" grand jury:

> The case demonstrates how far this Court departed from our constitutional plan when, after the Fourteenth Amendment's adoption, it permitted selective departure by the states from the scheme of ordered personal liberty established by the Bill of Rights. In the guise of permitting the states to experiment with improving the administration of justice, the Court left them free to substitute, "in spite of the absolutism of continental governments," their "ideas and processes of civil justice" in place of the time-tried "principles and institutions of the common law" perpetuated for us in the Bill of Rights. Only by an exercise of this freedom has Michigan been enabled to adopt and apply her scheme as was done in this case. It is the immediate offspring of Hurtado v. California, and later like cases.

333 U.S. 257, 280 (1948) (Rutledge, J., concurring) (internal citations omitted).

234 176 U.S. 581 (1900).

to jury trial, like the grand jury right, was not compelled by the Fourteenth Amendment and, therefore, the States could alter the number of jurors.[235] Likewise, in *Twining v. New Jersey*,[236] the Court applied a similar rationale in holding that the Fifth Amendment did not constrain states from denying a defendant the privilege against self-incrimination.[237] In the 1994 case of *Honda Motor Co. v. Oberg*,[238] the Court observed *Hurtado*'s legacy in this regard:

> Of course, not all deviations from established procedures result in constitutional infirmity. As the Court noted in *Hurtado*, to hold all procedural change unconstitutional "would be to deny every quality of the law but its age, and to render it incapable of progress or improvement." A review of the cases, however, suggests that the case before us is unlike those in which abrogations of common-law procedures have been upheld. In *Hurtado*, for example, examination by a neutral magistrate provided criminal defendants with nearly the same protection as the abrogated common-law grand jury procedure.[239]

Although this procedural flexibility norm is reflected throughout the Court's criminal procedure jurisprudence, it has not gone unchallenged. Certain Justices have expressed grave skepticism that states should be permitted to experiment with procedures at the expense of protections enshrined in the Bill of Rights.[240] As Justice Rutledge explained in his concurrence in *In re Oliver*:

> The states have survived with the nation through great vicissitudes, for the greater part of our history, without wide departures or numerous ones from the plan of the Bill of Rights. They accepted that plan for the nation when they ratified those amendments. They accepted it for themselves, in my opinion, when they ratified the Fourteenth Amendment. It was good enough for our fathers. I think it should be good enough for this Court and for the states.

---

235 *See id.* at 604–05 (reaffirming that "the state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution"); *id.* at 602–03 ("[T]he right to be exempt from prosecution for an infamous crime, except upon a presentment by a grand jury, is of the same nature as the right to a trial by a petit jury of the number fixed by the common law. If the state have the power to abolish the grand jury and the consequent proceeding by indictment, the same course of reasoning which establishes that right will and does establish the right to alter the number of the petit jury from that provided by the common law.").

236 211 U.S. 78 (1908).

237 *See id.* at 111–14.

238 512 U.S. 415 (1994).

239 *Id.* at 430–31 (internal citations omitted).

240 *See, e.g.*, Hurtado v. California, 110 U.S. 516, 538 (1884) (Harlan, J., dissenting).

> Room enough there is beyond the specific limitations of the Bill of Rights for the states to experiment toward improving the administration of justice. Within those limitations there should be no laboratory excursions, unless or until the people have authorized them by the constitutionally provided method. This is no time to experiment with established liberties. That process carries the dangers of dilution and denial with the chances of enforcing and strengthening.[241]

And, of course, it is significant that in all of the instances of the Court's adherence to the notion that states should be given the flexibility to experiment with other procedural forms, the Court eventually reversed course and subsequently incorporated the right.[242]

Thus, the Court, in *Hurtado*, showed its willingness to abrogate an ancient common law procedural protection. However, the grand jury—unlike the protection against double jeopardy or the right of notice or confrontation—is also itself an *institution*. It is an *entity* unto itself, as well as a vehicle for delivering a due process protection. This nuance is critical to fully understanding the *Hurtado* decision. *Hurtado* did not hold that a criminal defendant is entitled to *no* process animating the initiation of charges. Rather, the case stands for the proposition that the grand jury is not the exclusive procedural mechanism equipped to provide such process.

III. APPLYING THE MODERN INCORPORATION TOUCHSTONES TO THE GRAND JURY RIGHT

As discussed above, the Supreme Court, in *Ramos v. Louisiana*,[243] recently incorporated one of the last remaining unincorporated criminal procedural protections—the right to jury unanimity—to apply to the States. In doing so, the Court rejected Justice Powell's dual-track incorporation approach in *Apodaca* that, due to the 4–4 split on the Court in that case, permitted nonunanimous juries to remain in state criminal cases, contrary to the Sixth Amendment. Justice Alito, in his dissenting opinion in *Ramos*, made the following observation:

> In *Hurtado v. California*, the Court held that the Grand Jury Clause does not bind the States and that they may substitute preliminary hearings at which the decision to allow a prosecution to go forward is made by a judge rather than a defendant's peers. That decision was

---

241 *In re* Oliver, 333 U.S. 257, 280–82 (1948) (Rutledge, J., concurring) (internal citations omitted).

242 *See supra* Section I.A.

243 140 S. Ct. 1390 (2020).

> based on reasoning that is not easy to distinguish from Justice Powell's in *Apodaca*. *Hurtado* remains good law and is critically important to the 28 States that allow a defendant to be prosecuted for a felony without a grand jury indictment. If we took the same approach to the *Hurtado* question that the majority takes in this case, the holding in that case could be called into question.[244]

Justice Alito's claim—that modern incorporation doctrine would call into question the Supreme Court's nonincorporation of the Fifth Amendment's right to grand jury indictment—is one worth interrogating, not only as a matter of constitutional logic, but also of normative policy.[245]

The Court's 1884 ruling in *Hurtado* is not an insurmountable obstacle to reconsideration of the incorporation of the Grand Jury Clause. One need not look further than *Ramos* for an example of the Court reversing course on an earlier decision that a Bill of Rights protection does not bind the States. However, the *Ramos* decision is but the latest in a line of Supreme Court cases incorporating rights previously deemed by the Court not to apply to the States.[246] In addition, as with the original decision not to apply the Sixth Amendment right to jury trial to the States, the 1884 decision in *Hurtado* not to incorporate the right to grand jury indictment "long predate[s] the era of selective incorporation."[247] Thus, it is instructive to explore the case for incorporation of the grand jury right, under the incorporation touchstones employed in the modern era for determining whether a

---

244 *Id.* at 1435 (Alito, J., dissenting) (internal citations omitted).

245 Professor Suja Thomas, a leading jury and incorporation theorist, made an insightful argument—prior to *Ramos*—that the Court's theories of what she terms "nonincorporation" do not justify the failure to incorporate of the then-remaining criminal and noncriminal rights in the Bill of Rights, including the civil jury, criminal jury unanimity, and the grand jury right. *See* Suja A. Thomas, *Nonincorporation: The Bill of Rights After* McDonald v. Chicago, 88 NOTRE DAME L. REV. 159, 180–83 (2012); *see also id.* at 185–89 (discussing the grand jury right).

246 In *Maxwell v. Dow*, 176 U.S. 581 (1900), the Court stated that the right to jury trial did not apply to the States, only to hold almost seventy years later that the jury right did, in fact, apply. *See* Duncan v. Louisiana, 391 U.S. 145 (1968); *see also, e.g.*, Benton v. Maryland, 395 U.S. 784 (1969); Malloy v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); *cf.* Duncan v. Louisiana, 391 U.S. 145 (1968) (characterizing as dicta statements in prior decisions that jury trial right is not a requisite of due process).

247 McDonald v. City of Chicago, 561 U.S. 742, 765 n.13 (2010) ("Our governing decisions regarding the Grand Jury Clause of the Fifth Amendment and the Seventh Amendment's civil jury requirement long predate the era of selective incorporation."). The Court declined to incorporate the Seventh Amendment's civil jury right in *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211 (1916). There have been recent calls for the incorporation of the Seventh Amendment's civil jury trial right. *See, e.g.*, Clayton LaForge, *Ripe for Incorporation: The Seventh Amendment and the Civil Jury Trial*, ABA LITIG. (Dec. 16, 2015), https://www.americanbar.org/groups/litigation/committees/appellate-practice/articles/2015/fall2015-1215-ripe-incorporation-seventh-amendment-civil-jury-trial [https://perma.cc/8GMP-4XBF].

right is "fundamental to our scheme of ordered liberty," or "dee[ply] root[ed] in [this Nation's] history and tradition."[248] Among these touchstones for determining whether a right is essential to the American tradition include its history and lineage, constitutional logic, and policy considerations. Finally, this Part will examine the case for incorporation under stare decisis principles.

