

## NONINCORPORATION: THE BILL OF RIGHTS AFTER *MCDONALD V. CHICAGO*

Suja A. Thomas\*

*Very few rights in the Bill of Rights have not been incorporated against the states. In *McDonald v. Chicago*, the Supreme Court held that the Second Amendment right to bear arms, which the Court previously had decided did not apply against states, was incorporated. This decision left only three, what this Article terms, “nonincorporated” rights—the Fifth Amendment grand jury right, the Sixth Amendment criminal jury unanimity requirement, and the Seventh Amendment civil jury trial right—rights that the Court previously decided do not apply against the states that remain not incorporated. After the decision to incorporate the right to bear arms, an important unaddressed question with far-reaching implications is whether nonincorporation is defensible under the Court’s jurisprudence. Scholars to date have viewed the Bill of Rights exclusively through theories of incorporation, including the theory of selective incorporation under which incorporation occurs if a fundamental right exists. This Article is the first to view incorporation from the perspective of a theory of nonincorporation. This theory could be simply the opposite of selective incorporation—that a right is not fundamental—or, it could be, that the Court has not incorporated rights for some other reason. This Article sets forth possible theories of nonincorporation, both prior to and after *McDonald*, and exploring their viability, concludes that no nonincorporation theory is defensible under the Court’s jurisprudence. The resulting incorporation of the nonincorporated rights would change the administration of justice in the states*

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\* Professor of Law, University of Illinois College of Law. I am grateful for the comments of, or discussions with, the following individuals: Robert Bone, Caitlin Borgmann, Paul Caron, Gabriel Chin, Richard Epstein, Kurt Lash, Darrell Miller, Wendy Parker, Arden Rowell, Joseph Seiner, Jamelle Sharpe, Michael Solimine, and Sandra Sperino. I am also thankful for the research assistance of Kaitlyn Luther on the Table of History of Jury Rights used in this Article and for the word processing assistance of Tina Lamb.

and also would make the Court's theory of selective incorporation more justifiable.

## INTRODUCTION

For many years, justices of the Supreme Court have articulated theories regarding whether rights in the Bill of Rights apply against the states to defend their decisions on which rights apply against the states.<sup>1</sup> Likewise, using such theories, scholars have argued for and against the application of rights in the Bill against the states.<sup>2</sup> Also, over time, many of the rights that the Court initially decided do not apply against the states shifted to decisions to incorporate.<sup>3</sup> However, certain rights have remained “nonincorporated.”<sup>4</sup>

The question of incorporation has never been viewed from the perspective of “nonincorporation.” Prior to *McDonald v. Chicago*, in what this Article terms the “nonincorporation” decisions, the Court decided against incorporating the Second Amendment right to bear arms,<sup>5</sup> the Fifth Amendment grand jury right,<sup>6</sup> the Sixth Amendment criminal jury unanimity requirement,<sup>7</sup> and the Seventh Amendment civil jury trial right.<sup>8</sup>

In *McDonald*, the Court incorporated the Second Amendment pursuant to the Fourteenth Amendment, the plurality under selective incorporation under the Due Process Clause,<sup>9</sup> and Justice Thomas

1 See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3028–36 (2010).

2 See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS* 215–30 (1998) (using refined incorporation to argue for and against incorporation of parts of the Bill); RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 155–89 (2d ed. 1997) (arguing against incorporation of the Bill); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE* 92–130 (1986) (arguing for the incorporation of the Bill); Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435 (1981) (arguing against incorporation of the Bill). See generally WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT* (1988) (reviewing scholarship, examining new sources regarding incorporation, and viewing incorporation from equality angle).

3 See *McDonald*, 130 S. Ct. at 3028–36.

4 See *id.* at 3035 n.13.

5 See *Miller v. Texas*, 153 U.S. 535 (1894) (right to bear arms not incorporated); *Presser v. Illinois*, 116 U.S. 252 (1886) (same); *United States v. Cruikshank*, 92 U.S. 542 (1875) (same).

6 See *Hurtado v. California*, 110 U.S. 516 (1884) (right to grand jury not incorporated).

7 See *Apodaca v. Oregon*, 406 U.S. 404 (1972) (Sixth Amendment criminal jury unanimity requirement not incorporated).

8 See *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916) (Seventh Amendment right to civil jury trial not incorporated).

9 See *McDonald*, 130 S. Ct. at 3026–50.

who concurred under the Privileges or Immunities Clause.<sup>10</sup> In the decision, the Court left open the possibility that the Fifth Amendment grand jury right, the Sixth Amendment criminal jury unanimity requirement, and the Seventh Amendment civil jury trial right could be incorporated in the future. It emphasized that in past decisions on the Fifth Amendment grand jury right and the Seventh Amendment civil jury trial right, it had decided against incorporation prior to selective incorporation, similar to the pre-*McDonald* decisions on the Second Amendment.<sup>11</sup> For the remaining right that it had affirmatively decided not to incorporate against the states in the past—the Sixth Amendment criminal jury unanimity requirement—the Court stressed that an odd decision had resulted from the division of the Court in that case.<sup>12</sup> Importantly, a “single, neutral principle” based on whether a right was fundamental should guide the incorporation of the Bill of Rights against the states; only this principle and, if applicable, *stare decisis* stood in the way of incorporation of the remaining nonincorporated rights in the Bill.<sup>13</sup> In dissent, Justice Stevens criticized the plurality’s opinion by, among other things, pointing out the parts of the Bill of Rights that the Court had decided did not apply against the states, and the unwillingness of the Court to grant *certiorari* on the unanimity question.<sup>14</sup>

Scholars have never studied the nonincorporated rights and examined whether the Court has a theory of nonincorporation. The theory could be simply the opposite of selective incorporation—that a right is not fundamental—or, it could be, that the Court has not incorporated the rights for some other reasons. This Article explores these possible theories of nonincorporation. It further discusses whether nonincorporation of the Fifth Amendment grand jury right, the Sixth Amendment criminal jury unanimity requirement, and the Seventh Amendment civil jury trial right is justifiable under any such theory of nonincorporation.

Part I begins with a brief discussion of the theories of incorporation that existed prior to the Supreme Court’s decision in *McDonald*. Next, the Court’s decisions not to incorporate the Second Amendment right to bear arms, the Fifth Amendment grand jury right, the Sixth Amendment criminal jury unanimity requirement, and the Seventh Amendment civil jury trial right are discussed. Then, there is a

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10 *See id.* at 3058–88 (Thomas, J., concurring).

11 *See id.* at 3035 n.13.

12 *See id.* at 3035 n.14.

13 *Id.* at 3048.

14 *See id.* at 3094 & n.12 (Stevens, J., dissenting).

description of the possible theories of nonincorporation prior to *McDonald*. After a discussion of the Supreme Court's decision in *McDonald* the possible theories of nonincorporation after *McDonald* are set forth. Part II examines the future of nonincorporation. It begins with a fresh examination of each of the nonincorporated provisions under the incorporation theory articulated in *McDonald* and also briefly discusses the rights in the Bill that the Court has never examined at all for application against the states. After deciding that the nonincorporated provisions are fundamental rights, the circumstances for stare decisis are explored and dismissed. The Article concludes that a nonincorporation theory is not defensible under the Court's current due process jurisprudence.

## I. NONINCORPORATION UNDER THE JURISPRUDENCE OF THE SUPREME COURT

Prior to *McDonald v. Chicago*, the Supreme Court decided that the Second Amendment right to bear arms, the Fifth Amendment grand jury right, the Sixth Amendment criminal jury unanimity requirement, and the Seventh Amendment civil jury trial right did not apply against the states.<sup>15</sup> This Article refers to these decisions not to incorporate certain rights under the Bill of Rights as the "nonincorporation" decisions. In *McDonald*, the Court incorporated the Second Amendment. This Part explores the Court's possible theories of nonincorporation prior to and after *McDonald*.

### A. *Theories of Incorporating Rights in the Bill of Rights Against the States*

To examine possible theories of nonincorporation of rights, it is helpful to start with a brief look at how incorporation of rights under the Bill of Rights has been viewed to date by the Supreme Court and scholars. In the first decision on the application of rights in the Bill to the states, *Barron v. Baltimore*,<sup>16</sup> the Supreme Court rejected that the Bill of Rights applied against the states.<sup>17</sup> After the adoption of the Fourteenth Amendment, in the *Slaughter-House Cases*,<sup>18</sup> the Court also dismissed any notion that the Privileges or Immunities Clause of the Fourteenth Amendment protected significantly against states' intru-

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15 See *id.* at 3035 nn.13–14; *cf.* AMAR, *supra* note 2, at 269 (discussing that the Fifth Amendment grand jury right and Seventh Amendment in addition to the Second Amendment have not been incorporated).

