NOTE

INCORPORATION, FUNDAMENTAL RIGHTS, AND THE GRAND JURY: *HURTADO V. CALIFORNIA* RECONSIDERED

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The U.S. Supreme Court has never held that the Fourteenth Amendment makes the entire Bill of Rights applicable to the states. Instead, it has selectively incorporated against the states those rights that it deems to be fundamental. However, only two enumerated rights remain that the Court has affirmatively labeled non-fundamental. It is doctrinally puzzling why the Fourteenth Amendment should be understood to stop just short of total incorporation.

Of the last unincorporated rights, only one relates to criminal procedure: the Grand Jury Clause, which guarantees the right to be indicted by a grand jury before prosecution for a felony. The Court declined to incorporate the Grand Jury Clause in 1884 in Hurtado v. California*, and this Note argues that* Hurtado *should be overturned. After analyzing the incorporation caselaw from the Roberts Court, an area in which the Court has been active, this Note argues that* Hurtado *is doctrinally incompatible with the modern approach to fundamental rights. Despite the internal inconsistencies in the doctrine, which this Note identifies, applying the modern incorporation framework to the Grand Jury Clause shows that the right to indictment is a fundamental one.*

Finally, this Note argues that Hurtado *can be overturned consistent with principles of stare decisis. Indeed, this Note makes a novel but striking finding—*Hurtado *likely does not carry precedential force as an incorporation case at all. This Note shows that* Hurtado *was argued and decided as a procedural due process case. Because the Court's*

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incorporation doctrine turns on substantive rather than procedural due process, Hurtado *did not decide the relevant legal question at all for incorporation purposes.*

INTRODUCTION

"[F]or so 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 offence, unless by the unanimous voice of twenty-four of his equals and neighbours: 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."[1]

In at least one corner of constitutional law, the Supreme Court makes explicit value judgments about which constitutional rights are important and which are not. Under the Court's longstanding incorporation precedents, the Due Process Clause of the Fourteenth Amendment only secures "fundamental" rights against violation by the states. States remain

[1] 4 William Blackstone, Commentaries 306 (London, 16th ed. 1825).

free to ignore or abridge rights in the Bill of Rights that the Court deems non-fundamental.

At one time, the Supreme Court believed that nearly all of the Bill of Rights was non-fundamental, but after a flurry of incorporation cases from the Roberts Court, only two affirmatively non-fundamental rights remain: the Seventh Amendment's right to a civil jury and the Fifth Amendment's requirement of a grand jury's indictment as a prerequisite to prosecution for capital or infamous crimes.[2] This Note is concerned with the latter. In 1884, in *Hurtado v. California*, the Supreme Court held that it did not violate the Fourteenth Amendment's guarantee of due process when the State of California tried, convicted, and sentenced a man to death without an indictment. This Note offers a long-overdue reconsideration of *Hurtado* and argues that the right to indictment is a fundamental one that should bind the states—no longer should states be able to prosecute by information at the whim of a lone prosecutor.

This reevaluation of *Hurtado* comes at a time when the Supreme Court itself is pondering the future of *Hurtado*. Dissenting from the Court's recent decision in *Ramos v. Louisiana*, which incorporated the requirement of a unanimous jury for criminal convictions, Justice Alito warned that the Court's holding there threatened the validity of *Hurtado*.[3] This Note is the first since *Ramos* to take Justice Alito's comments seriously by analyzing the validity of *Hurtado* both on its own terms and in light of the Supreme Court's recent incorporation precedents.[4] It finds that *Hurtado* is a flawed, misunderstood precedent that cannot be maintained in light of current doctrine.

In addition, this Note also contributes to the literature by uncovering hitherto unnoticed inconsistencies among the Roberts Court's incorporation cases. While these cases seem conceptually unified, careful

[2] Walker v. Sauvinet, 92 U.S. 90 (1876) (civil jury right); Hurtado v. California, 110 U.S. 516 (1884) (grand jury right). While the Supreme Court has never considered the fundamentality of the Third Amendment, the one circuit to consider the question found that it is fundamental. Engblom v. Carey, 677 F.2d 957, 961 (2d Cir. 1982).

[3] Ramos v. Louisiana, 140 S. Ct. 1390, 1435 (2020) (Alito, J., dissenting).

[4] See Suja A. Thomas, Nonincorporation: The Bill of Rights after *McDonald v. Chicago*, 88 Notre Dame L. Rev. 159, 187 (2012) (assessing all unincorporated rights post-*McDonald* but before *Timbs* or *Ramos*) [hereinafter Thomas, Nonincorporation]; F. Andrew Hessick & Elizabeth Fisher, Structural Rights and Incorporation, 71 Ala. L. Rev. 163, 175 (2019) (arguing before *Timbs* and *Ramos* that jury-related rights should not be incorporated because of federalism concerns). Only Professor Thomas's piece makes the affirmative case for incorporation of the Grand Jury Clause, but it does so only briefly, and it does not undertake the necessary analysis done here with the benefit of hindsight from more recent decisions.

examination shows that they differ from one another in subtle but important methodological aspects.

A word of clarification. This Note takes a purely doctrinal approach. It is not concerned with the well-trodden issue of whether the Fourteenth Amendment was intended to incorporate rights against the states as an originalist matter. Nor does it take any stance on whether incorporation is properly accomplished via the Due Process Clause or the Privileges or Immunities Clause. It accepts as a matter of settled precedent that the Fourteenth Amendment incorporates at least some rights and that it does so through substantive due process. Finally, while there is a voluminous literature both critiquing and defending the grand jury as an institution, that, too, is beyond the scope of this Note and is only considered so far as the Court's doctrine makes such functionalist assessments of constitutional rights relevant.

The argument proceeds as follows. Part I briefly outlines the contours of the right to grand jury indictment in order to clarify what is at stake in the incorporation debate. Part II traces the arc of the Supreme Court's incorporation doctrine and then analyzes the modern caselaw, noting differences in how the cases apply the incorporation framework. Part III turns to *Hurtado* itself, critiquing the opinion and explaining its important role in the development of criminal procedure among the states. Part IV applies the modern incorporation framework to the Grand Jury Clause and finds that it is a fundamental right protected by substantive due process. Finally, Part V argues that *Hurtado* can be overturned consistent with stare decisis principles. In fact, it is entirely possible that stare decisis does not attach to *Hurtado* at all under the modern incorporation doctrine because *Hurtado* determined only that procedural due process does not guarantee the right to indictment—the holding did not implicate substantive due process.

I. THE SCOPE OF THE GRAND JURY INDICTMENT RIGHT

It is important from the outset to be clear about the scope of the right protected by the Grand Jury Clause that incorporation would require the states to observe. The Fifth Amendment guarantees that "[n]o 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."[5] This Part outlines the core features of this right in order to contextualize what is at stake.

The Grand Jury Clause applies broadly to any *person*, with certain military-related exceptions. The Supreme Court has held that the right extends to aliens just as it does to citizens, recognizing that personhood precludes any distinction on the basis of citizenship.[6] Active members of the military (and, in time of war, the militia) constitute the only exception.[7] The exception allows courts-martial to try charges against servicemembers regardless of whether the alleged crime relates to military service.[8]

The Clause is more limited in scope when it comes to the types of crimes for which it requires indictment or presentment. The Federal Rules of Criminal Procedure effectively codify several Supreme Court decisions by requiring grand jury indictment only for felonies.[9] This distinction follows that of the common law, at which misdemeanors could typically be prosecuted without the formality of an indictment. Thus, it is the degree of punishment the accused faces if found guilty that determines whether a crime warrants the grand jury's oversight.

That oversight takes the form of the "presentment or indictment" required for a prosecution to proceed. An indictment is a formal document issued by a grand jury at the request of a prosecutor charging someone with the commission of a crime;[10] a presentment is an accusation of criminal wrongdoing brought on the grand jury's own initiative and based on facts either within the personal knowledge of the grand jurors or facts discovered during the course of their investigation.[11] The federal grand jury issues an accusation only if the modest standard of probable cause is

[5] U.S. Const. amend. V.

[6] Wong Wing v. United States, 163 U.S. 228, 238 (1896). While the Court has never determined whether the Clause protects artificial persons, federal prosecutors generally prosecute artificial persons by indictment. Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, 4 Criminal Procedure 387 (3d ed. 2007).

[7] See United States ex rel. Toth v. Quarles, 350 U.S. 11, 14 (1955).

[8] Solorio v. United States, 483 U.S. 435, 439 (1987).

[9] Fed. R. Crim. P. 7(a) (requiring indictment for all crimes, other than criminal contempt, punishable by death or imprisonment for more than one year). Every such crime constitutes a felony, and any crime subject to a lesser punishment is a misdemeanor. 18 U.S.C. § 3559(a).

[10] Sara Sun Beale, Willian C. Bryson, James E. Felman & Michael J. Elston, 1 Grand Jury Law and Practice 1-33 (2d ed. 2002).

[11] Id. Presentments effectively no longer exist at the federal level, as the Federal Rules of Criminal Procedure do not provide for them. See Renée B. Lettow, Note, Reviving Federal Grand Jury Presentments, 103 Yale L.J. 1333, 1343 (1994).

met.[12] In theory, this is followed by a trial with a far more demanding standard of guilt, though in modern practice the vast majority of cases settle before trial through plea bargaining.[13]

The requirement of indictment or presentment ensures that the government cannot initiate prosecutions for felony charges on its own—it must have the consent of a body of laypeople.[14] By implication, it forbids prosecution by information, the practice by which a prosecutor initiates prosecutions without grand jury oversight by filing criminal charges himself. The grand jury largely earned its place in the Bill of Rights as a check on the government's prosecutorial power.[15] The Grand Jury Clause ensures that both the government and the grand jury concur in going forward with a prosecution for a serious crime.

But while the Constitution requires a grand jury, it is silent as to its powers and structure.

The Supreme Court has said that the Constitution "presupposes an investigative body 'acting independently of either prosecuting attorney or judge' whose mission is to clear the innocent, no less than to bring to trial those who may be guilty."[16] Accordingly, courts have consistently looked to the grand jury of English common law when defining the contours of the grand jury's powers and responsibilities,[17] though to some extent Congress is able to modify these traditional arrangements.[18]

Drawing from this common law tradition, the Supreme Court recognizes at least two defining characteristics of the grand jury as an institution. First, and most importantly, the grand jury wields discretion regarding whom it indicts and for what crimes. As the Court has recognized, the grand jury is not obligated to indict when it determines probable cause exists; it is free to exercise its own discretion about the

[12] United States v. Calandra, 414 U.S. 338, 343 (1974).

[13] See Andrew Manuel Crespo, The Hidden Law of Plea Bargaining, 118 Colum. L. Rev. 1303, 1378 n.223 (2018).

[14] United States v. Mara, 410 U.S. 19, 27–28 (1973) (Douglas, J., dissenting) ("The individual is therefore protected by a body of his peers who have no axes to grind or any Government agency to serve.").

[15] See United States v. Cotton, 535 U.S. 625, 634 (2003).

[16] United States v. Dionisio, 410 U.S. 1, 16–17 (1973) (quoting Stirone v. United States, 361 U.S. 212, 218 (1960)).

[17] Blair v. United States, 250 U.S. 273, 282 (1919) (recognizing the grand jury should have the same powers as its British predecessor).

[18] See id.

wisdom of prosecuting.[19] Similarly, when the grand jury chooses to indict, it determines the charges, not the prosecutor. It may charge a greater or a lesser crime than that requested by the prosecutor.[20] This discretion lies at the heart of the grand jury and allows it to act as a "buffer or referee between the Government and the people."[21]

Similarly, the grand jury is—at least theoretically—independent from any of the three branches of government.[22] It is an institution that operates under its own auspices, drawing its authority directly from the people themselves.[23] In practice, this means that the grand jury is free to conduct broad investigations with minimal judicial oversight,[24] and it deliberates on whether to indict in privacy without the presence of the prosecutor.[25] As a body of laypeople acting in a pretrial proceeding, the grand jury is traditionally also exempt from legal constraints on the type of evidence it hears, like hearsay.[26] And its decision whether or not to indict is entirely unreviewable, although the prosecutor may bring the same charges before a subsequent grand jury.[27]

This is the basic framework put in place by the Fifth Amendment, but it is only required at the federal level. Incorporating the Grand Jury Clause would require states to similarly place the grand jury between the accused

[19] Vasquez v. Hillery, 474 U.S. 254, 263 (1986) ("[T]he grand jury is not bound to indict in every case where a conviction can be obtained." (quoting United States v. Ciambrone, 601 F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting))); United States v. Navarro-Vargas, 408 F.3d 1184, 1200 (9th Cir. 2005) (en banc).