A. *History and Lineage*

1. Antecedents, the Colonial Period, and the Founding

The grand jury enjoys a proud lineage, stretching back nearly a millennium.[249] The Constitutions of Clarendon and the Assize of Clarendon, which constructed mechanisms for mediating the exercise of criminal authority between the ecclesiastical and monarchical realms, provided a blueprint for the protections the modern grand jury would eventually represent.[250] The fourteenth-century Edwardian advances in criminal procedural design—including the separation of the accusatory function from the fact-finding function—would give shape to the modern grand jury and contribute to its ultimate significance.[251] In the seventeenth century, the celebrated cases of Stephen Colledge and the Earl of Shaftesbury saw the grand jury emerge as valued protection of individual liberty against encroachment of the Crown through politically motivated criminal prosecution.[252]

The grand jury's function as a shield between the individual and the government would solidify itself on American soil, as the founding generation found in colonial grand juries protection from King George's exercise of colonial criminal authority in the eighteenth century.[253] For example, the grand jury frustrated the Crown's prosecution of a newspaper publisher being prosecuted for seditious

---

248 Timbs v. Indiana, 139 S. Ct. 682, 686–87 (2019); *see also supra* Part II.

249 *See* BEALE ET AL., *supra* note 6, § 1.1.

250 *See* Fairfax, *Jurisdictional Heritage*, *supra* note 144, at 408–09; Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 4–5 (2002).

251 *See* Fairfax, *Jurisdictional Heritage*, *supra* note 144 at 408–09 n.39.

252 *See id.* at 409 n.41; Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 9 (1996); Simmons, *supra* note 250, at 8.

253 *See* BERNARD SCHWARTZ, THE GREAT RIGHT OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 24 (1992); Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL'Y & L. 67, 69–70 (1995); Fairfax, *Jurisdictional Heritage*, *supra* note 144, at 409–10.

libel in the wake of the publication of editorials highly critical of colonial rule.[254] Likewise, grand juries refused to indict colonists for violations of British laws in the years leading up to the American Revolution.[255]

With the grand jury having played a significant role in the resistance to British colonial rule, it is logical that the Framers of the Constitution thought highly of the protection and its indispensability. Notwithstanding the fact that only five of the thirteen former colonies had a right to grand jury indictment referenced in their state constitutions at the time of the Articles of Confederation,[256] the Framers included the right to grand jury indictment in the Fifth Amendment, as part of the Bill of Rights, seeking to similarly restrain the criminal power of the new federal government.[257]

2. The Antebellum Period and Reconstruction

The grand jury would continue to play a key role in the evolution of the American identity after the Founding period. The influence of grand juries would extend beyond their role in criminal cases. Transcripts of charges to grand juries during the early nineteenth century reveal their role as audience and sounding board for the political disputes of the day.[258] As the nation inched closer toward division and civil war, the grand jury had solidified its place in American life. Indeed, even the secessionist constitution of the

---

254 *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 871–74 (1994); *see also* Ronald F. Wright, *Grand Juries and Expertise in the Administrative State*, *in* GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY 295 (2011); Fairfax, *supra* note 217, at 722; Robert D. Rucker, *The Right to Ignore the Law: Constitutional Entitlement Versus Judicial Interpretation*, 33 VAL. U. L. REV. 449, 452–53 (1999). Although the government bypassed the grand jury and charged Zenger by information, the colonial petit jury acquitted him. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 84–85 (1998); Meghan J. Ryan, *Juries and the Criminal Constitution*, 65 ALA. L. REV. 849, 858–59 (2014).

255 *See* Fairfax, *supra* note 217, at 722. The grand jury also played a substantial role in basic local government, beyond its criminal procedural function. *See* LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 221–23 (1999); Fairfax, *Jurisdictional Heritage*, *supra* note 144, at 410 n.45.

256 *See* United States v. Navarro-Vargas, 408 F.3d 1184, 1193 & n.12 (9th Cir. 2005); *see also* SCHWARTZ, *supra* note 253, at 76; Fairfax, *Jurisdictional Heritage*, *supra* note 144, at 410–11.

257 Although there is no reference to the grand jury in the original Constitution, there is a reference to "indictment." *See* Fairfax, *Jurisdictional Heritage*, *supra* note 144, at 411 & n.52. This further underscores the fundamental nature of grand jury indictment in the eighteenth century.

258 *See, e.g.*, RICHARD D. YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634–1941, at 47 (1963); John P. Kaminski & C. Jennifer Lawton, *Duty and Justice at "Every Man's Door": The Grand Jury Charges of Chief Justice John Jay, 1790–1794*, 31 J. SUP. CT. HIST. 235, 240–50 (2006).

Confederacy contained a grand jury provision identical to that in the Fifth Amendment to the United States Constitution.[259]

After the Civil War, the grand jury retained its prominence even as Black citizens were beginning to serve on grand juries during the Reconstruction Era.[260] Indeed, in the wake of anti-Black violence and intimidation in the post–Civil War South, the Ku Klux Klan Act of 1871 created a cause of action targeting conspiracy to obstruct justice through intimidating grand jurors or influencing grand jury deliberations.[261]

However, by the time the Fourteenth Amendment was ratified, only a little more than half of the thirty-seven states provided the right to grand jury indictment.[262] As Professors Calabresi and Agudo note:

> Looking at the issue by population, it turns out that 51% of Americans in 1868—again a bare majority—lived in states that guaranteed the right to a grand jury indictment. Geographically, the right to a grand jury was found in 58% of the Midwestern-Western

---

259 *See* CONSTITUTION OF THE CONFEDERATE STATES of 1861, art. I, § 9, cl. 16 ("No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger . . . .").

260 *See, e.g.*, Roger A. Fairfax, Jr., Batson*'s Grand Jury DNA*, 97 IOWA L. REV. 1511, 1516–24 (2012).

261 *See* Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §§ 1983, 1985, 1986). 42 U.S.C. § 1985 provides as follows:

> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws . . . .

42 U.S.C. § 1985; *see also* Brian J. Gaj, *Section 1985(2) Clause One and Its Scope*, 70 CORNELL L. REV. 756 (1985). It should be noted that the Ku Klux Klan Act creates a *civil* remedy. The Civil Rights Act of 1866 and the Enforcement Act of 1870, both established or amended the criminal civil rights provisions now codified at 18 U.S.C. §§ 241, 242 (1996). *See, e.g.*, United States v. Price, 383 U.S. 787 (1966).

262 *See, e.g.*, Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 78 (2008) ("It turns out that only nineteen states out of thirty-seven in 1868—a bare majority—guaranteed the right to presentment or indictment by a grand jury for felonies (or capital and other infamous crimes).").

> state constitutions in 1868, in 50% of Northeastern state constitutions, and in 47% of Southern state constitutions. It was present in 50% of the pre-1855 constitutions and 53% of the post-1855 constitutions.[263]

Thus, not only did nearly half of all Americans live in a state without the right to grand jury indictment in 1868,[264] "there was no Article V consensus of three-quarters of the states, nor was there a two-thirds majority of the states protecting the right to a grand jury."[265]

3. The Grand Jury After *Hurtado*

After the Court held, in the late nineteenth century, that the grand jury was not a requisite of due process and, therefore, was not incorporated through the Fourteenth Amendment to apply to the States, the grand jury lost considerable prestige.[266] Whether the relationship between the *Hurtado* decision and the reduction in the grand jury's standing was causal or correlative, the fact is that the Framers likely would have been taken aback by the diminished reputation of the grand jury of the twentieth century.[267]

To be sure, the grand jury continued to play a role in American life and the issues of the day. Grand juries were instrumental in the investigation of corruption associated with big-city political machines after the turn of the century, in the infamous McCarthy-era investigations of alleged communists,[268] the federal prosecution of civil rights crimes and organized crime in the 1960s and 1970s,[269] political scandals in the 1970s[270] and the 1990s,[271] financial scandal and

---

263 *Id.* at 79.