16 32 U.S. (7 Pet.) 243 (1833).

17 See *id.*

18 83 U.S. (16 Wall.) 36 (1872).

sion on rights.<sup>19</sup> Beginning in the late nineteenth century, the Court examined whether pursuant to the Due Process Clause in the Fourteenth Amendment, rights in the Bill should be incorporated against the states.<sup>20</sup> In these cases, the Court decided: whether a right was within due process was not related to the Privileges or Immunities Clause;<sup>21</sup> due process protected rights against state infringement if they were “in the conception of due process of law” and “not because those rights are enumerated in the first eight Amendments;”<sup>22</sup> the right did not apply to the states if a civilized system could be imagined that would not accord the particular protection;<sup>23</sup> some parts of the Bill of Rights applied against the states and some did not;<sup>24</sup> and the state right was not always the same as the federal right.<sup>25</sup> In the 1960s, the Court began “selective incorporation” by deciding that the “Due Process Clause fully incorporates particular rights contained in the first eight Amendments.”<sup>26</sup> Under this incorporation theory, the right was incorporated if it was essential to liberty and justice and therefore was a fundamental right.<sup>27</sup> In the process of selective incorporation, the Court rejected the civilized society requirement,<sup>28</sup> it embraced the incorporation of the rights in the Bill,<sup>29</sup> and it rejected different interpretations of rights for the states and for the federal government.<sup>30</sup> Importantly, many of the rights that the Court previously had decided were not incorporated were deemed incorporated.<sup>31</sup>

19 *See id.*

20 *See, e.g., Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897). In this Article, “incorporation” is used to describe any application of rights in the Bill against the states. Scholars have used the term “incorporation” in this general manner for many years.

21 *See, e.g., Twining v. New Jersey*, 211 U.S. 78, 113–14 (1908).

22 *Id.* at 99. At times, in the decisions, the Court stated that to be within due process, it must be “shocking to the universal sense of justice” not to provide the right in the particular circumstances. *See Betts v. Brady*, 316 U.S. 455, 462, 471 (1942) (denying lawyer for indigent defendant); *Palko v. Connecticut*, 302 U.S. 319, 328 (1937) (finding state appeal of no conviction not a denial of due process).

23 *See, e.g., Duncan v. Louisiana*, 391 U.S. 145, 149–60 & n.14 (1968).

24 *See, e.g., Twining*, 211 U.S. at 113–14.

25 *See, e.g., Betts*, 316 U.S. at 468–72. *McDonald v. Chicago* described this history of incorporation. *See McDonald v. City of Chicago*, 130 S. Ct. 3020, 3031–32 (2010).

26 *McDonald*, 130 S. Ct. at 3034 (citing several cases incorporating various rights).

27 *Id.*

28 *See Duncan*, 391 U.S. at 149–50 & n.14.

29 *See id.* at 149.

30 *See id.* *McDonald v. Chicago* described this history of incorporation. *See* 130 S. Ct. at 3034.

31 *See McDonald*, 130 S. Ct. at 3036.

As this brief history describes, justices of the Supreme Court have discussed theories of incorporation, some under the Due Process Clause and some under the Privileges or Immunities Clause. Justice Black is the most well-known judicial advocate for incorporation under the Privileges or Immunities Clause. He propounded what has been referred to as “total incorporation” of the Bill of Rights.<sup>32</sup> He believed that the Fourteenth Amendment incorporated the Privileges or Immunities of citizens of the United States contained in the Bill against the states.<sup>33</sup> Justice Brennan proposed “selective incorporation”—the incorporation of fundamental rights in the Bill pursuant to the Due Process Clause of the Fourteenth Amendment.<sup>34</sup> Justice Frankfurter, on the other hand, had the view that no part of the Bill was “incorporated” against the states through the Fourteenth Amendment.<sup>35</sup>

Professor Akhil Reed Amar also has discussed incorporation. In one of the most acclaimed books on the Bill of Rights, he discussed the theories of incorporation, including Justice Black’s total incorporation and Justice Brennan’s selective incorporation.<sup>36</sup> Professor Amar argued, contrary to the view of Justice Black, that Section One of the Fourteenth Amendment did not limit itself to incorporation of rights in the Bill of Rights.<sup>37</sup> Furthermore, the rights in the Bill and elsewhere in the Constitution did not neatly apply against the states; indeed some were states’ rights provisions.<sup>38</sup> Professor Amar also found difficulties with Justice Brennan’s selective incorporation, which, similar to Justice Black’s approach, failed to address the possible incorporation of other parts of the Constitution and which may have been simply an approach taken—right by right—to accomplish

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32 See, e.g., *Duncan*, 391 U.S. at 162–63 (Black, J., concurring); *Adamson v. California*, 332 U.S. 46, 71–72 (1947) (Black, J., dissenting).

33 See *Adamson*, 332 U.S. at 71–72.

34 See *Malloy v. Hogan*, 378 U.S. 1, 4–6 (1964); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 545–46 (1986).

35 See Felix Frankfurter, *Memorandum on “Incorporation” of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746, 748 (1965) (criticizing the term “incorporation” and stating “[t]he sense of the word ‘incorporate’ implies simultaneity,” which is not an accurate description); cf. *Rochin v. California*, 342 U.S. 165, 172 (1952) (holding that forced procedure to retract pills “shocks the conscience” and thus violates due process).

36 See AMAR, *supra* note 2, at 219.

37 See *id.*

38 See *id.*

total incorporation; when considering each right, Justice Brennan invariably had decided that the right was fundamental.<sup>39</sup>

Professor Amar himself proposed “refined incorporation” as the proper manner to decide issues of incorporation.<sup>40</sup> To decide questions of incorporation, Professor Amar emphasized the necessity of examining “the spirit of the amendment of 1866, not the Bill of 1789,”<sup>41</sup> and he stated that the appropriate question was “whether [the right] is a personal privilege—that is, a private right—of individual citizens, rather than a right of states or the public at large.”<sup>42</sup> Under this theory, some parts of the Bill and the Constitution will not be incorporated because they are not personal privileges or private rights.<sup>43</sup> Further, “the reason [that certain rights are not incorporated] is not that these rules and subdoctrines are not fundamental; rather, it is that they may reflect federalism and other structural concerns unique to the central government.”<sup>44</sup> How Amar applied his theory to the Second Amendment right to bear arms, the Fifth Amendment grand jury right, and Seventh Amendment civil jury trial right will be described below.<sup>45</sup>

### B. *Nonincorporation Jurisprudence Before McDonald*

The Supreme Court has overruled most of its decisions in which it decided not to incorporate rights in the Bill against the states.<sup>46</sup> However, prior to *McDonald*, the Court had not overruled its decisions not to incorporate the Second Amendment right to bear arms, the Fifth Amendment grand jury right, the Sixth Amendment criminal jury unanimity requirement, and the Seventh Amendment civil jury trial right.<sup>47</sup> An examination of these nonincorporation decisions provides an opportunity to analyze the Court’s possible theories of nonincorporation prior to *McDonald*.

#### 1. The Second Amendment Right to Bear Arms

Prior to *McDonald*, in several cases before selective incorporation, the Supreme Court had decided that the Second Amendment right to

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39 *See id.* at 21920.

40 *Id.* at 21530.

41 *Id.* at 223.

42 *Id.* at 221.

43 *See id.*

44 *Id.* at 222.

45 *See infra* Part I.B.

46 *See supra* note 31 and accompanying text.

47 *See supra* note 15 and accompanying text.

bear arms<sup>48</sup> did not apply against the states under the Privileges or Immunities Clause of the Fourteenth Amendment.<sup>49</sup> Responding to this jurisprudence, a number of scholars criticized the Court's failure to incorporate this amendment.<sup>50</sup>

## 2. The Fifth Amendment Grand Jury Right

Prior to the time that the Supreme Court decided *McDonald*, the Supreme Court also had decided that the Fifth Amendment grand jury right<sup>51</sup> did not apply against the states.<sup>52</sup> In *Hurtado v. California*, a late nineteenth-century case, the Court considered the question of whether the Fifth Amendment grand jury right was incorporated against the states pursuant to the Due Process Clause in the Fourteenth Amendment.<sup>53</sup> There, California did not require a grand jury to present or indict a person accused of a crime but instead permitted a magistrate to examine and commit an information.<sup>54</sup> A jury convicted Hurtado of murder without presentment or indictment by a grand jury,<sup>55</sup> and Hurtado appealed the conviction, for which he was sentenced to death, on the basis that a grand jury had not been convened.<sup>56</sup>

The Court decided that due process did not require states to conduct grand jury proceedings.<sup>57</sup> Although the grand jury had been used in the past, there was no intention to bind the states to this particular procedure.<sup>58</sup> Also nothing in the commentary of Lord Coke,

48 The Second Amendment provides “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.

49 See *Miller v. Texas*, 153 U.S. 535 (1894); *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Cruikshank*, 92 U.S. 542 (1876).