[20] *Vasquez*, 474 U.S. at 263.

[21] United States v. Williams, 504 U.S. 36, 47 (1992); see also Roger A. Fairfax, Jr., Grand Jury Discretion and Constitutional Design, 93 Cornell L. Rev. 703, 726–31 (2008) (defending the structural role of grand jury discretion) [hereinafter Fairfax, Grand Jury Discretion]; Josh Bowers, The Normative Case for Normative Grand Juries, 47 Wake Forest L. Rev. 319, 324–25 (2012) (recognizing the importance of grand jury discretion).

[22] *Williams*, 504 U.S. at 47 (noting that the "whole theory" of the grand jury's function is its independence from the government, making it a "constitutional fixture in its own right"); Stirone v. United States, 361 U.S. 212, 218 (1960). Whether the modern federal grand jury is independent in practice is the subject of much debate, but it is a discussion that this Note cabins for another day.

[23] United States v. Cox, 342 F.2d 167, 178 (5th Cir. 1965) (Rives, J., concurring in part and dissenting in part) (explaining that the grand jury's authority stems "directly from the people themselves"). But see United States v. Hill, 26 F. Cas. 315, 317 (Marshall, Circuit Justice, C.C.D. Va. 1809) (No. 15,364) (explaining that grand juries derive their powers from the judiciary).

[24] *Williams*, 504 U.S. at 47–49.

[25] Fed. R. Crim. P. 6(d)(2).

[26] Costello v. United States, 350 U.S. 359, 364 (1956).

[27] Id. at 362–63; United States v. Navarro-Vargas, 408 F.3d 1184, 1200–01 (9th Cir. 2005) (en banc).

and the jeopardy of felony charges.[28] Incorporation turns on the fundamentality of the right in question. Accordingly, with this background in place, the next Part turns to the Supreme Court's framework for determining which constitutional rights apply to the states and which do not.

II. DETERMINING WHETHER RIGHTS ARE FUNDAMENTAL

During oral arguments for *Timbs v. Indiana*, Justice Gorsuch remarked, "[H]ere we are in 2018 . . . still litigating incorporation of the Bill of Rights. Really?"[29] The answer is yes, despite the debate stretching back to the ratification of the Fourteenth Amendment. Over the years, the Court's willingness to incorporate fundamental rights and approach to doing so has varied greatly. This Note leaves past approaches to more comprehensive works, focusing instead on the three cases decided by the Roberts Court, which only recently resumed the project of incorporation after a several-decade lull. While these cases clarify central aspects of the test for identifying fundamental rights, they are neither comprehensive nor fully consistent with one another.

This Part analyzes the cases, identifies areas of uncertainty, and formulates a test for identifying rights so fundamental that substantive due process prohibits states from violating them. It finds that the Court agrees on broad principles, such as looking to American tradition to inform its conclusions, but that it is inconsistent about the role of functionalism in this doctrinal area as well as divided over the application of stare decisis. Despite these uncertainties, the validity of *Hurtado* is subject to doubt under any fair reading of the cases.

[28] As always, however, the Constitution imposes only a floor on the level of protection for a right, not a ceiling. States would remain free to legislatively impose additional requirements before prosecution, and, indeed, many states that still retain indicting grand juries impose various additional safeguards, such as preventing prosecutors from presenting hearsay to the grand jury or limiting the number of times a prosecutor may present rejected charges to a subsequent grand jury. See LaFave et al., supra note 6, at 510–11. The Supreme Court has recognized the validity of legislative adjustments of grand jury proceedings. See *Williams*, 504 U.S. at 55.

[29] Transcript of Oral Argument at 32, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091).

A. McDonald v. City of Chicago *(2010)*

The Roberts Court first took up the question of incorporation in *McDonald v. City of Chicago*, in which it incorporated the Second Amendment.[30] While subsequent cases have subtly departed from its purely historical approach, *McDonald* is the foundational case in this area. It is worth examining closely what factors and evidence the Court weighed in finding that the right to bear arms is a fundamental right.

The Court first confirmed that incorporation is a matter of substantive due process. While some of the earliest incorporation cases had found that the Privileges or Immunities Clause did not incorporate the right to bear arms,[31] the petitioners asked the Court to reconsider these precedents. The Court declined to revisit its interpretation of the Privileges or Immunities Clause. Instead, it reaffirmed that the Due Process Clause was the appropriate vehicle for incorporation.[32] Accordingly, the Court had no need to undertake any stare decisis analysis, as the Court had never examined the relationship between the right to bear arms and substantive due process.[33]

The Court then turned to the framework for incorporation and adopted a history-based approach. It held that a right is within the scope of due process if it is "fundamental to *our* [American] scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition."[34] This formulation explicitly rejected the argument that only rights considered essential across different legal traditions, not just American ones, can be considered fundamental.[35] Neither subsequent case has questioned this principle; fundamentality stems from the American perspective alone.

What is most salient for present purposes is how the Court applied that test, because whether a right is "deeply rooted" in American history is not

[30] 561 U.S. 742, 746 (2010).

[31] United States v. Cruikshank, 92 U.S. 542, 553 (1876) (declining to incorporate the Second Amendment under the Privileges or Immunities Clause); Presser v. Illinois, 116 U.S. 252 (1886) (accord).

[32] *McDonald*, 561 U.S. at 758–59; id. at 791 (Scalia, J., concurring); id. at 810–11 (Thomas, J., concurring in part and in the judgment); id. at 861 (Stevens, J., dissenting) ("This is a substantive due process case.").

[33] Only Justice Thomas found that the Privileges or Immunities Clause was the proper source of incorporation. Accordingly, only he undertook stare decisis analysis. Id. at 850–58 (Thomas, J., concurring in the judgment).

[34] Id. at 767 (majority opinion) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

[35] Id. at 780–82.

self-evident. The Court's inquiry was purely historical. It focused primarily on the degree to which the states and Congress legally protected the right to bear arms at the Founding and at the ratification of the Fourteenth Amendment, taking these protections as evidence that Americans considered a right fundamental in the past. In *McDonald*, at least, the Court found history alone dispositive.[36]

The Court's historical analysis began with English history, ended at the ratification of the Fourteenth Amendment, and paid particular attention to the level of consensus about bearing arms among the states. For instance, the Court noted that four states at the Founding had equivalents to the Second Amendment in their constitutions and that both the Federalists and the Antifederalists, though divided over the necessity of the Bill of Rights, agreed that keeping and bearing arms was an essential right.[37] By 1820, an additional nine states had protected the right and legal commentators lauded it as a central aspect of liberty, confirming its fundamentality at the Founding.[38] By the time of the Fourteenth Amendment, twenty-two out of thirty-seven states, a "clear majority," protected the right in their state constitutions.[39] Nor were the states alone in protecting this right—Congress twice passed legislation after the Civil War to protect freedmen in the former Confederacy from attempts to strip them of the right to bear arms.[40] This was ample evidence that the right was "still recognized to be fundamental" at the Framing of the Fourteenth Amendment.[41]

Importantly, the Court never looked to anything but history, and the relevant history ended shortly after the Fourteenth Amendment's adoption. Both Justice Stevens's and Justice Breyer's dissents advocated for partially looking to current practices to determine fundamentality. Justice Breyer objected that there was "no popular consensus" about the importance of a right to self-defense, while Justice Stevens argued that the Court should have looked to see whether the right remained fundamental over time, including in contemporary society.[42] A plurality

[36] See id. at 874 (Stevens, J., dissenting) (criticizing the plurality for adopting a "rigid historical test").
[37] Id. at 768–70 (majority opinion).
[38] Id. at 769.
[39] Id. at 777.
[40] Id. at 773–77.
[41] Id. at 773.
[42] Id. at 909–10 (Stevens, J., dissenting); id. at 917–18, 920 (Breyer, J., dissenting).

of the Court found that there was "no basis" for looking to current opinion about a right as part of incorporation analysis.[43]

To sum up, the *McDonald* test ties substantive due process to historical tradition. It looks to see whether there was consensus among the states about a right at both the Founding and the Fourteenth Amendment's ratification, focusing on evidence such as state constitutions, congressional action, and the commentary of leading legal figures. However, the Court never specified just how much consensus is necessary for a right to be fundamental or how its analysis might change if the level of consensus varied widely over time. Nor did it answer whether other types of historical evidence might be probative.

B. Timbs v. Indiana *(2019)*

The next time the Court addressed incorporation, it was considerably more unified. In *Timbs v. Indiana*, the Court unanimously held that the Fourteenth Amendment made the Eighth Amendment's Excessive Fines Clause applicable to the states.[44] In so doing, it appeared to add an additional step to the *McDonald* analysis.

The Court, in an opinion by Justice Ginsburg, followed the *McDonald* framework closely but not exactly. It first affirmed that the proper framing of the issue was the one posed in *McDonald*: Was the Excessive Fines Clause deeply rooted in and fundamental to the American scheme of ordered liberty?[45] The Court then traced the right from its origin in the Magna Carta to its inclusion in the Bill of Rights. The Court found that the right had been included in some colonial charters and that in 1787, eight of the states enshrined it in their constitutions.[46] By the time the Fourteenth Amendment was ratified, that consensus among the states had only increased; thirty-five out of thirty-seven states protected the right.[47] Congress, too, recognized the importance of the right at that time, as it

[43] Id. at 789 (majority opinion). While Justice Thomas concurred only in the judgment, his approach was equally grounded in history alone. See id. at 812 (Thomas, J., concurring in the judgment) (praising the plurality's tying of substantive due process to historical practice as a way to prevent unmoored judicial discretion).

[44] Timbs v. Indiana, 139 S. Ct. 682 (2019). While the Court was unanimous as to the result, Justice Thomas concurred only in the result. As in *McDonald*, he wrote separately to argue that the Privileges or Immunities Clause was the proper vehicle for incorporation. Id. at 691 (Thomas, J., concurring in the judgment).

[45] Id. at 687 (majority opinion).

[46] Id. at 687–88.

[47] Id. at 688.

had taken notice of the abuse of fines to force newly freed slaves back into involuntary labor when it passed the Civil Rights Act of 1866.[48] This concluded the Court's brief historical analysis, which, like *McDonald*, ended with the Fourteenth Amendment.

But what followed was different. The Court continued in the next paragraph, "Today, acknowledgment of the right's fundamental nature remains widespread" because all fifty states have some form of constitutional protection against excessive fines.[49] *McDonald* had expressly rejected the attempts of both dissents to bring modern practice into the equation. It is not clear what relevance the Court intended this to have to its holding, so it is difficult to say with total certainty whether this is dicta. On the one hand, the Court could have mentioned this purely to show that incorporation would cause little disruption to the states, as context seems to suggest.[50] But it is at least possible that the Court thought that the present-day consensus among the states regarding protections against excessive fines weighed in favor of incorporation. This is unlikely, though, considering that Chief Justice Roberts and Justice Alito, the last remaining members of the *McDonald* plurality, both signed onto the opinion without comment. They almost certainly would have objected to an attempt to inject modern practice into the framework, so their silence militates in favor of interpreting this one sentence as policy-related dicta rather than a stealthy attempt to radically change doctrine.

But even if the Court did not inject contemporary consensus into the test, it did not confine itself solely to history. While *McDonald* had taken pains to explain why the right to bear arms was so prized by the states in the past, the Court in *Timbs* made no effort to show why the states historically valued protection against excessive fines. Instead, the Court listed examples of how fines could be used in the present day to "undermine other constitutional liberties," such as to chill the speech of political opponents or to disproportionately punish criminal offenders for the purpose of raising revenue for the State.[51] The Court then concluded

[48] Id. at 688–89.