264 *See id.*

265 *Id.* at 79. As Calabresi and Agudo have noted, "This could be argued to weigh in favor of the non-incorporation of the grand jury requirement." *Id.* However, Professors Calabresi and Agudo found that seven states in 1868 prohibited prosecution by information, which is the primary substitute for prosecution by grand jury indictment. *See id.* at 79–80.

266 *See supra* Section II.B.

267 *See* Fairfax, *Grand Jury Innovation*, *supra* note 144, at 346.

268 *See* Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 287 & n.140 (1995); David J. Fine, *Federal Grand Jury Investigation of Political Dissidents*, 7 HARV. C.R.-C.L. L. REV. 432 (1972).

269 *See* Fairfax, *Grand Jury Discretion*, *supra* note 217, at 715 n.49.

270 *See, e.g.*, Michael F. Buchwald, *Of the People, by the People, for the People: The Role of Special Grand Juries in Investigating Wrongdoing by Public Officials*, 5 GEO. J.L. & PUB. POL'Y 79, 82–83 (2007).

271 *See, e.g.*, *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997).

counterterrorism investigations of the 2000s,[272] and the investigation of foreign influence in American presidential elections in more recent years.[273]

However, at the same time, there have been constant assaults on the institution of the grand jury. This American anti-grand jury sentiment followed the cue of the British, who entertained abolition of the grand jury prior to World War I, suspended it during the war, and ultimately abolished it altogether in 1933.[274] In the United States, criticisms of the grand jury have been lodged at both the state and federal levels for more than a century now.[275] Characterizing the grand jury as ineffective, redundant, and a waste of resources, prominent figures in the judiciary and legal academy called for its abolition or curtailment.[276] More recently, the high-profile cases in which grand juries have failed to indict police officers who killed African Americans allegedly without justification have renewed calls for abolition of the grand jury.[277] Today, roughly the same proportion—slightly more than half—of states offer the guarantee of grand jury indictment as did in 1868.[278]

---

272 *See, e.g.*, Sara Sun Beale & James E. Felman, *Enlisting and Deploying Federal Grand Juries in the War on Terrorism*, *in* GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY (2011); Buchwald, *supra* note 270, at 91–93.

273 *See, e.g.*, *In re* Application of the Comm. on the Judiciary, U.S. House of Representatives, For an Ord. Authorizing the Release of Certain Grand Jury Materials, 414 F. Supp. 3d 129 (D.D.C. 2019).

274 *See* Fairfax, *Jurisdictional Heritage*, *supra* note 144, at 428 (citing Albert Lieck, *Abolition of the Grand Jury in England*, 25 J. AM. INST. CRIM. L. & CRIMINOLOGY 623 (1934)).

275 *See* Fairfax, *Jurisdictional Heritage*, *supra* note 144, at 429–30.

276 *See id.*; Fairfax, *Grand Jury Innovation*, *supra* note 144, at 341–45.

277 *See infra* Section III.C; Fairfax, *Grand Jury's Role*, *supra* note 4; Fairfax, *Grand Jury Survive*, *supra* note 4, at 826 n.8.

278 *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1435 n.28 (2020) (Alito, J., dissenting) (citing ARIZ. CONST., art. 2, § 30; ARK. CONST., amend. 21, § 1; CAL. CONST., art. I, § 14; COLO. REV. STAT. § 16-5-205 (2019); CONN. GEN. STAT. § 54-46 (2017); HAW. CONST., art. I, § 10; IDAHO CONST., art. I, § 8; ILL. COMP. STAT., ch. 725, § 5/111-2(a) (West 2018); IND. CODE § 35-34-1-1(a) (2019); Iowa Ct. Rule 2.5 (2020); KAN. STAT. ANN. § 22-3201 (2007); MD. CRIM. PROC. CODE ANN. §§ 4-102, 4-103 (2018); MICH. COMP. LAWS § 767.1 (1979); MO. CONST., art. I, § 17; MONT. CONST., art. II, § 20(1); NEB. REV. STAT. § 29-1601 (2016); NEV. CONST., art. I, § 8; N.M. CONST., art II, § 14; N.D. Rule Crim. Proc. 7(a) (2018–2019); OKLA. CONST., art II, § 17; ORE. CONST. (amended), art. VII, §§ 5(3)–(5); PA. CONST., art. I, § 10 (providing that "[e]ach of the several courts of common pleas may, with the approval of the Supreme Court, provide for the initiation of criminal proceedings therein by information"—a condition that has now been met in all counties); 42 PA. CONS. STAT. § 8931 (2015); S.D. CONST., ART. VI, § 10; UTAH CONST., art. I, § 13; VT. RULE CRIM. PROC. 7(a) (2018); WASH. REV. CODE § 10.37.015 (2019); WIS. STAT. § 967.05 (2015–2016); WYO. STAT. ANN. § 7-1-106(a) (2019)); Calabresi & Agudo, *supra* note 262, at 78.

B. *Constitutional Logic*

1. Symmetry

The Court also has explored the question of whether a particular right should be incorporated utilizing the touchstone of constitutional logic. One such consideration is related to the debate between Justices Black and Frankfurter over the concept of total incorporation. While it is clear that Black's total incorporation theory failed to win the day,[279] now that every other criminal procedural right has been incorporated on a case-by-case basis, query whether it would make sense to incorporate the grand jury right—the sole outlier—to apply to the states as well.

One might read the desire for symmetry in the Court's rejection of the dual-track incorporation theory embraced by Justice Powell.[280] The notion that rights should apply to constrain the federal government and state governments equally and on the same terms is akin to the notion that, where all of the protections enumerated in the Bill of Rights have been incorporated to apply to the States, it is nonsensical (and asymmetrical) to exclude just one. This is particularly so given that the grand jury right is explicitly set forth in the text of the Fifth Amendment, whereas other incorporated rights, such as jury unanimity or the exclusionary rule, have no such explicit textual grounding and are merely features of, or methods of implementing, rights as opposed to rights themselves like the grand jury.

Although such symmetry arguments have surface appeal, the project of selective incorporation unfolded over the course of a century with the Court developing its approaches in the context of the concrete constitutional right at issue. It is true that the Court has not been fully consistent in the development of the principles governing its incorporation inquiry.[281] In addition, the Court decided *Hurtado* before the era of selective incorporation began. However, there is an existing theoretical framework in place to evaluate the case for the incorporation of the grand jury right.[282] Rather than arbitrarily including the grand jury right to avoid having it exist as an outlier, the more prudent course

279 *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 761–63 (2010).

280 *See, e.g.*, *Ramos*, 140 S. Ct. at 1398.

281 *See, e.g.*, *McDonald*, 561 U.S. at 759–66.

282 *See supra* Section I.B.

would be to apply the criteria used to test other rights deemed to be "deeply rooted in this Nation's history and tradition."[283]

2. Bundle of Sticks

a. The Grand Jury's Screening Function

Part of the theoretical difficulty surrounding the grand jury is that it pursues several separate and distinct constitutional and practical values—a bundle of sticks, so to speak. The first of these sticks is the grand jury's function as a screening mechanism. The grand jury, as a lay entity, assesses the merits of potential criminal charges.[284] In doing so, the grand jury reviews the evidence in the matter and determines whether there is probable cause to support proposed charges.[285] Often, those charges are proposed by the government. However, in the grand jury's tradition, the body has played a role in considering charges surfaced by private individuals.[286] In addition, the grand jury has a largely dormant, but still existent, power to consider and bring charges itself.[287] Notably, as discussed above, this screening mechanism is one that the *Hurtado* Court held is not a requisite of due process.[288] In other words, *Hurtado* and its progeny held that a state may dispense with grand jury review and, instead, permit prosecution of a defendant for charges that were reviewed by the *prosecutor* for probable cause.[289]

---

283 *McDonald*, 561 U.S. at 767 (quoting Washington v. Gluksberg, 521 U.S. 702, 721 (1997)); *see also* Timbs v. Indiana, 139 S. Ct. 682, 686–87 (2019) (quoting *McDonald*).

284 *See, e.g.*, BEALE ET AL., *supra* note 6, § 1:7; Fairfax, *Grand Jury Discretion*, *supra* note 217, at 707–08.