50 See, e.g., AMAR, *supra* note 2, at 147–48, 216–18, 220–23; CURTIS, *supra* note 2, at 92–130; Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1207–25 (1996); cf. Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 959–71 (2009) (discussing possibility of incorporation after *Heller*, 554 U.S. 570 (2008)).

51 The Fifth Amendment provides in part “[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.” U.S. CONST. amend. V.

52 See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3034–35 & n.13 (2010).

53 See *Hurtado v. California*, 110 U.S. 516 (1884).

54 See *id.* at 517–19.

55 See *id.* at 518–19.

56 See *id.* at 518–20.

57 See *id.* at 519–38.

58 See *id.* at 528–29, 531. The Court stated “a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of



William Blackstone, or Francis Buller suggested that due process required a grand jury presentment or indictment.<sup>59</sup>

The Court recognized that pursuant to the English common law, it could draw meaning for due process from other governments beyond England.<sup>60</sup> The Court also emphasized that due process in the Magna Carta did not seek to protect against the legislature<sup>61</sup> and that the system under the Magna Carta was different from the system in the United States under which the people were protected against actions of the legislature and other branches.<sup>62</sup> Thus, due process in the United States held more protection but also pursuant to the protection in England, permitted the methods of protection to be expanded.<sup>63</sup>

The Court added that the text of the Fifth Amendment supported the conclusion that due process did not require grand juries in

settled usage both in England and in this country.” *Id.* at 528. The Court went on to say, however, that “it by no means follows, that nothing else can be due process of law . . . . But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.” *Id.* at 528–29.

59 *See id.* at 522–28, 538. For example, the Court explained what Lord Coke had stated about the importance of the grand jury to due process; Lord Coke had described the grand jury as only “an example and illustration” of due process, not as a requirement of due process. *Id.* at 523. The Court stated that a broader, contrary meaning to Lord Coke’s words would require a nonsensical interpretation of a grand jury for every crime that involved imprisonment including misdemeanors. *See id.* at 522–28.

60 *See id.* at 531 (“There is nothing in *Magna Charta* [sic], rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted.”).

61 *See id.*

62 *See id.* at 531–32.

63 The Court stated that “they must be held to guarantee, not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.” *Id.* at 532. They “may alter the mode and application, but have no power over the substance of original justice.” *Id.* at 532 (quoting Edmund Burke, *Fragments of a Tract Relative to the Laws Against Popery in Ireland*, in 6 *THE WORKS OF THE RIGHT HONORABLE BURKE* 304, 323 (3d ed. 1869)). The Court continued:

“[T]he law itself, as a rule of conduct, may be changed at the will or even at the whim of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.”

*Id.* at 533 (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1876)).

the state courts.<sup>64</sup> The Fifth Amendment included the grand jury requirement in addition to the due process requirement.<sup>65</sup> Construing this language against superfluous language, due process in the Fifth Amendment could not include the grand jury.<sup>66</sup> Thus, the same due process provision in the Fourteenth Amendment could not require a grand jury.<sup>67</sup>

The Court concluded that within constitutional constraints Congress determined the meaning of due process within the Fifth Amendment, and similarly the states decided the meaning of due process within the Fourteenth Amendment.<sup>68</sup> Quoting the Supreme Court of Mississippi, the Court referred to the preservation of “fundamental rights” as key to the due process right.<sup>69</sup> Here, the information by a magistrate preserved liberty and justice thus satisfying due process.<sup>70</sup>

In his dissent, Justice Harlan stated that the same due process right in the Fourteenth Amendment and the Fifth Amendment was intended to confer the same protections against the states as against the federal government.<sup>71</sup> To decide whether an information was due process under the Constitution, generally the common law and the statutes of England prior to the time that the English settled in America must be examined.<sup>72</sup>

Due process was derived from and had the same meaning as “by the law of the land” in the Magna Carta.<sup>73</sup> Justice Harlan stated that the only relevant inquiry in the case was whether an information was due process of law under the common law for a capital offense.<sup>74</sup> He concluded that it was not; a grand jury was required.<sup>75</sup>

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64 *See id.* at 534–35.

65 *See id.*

66 *See id.*

67 *See id.*

68 *See id.* at 535.

69 *Id.* at 536 (quoting *Brown v. Bd. of Levee Comm'rs*, 50 Miss. 468, 479 (1874)).

70 *See id.* at 536–38.

71 *See id.* at 541 (Harlan, J., dissenting).

72 *See id.* at 542.

73 *Id.* at 542–43 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855)). The Magna Carta stated “no freeman shall be taken, or imprisoned, or be disseized of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we [not] pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land.” *Id.* at 542 (quoting MAGNA CARTA Jun. 15, 1215, cl. 39).

74 *See id.* at 543.

75 *See id.* at 543–44. Apparently addressing the argument of the majority about the unavailability of grand juries for misdemeanors, he stated that this fact just made the grand jury more important for crimes for which it was available. *See id.* He quoted Blackstone who stated a person could not be convicted unless twenty-four

Justice Harlan also rejected the Court's reasoning that the grand jury and due process language in the Fifth Amendment compelled a meaning that excluded the grand jury right from due process.<sup>76</sup> He stated that if so, the many other rights mentioned in the Fifth Amendment also would not be considered due process.<sup>77</sup>

The right to a grand jury in capital cases was as important to the Magna Carta or at common law as the right to a jury trial in such cases.<sup>78</sup> The grand jury protected in a different way than the jury trial right, protecting against "unfounded accusation."<sup>79</sup> The grand jury right and other rights in the Fifth Amendment were so important that special mention was made of them so that it was clear that Congress could not legislate against those rights.<sup>80</sup>

Justice Harlan concluded by stressing that at the time of the adoption of the Fourteenth Amendment, all states in some form had a constitutional provision preventing deprivation of life, liberty, or property without due process, almost every state had a bill of rights setting forth the rights, twenty-seven states expressly did not permit

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people in the grand jury and jury had so decided. *See id.* at 544 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*306 [sic]). He also quoted Blackstone who stated that informations were appropriate only for misdemeanors. *See id.* at 544 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*309–10 [sic]). Blackstone had warned that however "convenient" informations by judges were that the jury was the right price to pay for liberty. *Id.* at 544–45 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*349–50 [sic]). Justice Harlan also referenced several other authorities of the time who stated that grand juries were required for capital crimes. *See id.* at 545. Moreover, under the common law, the grand jury right was as important as other protections in the Fifth Amendment such as against double jeopardy, against self-incrimination, and against the taking of property without just compensation. *See id.* at 546–47.

76 *See id.* at 547–48.

77 *See id.* at 548.

78 *See id.* at 549.

79 *Id.* Justice Harlan quoted the Massachusetts Supreme Court:

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

*Id.* at 551–52 (quoting *Jones v. Robbins*, 74 Mass. (8 Gray) 329, 344 (1857)).

80 *See id.* at 550. Lord Coke among others had recognized that informations by magistrates were not sufficient due process for capital offenses. *See id.* at 552–53. Moreover, Justice Harlan emphasized that grand jurors, unlike magistrates, were private citizens who, for the most part, did not hold public office, and their participation protected against improper prosecution. *See id.* at 554–55. Justice Harlan further set forth the importance of the grand jury as described by Justices Wilson and Field. *See id.* at 555–56.

informations for capital crimes, and another ten states implicitly did not permit informations in capital cases by reference to a law of the land or due process requirement.<sup>81</sup> He stated that the Supreme Court recognized that “due process of law protects the fundamental principles of liberty and justice,” and at the same time a grand jury was recognized as “essential to personal security” under the common law, “jealously guarded” in the Constitution, and at the time of the adoption of the Fourteenth Amendment, recognized in all of the states.<sup>82</sup> Accordingly, the grand jury must be a requirement of due process.<sup>83</sup>

Several scholars have written about whether the Fourteenth Amendment incorporated the grand jury right against the states, among them Professors Amar, Michael Curtis, Kurt Lash, Raoul Berger, and William Nelson. Professor Amar emphasized that the grand jury was a check on the possible abuse of government agents.<sup>84</sup> He recognized that the “core meaning” of due process in the Fifth Amendment was indictment or presentment by a grand jury.<sup>85</sup> As for the Fourteenth Amendment Due Process Clause, Professor Amar quoted nineteenth-century commentary by Justice Story and Chancellor Kent, in addition to decisions in the nineteenth century, to support that due process in the Fourteenth Amendment included the grand jury right.<sup>86</sup> He argued that it is difficult to see why the grand jury right is not incorporated under either the Due Process Clause or the Privileges or Immunities Clause.<sup>87</sup> Michael Curtis has commented more generally on incorporation of the rights in the Bill, including the grand jury right. He stated that

[t]o me it seems that a natural reading of “privileges or immunities” is that the phrase is equivalent to “rights.” The amendment read that way says that no state shall abridge the rights of citizens of the United States. These rights, literally understood, would include all rights of citizens provided for in the Constitution, including rights set out in the Bill of Rights.<sup>88</sup>

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81 See *id.* at 557–58.