[49] Id. at 689.

[50] In the same paragraph, the Court commented that even Indiana had a constitutional provision against excessive fines that is coextensive with the Excessive Fines Clause. Id. Since that lone sentence is the only context for the Court's discussion of current practice, context might suggest that the Court was focused on the disruption (or lack thereof) that incorporation would cause. Id.

[51] Id.

that this evidence showed that the "historical *and logical* case" for incorporation was overwhelming.[52]

The Court's examination of the "logic" of incorporation altered the purely historical approach adopted in *McDonald.* The Court's commentary implicitly focused on the functional value of the Excessive Fines Clause to contemporary society. Although the *McDonald* Court doubtless considered bearing arms for self-defense an important value for the present day, its holding was not predicated on modern utility. The *Timbs* approach is openly functionalist; it examined the "logic" of incorporating a right, not just its history, suggesting that for a right to be fundamental enough to warrant incorporation, it must still provide some measure of usefulness regardless of its value in the past.

This reading parses the Court's words finely, but the distinction is a material one that clearly contributed to the holding. It transforms the rigidly historical *McDonald* test into something akin to an "experience and logic" test that provides the Court discretion to decide for itself whether a constitutional right has outlived its usefulness.[53] While the *McDonald* approach left the Court no room to make its own value judgements, *Timbs*'s functionalism introduced this possibility.

C. Ramos v. Louisiana *(2020)*

The latest incorporation case is different from the others and particularly relevant to the *Hurtado* question because it squarely addressed stare decisis in the incorporation context. *Ramos* dealt with whether the Sixth Amendment's unenumerated requirement of jury unanimity applies to the states.[54] While the Warren Court incorporated the right to a jury trial, *Apodaca v. Oregon* later held both that the Sixth Amendment required a jury to be unanimous in order to convict and that this requirement did not apply to the states.[55] *Ramos* overturned *Apodaca*, but in so doing it revealed deep disagreement about stare decisis.[56]

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[52] Id. (emphasis added).

[53] Cf. Press-Enterprise Co. v. Sup. Ct., 478 U.S. 1, 8–9 (1986) (establishing a twofold "experience and logic" test to determine whether the First Amendment provides a right of public access to a particular proceeding by looking to whether the proceeding was historically open to the public and whether public access supports the current function of the proceeding).

[54] Ramos v. Louisiana, 140 S. Ct. 1390 (2020).

[55] Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (incorporating the jury trial right); Apodaca v. Oregon, 406 U.S. 404, 411 (1972) (plurality opinion).

[56] *Ramos*, 140 S. Ct. at 1405.

It is worth briefly noting that *Ramos* did not and could not alter the incorporation test created by *McDonald* and *Timbs* because it was an incorporation case of a different kind. The underlying right, the Sixth Amendment jury trial right, had already been incorporated fifty years earlier.[57] *Ramos* dealt with one unenumerated facet of that right, whether a jury must be unanimous to convict. Because the Court's precedents had already rejected the proposition that an incorporated right could have different scopes at the state and federal level, if the Sixth Amendment required unanimity at the federal level, it was likewise required at the state level.[58] The only question, then, was whether stare decisis required keeping *Apodaca* despite its mistaken allowance of different federal and state standards. Because *Hurtado* and the grand jury question do not implicate double standards, *Ramos* is only relevant, strictly speaking, for its insight into stare decisis's application to incorporation precedents.

However, the Court's conception of the proper application of the incorporation test is apparent from other aspects of the *Ramos* opinion. For instance, the Court excoriated *Apodaca* for having conducted a "breezy cost-benefit analysis" of whether jury unanimity was worth the headache of hung juries.[59] It was not the place of the Court to subject an "ancient guarantee . . . to its own functionalist assessment."[60] This reasoning cuts heavily against the decision in *Timbs* to assess the "logic" and modern-day usefulness of the Excessive Fines Clause. The *Ramos* Court made this crystal clear when it explained that "[a]s judges, it is not our role to reassess whether the right to a unanimous jury is 'important enough' to retain."[61] *Ramos*, then, contradictorily suggests that the modern utility of a right is not a proper consideration for incorporation.

The real issue that split the Court, and one that has significant ramifications for the future of the Grand Jury Clause, was whether to maintain *Apodaca*. It is telling that not a single Justice supported separate federal and state standards for incorporated rights, but three were willing to allow jury unanimity to remain as the sole outlier on this point because of a precedent that could not even muster a majority opinion when it was decided. The majority explained that stare decisis is at its nadir in constitutional cases where, practically speaking, an error can only be

[57] *Duncan*, 391 U.S. at 149.
[58] Timbs v. Indiana, 139 S. Ct. 682, 689 (2019).
[59] *Ramos*, 140 S. Ct. at 1401.
[60] Id. at 1401–02.
[61] Id. at 1402.

corrected by the Court itself.[62] It then applied the traditional stare decisis factors, looking to the quality of the precedent's reasoning, its consistency with related decisions and subsequent developments, and reliance interests.[63] The Court concluded that *Apodaca* could not stand because its reasoning was weak, having passed over the original meaning of the Sixth Amendment for a functionalist evaluation of jury unanimity, and its dual-track holding was inconsistent with other incorporation cases.[64] It also dismissed the importance of the states' reliance interests, pointing out that criminal procedure decisions often impose substantial costs.[65]

Justices Sotomayor and Kavanaugh both wrote separately to address their stare decisis concerns, which are worth mentioning briefly. Justice Sotomayor emphasized that *Apodaca*'s fatal flaw was not its functionalist rather than originalist analysis but that it was a "universe of one" irreconcilable with other incorporation cases.[66] In her view, stare decisis was at its lowest ebb because criminal procedure was at stake. While recognizing that criminal procedure decisions invariably impose costs on the government, Justice Sotomayor found such reliance interests unpersuasive in the face of the constitutional duty to dispense with "flawed criminal procedures."[67]

Justice Kavanaugh's concurrence laid out his own framework for stare decisis. In his view, three conditions had to be met in order to overturn a precedent. It must not just be wrong, but egregiously wrong; it must cause significant jurisprudential or practical harm; and reversal must not unduly upset reliance interests founded on the precedent.[68] He concluded that *Apodaca* satisfied all three factors and therefore warranted reversal.[69]

As the foregoing discussion shows, the Roberts Court's approach to incorporation is somewhat muddy, despite the superficial clarity of its test

[62] Id. at 1405.
[63] Id.
[64] Id. at 1405–06.
[65] Id. at 1406–07. When discussing reliance interests, the Court pointed out that only two states allow split juries and therefore they could not possibly have "become part of our national culture." Id. at 1406 (quoting Dickerson v. United States, 530 U.S. 428, 443 (2000) (declining to overturn *Miranda* in part because it had become a national fixture)). It is important to note that the Court's discussion of current practices and culture was cabined to its discussion of stare decisis. Nowhere in the opinion did the Court suggest that modern practices are relevant in determining the fundamentality of rights for incorporation purposes.
[66] Id. at 1409 (Sotomayor, J., concurring).
[67] Id. at 1409–10.
[68] Id. at 1414–15 (Kavanaugh, J., concurring in part).
[69] Id. at 1416.

for fundamental rights. The three cases are in methodological tension with one another—the history-bound approach in *McDonald* and dicta in *Ramos* are inconsistent with the move in *Timbs* to silently add a functionalist step to the Court's analysis. Even the historical prong of the two-part test is opaque in certain respects; none of the cases precisely define the level of historical consensus required for a right to prove fundamental or the acceptable types of evidence on which to draw. And stare decisis proves just as divisive in this context as it does in others.

Despite these tensions and uncertainties, it is possible to synthesize the contours of the incorporation test from the Roberts Court's cases. A right is fundamental, and therefore incumbent on the states through the Due Process Clause, if there was consensus among the states about its essentiality at both the Founding and the ratification of the Fourteenth Amendment. The most relevant evidence of a right's essentiality is the number of states that protected the right in their constitutions, but whether Congress took steps to shield the right from state infringement is also probative. Additionally, even if a right enjoyed historical consensus, it is not fundamental unless that right remains useful or valuable to contemporary American society.

It is with this framework in mind that we turn to the Grand Jury Clause. In his dissent in *Ramos*, Justice Alito protested that the majority's approach jeopardized the validity of *Hurtado*.[70] Justice Alito's fears are not groundless. The next Part dissects the Court's ruling in *Hurtado* and explores its impact on state criminal procedure.

III. *HURTADO V. CALIFORNIA* REEVALUATED

Hurtado v. California bears little resemblance to the cases discussed up to this point. Decided relatively soon after the Fourteenth Amendment's ratification, it predates the Supreme Court's first foray into incorporating rights against the states through the Due Process Clause, and as a result its incorporation analysis stands alone.[71] Thanks to *Hurtado*, the Grand Jury Clause is the last criminal procedure right that the Court has not found to be fundamental.

This Part first breaks down the Court's rejection of the grand jury indictment right on procedural due process grounds and argues that the

[70] Id. at 1435 (Alito, J., dissenting).

[71] See McDonald v. City of Chicago, 561 U.S. 742, 784 n.30 (2010) (observing that *Hurtado* predates the Court's selective incorporation jurisprudence).

majority's arguments are flawed even on their own terms. Next, it examines the pattern of grand jury disestablishment among the states post-*Hurtado* and explains how its narrow holding has morphed and obtained a broad, anti-defendant gloss over the years.

A. Hurtado *and the Meaning of Procedural Due Process*

Hurtado upheld, by a 7-to-1 vote, the murder conviction and death sentence of Joseph Hurtado, who was prosecuted in California by an information filed by the District Attorney rather than by grand jury indictment.[72] *Hurtado* has come to be viewed as a straightforward decision about the incorporation of the Grand Jury Clause,[73] but Hurtado's argument on appeal was narrow. He did not assert that the Privileges or Immunities Clause encompassed the grand jury indictment right, nor did he argue that the Due Process Clause directly incorporated or applied the Fifth Amendment's Grand Jury Clause against the states. Rather, he argued that due process intrinsically includes indictment by a grand jury as a procedural guarantee.[74] The procedural framing explains why the Fifth Amendment receives curiously little attention; Hurtado's argument bypassed the Grand Jury Clause entirely by only relying on the Fourteenth Amendment's general guarantee of procedural due process.[75]

Hurtado's argument was this: the Due Process Clause of the Fourteenth Amendment, at the time it was ratified, included the right not to be tried for a felony offense without first having been indicted by a grand jury.[76]

[72] Hurtado v. California, 110 U.S. 516, 538 (1884). Justice Field did not participate in the decision. Id. at 558.

[73] See Albright v. Oliver, 510 U.S. 266, 272 (1994) ("*Hurtado* held that the Due Process Clause did not make applicable to the States the Fifth Amendment's requirement that all prosecutions for an infamous crime be instituted by the indictment of a grand jury."); Campbell v. Louisiana, 523 U.S. 392, 399 (1998) (noting that *Hurtado* did not incorporate the Fifth Amendment's grand jury requirement).

[74] Brief of Plaintiff in Error at 7–9, *Hurtado*, 110 U.S. 516 (No. 1207), *reprinted in* 8 Landmark Briefs and Arguments of the Supreme Court of the United States 398, 404–06 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter Landmark Briefs].

[75] The majority mentions the Fifth Amendment only twice, neither time considering that the Fifth Amendment might *itself* be applicable to the states through the Fourteenth Amendment. *Hurtado*, 110 U.S. at 534–35. The focus, instead, is almost solely on the procedural meaning of due process. This distinction is material for determining the scope of *Hurtado*'s holding and its precedential effect, which is addressed fully in Section V.A, infra.

[76] Brief of Plaintiff in Error, *in* Landmark Briefs, supra note 74, at 404 ("Indictment by a Grand Jury was an essential part of due process of law as applied to felony cases, at the time that phrase was adopted into the Fourteenth Amendment of the Constitution." (emphasis omitted)); *Hurtado*, 110 U.S. at 519.