285 *See, e.g.*, BEALE ET AL., *supra* note 6, § 4:14.

286 *See* Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 292–93 (1989). In the era before the public prosecutor, the grand jury served as an arbiter between private accusers and the accused. *See* Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 422–23 n.33 (2009); *see also* I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1573–81 (2020).

287 *See, e.g.*, Lettow, *supra* note 218.

288 *See supra* Section II.B.

289 In *Hurtado*, the Court actually held that a prosecutor's filing of an information prompted by a magistrate's review of the evidence and certification that there is sufficient cause, was an adequate substitute for grand jury indictment. *See* Hurtado v. California, 110 U.S. 516, 538 (1884) ("[W]e are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law."); *see also* Albright v. Oliver, 510 U.S. 266, 292 (1994) (Stevens, J., dissenting). However, the Court later suggested that due process required only the information, without the necessity of a prior judicial

b. The Grand Jury's Notice Function

Closely related to the screening function, is another stick in the bundle—the notice function. When the grand jury approves charges, it returns an indictment. An indictment is a formal charging document that specifies the charges being brought, and it provides a concise summary of the allegations against the defendant.[290] The significance of this document should not be understated. First, it provides the notice essential to due process. Indeed, the Sixth Amendment requires that a criminal defendant be "informed of the nature and cause of the accusation."[291] Such basic notice of the allegations is required in a system that condemns star chamber–like procedures, and such notice also promotes fairness and transparency in the process attending the government's attempt to burden an individual's liberty.

This notice is critical to other important rights as well. The right to counsel would be burdened if the defense lawyer were not made aware of the particulars of the allegations in preparing a defense or motion to dismiss. Likewise, the exercise of other Sixth Amendment rights, including ensuring proper venue, confrontation rights, and utilization of compulsory process is dependent on the notice of charges the indictment provides. In addition, certain Fifth Amendment rights are bolstered by the grand jury indictment. For instance, notice of the allegations could factor into whether a defendant can provide certain evidence or make sworn statements without compromising the privilege against self-incrimination.[292] Furthermore, the specificity around the charges being advanced in a criminal case empowers the defendant to raise the double jeopardy bar against a future prosecution, whether or not the defendant was convicted or acquitted of the original charges.[293]

With all that said, a prosecutor's information arguably can provide the same notice that a grand jury indictment provides. Indeed, the format of the information is virtually identical to that of the indictment, except in two significant ways.[294] The allegations contained in the

determination of probable cause. *See* Lem Woon v. Oregon, 229 U.S. 586, 590 (1913) ("But since, as this court has so often held, the 'due process of law' clause does not require the state to adopt the institution and procedure of a grand jury, we are unable to see upon what theory it can be held that an examination, or the opportunity for one, prior to the formal accusation by the district attorney is obligatory upon the states.").

290 *See, e.g.*, FED. R. CRIM. P. 7(c)(1); BEALE ET AL., *supra* note 6, § 8:1.

291 U.S. CONST. amend. VI.

292 *See* U.S. CONST. amend. V ("[N]or shall [any person] be compelled in any criminal case to be a witness against himself.").

293 *See id.* ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.").

294 *See, e.g.*, FED. R. CRIM. P. 7(c).

information are those of the prosecutor, not of the grand jury.[295] In addition, the information is signed by the prosecutor who, in doing so, certifies that the evidence establishes probable cause that the defendant committed the offenses outlined in the information.[296] On the other hand, an indictment states that "the Grand Jury alleges" and is signed by the foreperson of the grand jury.[297] The significance of the difference between a prosecutor certifying to probable cause and the lay grand jury so certifying is important. An indictment, as an articulation of allegations found credible by a body of the defendant's peers, carries with it the heft of community condemnation that perhaps a prosecutor's information does not. To say that a defendant has been "indicted by a grand jury" is likely to generate greater stigma than the prosecutor's mere unchecked allegation of criminal conduct.[298]

c. The Grand Jury and Popular Discretion

The grand jury also is a vehicle for discretion in charging. It has often been said that the grand jury is a font of community wisdom.[299] The grand jury, typically ranging in size from twelve to twenty-three individuals, is positioned to represent a broad cross-section of the community.[300] As such, the grand jury is able to bring to bear its own judgment on the propriety of criminal charges beyond the foundational question of whether the evidence establishes probable cause. Given the grand jury's heritage in the American colonies as a mechanism of resistance to British colonial laws or the unfair enforcement of those laws,[301] some have recognized that grand jury's discretionary role in the initiation of criminal prosecution even in contemporary times.[302] This lay judgment and discretion represents another stick in the bundle, one

---

295 *See, e.g.*, CECILY FUHR, GLENDA K. HARNAD, MICHELE HUGHES, JOHN KIMPFLEN & WILLIAM LINDSLEY, C.J.S. § 104 (2021).

296 *See id.* § 108.

297 *See id.* § 68.

298 *See* Kaley v. United States, 571 U.S. 320, 329 (2014).

299 *See* Laura I. Appleman, *Local Democracy, Community Adjudication, and Criminal Justice*, 11 NW. U. L. REV. 1413, 1416–17 (2017); Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 263–64, 264 n.53 (2019); *see also* United States v. Smyth, 104 F. Supp. 283, 291 (N.D. Cal. 1952) ("The grand jury breathes the spirit of a community into the enforcement of law.").

300 *See* Brenner, *supra* note 253, at 78; Fairfax, *supra* note 217, at 745.

301 *See* Roger A. Fairfax Jr., *Does Grand Jury Discretion Have a Legitimate (and Useful) Role to Play in Criminal Justice?*, *in* GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY 57–58 (2011) [hereinafter Fairfax, *Grand Jury Discretion's Role*] ("Where the grand jury truly adds value is through its ability to exercise robust discretion *not* to indict where probable cause nevertheless exists—what some might term 'grand jury nullification.'").

302 *See* Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 GEO. L.J. 1265, 1313–17 (2006); Fairfax, *supra* note 217, at 743–52.

that the prosecution by mere information cannot deliver—a point made all the more significant by the recognition that the grand jury right represents an "immunity" to the burden and stigma of accusation and prosecution.[303]

3. The Grand Jury's Enigmatic Nature

The grand jury's enigmatic nature presents another complication of assessing its essentialism to American democracy. First, the grand jury is "both [a] shield and [a] sword."[304] Although the grand jury's value can be characterized by the rights represented in the aforementioned bundle of sticks, it is also an investigative tool, and a powerful one at that. The grand jury is perhaps the most potent weapon in the government's arsenal. The subpoena power the grand jury possesses can reach "every man's evidence,"[305] and is subject to no limits outside of constitutional, statutory, or recognized common law privileges.[306] Also, the ability to place witnesses under oath and lock in their testimony under pain and penalty of perjury provides the government advantages later at trial as well. The grand jury's role as a "sword" as well as a "shield" complicates the consideration of whether it is "fundamental to our scheme of ordered liberty."[307]

Another enigmatic feature of the grand jury is that it is an entity unto itself, with a long and storied history. It has been described as a "pre-constitutional institution,"[308] and it has a legacy that extends well beyond criminal procedure. Whereas the petit jury is closely associated with and subsumed within the judicial branch of government, the grand jury is actually thought to exist independently, outside of the three branches. Properly understood, the grand jury has served as a check on the judicial, executive, and legislative branches.[309] In this way, it serves

---

303 *See* Hurtado v. California, 110 U.S. 516, 551–52 (1884) (Harlan, J., dissenting) ("The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense, and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a grand jury, in case of high offences, is justly regarded as one of the securities to the innocent against hasty, malicious, and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty.").

304 BEALE ET AL., *supra* note 6, § 1:7.

305 Branzburg v. Hayes, 408 U.S. 665, 688 (1972).

306 *See id.*

307 Timbs v. Indiana, 139 S. Ct. 682, 686 (2019); *see also* Blair v. United States, 250 U.S. 273, 282 (1919).

308 United States v. Chanen, 549 F.2d 1306, 1312 (9th Cir. 1977) (internal citations omitted); *see also* Fairfax, *Grand Jury Discretion's Role*, *supra* note 301, at 726–27.