82 *Id.* at 558.

83 See *id.*

84 See AMAR, *supra* note 2, at 82–87 (recognizing grand jury, criminal, and civil juries as checks on government).

85 *Id.* at 97. Professor Amar has recognized that due process might mean more than a grand jury right, and that others have recognized this, including the Supreme Court in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276–77 (1855). See AMAR, *supra* note 2, at 201–02.

86 See AMAR, *supra* note 2, at 200–02.

87 See *id.* at 220.

88 Michael Kent Curtis, *Further Adventures of the Nine Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 OHIO ST. L.J. 89, 92 (1982).

Additionally, Kurt Lash recently has discovered new evidence that the first eight amendments were understood to be “privileges or immunities of *citizens* of the United States.”<sup>89</sup> Different from Professors Amar, Curtis, and Lash, Professor Raoul Berger argued that the framers of the Fourteenth Amendment had no intention to incorporate the grand jury right against the states.

Bearing in mind that the purpose of the framers was to secure the emancipated slaves from violence and oppression and to safeguard their rights to exist and make a living, the omission to call to each state’s attention that it was surrendering its control of grand juries, of non-use of indictments, and other preliminaries to trial, is powerful evidence that no such intention existed.<sup>90</sup>

William Nelson also wrote about the Fifth Amendment grand jury right and incorporation under the Fourteenth Amendment. Professor Nelson stated that thinking of the incorporation of rights as equality instead of as protection made more sense because of an oddity of incorporation in the nineteenth century—that most states provided the protections in the Bill of Rights.<sup>91</sup> Under this reading, the states could disregard the grand jury right, and Congress could act when states did not give rights equally to blacks and whites.<sup>92</sup>

### 3. The Sixth Amendment Criminal Jury Unanimity Requirement

Prior to the time that the Supreme Court decided *McDonald*, the Court also had decided that the Due Process Clause of the Fourteenth Amendment did not incorporate the Sixth Amendment criminal jury unanimity requirement<sup>93</sup> against the states.<sup>94</sup> *Apodaca v. Oregon* is cited for the proposition that the unanimity requirement has not been incorporated against the states.<sup>95</sup> *Apodaca* had a different pos-

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89 Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329, 400–01 (2011) (discussing John Bingham’s intention that the rights in the first eight amendments were understood to be “privileges or immunities of *citizens* of the United States”).

90 Raoul Berger, *Incorporation of the Bill of Rights: A Reply to Michael Curtis’ Response*, 44 OHIO ST. L.J. 1, 19 (1983).

91 See NELSON, *supra* note 2, at 118.

92 See *id.* at 118–19.

93 The Sixth Amendment provides in part “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . .” U.S. CONST. amend. VI.

94 See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 n.14 (2010).

95 See *id.* (citing *Apodaca v. Oregon*, 406 U.S. 404, 406 (1972) (plurality opinion)).

ture than the decision not to incorporate the Fifth Amendment grand jury right and the decision not to incorporate the Seventh Amendment civil jury trial right, which is discussed below. The Court already had decided that the Due Process Clause incorporated the Sixth Amendment criminal jury trial right<sup>96</sup> and already had decided that once a right was incorporated, the same standards for the right applied against the federal and state governments.<sup>97</sup>

In the cases in *Apodaca*, non-unanimous juries convicted the defendants in state trials, and the Court considered whether those convictions violated the Sixth Amendment jury trial right.<sup>98</sup> In *Apodaca*, eight justices stated that the same requirements for the Sixth Amendment jury trial right applied to federal and state courts.<sup>99</sup> Applying this concept, four justices opined that there was no unanimity requirement under the Sixth Amendment for federal and state courts, while four justices opined that there was a unanimity requirement under the Sixth Amendment for federal and state courts.<sup>100</sup>

Justice Powell concurred in the judgment that unanimity was not required in the state courts but also stated that unanimity was required in the federal courts.<sup>101</sup> Justice Powell emphasized that the federal and state criminal jury trial rights were not the same.<sup>102</sup> As stated previously, however, at this time, the case law was clear (and continues to be), consistent with the opinions of the other eight justices, that any right that was incorporated against the states had the same standards as the federal right.<sup>103</sup>

#### 4. The Seventh Amendment Civil Jury Trial Right

Prior to the time that the Supreme Court decided *McDonald*, the Court also had decided that the Seventh Amendment civil jury trial

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96 See *Duncan v. Louisiana*, 391 U.S. 145 (1968).

97 See *Malloy v. Hogan*, 378 U.S. 1, 10–11 (1964).

98 See *Apodaca*, 406 U.S. at 406 (plurality opinion).

99 See *id.*; *id.* at 414–15 (Stewart, J., dissenting); *Johnson v. Louisiana*, 406 U.S. 356, 395–96 (1972) (Brennan, J., dissenting).

100 See *Apodaca*, 406 U.S. at 406 (plurality opinion); *id.* at 414–15 (Stewart, J., dissenting).

101 See *Johnson*, 406 U.S. at 366, 369–77 (Powell, J., concurring).

102 See *id.*

103 See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 & n.14 (2010). For recent discussions of this requirement and incorporation, see Kate Riordan, *Ten Angry Men: Unanimous Jury Verdicts in Criminal Trials and Incorporation After McDonald*, 101 J. CRIM. L. & CRIMINOLOGY 1403 (2011); Chenyu Wang, *Rearranging Jury Unanimity: An Alternative*, 16 LEWIS & CLARK L. REV. 389 (2012).

right<sup>104</sup> was not incorporated against the states.<sup>105</sup> *Minneapolis & St. Louis Railroad Co. v. Bombolis* is cited for the proposition that the right to a civil jury trial was not incorporated against the states.<sup>106</sup> In that case, the Court considered whether the state of Minnesota, which did not require a unanimous jury verdict in a civil trial, violated the Seventh Amendment.<sup>107</sup> The plaintiff had brought the case in state court under the Federal Employers' Liability Act against the defendant who had employed a relative of the plaintiff who had allegedly died because of the defendant's negligence.<sup>108</sup> The defendant company objected to the jury instruction given after twelve hours of deliberation that five-sixths of the jury could render a verdict.<sup>109</sup> The defendant argued that because a federal statute governed the case, the Seventh Amendment applied to the case, and under the applicable common law, a unanimous jury trial was required.<sup>110</sup>

The Court was required to decide whether the Seventh Amendment applied to the states.<sup>111</sup> Citing *Barron v. Baltimore*, among other cases, the Court stated that it had long been held that the Bill of Rights applied only to the federal government, and thus, that the Seventh Amendment applied only to the federal courts.<sup>112</sup> The Court stated that the question was not "an open one."<sup>113</sup> Defendant had argued that because Congress cannot create another federal forum with no jury trial right to enforce congressionally created laws, then such laws also cannot be enforced where a Seventh Amendment jury trial right does not exist, including in the state courts without such rights.<sup>114</sup> Citing several cases, the Court stated that this proposition had been rejected in the past.<sup>115</sup> State and federal courts could

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104 The Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

105 See *McDonald*, 130 S. Ct. at 3034–35 n.13.

106 See *id.* at 3046 n.30 (citing *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 221–223 (1916)).

107 See *Bombolis*, 241 U.S. at 216. Other cases from Virginia, Kentucky, and Oklahoma were also sent to the Court on this question and other questions. See *id.* at 215–16.

108 See *id.* at 215.

109 See *id.* at 216.

110 See *id.*

111 See *id.* at 216–17.

112 See *id.* at 217 (citing *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250–51 (1833)).

113 *Id.* at 219.