This was because, Hurtado maintained, "due process of law" was the equivalent of the Magna Carta's phrase "the law of the land," and the law of the land encompassed not just general principles but specific institutions like the grand jury which the colonists had brought with them and adopted into the Bill of Rights.[77] The Due Process Clause of the Fourteenth Amendment, therefore, was intended to place certain essential common law procedural protections outside the power of the states to abolish.[78] Accordingly, the provision of California's Constitution of 1879 which had authorized prosecution by information violated his right to procedural due process under the Fourteenth Amendment.[79]

The Supreme Court disagreed in an opinion written by Justice Stanley Matthews. Beneath its antiquated verbiage, it sounded in a theme that rings familiar today: federalism. The Court's overarching concern was to leave the concept of due process malleable enough for the states to freely experiment with new legal proceedings as they saw fit without the risk that their changes would pose constitutional problems.[80]

The Court laid out several interrelated arguments for its holding, but none are particularly compelling. First, the Court denied the contention that due process of law had "by immemorial usage . . . acquired a fixed, definite, and technical meaning."[81] Contrary to Hurtado's contention that certain traditional modes of proceeding had been absorbed into the meaning of due process when the Constitution was framed, the Court explained that due process was merely concerned with "secur[ing] the individual from the arbitrary exercise of the powers of government."[82] Accordingly, due process simply consisted of proceedings according to the law of the land of each state, provided that the law was "within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[83] The "mere form" of a proceeding, such as whether a prosecution was initiated by a grand jury's

[77] Brief of Plaintiff in Error, *in* Landmark Briefs, supra note 74, at 418–21.

[78] Id. at 434–37.

[79] "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." Id. at 398 (quoting Cal. Const. of 1879, art. I, § 8).

[80] See *Hurtado*, 110 U.S. at 528–29.

[81] Id. at 521.

[82] Id. at 527 (quoting Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 244 (1819)).

[83] Id. at 535. The Court did little to elaborate on those "fundamental principles," but it suggested that the law must be one of general applicability. Id. at 535–36.

indictment or a prosecutor's information, was not what rendered it compatible or incompatible with due process.[84] Due process guaranteed "not particular forms of procedure, but the very substance of individual rights to life, liberty, and property."[85] But the Court left it a mystery what precisely constituted the "very substance" of those rights.

To reach this conclusion, the Court had to twist to escape its holding in *Murray's Lessee v. Hoboken Land & Improvement Co.*, which had already interpreted the scope of procedural due process in the context of the Fifth Amendment.[86] As the *Hurtado* Court recognized, the Due Process Clauses of the Fourteenth and Fifth Amendments were equivalents, so *Murray's Lessee* was directly applicable.[87] There, the Court had confronted whether an act of Congress that allowed for the seizure of a customs collector's property without judicial process in satisfaction of his debt to the United States violated due process. The Court said that "undoubtedly" due process of law meant the same as the Magna Carta's law of the land, meaning that due process was a restriction upon the legislative power from making any process into due process "by its mere will."[88]

The Court then explained how to determine whether a process exceeded the bounds placed on the legislative power by the requirement of due process. The proper test, it said, was to "examine the constitution itself, to see whether this process be in conflict with *any* of its provisions," and, even if it did not facially conflict with the Constitution, to see whether the process aligned with settled common law.[89] By this, the Court necessarily implied that due process encompassed all of the Constitution's procedural guarantees, including the Grand Jury Clause.[90] Prosecution of a capital offense by information would have failed either

[84] Id. at 527.

[85] Id. at 532.

[86] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 275–76 (1856).

[87] See *Hurtado*, 110 U.S. at 534–35.

[88] *Murray's Lessee*, 59 U.S. at 276.

[89] Id. at 277 (emphasis added).

[90] Bryan H. Wildenthal, The Road to *Twining*: Reassessing the Disincorporation of the Bill of Rights, 61 Ohio St. L.J. 1457, 1472 (2000) [hereinafter Wildenthal, Road to *Twining*]; William Winslow Crosskey, Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority, 22 U. Chi. L. Rev. 1, 6–7 (1954).

step of this test.[91] The *Hurtado* Court hand-waved away the holding of *Murray's Lessee*, interpreting it to simply mean that any well-settled procedure was consistent with due process, but that this did not mean that *only* well-settled procedures could be consistent with due process.[92] This was a poor gloss on the Court's precedent.

The Court then tried to bolster its distortion of *Murray's Lessee* by employing the canon against superfluity to explain why due process was unrelated to the grand jury.[93] The Court reasoned that since the Fifth Amendment enumerated the right to due process and the right to a grand jury indictment separately, the latter could not be intrinsic to the former without rendering the mention of the grand jury superfluous.[94] Therefore, if the Fourteenth Amendment had been calculated to impose upon the states the requirement of a grand jury indictment prior to prosecution, it would have made this requirement explicit just as the Fifth Amendment did.[95]

The Court's application of the superfluity canon was a far stricter version than the Court had applied in *Murray's Lessee* or in its subsequent incorporation cases, which have had no trouble incorporating other procedural rights. *Murray's Lessee*, by contemplating that due process encompassed all of the Constitution's procedural protections, had implicitly rejected such a formulation of the canon.[96] And the Court has explicitly rejected *Hurtado*'s application of it since in other incorporation cases.[97] While the canon has a distinguished history in constitutional interpretation, it traditionally applies only where an interpretation would deprive a clause of *all* effect, rendering it a nullity.[98] The Constitution is no stranger to language that merely clarifies or emphasizes a certain

[91] Early treatise writers were "remarkably uniform" in connecting due process of law with indictment by a grand jury. Ryan C. Williams, The One and Only Substantive Due Process Clause, 120 Yale L.J. 408, 452 (2010).

[92] *Hurtado*, 110 U.S. at 528.

[93] Id. at 534.

[94] Id. at 534–35.

[95] Id. Note the perversity of the Court's logic here. By its reasoning, if the Grand Jury Clause (or any other enumerated procedural protection) were actually important to due process, it would have had to have been left out of the Constitution entirely!

[96] Wildenthal, Road to *Twining*, supra note 90, at 1471–72.

[97] Powell v. Alabama, 287 U.S. 45, 65–67 (1932) (rejecting *Hurtado*'s formulation); LaFave et al., supra note 6, at 409; see also Wildenthal, Road to *Twining*, supra note 90, at 1471 (calling the Court's application of the superfluity canon its "most notorious analytical gambit").

[98] Akhil Reed Amar, Constitutional Redundancies and Clarifying Clauses, 33 Val. L. Rev. 1, 3–4 (1998) [hereinafter Amar, Constitutional Redundancies].

point,[99] which is precisely what the Grand Jury Clause does—it establishes the contours of due process in a particular area.[100] For the *Hurtado* Court to conceptually separate grand jury indictment from due process, it had to apply a version of the superfluity canon that previous and subsequent Supreme Court cases have found thoroughly unconvincing.

Finally, having established that procedural due process did not require indictment prior to prosecution, the Court held that the pretrial procedure that California provided in place of the grand jury satisfied due process.[101] As noted above, the Court had determined that due process was not a guarantee of certain traditional proceedings but rather a guarantee to the "very substance" of the rights to life, liberty, and property.[102] The Court did little to explain how California's pretrial procedure satisfied this standard. It simply noted in a brief paragraph that California's prosecution by information "carefully consider[ed] and guard[ed] the substantial interest of the prisoner" by allowing a pretrial determination of probable cause before a neutral magistrate, at which the accused enjoyed the right to counsel and to cross-examine the prosecution's witnesses.[103] While the Court's holding plainly required some kind of pretrial screening of charges in order to dispense with grand jury indictment,[104] it did not provide any criteria by which to determine whether a preliminary hearing passed constitutional muster.

The Court seemed to assume that California's procedure was the procedural equivalent of the grand jury, calling it merely a "substitution for a presentment or indictment."[105] But there is a significant difference between a determination of probable cause by a lone government officer and a body of one's peers.[106] The central theory behind the American grand jury is to ensure that the government alone cannot initiate prosecutions for serious crimes. Moreover, unlike a judicial officer, the grand jury enjoys the prerogative of discretion and is not obligated to

[99] Id.
[100] See Albright v. Oliver, 510 U.S. 266, 272–73 (1994).
[101] Hurtado v. California, 110 U.S. 516, 538 (1884).
[102] Id. at 532.
[103] Id. at 538.
[104] Beale, supra note 10, at 1-24.
[105] *Hurtado*, 110 U.S. at 538; Nathan S. Chapman & Michael W. McConnell, Due Process as Separation of Powers, 121 Yale L.J. 1672, 1777 (2012) (reading *Hurtado* as suggesting that the Court viewed California's procedure as equivalent to the grand jury).
[106] *Hurtado*, 110 U.S. at 554 (Harlan, J., dissenting).

indict when it finds probable cause, and, even if it chooses to indict, it may opt for lesser charges than those sought by the prosecutor.[107] So to the extent that the Court approved California's procedure because it believed that it approximated the protections that the accused enjoyed before a grand jury, the Court was mistaken.

The foregoing discussion hopefully sheds light on the curious position in which *Hurtado* finds itself. As a procedural case, it bears almost no resemblance to modern incorporation doctrine, all of which turns on substantive due process and the fundamentality of rights. Even if *Hurtado* was decided correctly at the time, it is facially incompatible with today's doctrine. Nevertheless, *Hurtado* remains a fixture of the legal landscape and has had a significant impact on the shape of pretrial proceedings in the states. It is to the ramifications of *Hurtado* that the next Section turns.

B. Hurtado*'s Criminal Procedure Legacy*

Hurtado proved to be the harbinger of at least two significant trends. First, it was the start of a slew of cases in which the Supreme Court declined to incorporate rights, usually under the Due Process Clause. Over the following several decades the Court rejected numerous petitions to incorporate both procedural and substantive rights. For instance, the Court declined to incorporate the protections against double jeopardy and self-incrimination as well as the rights to a jury trial and confrontation of witnesses.[108] Non-procedural rights, like the protection against cruel and unusual punishment, also were left unincorporated.[109] The lone exception was the Takings Clause, which the Court unanimously incorporated on the basis of substantive due process.[110] It is difficult to find any principled basis for why the Court deemed just compensation alone fundamental enough to incorporate.[111]

[107] Vasquez v. Hillery, 474 U.S. 254, 263 (1986); LaFave et al., supra note 6, at 503.

[108] Palko v. Connecticut, 302 U.S. 319 (1937) (double jeopardy); Twining v. New Jersey, 211 U.S. 78 (1908) (self-incrimination); Maxwell v. Dow, 176 U.S. 581 (1900) (jury trial); West v. Louisiana, 194 U.S. 258 (1904) (confrontation of witnesses).

[109] O'Neil v. Vermont, 144 U.S. 323 (1892).

[110] Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897); see also Wildenthal, Road to *Twining*, supra note 90, at 1503–04 (discussing the substantive due process reasoning in *Chicago, Burlington & Quincy Railroad Co.*).

[111] Wildenthal, Road to *Twining*, supra note 90, at 1504 (suggesting that the incorporation of the Takings Clause is more easily explained as a pro-business decision than a pro-incorporation decision).

The second trend in which *Hurtado* played a part was the decline of the grand jury in the states, mirroring its decline in England.[112] The grand jury had long been under attack in England by radical reformers like Jeremy Bentham, whose influence later spread to the United States.[113] His critiques eventually bore fruit; in 1872, Parliament ended the use of grand juries in London unless the magistrate decided to summon one.[114] Parliament later suspended the use of all grand juries during the First World War and then abolished them completely in 1933.[115]

While a handful of states like California had dispensed with indictment as a prerequisite to felony prosecution before *Hurtado*,[116] many others joined once *Hurtado* cleared the path constitutionally. Mere months after the Court handed down its opinion in 1884, a special referendum in Iowa gave the legislature the power to abolish indicting grand juries.[117] The next year, the legislature of Nebraska exercised the authority given to it in its recent constitution to abolish indictment as a prerequisite for prosecution.[118] Grand jury disestablishment among the states reached its peak near the close of the nineteenth century. In 1889, six new western states entered the Union, all of which omitted the right to grand jury indictment from their state constitutions.[119] Utah did the same when it joined the Union in 1897, expressly allowing prosecution by information in its constitution.[120] States that disestablished (or never established) the indicting grand jury were typically concerned with costs and the inconvenience of summoning grand juries in sparsely populated areas,

[112] By the late nineteenth century, opponents of the grand jury in the United States, England, and Canada were making similar arguments and building on each other's momentum. See Richard Younger, The People's Panel: The Grand Jury in the United States 1634–1941, at 134–36, 224–25 (1963). Thus, while this Note necessarily focuses on the American side of the story, it is worth noting that the grand jury was on the defensive internationally, and that international developments had some degree of impact on its fate in the states.