309 *See* United States v. Williams, 504 U.S. 36, 47 (1992) (describing the grand jury as a "constitutional fixture in its own right" (internal citations omitted)).

a distinct *structural* role, as well as a rights-promoting role.[310] The grand jury, unlike the petit jury, historically played a robust role in American civic life.

In addition to its core function of determining whether criminal cases would proceed to trial, the grand jury also oversaw revenue and spending, public works projects, and the conduct of public officials.[311] In many ways, it served as an organ of local government. Relatedly, although the racial and gender exclusion that has marked the nation's history constrains the ability to characterize the grand jury as being representative, the grand jury ostensibly has sought to embody representative ideals. Accordingly, the courts have turned back attempts to undermine that representativeness through discriminatory means.[312]

Furthermore, the parameters of the grand jury as an entity have not been well-defined. The petit jury has been the subject of extensive jurisprudential evaluation of what a jury is.[313] Features such as jury size, unanimity, and methods of deliberation have been frequently examined by the courts.[314] However, the same cannot be said about the grand jury. Although the courts have provided guidance on certain requisites, such as the role of a foreperson and the notion that grand jury proceedings are not meant to approximate a trial,[315] little has been said about what a grand jury is or what it must look like as a matter of constitutional law.[316] However, like with the jury trial right, the right to grand jury indictment "surely mean[s] something."[317] A lack of clarity regarding the parameters of the grand jury right also frustrates consensus that it is essential to our democracy.

---

310 *See* Fairfax, *Grand Jury Discretion's Role*, *supra* note 301, at 726–27.

311 *See* LEVY, *supra* note 255, at 221–23; Fairfax, *Jurisdictional Heritage*, *supra* note 144, at 410 n.45.

312 *See, e.g.*, Fairfax, *supra* note 260, at 1516–24.

313 *Cf.* Ramos v. Louisiana, 140 S. Ct. 1390, 1395 (2020) ("[T]he promise of a jury trial surely meant something—otherwise, there would have been no reason to write it down.").

314 *See, e.g.*, *Ramos*, 140 S. Ct. at 1394–95; Williams v. Florida, 399 U.S. 78 (1970).

315 *See* United States v. Williams, 504 U.S. 36, 51–52 (1992).

316 That said, the Court has discussed—and approved—a state's use of the "one-man" grand jury. *See In re* Oliver, 333 U.S. 257, 261–63 (1948). The Court also has discussed the rationales behind grand jury secrecy generally and in the context of the federal rule imposing secrecy on grand jury proceedings. *See, e.g.*, United States v. Sells Eng'g, 463 U.S. 418 (1983); *In re Oliver*, 333 U.S. at 264–65; Daniel Richman, *Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket*, 36 AM. CRIM. L. REV. 339, 352–53 (1999) (citing Douglas Oil Co. v. Petrol Oil Stops Nw., 411 U.S. 211, 219 n.10 (1979)). It should also be noted that, although grand jury indictment has not been incorporated to apply to the States, if a state does utilize the grand jury, then the Federal Constitution speaks to certain issues, such as discrimination in the selection of grand jurors. *See, e.g.*, Fairfax, *supra* note 260, at 1528 n.100.

317 *Ramos*, 140 S. Ct. at 1395.

C. *Policy*

The Court also has transparently included policy considerations in its evaluation of whether a criminal procedural right is to be incorporated to apply to the States. This third touchstone presents perhaps the most formidable challenge to the case for the incorporation of the grand jury right. The difficulty begins with the low esteem in which the grand jury is held in American legal culture.[318] To be sure, the *Hurtado* Court's decision not to incorporate the grand jury right certainly set the grand jury on its course of unpopularity. However, even in the federal system and in the more than twenty states in which the grand jury is required, the grand jury comes under frequent criticism.[319]

1. The Grand Jury's Effectiveness

One of the reasons many condemn the grand jury is because of its perceived high rate of indictment. Although grand jury return statistics are not always easy to come by, some data reveal that grand juries nearly always return an indictment against a defendant when the prosecutor requests one.[320] For example, in one recent year, federal grand juries declined to return an indictment in a tiny percentage of the cases reviewed.[321] This had led some to believe the canard that a grand jury "would indict a ham sandwich."[322]

While these statistics certainly may supply cause for skepticism, they do not tell the entire story. Importantly, the data capture only cases in which prosecutors are asking for an indictment. There is no requirement that the prosecutor request the grand jury to approve an indictment even after evidence has been presented. Where a prosecutor does not have confidence that the grand jury will approve the charges, the case can simply be withdrawn. Given this, the statistics do not fully reflect the grand jury's potential skepticism or resistance to charges in those cases.[323]

---

318 *See, e.g.*, Fairfax, *Jurisdictional Heritage*, *supra* note 144, at 428–30.

319 *See, e.g.*, United States v. Navarro-Vargas, 408 F.3d 1184, 1195–96 (2005).

320 *See, e.g.*, MARK MOTIVANS, BUREAU OF JUST. STAT., FEDERAL JUSTICE STATISTICS 2010—STATISTICAL TABLES 12 (2013); Simmons, *supra* note 250, at 31–32.

321 *See* Simmons, *supra* note 250, at 31–32; Ben Casselman, *It's Incredibly Rare for a Grand Jury to Do What Ferguson's Just Did*, FIVETHIRTYEIGHT (Nov. 24, 2014, 9:30 PM), https://fivethirtyeight.com/features/ferguson-michael-brown-indictment-darren-wilson [https://perma.cc/C7MT-XF8M].

322 *See Navarro-Vargas*, 408 F.3d at 1195 (internal citations omitted).

323 *See, e.g.*, Fairfax, *Grand Jury Innovation*, *supra* note 144, at 342–43.

Also, it is important to understand that the grand jury presentation process is quite fluid and dynamic. Unlike in the petit jury context, the prosecutor in the grand jury can informally poll the grand jurors at any time regarding potential gaps in the evidence or weaknesses in the case. If any such deficiencies exist, the prosecutor can cure them before asking the grand jurors to vote on the indictment, and if the prosecutor is unable to rectify issues with the case, she can withdraw it before the vote. Such cases do not show up in the statistics.[324]

Finally, the fact that the grand jury's review of a proposed charge is often confirmed by other criminal justice actors may cut against the notion that grand juries are too pliable. Most criminal cases are resolved by a guilty plea.[325] Even though a case indicted by a grand jury is more likely to proceed to trial than the typical case, some are disposed by a guilty plea when the defendant decides to strike a plea bargain with the government. In such situations, the government has to allocute as to the facts it believes it could prove at trial with evidence beyond a reasonable doubt.[326] In addition, the presiding judge must determine that there is a factual basis for the defendant's guilty plea.[327] Furthermore, for the cases that proceed to trial, the petit jury or the judge applies a much higher standard of proof—beyond a reasonable doubt—than the probable cause standard applied by the grand jury.[328] Nevertheless, the rate of conviction at trial is quite high, which can be seen as corroborating the earlier grand jury review of the evidence.[329]

2. Potential Disruption

Another policy consideration concerns the disruption to state criminal legal systems that would be caused by a decision to incorporate the right to grand jury at this late date. There are twenty-eight states that do not utilize the grand jury to initiate most serious prosecutions.[330] By contrast, the Court's recent incorporation of the right to jury unanimity impacted only the two states that still permitted nonunanimous verdicts.[331] Even the incorporation of the petit jury right

---

324 *See id.* at 342–44.

325 *See, e.g.*, Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1100 (2001).

326 *See* Roger A. Fairfax, Jr., *Thinking Outside the Jury Box: Deploying the Grand Jury in the Guilty Plea Process*, 57 WM. & MARY L. REV. 1395, 1406 (2016).

327 *See id.* at 1406–07.

328 *See, e.g.*, Fairfax, *Grand Jury Innovation*, *supra* note 144, at 342–43.

329 *See id.*

330 *See supra* Part II.