114 See *id.* at 220–21.

115 See *id.* at 221–23.

enforce each others' laws in accordance with their own procedures.<sup>116</sup> In the decision, the Court did not discuss the Fourteenth Amendment or due process.

Some scholarship has agreed with the Court's result although not with its reasoning. Professor Amar has agreed that the Seventh Amendment should not be incorporated.<sup>117</sup> However, his position is based on his theory of refined incorporation.<sup>118</sup> To understand how his theory of refined incorporation affects the Seventh Amendment, his view on the jury trial right in the Seventh Amendment must be examined first. Professor Amar has taken the original position that under the Seventh Amendment, a particular state's civil jury trial right or non-right should govern in the federal courts in that state absent an explicit congressional act otherwise.<sup>119</sup> In other words, if state X has a civil jury trial right, the federal court in state X will also have a jury trial right. However, if state Y does not have a civil jury trial right, the federal court in state Y will also not have a jury trial right. And Congress can act to change the jury trial right in the states. Thus, according to Professor Amar, the Seventh Amendment right to a civil jury trial in the federal courts should be defined by the jury rights in the states unless Congress has acted. In support of his position, Professor Amar cited sources, which stated that the jury rights in states varied at the time of the adoption of the Seventh Amendment.<sup>120</sup> He cited other sources which supported that some framers of the original Constitution argued against a jury trial right, that others argued for a jury right, and that others argued for a jury trial right based on, for example, state jury rights.<sup>121</sup> Using these sources, Professor Amar argued that under the Seventh Amendment, states could each determine their jury trial rights in their federal courts, and Congress could add jury trial protection if it chose to do so.<sup>122</sup>

This perspective on the Seventh Amendment right has influenced Professor Amar's opinion that the Fourteenth Amendment did not incorporate the Seventh Amendment against the states.<sup>123</sup> Profes-

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116 *See id.*

117 *See AMAR, supra* note 2, at 75–76.

118 *See supra* text accompanying notes 36–45.

119 *See AMAR, supra* note 2, at 89–92. *But see* Stanton D. Krauss, *The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. RICH. L. REV. 407 (1999) (disagreeing with Amar regarding adoption of state-rights-based Seventh Amendment and arguing Congress decides when jury right exists).

120 *See AMAR, supra* note 2, at 89.

121 *See id.* at 90.

122 *See id.* at 89–90.

123 *See id.* at 222, 275–76.



sor Amar took his interpretation of the Seventh Amendment right in the federal courts based on individual states' jury rights and applied his refined incorporation theory to it.<sup>124</sup> Under his theory, the Seventh Amendment arguably should not be incorporated, because it was "rooted in federalism concerns that should not be imposed on states."<sup>125</sup> In other words, because the correct interpretation, according to Professor Amar, of the Seventh Amendment in the federal courts was based on rights in each state in the absence of a congressional act, the Seventh Amendment was concerned with federalism and should not be incorporated. Citing Amar and framers of the Fourteenth Amendment, Kevin Newsom also argued against incorporation of the Seventh Amendment under the Privileges or Immunities Clause.<sup>126</sup> Professor Wildenthal, on the other hand, disputed Amar's and Newsom's views of the nonincorporation of the Seventh Amendment and reviewed additional sources that he argued supported incorporation of the Seventh Amendment under the Privileges or Immunities Clause.<sup>127</sup>

##### 5. A Theory of Nonincorporation Before *McDonald*?

Prior to *McDonald*, the Court affirmatively had decided not to incorporate the small set of rights in the Bill of Rights described in the previous section.<sup>128</sup> This leads to the question of whether the Court had a theory of (what this Article terms) "nonincorporation" before *McDonald*. Because selective incorporation, the theory of incorporation that existed for several years before the Court decided *McDonald*, was based on liberty and justice or fundamental rights,<sup>129</sup> the simple answer could be that nonincorporation was based on the opposite; a

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124 See *id.* at 92, 222, 275–76.

125 *Id.* at 222.

126 See Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643, 727–32 (2000). Under one argument, Newsom stated that some states did not have civil jury trial rights at the time of adoption of the Fourteenth Amendment; this fact argued against incorporation of the Seventh Amendment. See *id.* at 729–30. However, this could be said of any of the Amendments' incorporation against the states at the time of the adoption of the Fourteenth Amendment.

127 See Brian H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051, 1135–47 (2000); see also James L. "Larry" Wright & M. Matthew Williams, *Remember the Alamo: The Seventh Amendment of the United States Constitution, the Doctrine of Incorporation, and State Caps on Jury Awards*, 45 S. TEX. L. REV. 449 (2004).

128 A few amendments have not been addressed at all by the Court. These amendments are discussed in Part II.A.4.

129 See *supra* text accompanying notes 26–31.

provision was not incorporated where it was not a fundamental right. This concept cannot be applied neatly to the decisions discussed above, however, because either they were not decided under selective incorporation or, in the case of the Sixth Amendment unanimity requirement, the decision was particularly unique.<sup>130</sup>

At times there is at least some suggestion in the Court's jurisprudence on incorporation that the Court believed it had a theory for *not* incorporating rights. Initially, in the late nineteenth century, if the right was listed in the Bill of Rights, it was presumptively not a right protected under due process.<sup>131</sup> After the Court began to incorporate rights, in the early twentieth century, the Court articulated a theory for why rights had not been incorporated and defended its decisions not to incorporate rights, including the grand jury right and civil jury right, as a "rationalizing principle which gives to discrete instances a proper order and coherence."<sup>132</sup> The Court stated that the criminal jury trial right, civil jury trial right, and the grand jury trial right "are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"<sup>133</sup> The Court also stated that protections against self-incrimination and double jeopardy were not fundamental rights. It went on to explain:

The exclusion of these immunities and privileges [indictment by grand jury, jury trial, protection against self incrimination, and double jeopardy] from the privileges and immunities protected against the action of the states has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself.

We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over

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130 See *supra* Part I.B.

131 See Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 *FORDHAM L. REV.* 459, 483–84 n.110 (2001) (discussing *De Jonge v. Oregon*, 299 U.S. 353 (1935), where the Court "seemed to imply textual inclusion in the Bill of Rights could be construed as evidence against inclusion as a due process right"); *supra* text accompanying notes 20–25. This changed when the post-New Deal Court turned to textual inclusion in the Bill of Rights as justifying judicial enforcement of rights listed in the Bill, but also justifying the abandonment of the non-textual right of liberty of contract. See *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); see also Lash, *supra*, at 481–84, 494. (discussing case law demonstrating the shift in the New Deal Court's reasoning). The "Twining" rule was used to determine which textually listed rights ought to be "incorporat[ed]," a term that appears only after the New Deal. See *id.* at 474–75.

132 *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

133 *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed.<sup>134</sup>

Of course, since that time, there were changing interpretations of what constituted liberty, justice, and thus, fundamental rights; the Court held that some of the rights that it previously stated were not essential to liberty and justice were essential to liberty and justice and thus fundamental and incorporated under the Due Process Clause.<sup>135</sup> Thus, the Court has not had a consistent theory of incorporation or nonincorporation over the years. Moreover, by not examining the nonincorporated rights, the Court has left itself open to criticism. Professor Amar stated “[b]y refusing to discuss openly why these three rights [the civil jury, the grand jury, and the right to bear arms] somehow were not fundamental enough to justify incorporation, the justices have seemed to plead no contest to the critics’ charge that selective incorporation was unprincipled.”<sup>136</sup>

### C. *Nonincorporation Pursuant to McDonald*

In *McDonald v. City of Chicago*, the Supreme Court reconsidered whether the Fourteenth Amendment incorporated the Second Amendment right to bear arms. In doing so, the Court also discussed the other parts of the Bill of Rights that previously had been deemed not incorporated that remained not incorporated after *McDonald*.

#### 1. *McDonald*

In *McDonald*, to decide whether the Fourteenth Amendment’s Due Process Clause incorporated the Second Amendment against the states, the Court stated that “we must decide whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty . . . or as we have said in a related context, whether this right is ‘deeply rooted in this Nation’s history and tradition.’”<sup>137</sup> In deciding this case based on the Due Process Clause, the plurality declined the invitation

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134 *Id.* at 326.

135 *See, e.g., McDonald v. City of Chicago*, 130 S. Ct. 3020, 3034–36 (2010) (plurality opinion).