[113] See Donald A. Dripps, The Fourteenth Amendment, the Bill of Rights, and the (First) Criminal Procedure Revolution, 18 J. Contemp. Legal Issues 469, 476 (2009).

[114] Younger, supra note 112, at 134–35.

[115] Id. at 224, 226.

[116] See Section IV.A, infra, for a description of the grand jury's role among the states around the time of the Fourteenth Amendment.

[117] Younger, supra note 112, at 151.

[118] Id.

[119] Id. at 151–52; Beale, supra note 10, at 1–24.

[120] Beale, supra note 10, at 1–24.

hence the West being the area of the country least likely to retain indictment requirements.[121]

The twentieth century began and closed with more disestablishment. Washington began allowing prosecution by information in 1909, and Oregon did the same in 1958.[122] The most recent states to disestablish did so in the 1970s and 1980s, when Maryland, Illinois, Pennsylvania, and Hawaii all loosened or eliminated indictment requirements.[123] Currently, twenty-eight states allow prosecution for a felony without first securing a grand jury's indictment.[124] That these states allow prosecution by information, however, does not mean that they do not have grand juries in some capacity. Almost all states still make use of grand juries for investigations, particularly into public corruption, and even in most information states prosecutors may still choose to seek a grand jury's indictment and do so in a meaningful percentage of cases.[125] It is difficult to say whether *Hurtado* caused this decline or merely correlated with it. True, some states had already authorized prosecution by information before the Supreme Court formally sanctioned it, as discussed in the following Part. But it is undeniable that the bulk of disestablishment occurred in the immediate aftermath of *Hurtado* once the Court cleared the constitutional path for states to dispense with indictment (or to enter the Union without ever having secured that right).

In addition to these two significant trends, it is also worth noting that the holding in *Hurtado* expanded over the years in a way that was beneficial to the State but not the accused. Recall that the *Hurtado* Court held that due process required a pretrial screening of charges for probable cause but did not explain exactly what this procedure must consist of; it simply listed the protections California afforded the accused and concluded that this was enough to protect the accused's interests.[126] Thus, *Hurtado*'s holding was both clear and vague—states that disestablished

[121] Id. The story is not wholly one-sided, however. The grand jury held fast in eastern and southern states, and it survived attempts at abolishment in a handful of western ones. Younger, supra note 112, at 153–54.

[122] Beck v. Washington, 369 U.S. 541, 545 n.1 (1962); Beale, supra note 10, at 1–26.

[123] Beale, supra note 10, at 1–27.

[124] Ramos v. Louisiana, 140 S. Ct. 1390, 1435 (2020) (Alito, J., dissenting).

[125] This is discussed further in Section V.B, infra.

[126] Hurtado v. California, 110 U.S. 516, 538; Beale, supra note 10, at 1–24; Albright v. Oliver, 510 U.S. 266, 292 (1994) (Stevens, J., dissenting) (noting that *Hurtado* held that the "substance" of the grand jury right must be preserved by providing another pretrial means of assessing probable cause).

indicting grand juries must provide some pretrial assessment of the prosecutor's charges, but whether any proceeding that differed from California's would satisfy due process remained to be seen.

But by the early twentieth century, *Hurtado* had come to mean something else entirely: that the accused had no constitutional right whatsoever to pretrial review of the charges against him to ensure the existence of probable cause. In *Lem Woon v. Oregon*, the Supreme Court unanimously upheld a state procedure which authorized prosecution by information for capital offenses without any pretrial review of the charges.[127] The Court relied on *Hurtado* to hold that this was consistent with due process. While it noted that the defendant in *Hurtado* enjoyed the right to a preliminary examination of the charges against him, the Court called this an "untenable" distinction.[128] The Court concluded that if the grand jury was not incumbent upon the states as part of due process, "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."[129] In essence, the Court read the fact-specific holding of *Hurtado* so broadly as to allow states to dispense with any pretrial determination of probable cause, whether by the grand jury or the judiciary.[130] But what *Hurtado* had left undecided for future cases was what protections pretrial review must include, not whether there must be pretrial review at all.[131]

Thus, *Hurtado* has had a profound impact on the scope of state criminal procedure. It allowed many states to shift to prosecution by information, and, after *Lem Woon*, it resulted in all states being left constitutionally free to prosecute without any pretrial process to establish probable cause. These are significant consequences—consequences too extensive to

[127] 229 U.S. 586 (1913); see also Gerstein v. Pugh, 420 U.S. 103, 119 (1975) (reaffirming *Lem Woon*).

[128] *Lem Woon*, 229 U.S. at 590.

[129] Id.

[130] Crespo, supra note 13, at 1340–41.

[131] True, even in *Hurtado* the Court cast doubt on the value of pretrial proceedings. The Court implied that California's procedure was not important, seeing as that it was "merely a preliminary proceeding, and can result in no final judgment." *Hurtado*, 110 U.S. at 538. But the Court in no way held that due process did not require pretrial screening. If that were so, the Court could have concluded its opinion after determining that due process does not require grand jury indictment because it would not matter what, if anything, the states replaced the grand jury with. But the Court's analysis assumed, and its holding confirmed, that states must substitute a pretrial proceeding of some kind in place of the grand jury. See Honda Motor Co. v. Oberg, 512 U.S. 415, 431 (1994).

allow *Hurtado* to remain good law simply out of habit. The following Parts make the case that *Hurtado* should be overturned.

IV. THE CASE FOR INCORPORATING THE GRAND JURY CLAUSE

Hurtado would likely turn out differently if it reached the Supreme Court for the first time today. Applying the Court's modern incorporation framework to the Grand Jury Clause shows that it has as much claim of fundamentality to the historical American system as the Second Amendment and the Excessive Fines Clause. The right to grand jury indictment was widely valued by the states from colonial times through the Fourteenth Amendment's ratification. Nor has the "logic" undergirding the right, as *Timbs* put it, eroded with time. The grand jury still serves valuable and pressing functions today.

A. The Grand Jury is Deeply Rooted in American History

Whether or not the Fourteenth Amendment incorporates a right against the states turns on whether that right is "fundamental to [the American] scheme of ordered liberty and system of justice"[132] or is "deeply rooted in this Nation's history and tradition."[133] As Part II discussed, this is principally a historical inquiry, examining the history of the right in question and the level of state consensus regarding that right both at the Founding and the Framing of the Fourteenth Amendment. The modern cases look in particular to the number of states that had constitutional protections for the right in those two relevant time periods. If a right is "deeply rooted" historically, then it is deeply rooted in the relevant doctrinal sense regardless of whether that consensus continues to the present day.[134]

Even if a right is deeply rooted in a historical sense, the Court requires that a right must still serve a logical function in modern society. *Timbs* looked to how the "logic" of the Excessive Fines Clause helped safeguard other constitutional rights and societal values. We might be able to

[132] McDonald v. City of Chicago, 561 U.S. 742, 764 (2010).

[133] Id. at 767 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

[134] As explained in Part II, supra, the one sentence in *Timbs* referring to modern practice among the states, read in context, is highly unlikely to have been intended to shift the Court's incorporation focus from the past to the present. Modern state consensus simply does not factor into whether a right is fundamental. This is not to say that modern practice is completely irrelevant—the current use of the grand jury is perhaps the central concern in stare decisis analysis.

imagine certain rights that were valuable at one time but have been rendered vestigial by the passage of time because the purpose they were designed to serve is no longer relevant. The Court has suggested that such rights are not fundamental enough to warrant incorporation. Thus, a right must meet three requirements to be incorporated: the states must have considered it fundamental first at the Founding and then at the Fourteenth Amendment's ratification, and it must still serve a useful purpose today.

The right to a grand jury indictment satisfies these requirements. English colonists quickly transplanted the grand jury, already an ancient institution, to the American colonies.[135] The Massachusetts Bay Colony established the first regular grand jury in 1635.[136] Connecticut instituted grand juries for each county court in 1666.[137] Virginia installed a similar system in 1662, under which justices of the peace summoned grand juries to attend the county courts twice a year.[138] Likewise, Maryland, Rhode Island, New Jersey, New York, Pennsylvania, and the Carolinas all instituted grand juries capable of indictment or presentment during the seventeenth century.[139] When New York, North Carolina, and New Jersey framed declarations of rights toward the close of the seventeenth century, all three included provisions making the grand jury's indictment or presentment a prerequisite to certain prosecutions.[140]

The grand jury proved itself a powerful political force for liberty during the Revolutionary War and the tense years leading up to it.[141] Famously, two grand juries refused to indict John Peter Zenger, a publisher who criticized the colonial governor of New York. Unable to secure an indictment, the government prosecuted him by information and the petit jury refused to convict.[142] Grand juries also refused to indict the leaders

[135] See Roger A. Fairfax, Jr., The Jurisdictional Heritage of the Grand Jury Clause, 91 Minn. L. Rev. 398, 409–10 (2006) [hereinafter Fairfax, Jurisdictional Heritage].

[136] Younger, supra note 112, at 6.

[137] Id. at 8.

[138] Id. at 10. Any justice of the peace who failed to summon a grand jury was liable to be fined. Id.

[139] Id. at 11–16.

[140] The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins 279–80 (Neil H. Cogan ed., 1997) [hereinafter The Complete Bill of Rights]. There was some variance between the degree of the right secured. New Jersey, for instance, protected the "Grand Inquest" only for capital offenses, while New York required it for "all Cases Capital and Criminal." Id.

[141] Younger, supra note 112, at 27–40; Leonard Levy, Origins of the Bill of Rights 222–23 (1999).

[142] Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 84–85 (1998) [hereinafter Amar, The Bill of Rights].

of protests against the Stamp Acts and publishers charged with libel for criticizing British rule.[143] As an institution, the grand jury emerged from the Revolutionary War having gained considerable prestige for its efforts.[144]

Despite its reputation, the original Constitution did not directly mention the grand jury—it only implied it. Article I, Section 3 clarifies that impeached officers are still subject to indictment,[145] and indictment necessarily implies the existence of the grand jury to return an indictment.[146] The states were not satisfied with this oblique reference. Eight states recommended that the right to indictment or presentment before prosecution be specifically enshrined.[147] State conventions in New Hampshire and Massachusetts recommended the right to indictment for any crimes punishable by death or infamous punishment;[148] New York's convention went even further and recommended that it should extend to "all Crimes cognizable by the Judiciary of the United States."[149] Congress proposed what became the Fifth Amendment in response, which the states then ratified in 1791.[150] From the surviving historical record, the debate surrounding the drafting of the Grand Jury Clause centered only on stylistic differences.[151]

At the time the Constitution was ratified, every state had laws guaranteeing the right to grand jury indictment for serious crimes.[152] Determining how many states protected the right constitutionally rather than statutorily is more contested.[153] Fourteen states had been admitted to

[143] Id.

[144] Younger, supra note 112, at 40.

[145] U.S. Const. art. I, § 3, cl. 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and *subject to Indictment*, Trial, Judgment and Punishment, according to Law." (emphasis added)).

[146] See Adam H. Kurland, First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction, 45 Emory L.J. 1, 50 (1996). The grand jury and indictment are inseparable; there is no such thing as an indictment not approved by a grand jury.

[147] Susan M. Schiappa, Note, Preserving the Autonomy and Function of the Grand Jury: *United States v. Williams*, 43 Cath. U. L. Rev. 311, 329–30 (1993).

[148] The Complete Bill of Rights, supra note 140, at 278.