331 *See supra* Section I.B.2.

itself in *Duncan v. Louisiana* only impacted the small number of states that did not provide jury trial for all serious crimes at that time.[332]

To incorporate the Fifth Amendment grand jury right would require these states to fundamentally alter their charging procedures. Not only would this necessitate a reworking of the charging process, but it likely would have an impact on other pretrial procedures, such as pretrial detention hearings. Furthermore, such a change would impose financial costs, both in establishing technology infrastructure and courthouse personnel related to the summoning and oversight of grand jurors, and in the construction or adaptation of physical spaces to accommodate the grand juries' work.[333]

Additionally, the incorporation of the grand jury right could threaten to bring the already-slow criminal processing system in many states to a grinding halt as states scramble to establish grand juries and get them up and running. This could work to the disadvantage of many defendants, particularly those who are detained and would have their cases delayed. Also, the application of the grand jury right to the States would call into question literally millions of prior convictions obtained without grand jury indictment. Although retroactive application of the right is not a given,[334] it is a concern that courts have noticed. However, query whether concerns such as costs and efficiency, and caseloads should carry weight in the determination of whether a right is fundamental to the provision of due process for incorporation purposes.[335]

3. Breonna, Tamir, Michael, and Eric

The most damning indictment of the grand jury in recent years has been borne of the string of high-profile cases in which grand juries have declined to indict police officers accused of unjustifiably killing African Americans.[336] In Missouri, a grand jury declined to indict former officer Darren Wilson, who shot and killed eighteen-year-old Michael Brown.[337] In Staten Island, a grand jury declined to indict former officer Daniel Pantaleo, who administered an illegal chokehold and killed

---

332 *See* Duncan v. Louisiana, 391 U.S. 145, 153–54 (1968).

333 However, it should be noted that even in many states with no constitutional requirement of grand jury indictment, there exist grand juries. *See* BEALE ET AL., *supra* note 6, § 1:1.

334 *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1407 (2020).

335 *See infra* Section III.D.

336 *See generally* Fairfax, *Grand Jury's Role*, *supra* note 4.

337 *See* Fairfax, *supra* note 3, at 214–15.

forty-three-year-old Eric Garner.[338] In Ohio, a grand jury declined to indict former officer Tim Loehmann, who shot and killed twelve-year-old Tamir Rice while he was playing with a toy gun at a playground.[339] And, in the midst of worldwide protests in the wake of the police killing of a handcuffed George Floyd in Minneapolis, a Kentucky grand jury declined to charge any of the three former Louisville police officers with responsibility for the killing of twenty-six-year-old Breonna Taylor during a botched and ill-advised raid of her apartment in the middle of the night.[340]

These and other similar grand jury decisions have prompted outcry and even calls for the abolition of the grand jury as the questions about these outcomes continue to mount.[341] While there are structural issues that contribute to these grand jury outcomes,[342] many in the affected communities have lost patience with the excuses offered as more examples of grand jury refusals to indict are added to the list.[343] This frustration is exacerbated by the recognition that, as discussed above, grand juries are perceived to be particularly willing to indict in most cases. However, they appear to be more reluctant "in cases where police officers are accused of taking the life of a Black or brown person."[344]

Although there are no easy answers, it is clear that ensuring the independence of the prosecutor is a key factor in successfully charging police officers who unjustifiably take a life in the line of duty.[345] Prosecutors work closely with police officers in the investigation and

---

338 *See id.* at 215–16.

339 *See id.* at 217–18.

340 *See* Mark Berman, *Breonna Taylor's Case Shines Spotlight on Grand Juries, Which Usually Operate out of Public Eye*, WASH. POST (Oct. 2, 2020), https://www.washingtonpost.com/national/breonna-taylors-case-shines-spotlight-on-grand-juries-which-usually-operate-out-of-public-eye/2020/10/01/9b9b078c-043f-11eb-b7ed-141dd88560ea_story [https://perma.cc/B95S-6XLK]; Shaila Dewan, Will Wright & John Eligon, *In the Breonna Taylor Case, a Battle of Blame over the Grand Jury*, N.Y. TIMES (Oct. 30, 2020), https://www.nytimes.com/2020/09/29/us/breonna-taylor-grand-jury.html?searchResultPosition=1 [https://perma.cc/W6YW-CSRW].

341 *See* Fairfax, *Grand Jury Survive*, *supra* note 4, at 825–27.

342 *See* Fairfax, *supra* note 3, at 219–28; *see also* Brie McLemore, *Procedural Justice, Legal Estrangement, and the Black People's Grand Jury*, 105 VA. L. REV. 371 (2019); Gabriel J. Chin & John Ormonde, *Infamous Misdemeanors and the Grand Jury Clause*, 102 MINN. L. REV. 1911, 1913 (2018).

343 *See, e.g.*, Sarah Maslin Nir, *Rochester Officers Will Not Be Charged in Killing of Daniel Prude*, N.Y. TIMES (Mar. 6, 2021), https://www.nytimes.com/2021/02/23/nyregion/daniel-prude-rochester-police.html [https://perma.cc/A6D8-WC7M].

344 Dewan, Wright & Eligon, *supra* note 340. *But see* Noelle Phillips & Elise Schmelzer, *Elijah McClain Case: Grand Jury Indicts Police, Paramedics in Death*, DENV. POST (Sept. 2, 2021, 2:34 PM), https://www.denverpost.com/2021/09/01/elijah-mcclain-grand-jury-aurora-police [https://perma.cc/V64M-5BDX].

345 *See* Fairfax, *supra* note 3, at 227–28.

prosecution of criminal conduct, and, therefore, it may be asking too much of prosecutors to set aside their working relationship with law enforcement officers to conduct an aggressive and, if necessary, antagonistic investigation into an officer's conduct.[346] However, appointing an independent prosecutor is not a panacea. As recent cases have demonstrated, some independent prosecutors do not command the trust of the community that they have sought justice,[347] and still others who are perceived to have acted in good faith might still be frustrated by the facts or the law despite their best efforts to seek an indictment.[348]

As disappointing as the recent grand jury decisions have been for those concerned with racial justice, it is important to remember that the alternative to grand jury indictment—prosecution by information—is only as effective as the prosecutor making the decision. The same reasons that prosecutorial independence is critical in many cases also animate the exercise of prosecutorial discretion in these cases when grand jury indictment is not required.[349] If a prosecutor is not inclined to thoroughly investigate and, if the evidence warrants it, prosecute police officers, then it will not matter whether or not the grand jury is involved.

Furthermore, certain grand jurors in recent cases have sought to speak up and shine a light on alleged lapses or misconduct on the part of prosecutors who presented matters to the grand jury.[350] For instance, a number of grand jurors in the Breonna Taylor case petitioned the court to obtain the right to tell their side of the story contradicting the prosecutor's account of why the grand jury did not return an indictment

---

346 *See id.* To be sure, there is more than one school of thought on whether the local prosecutor should always be replaced by an independent prosecutor. *See* Fairfax, *Grand Jury's Role*, *supra* note 4, at 417 & n.126.

347 *See, e.g.*, Marisa Iati, *Breonna Taylor Grand Jury Was Not Given Option to Bring Homicide Charges, Anonymous Juror Says*, WASH. POST (Oct. 20, 2020, 7:18 PM), https://www.washingtonpost.com/national/breonna-taylor-grand-jury-was-not-given-option-to-bring-homicide-charges-anonymous-juror-says/2020/10/20/bdd2912e-101c-11eb-b1e8-16b59b92b36d_story.html [https://perma.cc/64TR-GVL2].

348 *See, e.g.*, Press Release, Letitia James, Att'y Gen., Attorney General James Releases Statement on Grand Jury Decision Regarding the Death of Daniel Prude (Feb. 23, 2021), https://ag.ny.gov/press-release/2021/attorney-general-james-releases-statement-grand-jury-decision-regarding-death [https://perma.cc/FN3X-AURA].

349 *See* Fairfax, *supra* note 3, at 228–29.

350 *See, e.g.*, Tessa Duvall, *Two Breonna Taylor Grand Jurors Are Telling Their Story. Why That's Important*, LOUISVILLE COURIER J. (Oct. 27, 2020, 5:40 PM), https://www.courier-journal.com/story/news/local/breonna-taylor/2020/10/27/two-breonna-taylor-grand-jurors-telling-their-story/6051938002 [https://perma.cc/HYE3-349K]; Debra Cassens Weiss, *8th Circuit Rules Against Grand Juror Who Wanted to Talk About Michael Brown Case*, ABA J. (Aug. 19, 2020, 2:36 PM), https://www.abajournal.com/news/article/8th-circuit-rules-against-grand-juror-who-wanted-to-talk-about-michael-brown-case [https://perma.cc/2RF7-P34Q].

containing charges connected to the death of Breonna Taylor.[351] This emerging independence being displayed could be a harbinger of a less passive model of grand jury engagement in these types of cases.