136 AMAR, *supra* note 2, at 220.

137 *McDonald*, 130 S. Ct. at 3036 (citation omitted) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

to examine the meaning of the Privileges or Immunities Clause.<sup>138</sup> Citing *District of Columbia v. Heller*, the Court stated that self-defense, including in one's home, which the regulations at issue involved, was such a fundamental right and that the right applied to handguns which were the firearms selected most for protection of the home.<sup>139</sup> Also citing *Heller*, the Court decided that the right to bear arms was "deeply rooted in this Nation's history and tradition."<sup>140</sup> There was an explicit English protection of the right to keep arms for self-defense in the 1689 English Bill of Rights, and in his *Commentaries*, Blackstone stated that the right was a "fundamental right[ ] of Englishmen."<sup>141</sup> The colonists, and then the founders, also recognized the importance of this right.<sup>142</sup> In the time period around the founding, many states also enacted rights to bear arms in their constitutions.<sup>143</sup> Thereafter, in the second half of the nineteenth century, in part in reaction to discrimination against blacks including the taking of their firearms, Congress enacted two laws, one of which explicitly protected the right to bear arms.<sup>144</sup> The Fourteenth Amendment followed these laws, and its enactment history included references to the right to bear arms.<sup>145</sup> Additionally at the time of the adoption of the Fourteenth Amendment, many states granted the right to bear arms in their constitutions.<sup>146</sup> Some of these rights reflected limitations of law enforcement and that individuals needed to be able to protect themselves.<sup>147</sup> The Court concluded: "In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."<sup>148</sup>

The plurality of Justices Alito, Roberts, Scalia, and Kennedy disputed the arguments of the municipalities including that, because many civilized countries had no right to bear arms, this right was not fundamental.<sup>149</sup> They stated that there are many rights in this country

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138 *See id.* at 3030–31.

139 *See id.* at 3036 (citing *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008)).

140 *Id.* (quoting *Glucksberg*, 521 U.S. at 721).

141 *See id.* (quoting *Heller*, 554 U.S. at 594).

142 *See id.* at 3037–38.

143 *See id.* at 3037.

144 *See id.* at 3038–41.

145 *See id.* at 3041–42.

146 *See id.* at 3042.

147 *See id.* at 3042 n. 27.

148 *Id.* at 3042.

149 *See id.* at 3044 (plurality opinion).

that are fundamental that do not exist in other countries.<sup>150</sup> Incorporation “must be governed by a single, neutral principle.”<sup>151</sup>

Under our precedents, if a Bill of Rights guarantee is fundamental from an American perspective, then, unless *stare decisis* counsels otherwise, that guarantee is fully binding on the States and thus *limits* (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values.<sup>152</sup>

The plurality cited previous decisions on the nonincorporation of the Fifth Amendment grand jury right and the Seventh Amendment civil jury trial right as a footnote to “*stare decisis*.”<sup>153</sup> It also stated that some regulations by states were possible, including those against possession of guns by felons, and they dismissed the dissenting opinion’s arguments on various grounds.<sup>154</sup> The plurality did not conduct a *stare decisis* analysis apparently because the previous Second Amendment jurisprudence rejecting incorporation occurred prior to selective incorporation.<sup>155</sup> Justice Thomas concurred in the judgment but decided that the Second Amendment was incorporated under the Privileges or Immunities Clause.<sup>156</sup>

In the context of deciding whether the Fourteenth Amendment incorporated the Second Amendment right to bear arms against the states, the Supreme Court discussed what this article has termed “nonincorporation.”<sup>157</sup> The Court pointed out the other rights that the Court previously had decided were not incorporated and suggested that these rights could be incorporated in the future. It stated that “[o]ur governing decisions regarding the Grand Jury Clause of the Fifth Amendment and the Seventh Amendment’s civil jury requirement long predate the era of selective incorporation.”<sup>158</sup> Also, the Court suggested that no compelling reason existed for the continued nonincorporation of the Sixth Amendment criminal jury unanimity requirement against the states under the Due Process Clause.<sup>159</sup> In addition to discussing nonincorporation, the Court briefly addressed the rights for which incorporation was never decided—the Eighth

150 *See id.* at 3044–45.

151 *Id.* at 3048.

152 *Id.* at 3046 (footnote omitted).

153 *Id.* at 3046 n.30.

154 *See id.* at 3047–50.

155 *See id.* at 3031 (plurality opinion); *see also infra* Part II.B (discussing the role *stare decisis* played in the plurality opinion).

156 *See McDonald*, 130 S. Ct. at 3058–88 (Thomas, J., concurring).

157 *Id.* at 3034–35 (plurality opinion).

158 *Id.* at 3035 n.13.

159 *See id.* at 3035 n.14.

Amendment prohibition against excessive fines and the Third Amendment prohibition against the quartering of soldiers.<sup>160</sup>

In dissent, Justice Stevens decided that due process in the Fourteenth Amendment did not include the right to bear arms.<sup>161</sup> He did not decide on the basis of incorporation of the Second Amendment, because the use of the term “incorporation” was “something of a misnomer.”<sup>162</sup> The question of whether a right applied against the states involved whether a particular right was included in due process, not whether a right was stated explicitly in the first eight amendments.<sup>163</sup> Indeed this was “a substantive due process case.”<sup>164</sup> Among other arguments against application of the right to bear arms against the states, Justice Stevens generally discussed incorporation and emphasized that total incorporation had not occurred because the Fifth Amendment grand jury right and the Seventh Amendment civil jury trial had not been incorporated against the states.<sup>165</sup> Justice Stevens also contrasted the Court not granting certiorari to petitions on the also important question of unanimity in state criminal jury trials with the Court’s decision to take the Second Amendment question and incorporate it against the states.<sup>166</sup> Although the Court generally had required uniformity between the state and federal courts regarding incorporation<sup>167</sup> it had not required unanimity for state criminal jury trials at the same time that it had required unanimity for federal criminal jury trials.<sup>168</sup>

## 2. A Theory of Nonincorporation After *McDonald*?

After *McDonald*, there are a few possible theories of nonincorporation for the Court. Again, the obvious theory of nonincorporation is the opposite of incorporation under selective incorporation—that the nonincorporated rights were not fundamental.<sup>169</sup> Because

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160 See *id.* at 3035 n.13; see also *infra* Part II.A.4 (discussing that the Supreme Court has never addressed incorporation of the Third Amendment prohibition against the quartering of soldiers or the Eighth Amendment prohibition against excessive fines).

161 See *McDonald*, 130 S. Ct. at 3088–3120 (Stevens, J., dissenting).

162 *Id.* at 3092.

163 See *id.*

164 *Id.* at 3090.

165 See *id.* at 3094.

166 See *id.* at 3094–95. Justice Breyer, joined by Justices Ginsburg and Sotomayor, agreed with Justice Stevens that due process did not include the right to bear arms and further decided that the Fourteenth Amendment did not incorporate the right to bear arms. See *id.* at 3120–36 (Breyer, J., dissenting).

167 See *id.* at 3094 (Stevens, J., dissenting).

168 See *id.* at 3094 & n.12.

169 See *supra* Part I.B.5.

the Court has not evaluated all of the nonincorporated rights under selective incorporation, it is difficult to know if the Court thinks these rights were fundamental. However, as discussed above, prior to *McDonald*, this theory was applied in an inconsistent manner.<sup>170</sup> Certain rights were changed from nonincorporated to incorporated at the same time that other rights remained unreevaluated and thus nonincorporated.<sup>171</sup> Also, after *McDonald*, at least from the perspective of Justice Stevens, this theory remains inconsistent, because in *McDonald*, the Supreme Court incorporated yet another right but left no firm indication that it would act to incorporate the remaining rights if presented with the opportunity.<sup>172</sup> The Court had accepted certiorari on the question of the incorporation of the Second Amendment right, but had refused to grant, for example, certiorari on petitions on the question of unanimity in state criminal jury trials.<sup>173</sup>

A different way to view nonincorporation is through stare decisis. In *McDonald*, the plurality explicitly referenced the Fifth Amendment grand jury right and the Seventh Amendment civil jury trial right when it discussed the circumstances for stare decisis of the nonincorporation decisions.<sup>174</sup> With this mention, the plurality suggested that if those rights were fundamental, nothing but possibly stare decisis stood in the way of the future incorporation of those provisions. Stare decisis will be examined further in Part II.B. However, suffice it to say now, the plurality did not find it necessary to conduct a stare decisis analysis with respect to the Second Amendment right to bear arms in *McDonald*.<sup>175</sup>

Another possible theory of nonincorporation is no nonincorporation, or in other words, total incorporation. In *McDonald*, the Court stated that it had never adopted Justice Black's total incorporation, but that selective incorporation "moved in that direction."<sup>176</sup> With the incorporation of the Second Amendment and thus with nearly every right in the Bill incorporated after *McDonald*, incorporation of the first eight amendments could exist after *McDonald*.