[149] Id. (quoting Ratification of the Constitution by the State of New York (July 26, 1788)).

[150] U.S. Const. amend. V.

[151] Fairfax, Jurisdictional Heritage, supra note 135, at 412.

[152] Hessick & Fisher, supra note 4, at 175.

[153] Compare Steven G. Calabresi, Sarah E. Agudo & Kathryn L. Dore, State Bills of Rights in 1787 and 1791: What Individual Rights are Really Deeply Rooted in American History and Tradition?, 85 S. Cal. L. Rev. 1451, 1512–13, 1516 (2012) [hereinafter Calabresi et al., State

the Union by 1791 when the Fifth Amendment was ratified, twelve of which had adopted their own constitutions or declarations of rights.[154] As it turns out, while only a few expressly guaranteed the right constitutionally, the majority of states almost certainly guaranteed the right generally through their due process clauses.[155]

Three states had enumerated constitutional protections for the grand jury indictment right when the Fifth Amendment was ratified, or, in Delaware's case, mere months afterward. North Carolina, Pennsylvania, and Delaware all prohibited prosecution by information for indictable offenses, reserving that authority to the grand jury.[156] Seven additional states, while not providing the grand jury with a monopoly on prosecutorial oversight via indictment requirements or information

Rights in 1787] (effectively finding that two states guaranteed the right), with Thomas, Nonincorporation, supra note 4, at 187 (claiming that four states mandated grand juries for felonies). The Ninth Circuit has also stated that only three states guaranteed the grand jury right by 1790. United States v. Navarro-Vargas, 408 F.3d 1184, 1193 (9th Cir. 2005) (en banc).

[154] Calabresi et al., State Rights in 1787, supra note 153, at 1543. Connecticut and Rhode Island simply maintained their colonial charters issued by the British Crown.

[155] See LaFave et al., supra note 6, at 404. Here it is worth noting that the work in this area by Professors Calabresi, Agudo, and Dore probably leads the field, as their articles on state constitutional rights at the Founding and at the ratification of the Fourteenth Amendment have been cited by the Supreme Court in incorporation cases. See McDonald v. City of Chicago, 561 U.S. 742, 777 (2010); Timbs v. Indiana, 139 S. Ct. 682, 688 (2019). Nevertheless, I think their work undercounts the level of protection for grand jury indictment at the Founding. Most significantly, their tallies account only for expressly enumerated rights, and most states covered grand jury indictment via general due process clauses. This, of course, is not a critique of their methodology; it merely highlights the limitations of looking only to express protections. But their work does contain some minor factual errors. For instance, the professors claim that no state constitution in the relevant time period had a clause "explicitly discussing grand juries." Calabresi et al., State Rights in 1787, supra note 153, at 1512. This is not the case, as North Carolina referenced the grand jury and its powers of presentment by name. N.C. Const. of 1776, Form of Government, art. XXIII. And while the professors chose not to examine previous iterations of state constitutions no longer in effect in 1791, Georgia's 1777 constitution mandated that twelve grand jurors must vote to indict, though this language was removed in its 1789 constitution. Ga. Const. of 1777, art. XLV.

[156] North Carolina's constitution provided that "no freeman shall be put to answer any criminal charge, but by indictment, presentment, or impeachment." N.C. Const. of 1776, Declaration of Rights, § VIII. Likewise, Pennsylvania's provided that, with certain exceptions, "no person shall, for any indictable offence, be proceeded against criminally by information." Pa. Const. of 1790, art. IX, § 10. Delaware's constitution, adopted just after the Fifth Amendment, closely paralleled the Fifth Amendment right: "No person shall for any indictable offence be proceeded against criminally by information, 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. . . ." Del. Const. of 1792, art. I, § 8.

prohibitions, referenced indictments and presentments in their constitutions and thus presumed the existence of grand juries with some role in the prosecutorial process.[157] Only three states mentioned prosecution by information, two of them to prohibit the practice (North Carolina and Pennsylvania, mentioned above) and New Hampshire, which required a specific verbal formula to conclude indictments, presentments, and informations.[158] Thus, while ten states presumed some prosecutions by indictment, either by express use of the word, prohibitions on informations, or both, only one expressly contemplated prosecutions by information. While reasoning from silence is fraught with danger, it is at least possible that the other states intentionally only mentioned prosecution by indictment and that their silence on prosecution by information was exclusive.

More importantly than any speculation about silence, however, is the fact that nine of the twelve states with constitutions had due process clauses though they all used the Magna Carta's phrase "law of the land."[159] These nine states specified that only by the law of the land could someone be deprived of certain essentials, usually some combination of life, liberty, property, and privileges.[160] These clauses almost certainly provided a constitutional guarantee of grand jury indictment for serious offenses.[161] Lord Coke, in his famous commentaries on the Magna Carta, explained "the words, by the law of the Land, are rendered, without due process of Law . . . that no man be taken, imprisoned, or put out of his freehold without process of the Law; that is, by indictment and presentment of good and lawfull [sic] men."[162] Justice Story later echoed

[157] N.Y. Const. of 1777, art. XXXIII; N.J. Const. of 1776, art. XV; Vt. Const. of 1786, art. XXIX; Md. Const. of 1776, art. XIX; Va. Const. of 1776, Form of Government; Mass. Const. ch. I, § 2, art. VIII (1780); N.H. Const. of 1784, pt. II, The Form of Government.

[158] N.H. Const. of 1784, pt. II ("All indictments, presentments and informations shall conclude against the peace and dignity of the state."). A number of other states also specified necessary wording in the same way but did so only for indictments without mentioning informations.

[159] Calabresi et al., State Rights in 1787, supra note 153, at 1500.

[160] See, e.g., Ma. Const. pt. I, art. XII (1780) ("And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land."). As the Supreme Court later confirmed, the law of the land and due process of law were one and the same. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856).

[161] See Amar, The Bill of Rights, supra note 142, at 97 (calling grand jury indictment the "core meaning" of the due process clause).

[162] Lord Edward Coke, 2 Institutes of the Lawes of England 50 (London 1642).

this in his *Commentaries on the Constitution*, noting that "the [due process] clause is but an enlargement of the language of the magna charta . . . (by the law of the land mean[s],) by due process of law, that is, without due presentment or indictment, and being brought in to answer thereto by due process of the common law."[163] Three other influential early treatise writers all connected due process to the requirement of grand jury indictment.[164]

State courts interpreted due process the same way throughout the nineteenth century. The Supreme Court of Massachusetts held that the state's "law of the land" clause intrinsically required indictment by grand jury for serious crimes despite the state's lack of an enumerated constitutional right to indictment.[165] The Supreme Court of Texas defined its law of the land clause with reference to a grand jury's indictment and presentment.[166] Even as late as 1898, the Supreme Court of New Hampshire held that its law of the land clause guaranteed "trial by jury according to the course of the common law," which included the requirement of a "lawful accusation" for felonies in the form of "an indictment returned by a grand jury."[167] Accordingly, both commentators and state courts seem to have understood constitutional due process provisions to protect the right to grand jury indictment. They certainly treated it as such in practice at the Founding.[168]

Summing up the evidence, there is a strong case grand jury indictment was fundamental to the states at the Founding. Eight states demanded its inclusion in the Bill of Rights; all protected it as a matter of law and practice; three explicitly enshrined it constitutionally; and seven others almost certainly protected it via their law of the land clauses. Additionally, seven of the eight states admitted to the union between 1792 and 1819 included enumerated constitutional protections for

[163] Joseph Story, 3 Commentaries on the Constitution of the United States § 1783, at 661 (Bos., Hilliard, Gray, & Co. 1833).

[164] Williams, supra note 91, at 452–54.

[165] Jones v. Robbins, 74 Mass. (8 Gray) 329, 340–47 (1857) (holding that the "law of the land" clause carried the same meaning as "due process of law," and therefore required grand jury indictment for "crimes of great magnitude and atrocity").

[166] Jones v. Montes, 15 Tex. 351, 353 (1855).

[167] State v. Gerry, 68 N.H. 495, 495–97 (1896).

[168] See Thomas Y. Davies, Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of "Due Process of Law," 77 Miss. L.J. 1, 7–8 (2007) (linking states' early interpretations of their "law of the land" clauses with indictment requirements and other common law pretrial processes).

indictment.[169] This evidence stacks up favorably with the rights to bear arms and be free from excessive fines, which the Court found to be constitutionally protected by four and eight states, respectively, in 1787.[170]

The grand jury remained fundamental to the American scheme of liberty through the Fourteenth Amendment's ratification in 1868.[171] This is not to say that the grand jury was without critics; it came under increasing fire from those influenced by British reformer Jeremy Bentham on account of its expense and secrecy.[172] These critics enjoyed some measure of success before the Civil War, starting with the State of Michigan. When Michigan adopted a new constitution in 1850, it granted the legislature the power to dispense with grand jury indictments for felony prosecutions, a power the legislature exercised in 1859.[173] Indiana and Illinois adopted a similar provision, and when Oregon and Kansas entered the Union, both came with constitutions that authorized the legislature to provide for prosecution of felonies by information if the legislature wished to do so.[174]

Despite these setbacks, the overwhelming majority of states at the time of the Fourteenth Amendment's ratification either explicitly enumerated the grand jury right, prohibited prosecution by information for indictable offenses, or judicially interpreted their due process clauses to make

[169] Ric Simmons, Re-examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?, 82 B.U. L. Rev. 1, 12 (2002). *McDonald* found this evidence relevant. McDonald v. City of Chicago, 561 U.S. 742, 769 (2010) (noting that nine additional states protected the right to bear arms between 1789 and 1820).

[170] *McDonald*, 561 U.S. at 769; Timbs v. Indiana, 139 S. Ct. 682, 688 (2019).

[171] There is a rich literature on how the reform of the grand jury in the states may or may not reflect on whether the Fourteenth Amendment was understood to incorporate the Bill of Rights at the time of its ratification. That originalist debate is outside the scope of this doctrinal Note. Compare Dripps, supra note 113 (arguing against incorporation), and Charles Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949) (accord), with Bryan H. Wildenthal, Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867–1873, 18 J. Contemp. Legal Issues 153 (2009) [hereinafter Wildenthal, Nationalizing the Bill of Rights] (arguing for incorporation), and Amar, The Bill of Rights, supra note 142, at 200–01 (accord).

[172] Dripps, supra note 113, at 476 n.19; Lettow, supra note 11, at 1340.

[173] Dripps, supra note 113, at 479.

[174] Younger, supra note 112, at 67–71. Not all new states added this procedural flexibility, however. Nevada entered the Union in 1864 and did guarantee the right to indictment. Id. at 71.

indictment a prerequisite to prosecution for serious crimes.[175] The best evidence is that twenty-nine of the thirty-seven states constitutionally secured the right substantially to the same extent as the Fifth Amendment.[176] Five states unquestionably did *not* require grand jury indictment at the Amendment's ratification: Michigan, Indiana, Kansas, Vermont, and Louisiana, though Louisiana is a clear outlier as a civil law state.[177] So while there was some difference of opinion on the utility of the grand jury right, there was a strong consensus among the states for retaining it at the time the Fourteenth Amendment was ratified.[178]

In roughly this same time period, Congress was also taking steps to protect and maintain the grand jury right. Both *McDonald* and *Timbs* interpreted evidence of congressional action to protect a right as weighing in favor of its incorporation.[179] With the rise of violence and intimidation by the Ku Klux Klan in the post-Civil War South, Congress passed the

[175] Connecticut was the outlier among states that protected the right, securing the right to grand jury indictment but only for crimes punishable by death or life in prison rather than all felonies. Conn. Const. of 1818, art. I, § 9.