In addition, prosecutors could deploy the grand jury to advance racial justice in other ways.[352] For example, a prosecutor could use the grand jury to investigate systemic misconduct in police departments. Using the grand jury's subpoena power, a prosecutor could probe whether a department engaged in a coverup of misconduct, or the extent to which racial supremacist groups have gotten a foothold in a particular department.[353] Even beyond policing, the prosecutor could pursue a racial justice agenda utilizing the grand jury to investigate conditions of confinement in the local jail facility, or the improper influence of the private prison industry on legislators and judges.[354] In this way, the grand jury, which is often conceptualized as a shield for the accused, also might be used as a sword in the quest for racial justice.

4. The Enduring (and Future) Relevance of the Grand Jury

Finally, the Court might consider what the grand jury *could* become if the right were to be incorporated. As discussed, part of the reason the grand jury enjoys so little respect is that it was relegated to second-class status in *Hurtado*.[355] Inclusion of the grand jury right with the other provisions of the Bill of Rights to have been deemed fundamental to due process under the Fourteenth Amendment would surely enhance the respect that it carries. Also, the greater exposure of more Americans to the institution of the grand jury could work to elevate its standing.

On a related note, the incorporation of the grand jury right—and the concomitant increased utilization of the institution of the grand jury—could serve to fuel the imagination about how the "voice of the community" might be deployed beyond the review of criminal charges.[356] Courts and scholars often reference the vaunted history of the grand jury in which it played a central role in civic life which enhanced its value in the criminal process.[357] Should the grand jury be

---

351 *See* Tessa Duvall, *supra* note 350.

352 *See* Roger A. Fairfax, Jr., *Prosecutors, Ethics, and the Pursuit of Racial Justice*, 19 OHIO ST. J. CRIM. L. (forthcoming 2022).

353 *See id.*

354 *See id.*

355 *See supra* Section II.A.

356 *See, e.g.*, Brenner, *supra* note 253; Fairfax, *Grand Jury Innovation*, *supra* note 144, at 354–68.

357 *See supra* Section III.A; Wright, *supra* note 254, at 294–96.

living that history now? Indeed, scholars have imagined a similarly more vibrant role for the grand jury, proposing its use as a vehicle for nontraditional purposes, such as approving criminal sentences, regulating plea bargaining, and overseeing prosecutorial conduct and enforcement priorities.[358]

Creative uses of the grand jury, harnessing its power of community wisdom and input might help the grand jury to be seen not as a mere speed bump in the criminal legal system, but as an engine or steering wheel.[359] In this way, this ancient body could be viewed as an enduring and valuable part of the criminal legal system worth preserving and adapting to the needs of modern society. Perhaps this robust vision of the grand jury could both help justify the incorporation of the grand jury right and be bolstered by it.

D. *Entitlement to Deference Under Stare Decisis?*

However one might perceive the critique of the *Hurtado* decision or how it would fare under an analysis employing the touchstones of modern incorporation doctrine, the case is still good law.[360] In interrogating the case for the incorporation of the grand jury right, we must acknowledge that the Court has long adhered to the doctrine of stare decisis, which generally counsels for caution in overturning precedents.[361] These precedents, the Court has noted, "warrant our deep respect as embodying the considered views of those who have come before."[362] However, as the Court also has acknowledged, "*stare decisis* has never been treated as an 'inexorable command.'"[363] This is particularly so in cases involving the interpretation of constitutional provisions.[364] To navigate these competing interests, the Court has considered several traditional guideposts for overturning precedent,

---

358 *Cf.* Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731 (2010); *see also* Fairfax, *supra* note 326, at 1402–05; Fairfax, *Grand Jury Innovation*, *supra* note 144, at 354–68.

359 *See, e.g.*, Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1193 (1995) (citing Ronald F. Wright, *Why Not Administrative Grand Juries?*, 44 ADMIN. L. REV. 465 (1992)).

360 *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1435 (2020) (Alito, J., dissenting).

361 *See, e.g.*, Alleyne v. United States, 570 U.S. 99, 118 (2013) (Sotomayor, J., concurring) ("We generally adhere to our prior decisions, even if we question their soundness, because doing so 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991))).

362 *Ramos*, 140 S. Ct. at 1405.

363 *Id.*

364 *See id.* (noting that the doctrine of stare decisis is "at its weakest when we interpret the Constitution" (quoting Agostini v. Felton, 521 U.S. 203, 235 (1997))).

including "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision."[365]

1. Quality of Reasoning

As discussed above, the *Hurtado* decision featured a lengthy explication of the relationship of the Bill of Rights provisions to the fundamental due process guaranteed against state interference under the Fourteenth Amendment.[366] Although we have had the benefit of reviewing 140 years of incorporation jurisprudence unfold since *Hurtado* was decided in 1884, the Court was engaged in the fairly new enterprise of determining how the post–Civil War amendments had changed the nature of federalism and the protection of rights in a rapidly changing and growing country post-slavery and post-Reconstruction.

The reasoning undergirding the *Hurtado* majority's position, read in the context of the time in which it was rendered, certainly is defensible. "Due process of law," the Court maintained, had no strict requirement for particular procedural mechanisms, and certainly did not necessarily incorporate the provisions of the Bill of Rights meant to constrain the federal government. Under this "pragmatic procedural federalism" approach, as long as a state was not infringing upon fundamental due process interests, it was free to experiment with various procedural forms suited to its evolving needs and to the modern context.[367]

However, as Harlan's dissent asserted, there are flaws in this reasoning. The logic that would exclude the grand jury from the conception of due process because the grand jury right is enumerated in the same provision guaranteeing due process of law, would also exclude other similarly enumerated rights that have been deemed fundamental to due process. In addition, the fact that the grand jury, earlier in its eight-hundred-year evolution had not always been as protective of individual liberty is beside the point. The question is whether the Framers of the Fifth and Fourteenth Amendments believed that the grand jury right, as it existed and functioned at the time of the Founding and at the adoption of the Fourteenth Amendment, was fundamental to due process. By the time of those eras, the grand jury had established a proud history in the colonies and the States as a

365 *Id.* (quoting Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1499 (2019)).

366 *See supra* Section II.A.

367 *See supra* Section II.C.

protector of individual liberty and was arguably seen as essential to due process.[368]

Furthermore, the *Hurtado* majority gave short shrift to the particular value the grand jury brings to the exercise of ensuring that defendants are not unfairly saddled with the burdens of accusation. Although the California magistrate examination and prosecution-by-information procedure approved in *Hurtado* as a substitute for grand jury indictment did offer certain features the grand jury typically does not, the grand jury is a lay body of the defendant's peers, not beholden to the government, insulated from outside influence, and better suited to bring community wisdom to the exercise of scrutinizing the ethical, moral, and practical merits of a proposed prosecution alongside its evidentiary merits.[369]

Finally, the *Hurtado* majority did not make explicit what exactly is required to ensure due process in connection with the initiation of criminal charges. Although the decision did determine that substituting for grand jury indictment the particular magistrate commitment and information process used in California did not violate due process of law, it did not make clear that a state must provide some sort of review of the merits of initiating prosecution. As a result, the Court's subsequent decisions soon had forgotten the portion of the holding approving the magistrate commitment and had embraced the view that *Hurtado* stood for the proposition simply that the grand jury indictment was not a requisite of due process. Thus, fewer than thirty years after *Hurtado*, the Court declared that a defendant is entitled to no review of the prosecutor's decision to lodge criminal charges and subject the accused to the burdens and stigma associated with the onset of criminal proceedings.[370]

2. Consistency with Related Decisions and Legal Developments Since the Decision

The next two traditional stare decisis guideposts—consistency with related decisions and legal developments since the decision—are closely related in this context. As discussed above, *Hurtado* predated the era of selective incorporation.[371] The case was decided in the period just after Reconstruction—as state and federal courts alike were grappling with the impact of the Fourteenth Amendment—and prior to the

368 *See supra* Section III.A.

369 *See, e.g.*, Kuckes, *supra* note 302; Fairfax, *supra* note 217.

370 *See* Lem Woon v. Oregon, 229 U.S. 586, 590 (1913).