Finally, whether intended or not, the Court may have adopted a jury theory of nonincorporation. All of the Bill of Rights that the

170 See *supra* Part I.B.5.

171 See *supra* Part I.B.5.

172 See *supra* text accompanying notes 161–68.

173 See *supra* text accompanying notes 166–68.

174 See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3046 & n.30 (2010) (plurality opinion).

175 See *infra* Part II.B. In his concurrence, Justice Thomas conducted a stare decisis analysis. See *infra* text accompanying note 290.

176 *McDonald*, 130 S. Ct. at 3034.

Court previously decided did not apply to the states and that continue not to be incorporated are jury provisions—the Fifth Amendment grand jury right, the Sixth Amendment criminal jury unanimity requirement, and the Seventh Amendment civil jury trial right. The only parts of the Bill the incorporation of which the Court has not decided at all—the Third Amendment quartering of soldiers and the Eighth Amendment excessive fines prohibition—presumably would be incorporated if relevant.<sup>177</sup>

As for this possible jury theory of nonincorporation, the Court has not specifically recognized any characteristics about juries that would cause those amendments to be treated differently. In the past, in *Duncan v. Louisiana*, the Court actually decided that the Due Process Clause of the Fourteenth Amendment incorporated one of the jury amendments—the Sixth Amendment criminal jury trial right. In that case, the defendant, who was black, was accused of battery during an incident that involved an apparent racial altercation between whites and blacks.<sup>178</sup> Defendant requested a jury trial, and after denial of this request, the judge convicted him of a misdemeanor, which was punishable by two years in prison and a fine.<sup>179</sup> The judge sentenced him to 60 days and to pay a fine.<sup>180</sup> The Court stated that the question was “whether given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty.”<sup>181</sup> The significant history of the criminal jury trial right, including under the English common law, was then described.<sup>182</sup> The Court also emphasized that the original states’ constitutions included jury trials.<sup>183</sup> This was evidence of the fundamentality of the right.<sup>184</sup> Moreover, at the time of the case, the states continued to conduct criminal jury trials.<sup>185</sup> The Court concluded by emphasizing that “[a] right to jury trial is granted to criminal defendants in order to prevent oppression by the Government,”<sup>186</sup> and “[t]he deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement

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177 See *infra* Part II.A.4.

178 See *Duncan v. Louisiana*, 391 U.S. 145, 147 (1968).

179 See *id.* at 146.

180 See *id.*

181 *Id.* at 149–50 n.14. The Court discounted earlier cases, which examined “if a civilized system could be imagined that would not accord the particular protection.” *Id.*

182 See *id.* at 151–53.

183 See *id.* at 153.

184 See *id.* at 153–54.

185 See *id.* at 154.

186 *Id.* at 155.



qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.”<sup>187</sup>

Ascribing to the Court a theory of nonincorporation based on the jury may seem unjustified because the Court has incorporated the criminal jury trial right. Still, the Court may have adopted a non-pure theory of nonincorporation based on the jury. Putting aside the odd case of unanimity, the Court appears to have a particular affinity for the criminal jury trial right and possibly an aversion to the civil jury trial right. It has expanded the Sixth Amendment criminal jury trial right such that juries have more fact-finding authority related to sentencing in federal and state courts at the same time that it can be argued that the Court has curbed the Seventh Amendment civil jury trial right in federal courts.<sup>188</sup> Additionally, it may be that the Court is comfortable with imposing incorporation in the context of the criminal jury but is not comfortable in the context of civil juries and grand juries; the difference may lie in the particular specific liberty interest that the criminal jury trial involves. Additionally, though the federal courts gain no specific benefit from state institutional aggrandizement, the Court also may have some motivation to affect the authority of state courts and prosecutors, which increases under nonincorporation.<sup>189</sup> In other words, it is difficult to ignore that the rights that the Court decided not to incorporate and continues not to incorporate are all jury rights. With this stated, a jury theory of nonincorporation might be the least rational under the Constitution. Of the rights in the Bill of Rights, the jury could be said to best comprise what traditionally has been viewed as due process. The extensive subject of procedural due process will not be revisited here, however.<sup>190</sup>

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187 *Id.* at 156.

188 See Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 69 (2003) (stating “[t]he Supreme Court has not allowed the kinds of limits on the criminal jury that it has condoned in the civil context”); Suja A. Thomas, *Judicial Modesty and the Jury*, 76 U. COLO. L. REV. 767 (2005) (discussing criminal and civil juries and division of authority between judiciary and jury).

189 Of course, courts would have even more power if the Court had not incorporated the criminal jury trial right; but again, the particular liberty interest there may have motivated the Court in *Duncan*.

190 See, e.g., AMAR, *supra* note 2, at 269 (discussing that civil, criminal, and grand juries were recognized as “basic components of due process of law” and “‘inestimable privilege[s]’” in 1866). “Historical practice is probative of whether a procedural rule can be characterized as fundamental” and thus required as procedural due process. *Medina v. California*, 505 U.S. 437, 446 (1992); see also *Dist. Attorney's Office v.*

## II. THE FUTURE OF NONINCORPORATION

Now that only a few provisions of the Bill of Rights have not been incorporated, the question is: where does this leave nonincorporation? To determine whether the Court has a theory of nonincorporation, it is necessary to examine each of the nonincorporated rights under the Court's articulated theory of incorporation—selective incorporation—and to explore the role of stare decisis.

### A. *Fundamental Rights?*

As stated above, in *McDonald*, the plurality made its incorporation decision on the basis of the Due Process Clause.<sup>191</sup> The *McDonald* analysis involved fundamental rights. The Supreme Court stated that to decide whether a right is incorporated “we must decide whether the right . . . is fundamental to *our* scheme of ordered liberty, . . . or as we have said in a related context, whether this right is ‘deeply rooted in this Nation’s history and tradition.’”<sup>192</sup>

To determine whether a right was fundamental and thus was incorporated against the states under the Fourteenth Amendment’s Due Process Clause, the Supreme Court has consistently examined the meaning of due process or what were fundamental rights at the time of the founding and ultimately at the time of the adoption of the Fourteenth Amendment.<sup>193</sup> In *McDonald*, to decide whether the right was fundamental, the Court examined the origin of the right in England, the adoption of the right in the states around the time of the ratification of the Bill, the meaning of the Fourteenth Amendment, and the protection of the right by the states at the time of the ratification of the Fourteenth Amendment.<sup>194</sup> Below, the nonincorporated rights of the Fifth Amendment grand jury right, the Sixth Amend-

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Osborne, 557 U.S. 52, 69 (2009) (applying the “fundamental” analysis of *Medina* to state postconviction relief frameworks (citing *Medina*, 505 U.S. at 448)).

Coke referred to the “judgement of his peers,” the jury, as equal to “the law of the land,” or in other words, due process. 1 EDWARD COKE, 2 THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 46 (1809). Justice Story also discussed the meaning of due process of law as “without due presentment or indictment, and being brought in to answer thereto by due process of the common law. So that this clause in effect affirms the right of trial according to the process and proceedings of the common law.” 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1783 (Fred B. Rothman & Co. 1991) (1833) (footnote omitted).

191 See *supra* Part I.C.1.

192 See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010) (citations omitted) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

193 See *id.* at 3036–42.

194 See *id.*

ment criminal jury unanimity requirement, and the Seventh Amendment civil jury trial right are examined under this selective incorporation analysis. Additionally, the other rights, the incorporation of which the Court has not addressed at all, are discussed summarily.

### 1. The Fifth Amendment Grand Jury Right

The grand jury was a fundamental right in England in the time period surrounding the founding. William Blackstone, who had significant influence upon the founders, stated:

[T]o find a bill [for a person to be indicted], there must at least twelve of the jury agree: for 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.<sup>195</sup>

Blackstone also stated that all cases, except misdemeanors, required grand juries, and for misdemeanors, informations were permitted.<sup>196</sup> Moreover, in his chapter on the criminal jury trial, Blackstone emphasized the importance of the grand jury in addition to the criminal jury.<sup>197</sup> He stated “[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.”<sup>198</sup> When discussing the grand jury, Blackstone also emphasized that:

[H]owever *convenient* [other forms of proceeding] may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters . . .<sup>199</sup>

Prior to this time, Lord Coke, whom Blackstone cited, had stated that “[n]o man shall be taken (that is) restrained of liberty, by petition, or

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195 4 WILLIAM BLACKSTONE, COMMENTARIES \*301. Blackstone did leave room that if twelve members of the grand jury agreed, the accused could be indicted even though everyone did not agree on a twenty-three-person grand jury. *Id.* at \*299, \*301.