[176] Wildenthal, Nationalizing the Bill of Rights, supra note 171, at 213. Professor Thomas puts the figure at twenty-six states, see Thomas, Nonincorporation, supra note 4, at 188, while Professor Calabresi, who counted only express enumerations, puts the figure at nineteen of thirty-eight states that guaranteed grand jury indictment expressly and an additional seven that did so implicitly by forbidding prosecutions by information for any indictable offense. 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, 78–79 (2008). Professor Wildenthal has argued that in Professor Calabresi's tally, two of the seven information-prohibiting states seem to overlap with the nineteen expressly guaranteed right-to-indictment states, so Calabresi's true tally seems to be twenty-four states that effectively guaranteed the right to approximately the same extent as the Fifth Amendment. Additionally, Professor Wildenthal has shown that Professor Calabresi's total slightly undercounts the number of express constitutional guarantees, and, by virtue of concentrating only on enumerated provisions, misses Massachusetts, Maryland, and New Hampshire, whose courts all interpreted their state due process clauses to cover the right to indictment to substantially the same extent as the Fifth Amendment. Wildenthal, Nationalizing the Bill of Rights, supra note 171, at 203–05 and footnotes therein.

[177] Wildenthal, Nationalizing the Bill of Rights, supra note 171, at 215 n.177. Louisiana, for instance, was the only state at the time not to guarantee a civil jury trial. Id. at 215–16 n.178.

[178] After the Fourteenth Amendment's ratification, the splintering among the states on this right continued. In the 1870s, Wisconsin, Colorado, and California all abrogated the right, leading to the challenge of California's prosecution by information in *Hurtado*. Dripps, supra note 113, at 490. Even so, well over half the states maintained the grand jury right by the time of *Hurtado*, comparable to the number that guaranteed the right to bear arms at the time of the Fourteenth Amendment's ratification, so it is not as though consensus among the states collapsed immediately post-ratification.

[179] See McDonald v. City of Chicago, 561 U.S. 742, 773–74 (2010); Timbs v. Indiana, 139 S. Ct. 682, 688–89 (2019).

Ku Klux Klan Act of 1871, which provided a remedy against any person conspiring to influence a grand jury's deliberations or to "injure such juror in his person or property on account of any verdict, presentment, or indictment."[180] The Civil Rights Act of 1875 barred discrimination on the basis of race in the selection of grand jurors.[181] Congress plainly thought that the indicting functions of grand juries was still a valuable one.

In sum, the evidence is strong that the grand jury indictment right is indeed deeply rooted in our nation's history and has proven itself fundamental to our scheme of ordered liberty and justice. While the current lack of consensus among the states is certainly relevant to stare decisis considerations, discussed below, it is not relevant to the incorporation test's initial determination of fundamentality. By any measure of the Court's modern doctrine, the Grand Jury Clause embodies a fundamental right.

B. The Logic of the Indicting Grand Jury

Despite the protests in *Ramos* against subjecting constitutional rights to a functionalist evaluation through weighing the costs and benefits to modern society, *Timbs* held that "logic" matters to the incorporation analysis—does the right still have a role to play in the current American scheme of liberty? Justice Ginsburg in *Timbs* concluded that the Excessive Fines Clause is still functionally valuable because it helps to safeguard other rights.[182] This suggests that the Grand Jury Clause must similarly offer value in our current constitutional system.

As a matter of logic, the Grand Jury Clause still proves fundamental for at least two reasons. The requirement of a grand jury's indictment before a prosecution checks the power of the executive branch to bring malicious or spurious prosecutions. It also adds a democratic, and therefore legitimizing, element to a criminal justice system that has all but abandoned trial by jury.

[180] This provision is currently codified at 42 U.S.C. § 1985. Federal grand juries were an essential part of Congress's attempt to fight the Ku Klux Klan and protect freedmen in the South. See Younger, supra note 112, at 129–31.

[181] Roger A. Fairfax, Jr., *Batson*'s Grand Jury DNA, 97 Iowa L. Rev. 1511, 1519 (2012).

[182] See *Timbs*, 139 S. Ct. at 689. Notably, *Timbs* did not attempt to connect the modern usefulness of the protection against excessive fines to any original purpose for the right. Accordingly, my discussion here is limited to current justifications for the right and does not necessarily claim that these justifications are part of the grand jury's historical pedigree.

The Supreme Court has called the grand jury a "buffer or referee between the Government and the people."[183] Its very purpose is to provide the defendant with a body of his peers, who have no agenda and are not answerable to any branch of government, the opportunity to independently decide whether the prosecutor's case can go forward.[184] As the previous discussion detailed, the Founders resented the ability of their British rulers to bring them to trial at the whim of one of the Crown's officers, a power often abused to silence political dissent. It is no coincidence that the earliest states to secure the right to grand jury indictment did so indirectly by prohibiting prosecution by information for indictable offenses. In our current system, prosecutors still enjoy wide latitude to decide whether or not to bring charges and against whom.[185] Equally today as at the Founding, the requirement of indictment prior to prosecution guards against the abuse of prosecutorial charging discretion.[186] Surely this remains a valuable function.

Similarly, as a body of laypeople with a gatekeeping role in the criminal justice system, the grand jury adds an element of democracy to the process.[187] This is something that the Supreme Court has emphasized and praised, noting that the grand jury exists not for the sake of prosecutors or judges but "for the people."[188] It adds the wisdom and experience of the community to the prosecutorial sphere.[189]

This democratic participation is valuable in and of itself, but it is perhaps even more important to today's criminal justice system than in

[183] United States v. Williams, 504 U.S. 36, 47 (1992). This language echoes the words of Justice James Wilson, one of the original Justices of the Supreme Court, who described the grand jury as "a great channel of communication, between those who make and administer the laws, and those for whom the laws are made and administered." George J. Edwards, Jr., The Grand Jury 124 (1906).

[184] United States v. Mara, 410 U.S. 19, 27–28 (1973) (Douglas, J., dissenting).

[185] United States v. Armstrong, 517 U.S. 456, 464 (1996); Fairfax, Grand Jury Discretion, supra note 21, at 734–36.

[186] See Campbell v. Louisiana, 523 U.S. 392, 398–99 (1998); Wood v. Georgia, 370 U.S. 375, 390 (1962).

[187] See Stirone v. United States, 361 U.S. 212, 218 (1960) (calling the heart of the grand jury right the fact that "fellow citizens" make the ultimate determination regarding prosecution).

[188] Hale v. Henkel, 201 U.S. 43, 61 (1906).

[189] In re Groban, 352 U.S. 330, 347 (1957) (Black, J., dissenting) (praising the grand jury for embodying the "experience, knowledge and viewpoint of all sections of the community").

years past because of the disappearance of the petit jury.[190] The Court has championed the democratic value of the petit jury in even stronger terms than the grand jury.[191] But today, ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result not of the unanimous finding of guilt beyond a reasonable doubt by a jury of the defendant's peers, but by a guilty plea as part of the plea bargaining process.[192] With the trial jury missing in action, a grand jury's participation in the charging process is the only form of peer oversight that the vast majority of the accused will receive.[193] The Supreme Court has consistently affirmed the value of public participation in the criminal justice process via juries. If the traditional process of giving the people a central role in the process from start to finish, from grand jury indictment to petit jury determination of guilt, has broken down, then the Grand Jury Clause matters all the more to the current state of affairs.[194]

Thus, the "logic" of the Grand Jury Clause supports its worthiness of incorporation as well as its historical pedigree. The right to grand jury indictment is not a right that, while useful at one time, no longer has a relevant purpose to serve in American society. Because the Grand Jury Clause satisfies all the prerequisites of incorporation—historical fundamentality among the states and enduring modern functionality—the only real legal obstacle to its incorporation is *Hurtado*'s force as a precedent, which the next Part addresses.

V. STARE DECISIS AND *HURTADO*

Stare decisis is the largest hurdle between the Grand Jury Clause and incorporation. Using *Ramos* as its guide, this Part evaluates whether the Court could, consistent with its principles, overrule *Hurtado* and finds that it could. But there is also the antecedent question of whether stare

[190] See generally Suja A. Thomas, The Missing American Jury: Restoring the Fundamental Constitutional Role of the Criminal, Civil, and Grand Juries 139 (2016) (detailing the erosion of trial by jury in the American system).

[191] See Blakely v. Washington, 542 U.S. 296, 305–06 (2004) (calling the petit jury a "fundamental reservation of power in our constitutional structure . . . ensur[ing] the people's ultimate control" in the judiciary).

[192] Lafler v. Cooper, 566 U.S. 156, 170 (2012).

[193] Simmons, supra note 169, at 47.

[194] Blackstone conceived of the grand and petit juries as a connected defense for the rights of the people, commenting that "[o]ur law has therefore wisely placed this strong and twofold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown." 4 Blackstone, supra note 1, at 349.

decisis attaches to *Hurtado* at all. The Court has always incorporated rights as a matter of substantive due process, but there is evidence that *Hurtado* addressed only the issue of procedural due process. Accordingly, it is at least possible that *Hurtado* may not have settled the relevant legal question after all.

A. Is Hurtado *Binding Incorporation Precedent?*

The Supreme Court has repeatedly affirmed *Hurtado* as a binding incorporation precedent. For instance, it has cited *Hurtado* for the proposition that a state's prosecution by information is "not a violation of the Federal Constitution."[195] Elsewhere, it has interpreted *Hurtado* as holding "that the Due Process Clause did not make applicable to the States the Fifth Amendment's requirement that all prosecutions for an infamous crime be instituted by the indictment of a grand jury."[196] But the Court's interpretation may be overbroad.

Even going back to the first incorporated right, the Takings Clause, the Supreme Court has only incorporated rights through the doctrine of substantive due process.[197] The first purely procedural right incorporated was the Sixth Amendment's right to counsel, and even its incorporation was couched purely in terms of substantive due process and fundamental rights.[198] The issue is that *Hurtado* was quite likely only a procedural due process case, and these are distinct questions of law.

The briefs of both parties recognized that the issue was whether due process intrinsically requires the procedure of grand jury indictment. Hurtado assigned as error to the Supreme Court California's allowance of his trial for a capital crime without a grand jury's indictment.[199] He argued that due process secured the "common law course of judicial proceedings"[200] and that the Fourteenth Amendment's Due Process Clause was intended to secure against the states certain long-established

[195] Gaines v. Washington, 277 U.S. 81, 86 (1928).

[196] Albright v. Oliver, 510 U.S. 266, 272 (1994).

[197] See Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 235 (1897) (relying on the "substance" of the right in question); McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) (acquiescing to incorporation through substantive due process because of its long history and limited scope).

[198] Powell v. Alabama, 287 U.S. 45, 73 (1932) (incorporating the right to counsel in some cases).

[199] Brief of Plaintiff in Error, *in* Landmark Briefs, supra note 74, at 403.

[200] Id. at 436 (quoting John Pomeroy, An Introduction to Municipal Law 367 (S.F., A.L. Bancroft & Co. 2d ed. 1883)).

"*processes*," namely the procedural protections enumerated in the Fifth and Sixth Amendments.[201]

Likewise, California agreed that the question was about the application of due process "to criminal procedure."[202] The state advanced two arguments. First, it contended that the superfluity canon dictated that the Fourteenth Amendment did not extend to *any* procedural rights in the Bill of Rights.[203] Second, it argued that the Fourteenth Amendment was meant only to secure equality before the law; due process, accordingly, only required that "all laws should be general and equal in their operations upon all citizens of the United States."[204] If the Fourteenth Amendment had intended to limit "the power of the States to regulate and provide their own . . . criminal judicial proceedings," it would have had to have done so by express terms to abrogate state sovereignty.[205] The first of these arguments was explicitly procedural, and the second was by implication. The second argument suggested that the Fourteenth Amendment had nothing to do with the "substance" of state law whatsoever—it only secured the equal application of state procedures, whatever their makeup. Such a contention cannot be squared with a substantive conception of due process.

The Court's analysis also betrays the fact that it considered the case procedural. Far from holding that the Grand Jury Clause was not applicable to the states, as the Supreme Court later characterized it, the Court only mentioned the Fifth Amendment during its application of the canon against superfluity, which was an argument about the procedures inherent in the concept of due process.[206] The Court's lengthy analysis of English common law procedures and its own procedural due process precedents confirm that its holding was predicated on procedural due process. Indeed, substantive due process scholars and the Ninth Circuit have recognized *Hurtado* as a procedural case.[207]

[201] Reply Brief of Plaintiff in Error at 4–5, Hurtado v. California, 110 U.S. 516 (1884) (No. 1207), *in* Landmark Briefs, supra note 74, at 469–70.