371 *See supra* Section III.B.

Court's adoption of the approach that would begin its project of selectively incorporating enumerated rights in the first eight amendments to apply to the States. Thus, the evolving touchstones and incorporation approaches the Court would apply throughout the twentieth century were not applied in *Hurtado*. Certainly, the more modern incorporation touchstones, which consider not only history, but also logic and policy considerations, were not prominent in the 1884 *Hurtado* decision.

Furthermore, aside from the fact that the methodology of selective incorporation was not utilized in *Hurtado*, the substantive *outcomes* of criminal procedural rights cases decided by the Court during the era of selective incorporation are significant. As discussed above, the Court has now considered every single criminal procedural right enumerated in, or made implicit by, the Bill of Rights.[372] For every one of those rights, the Court has decided to incorporate them through the Fourteenth Amendment to apply to the States.[373] Furthermore, it bears reiterating that with several of these now-incorporated criminal procedural rights, the Court first had decided the right was not incorporated but, as its incorporation doctrine evolved, the Court reversed course.[374]

3. Reliance on the Decision

Finally, the Court considers the extent of reliance on the decision. For example, in *Ramos*, the Court noted that the respondent States opposing the incorporation of the right to jury unanimity failed to claim "anything like the prospective economic, regulatory, or social disruption litigants seeking to preserve precedent usually invoke."[375] As discussed earlier in this Part, the incorporation of the grand jury right to apply to the States likely would lead to significant disruption in terms of process and infrastructure, and would introduce costs associated with integrating the grand jury into state systems in which it is currently absent.[376] These States certainly could fairly assert their reliance on the 1884 *Hurtado* decision when first designing their case processing systems, and could point to the vast changes the incorporation of the grand jury right would mandate for the manner in which most serious criminal cases are initiated.

---

372 *See supra* Section I.A.

373 *See supra* Section I.A.

374 *See supra* Section I.A.

375 Ramos v. Louisiana, 140 S. Ct. 1390, 1406 (2020).

376 *See supra* Section III.C.

Obviously, the incorporation of any criminal procedural right—whether the right to jury trial, the exclusionary rule, or the privilege against self-incrimination—brings a certain degree of disruption.[377] This disruption might be assessed across two different metrics—the number of states impacted by the ruling and the impact of the ruling within those states. For example, the *Ramos* Court noted that its decision to incorporate the right to jury unanimity in criminal cases would significantly impact only the two states then still permitting nonunanimous verdicts.[378] Of course, in contrast, the incorporation of the grand jury right would have a significant impact on roughly half of the fifty states.

That said, the States' reliance interests, however, would need to be balanced with other important considerations. The *Ramos* Court also emphasized that "new rules of criminal procedures usually do [impose a cost], often affecting significant numbers of pending cases across the whole country."[379] The new rules, and virtually all of the prior instances of incorporation of criminal procedural rights have come with substantial costs and disruption to the status quo for states that were forced to adapt.[380] While it is true that states can claim to have relied on

---

377 *See Ramos*, 140 S. Ct. at 1406.

378 *See id.* at 1394, 1406.

379 *Id.* at 1406.

380 *Cf. id.* at 1406 ("For example, after *Booker v. United States* held that the Federal Sentencing Guidelines must be advisory rather than mandatory, this Court vacated and remanded nearly 800 decisions to the courts of appeals. Similar consequences likely followed when *Crawford v. Washington* overturned prior interpretations of the Confrontation Clause or *Arizona v. Gant* changed the law for searches incident to arrests."). The *Ramos* Court also discounted the concern about finality of convictions given the current state of the law regarding retroactivity and the fact that "the test [for retroactivity] is demanding by design, expressly calibrated to address the reliance interests States have in the finality of their criminal judgments." *Id.* at 1407. Indeed, the Court closed the door on retroactivity of watershed rules of criminal procedure when it subsequently held that jury unanimity does not meet the test for retroactivity. *See* Edwards v. Vannoy, 141 S. Ct. 1547, 1559–60 (2021).

> [W]e recognize that the Court's many retroactivity precedents taken together raise a legitimate question: If landmark and historic criminal procedure decisions—including *Mapp*, *Miranda*, *Duncan*, *Crawford*, *Batson*, and now *Ramos*—do not apply retroactively on federal collateral review, how can any additional new rules of criminal procedure apply retroactively on federal collateral review? At this point, some 32 years after *Teague*, we think the only candid answer is that none can—that is, no new rules of criminal procedure can satisfy the watershed exception. We cannot responsibly continue to suggest otherwise to litigants and courts. . . . It is time—probably long past time—to make explicit what has become increasingly apparent to bench and bar over the last 32 years: New procedural rules do not apply retroactively on federal collateral review. The watershed exception is moribund. It must "be regarded as retaining no vitality."

Id. (internal citations omitted).

the *Hurtado* decision longer than it had relied on any other of the now-overturned decisions not to incorporate core criminal procedure rights, the fact that the Court happened to decide the case before the era of selective incorporation should not add weight to the reliance interest.

CONCLUSION

Should the grand jury right be incorporated to apply to the States, as is the case with every other criminal procedural protection enshrined in the Bill of Rights? It is fair to ask why this question is worth answering now. To be sure, since the Court's late nineteenth-century-*Hurtado* decision, we seem to have reached a point of stasis, with a little fewer than half the States choosing to utilize the grand jury in serious criminal cases, and the balance of states dispensing with it completely or making its use optional in all but the most narrow of circumstances. Those states in the cohort that use the grand jury largely follow the path that the federal grand jury system has beaten, in terms of both substance and procedure. This has led to a divided approach, which is not uncommon in our system of federalism.[381] Furthermore, the grand jury, which already had been facing heavy criticism, has drawn a new cohort of detractors who are understandably frustrated by the institution's recent track record in cases involving police violence against African Americans and other marginalized groups.[382]

So, with the passage of time, inertia, and the old and new critiques of the grand jury's relevance and value, why would we even contemplate anything other than a move toward abolition of the grand jury, much less consider bolstering the institution through incorporation? We are in the midst of a moment in which the legal culture is reimagining roles that were all but settled for various criminal justice actors such as prosecutors and law enforcement.[383] There is an ongoing rethinking of substantive criminal law policies, such as mandatory minimum sentencing, criminalization, and traditional mechanisms of

---

381 For example, some states have jury sentencing, some do not; some states have elected prosecutors, others do not. *See, e.g.*, Darryl K. Brown, *How Criminal Law Dictates Rules of Criminal Procedure*, 70 RUTGERS U. L. REV. 1093, 1094–95 (2018).

382 *See supra* Section III.C.

383 *See, e.g.*, PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2017); Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650 (2020); Capers, *supra* note 286, at 1581–87; Josie Duffy Rice, *The Abolition Movement*, VANITY FAIR (Aug. 25, 2020), https://www.vanityfair.com/culture/2020/08/the-abolition-movement [https://perma.cc/9SLL-PJUZ]; Christy E. Lopez, *Defund the Police? Here's What That Really Means*, WASH. POST (June 7, 2020), https://www.washingtonpost.com/opinions/2020/06/07/defund-police-heres-what-that-really-means [https://perma.cc/73GG-NMT9].

punishment.[384] In this time of reexamination, conventional wisdom is no longer at a premium. Thinkers are free to question long-settled assumptions about the nature and efficacy of certain aspects of the criminal legal system. It should be no different with the grand jury.

Although the Court's incorporation of rights has been largely a retrospective exercise, perhaps it is the forward-looking consideration of the grand jury's promise that best establishes the case for applying the right to the States. We might imagine the possibility of a reinvigorated grand jury, fulfilling the roles and performing the functions that compelled the Framers to include the right to grand jury indictment in the Fifth Amendment in the first place. Certainly, the Court's decision to incorporate the only remaining criminal procedural protection in the Bill of Rights not applicable to the States could prompt a sea change in how the grand jury is utilized in our criminal legal system and perceived in our culture. However, regardless of how the Court is likely to decide the question, even the exercise of interrogating the merits of incorporation could provide the catalyst for a reimagining of the ancient bulwark of liberty.

---

384 *See, e.g.*, Marina Bell, *Abolition: A New Paradigm for Reform*, 46 L. & SOC. INQUIRY 32 (2021); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613 (2019); Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1381 (2018); Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2015).