[202] Brief of Defendant in Error at 1, *Hurtado*, 110 U.S. 516 (No. 1207), *in* Landmark Briefs, supra note 74, at 444.

[203] Id. at 447 (listing all of the procedural rights that the state's application of the superfluity canon would exclude).

[204] Id. at 460.

[205] Id. at 461.

[206] *Hurtado*, 110 U.S. at 534–35.

[207] John Harrison, Substantive Due Process and the Constitutional Text, 83 Va. L. Rev. 493, 529 (1997); Chapman & McConnell, supra note 105, at 1777; Peterson v. California, 604 F.3d 1166, 1170 (9th Cir. 2010) (treating *Hurtado* as a procedural due process case).

Even if we were to interpret various comments in the opinion as suggesting that the Grand Jury Clause is not fundamental within the meaning of substantive due process,[208] it is well-established that in our adversarial system courts must generally rely on the parties to frame and present the issues for its adjudication.[209] The parties in *Hurtado* do not seem to have advanced any arguments that were not procedural in nature before the Supreme Court. Procedural due process and substantive due process are not interchangeable, and the Court's decision in one area presumably does not preclude it passing judgment in the other, just as *McDonald* was able to decide the issue of incorporation under the Due Process Clause without disturbing its Second Amendment precedents under the Privileges or Immunities Clause.

In the past, the Supreme Court undoubtedly believed that *Hurtado* settled the incorporation question in the sense relevant to its doctrine, but perhaps the Roberts Court will think differently if it revisits the case. It is beyond the scope of this Note to address whether and how a judicial gloss on a holding may itself become binding precedent over time, particularly if relied upon heavily. But should the Court ever reconsider *Hurtado*, it may be relevant that there is strong evidence that *Hurtado* was a case about incorporation under procedural due process.

B. Applying Stare Decisis Principles to Hurtado

If, however, the Court believes that *Hurtado* does answer the substantive due process issue, the question remains whether *Hurtado* should be overturned. The Court confirmed in *Ramos* that stare decisis is not an "inexorable command."[210] Indeed, it is at its nadir in constitutional cases because it is otherwise nearly impossible to correct a mistaken interpretation of the Constitution.[211] Justice Sotomayor suggested that

[208] For example, the Court defined due process at one point as the "law of the land in each State . . . exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Hurtado*, 110 U.S. at 535. This, while unnecessary to the Court's ultimate holding, might imply that the right to grand jury indictment is not a fundamental principle of liberty. That language sounds similar to the Court's later incorporation cases, which featured more developed conceptions of substantive due process.

[209] See Greenlaw v. United States, 554 U.S. 237 (2008). There are, of course, exceptions to every rule, such as the court's ability to address issues of jurisdiction *sua sponte*.

[210] Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020) (quoting Pearson v. Callahan, 555 U.S. 223, 233 (2009)).

[211] See id.

even within constitutional cases, stare decisis is weakest among those involving criminal procedure rights.[212] So the standard of deference to *Hurtado* is comparatively weak.

When evaluating whether to overturn a precedent, the Court considers the following factors: the quality of the precedent's reasoning; its consistency with related decisions; legal development since the decision; and the reliance interests at stake.[213] This Section addresses each of those considerations in turn.

1. The Quality of Hurtado*'s Reasoning*

Although *Hurtado* is not facially wrong, its reasoning is flawed enough to undermine its validity. As Section III.A argued, *Hurtado* made a litany of errors. It arguably misconstrued the precedent it relied on, and it applied a version of the superfluity canon so strict that the Supreme Court has since rejected it both inside and outside its incorporation cases. These errors were essential to the Court's holding that due process does not require grand jury indictment.

The Court also erred when it reached the second question of whether California's pretrial procedure satisfied due process. While the Court found that California's procedure adequately approximated the grand jury, it failed to place any value on a central characteristic of the grand jury—that the assessment of probable cause is made by a body of the accused's peers with the discretion not to indict even if the evidence is sound, rather than a lone agent of the government without such discretion. Finally, the Court failed to adequately explain why California's procedure satisfied due process. As *Ramos* explained, it is a decision's reasoning that allows it to have any precedential force beyond the parties themselves.[214] *Hurtado* was so opaque on this point that there is still disagreement on fundamental questions as to its holding, such as what due process requires from pretrial screening or even if due process requires such a screening at all.[215]

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[212] Id. at 1409 (Sotomayor, J., concurring).

[213] Id. at 1405 (plurality opinion) (citing Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1499 (2019)).

[214] Id. at 1404.

[215] Compare Lem Woon v. Oregon, 229 U.S. 586 (1913) (holding that *Hurtado* denied that due process required any substitute procedure for a grand jury), with Albright v. Oliver, 510 U.S. 266, 292 (1994) (Stevens, J., dissenting) (arguing that *Hurtado* required the preservation of the substance of the grand jury right through an alternate procedure), and Peterson v. California, 604 F.3d 1166, 1170–71 (9th Cir. 2010) (holding that a pretrial probable cause

These flaws are not merely cosmetic. The opinion's alternation between reasoning that has been explicitly rejected by the Court and reasoning so scant as to introduce doctrinal confusion cuts against retaining it as binding precedent.

2. Consistency with Related Decisions and Subsequent Legal Developments

Hurtado has been left isolated by the course of the Supreme Court's incorporation doctrine. It predates the Court's selective incorporation doctrine, and therefore it does not apply any test even approximating the approach that the Court currently takes.[216] Put simply, the reasoning in *Hurtado* and the reasoning in the modern incorporation cases are unrelated. So even if the reasoning in *Hurtado* had been sound at the time it was decided, that opinion would still be inconsistent with the Court's current doctrine.

Any justification for stare decisis in the area of incorporation has been severely eroded by the Court's steady incorporation of almost the entire Bill of Rights despite initially rejecting the incorporation of many of them. The Court has overturned nearly all of its non-incorporation cases. The overturning of *Apodaca* confirms that this trend remains ongoing.

The Grand Jury Clause is one of only three unincorporated rights in the Bill of Rights, alongside the Third and Seventh Amendments.[217] The Court has never addressed the Third Amendment's incorporation, although the Second Circuit has found that the Fourteenth Amendment does incorporate it.[218] In effect, then, the Grand Jury Clause exists in a shrinking universe of two. And among criminal procedure rights, those calculated to secure life, liberty, and property, it stands alone. These doctrinal developments weigh heavily against maintaining *Hurtado*.

3. Reliance Interests

The primary argument for keeping *Hurtado* stems from the reliance interests of the twenty-eight states that permit prosecution by information. Incorporation of the grand jury would seem to be particularly invasive

hearing need not provide the right to cross-examine witnesses, despite *Hurtado*'s explicit approval of this protection in California's procedure).

[216] See McDonald v. City of Chicago, 561 U.S. 742, 784 n.30 (2010).

[217] Id. at 765 & n.13.

[218] Engblom v. Carey, 677 F.2d 957, 961 (2d Cir. 1982).

because it would not just limit state authority in a certain area, like most of the negative rights in the Bill of Rights, but would affirmatively require these states to make use of a particular institution.[219] States also have an interest in the finality of their criminal judgments, which the introduction of a new procedural right might undermine. But these objections are less convincing once scrutinized.

Incorporation would cause little disruption to convictions in information states. The Supreme Court has held that newly announced rules of criminal procedure do not ordinarily apply retroactively during collateral review unless the new rule is a "watershed" rule implicating fundamental concerns of fairness.[220] The Court has never found a new rule to satisfy this requirement, and it recently concluded that *Ramos*'s jury unanimity requirement is not such a rule and cast doubt on whether there could ever be one.[221] There is little reason to think that the right to indictment would be the first. And while new procedural rules do apply on direct review, this impact on a modest number of active cases is part and parcel of all of the Court's criminal procedure decisions.[222]

The more serious reliance interest is that twenty-eight states would have to implement grand juries to oversee every felony indictment, but even this interest is not as great as it seems. To be sure, some western states have never guaranteed the right to grand jury indictment. From their perspective, then, the grand jury's indictment function may not seem deeply rooted. But reliance interests are about the cost of change, particularly costs imposed upon private parties rather than the government, and the costs here would be less than they seem at first glance.[223]

Even information states are not unfamiliar with the grand jury or its indicting function. All twenty-eight have laws providing that prosecutions may be initiated by indictment, and some have laws requiring particular charges to be prosecuted by indictment rather than information.[224] In all but Pennsylvania and Connecticut, which no longer have a mechanism for empaneling indicting grand juries, prosecution by indictment is in fact

[219] Hessick & Fisher, supra note 4, at 167–68.
[220] See Teague v. Lane, 489 U.S. 288, 311–12 (1989) (plurality opinion).
[221] Edwards v. Vannoy, 141 S. Ct. 1547, 1555–56 (2021).
[222] See Ramos v. Louisiana, 140 S. Ct. 1390, 1409–10 (2020) (Sotomayor, J., concurring).
[223] See id. at 1406 (plurality opinion) (suggesting that the force of stare decisis is strongest where reliance interests implicate the interests of private parties).
[224] LaFave et al., supra note 6, at 445–47, 447 n.350.

a realistic possibility; while it varies widely across states and across urban and rural divides, a sizable portion of prosecutions begin by indictment even in information states.[225] The point is that states would not be told to adopt an institution and procedures totally foreign to them. On the contrary, grand jury indictment is a recognizable part of criminal practice in forty-eight states.

The Court has imposed costly and inconvenient procedural protections on the states before. It has required the use of petit juries, which are just as cumbersome and expensive as grand juries, and it has incorporated rights that overrode the laws of over half the states, like the exclusionary rule.[226] *Ramos* pointed out that past decisions in the field of criminal procedure have imposed substantial costs, sometimes leading to hundreds of vacated and remanded cases.[227] Changes to criminal procedure are often costly and inefficient. But the point of criminal procedure is not to be efficient or convenient; it is to protect the administration of justice.

More fundamentally, stare decisis is conceptually a poor fit here. It would be perverse if the Court could justify denying the thousands of people each year accused of potentially life-altering crimes the benefit of an enumerated constitutional protection simply because it has denied them that right for a long time. If *Hurtado* had incorporated the grand jury indictment right, the decision would have been minimally disruptive.[228] It will only be inconvenient now because the Court has allowed its error to compound for over a century. As Justice Gorsuch pointed out, when it comes to constitutional rights, the real reliance interests are those "of the American people."[229] They trust that they will enjoy the evenhanded protections of the supreme law of the land. If the Court applies its incorporation doctrine in the same way it has with other rights, it follows that the Grand Jury Clause should apply to the states.

[225] Id.

[226] See Duncan v. Louisiana, 391 U.S. 145 (1968); Mapp v. Ohio, 367 U.S. 643 (1961); Kenneth D. Katkin, "Incorporation" of the Criminal Procedure Amendments: The View from the States, 84 Neb. L. Rev. 397, 417–18, 417 n.94 (2005) (stating that *Mapp* supplanted the law in up to twenty-eight of the fifty states at that time).

[227] *Ramos*, 140 S. Ct. at 1406–07.

[228] See Wildenthal, Nationalizing the Bill of Rights, supra note 171, at 215–17.

[229] *Ramos*, 140 S. Ct. at 1408.

CONCLUSION

Only one Justice dissented in *Hurtado*—the elder Justice John Marshall Harlan, known to history as The Great Dissenter. Though he did not say so in *Hurtado*, he would spend the rest of his time on the bench waging a lonely campaign to convince the Court that the Fourteenth Amendment secured not just some but all of the Bill of Rights against the states.[230] He did not live to see selective incorporation truly come to fruition.

More than a century later, Justice Harlan's position has almost won out. It is time for his dissent in *Hurtado* to be vindicated, too. The Supreme Court should revisit *Hurtado* and guarantee every person the ancient right to a grand jury's indictment before being put in jeopardy of a felony conviction.

[230] E.g., O'Neil v. Vermont, 144 U.S. 323, 370 (1892) (Harlan, J., dissenting).