196 *See id.* at \*305.

197 *See id.* at \*343.

198 *Id.*

199 *Id.* at \*344. He further warned of the jury disappearing by stating “and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.” *Id.*

suggestion to the king, or to his counsell, unless it be by indictment, or presentment of good, and lawfull men, where such deeds be done.”<sup>200</sup>

In America, at the time of the founding, the grand jury also was a fundamental right. Alexander Hamilton suggested the importance of the grand jury when, in a discussion of the inefficiency of civil juries for the collection of taxes, he stated that indictments and criminal juries are, however, necessary for prosecution for failure to pay taxes.<sup>201</sup> In the state debates legislators asserted that the absence of a provision in the Constitution that required a grand jury did not permit informations by judges.<sup>202</sup> Early nineteenth century commentators also remarked on the fundamental nature of the grand jury right. In his *Commentaries on the Constitution*, including the Bill of Rights, Justice Story stated that “it is obvious, that the grand jury perform most important public functions; and are a great security to the citizens against vindictive prosecutions, either by the government, or by political partisans, or by private enemies.”<sup>203</sup> When he discussed parts of the Bill of Rights including the grand jury, James Kent stated “[t]he Constitution of the United States, and the constitutions of almost every state in the Union, contain the same declarations in substance, and nearly in the same language” and stated that these provisions were “transcribed into the constitutions in this country” from England to guard the “right of personal security.”<sup>204</sup> Kent further stated that where there was no express constitutional provision in the states these “fundamental” doctrines would have been set forth in the legislative acts, because the “colonies were parties to the national declaration of rights in 1774, in which the trial by jury, and the other rights and liberties of English subjects, were peremptorily claimed as their

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200 COKE, *supra* note 190, at 46 (footnote omitted).

201 See THE FEDERALIST NO. 83, at 500 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

202 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 112–13 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter ELLIOT’S DEBATES] (debates of Mr. Gore & Mr. Dawes in the Convention of the Commonwealth of Massachusetts on the adoption of the Federal Constitution on Jan. 30, 1788); 4 ELLIOT’S DEBATES 154 (debate of Mr. Spencer in the Convention of the State of North Carolina on the adoption of the Federal Constitution on July 29, 1788) (“The trial by jury has been also spoken of. Every person who is acquainted with the nature of liberty need not be informed of the importance of this trial. Juries are called the bulwarks of our rights and liberty . . .”).

203 STORY, *supra* note 190, § 1779.

204 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW \*12 (The Blackstone Publishing Co. 1889) (1827).

undoubted inheritance and birthright.”<sup>205</sup> Further, Kent specifically stated that “[t]he words, *by the law of the land*, as used in *magna carta*, in reference to this subject, are understood to mean due process of law, that is, by indictment or presentment of good and lawful men . . . .”<sup>206</sup> In addition to these commentaries, at the time of the founding, there is evidence in the states that the grand jury was a fundamental right. Of the fourteen states, four explicitly provided a grand jury for felonies, and four others provided for some form of grand jury.<sup>207</sup>

At the time of the adoption of the Fourteenth Amendment, there is also significant evidence that the grand jury remained a fundamental right. The Civil Rights Act of 1866 required due conviction by jury, which could have included the grand jury.<sup>208</sup> Moreover, the adoption of the Thirteenth Amendment just three years prior to the adoption of the Fourteenth Amendment suggested the importance of the grand jury at the time of the Fourteenth Amendment’s adoption. The Thirteenth Amendment specifically stated that slavery and involuntary servitude had been abolished in absence of a person being “duly convicted.”<sup>209</sup> Again, this due conviction could have included the grand jury. Additionally, evidence existed in the statements of the proponents and opponents of the Fourteenth Amendment that the Fourteenth Amendment incorporated the Bill of Rights, although most of this evidence relates to the Privileges or Immunities Clause.<sup>210</sup>

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205 *Id.* at \*12–13.

206 *Id.* at \*13. (footnote omitted).

207 See Kaitlyn Luther, Table of History of Jury Rights (Feb. 10, 2012) (unpublished table compiled by research assistant for purposes of this article) (on file with the author, Suja A. Thomas).

208 Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866).

209 U.S. CONST. amend. XIII, § 1.

210 Representative Bingham discussed how a proposed version of the Fourteenth Amendment gave Congress the power to enforce the Bill of Rights against the states. “The proposition pending before the House is simply a proposition to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today.” CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866) (statement of Rep. Bingham).

Representative Rogers, who opposed the amendment, responded that the proposed amendment usurped the power of the states and gave such power to the federal government. See *id.* at 133 (statement of Rep. Rogers). He also discussed how “‘life, liberty, property, privileges, and immunities’” in the proposed Fourteenth Amendment included all rights. *Id.* Further, Representative Rogers said:

What are privileges and immunities? Why, sir, all the rights we have under the laws of the country are embraced under the definition of privileges and immunities. The right to vote is a privilege. The right to marry is a privilege. The right to contract is a privilege. The right to be a juror is a privilege. The right to be a judge or President of the United States is a privilege.

There is also evidence in the states that the grand jury right was a fundamental right. Twenty-six out of thirty-seven states guaranteed a right to a grand jury at the time of the adoption of the Fourteenth Amendment.<sup>211</sup>

Following the adoption of the Fourteenth Amendment, the Enforcement Act of 1871, which was enacted to enforce the Fourteenth Amendment, provided for civil and criminal liability and significant penalties for tampering with jurors, showing the general importance of the jury to the liberty of the freed people.<sup>212</sup> Moreover, the Civil Rights Act of 1875 explicitly prevented interference with freed people's right to serve as jurors for grand and petit juries.<sup>213</sup>

Additional support for the incorporation of the grand jury comes from the other parts of the Fifth Amendment. In the past, the other rights in the Fifth Amendment—double jeopardy, self-incrimination,

I hold if that ever becomes a part of the fundamental law of the land it will prevent any State from refusing to allow anything to anybody embraced under this term of privileges and immunities.

*Id.* Bingham later responded that states had inappropriately violated rights in the Bill and that the Fourteenth Amendment corrected this injustice, stating:

[M]any instances of State injustices and oppression have already occurred in the State legislation of this Union, of flagrant violations of the guaranteed privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever. Contrary to the express letter of your Constitution, "cruel and unusual punishments" have been inflicted under State laws within this Union upon citizens . . . .

*Id.* at 2542 (statement of Rep. Bingham). And in subsequent discussions in the Senate, Senator Howard explicitly stated that the first eight amendments in the Bill were incorporated against the states through the Fourteenth Amendment: "To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution." *Id.* at 2765 (statement of Sen. Howard) (also quoting the privileges and immunities stated in the circuit court decision of *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823)).

211 See Luther, *supra* note 207; *supra* text accompanying note 81; cf. 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) (stating nineteen states required grand jury indictment for felonies and seven prohibited prosecution solely by information).

212 See Enforcement Act of 1871, ch. 22, § 1–2, 5, 17 Stat. 13, 13–15 (1871).

213 See Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 335, 336–37 (1875).

and just compensation—were found fundamental and incorporated under the Fourteenth Amendment.<sup>214</sup>

Thus, examining the Fifth Amendment grand jury right through selective incorporation shows the right was incorporated. Evidence from the time of the founding through the time of the adoption of the Fourteenth Amendment, plus the constitutional text, demonstrates that the grand jury was a fundamental right and thus was incorporated against the states through the Due Process Clause of the Fourteenth Amendment.

## 2. The Sixth Amendment Criminal Jury Unanimity Requirement

As the Court has stated, the federal courts and state courts have different standards on unanimity, with unanimity required in the federal courts and not in the state courts, even though under the Court’s jurisprudence, state rights that were incorporated were to have the same standards as the federal rights.<sup>215</sup> This division on unanimity was the result of an odd decision, as the Court has stated.<sup>216</sup>

However, unanimity in criminal jury trials has a long, significant history. In describing the criminal jury trial more generally, Blackstone described it “as the grand bulwark of [every Englishman’s] liberties.”<sup>217</sup> He pointed out that this right was even more important than the civil jury right because of the possibility of governmental abuse.<sup>218</sup> Blackstone went on to state that an indictment by twelve or more grand jurors “should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen, and superior to all suspicion.”<sup>219</sup> Moreover, Blackstone stated that “the

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214 Cf. STORY, *supra* note 190, § 1781 (after discussing the grand jury, Justice Story recognized that the privilege against double jeopardy was “another great privilege secured by the common law” (emphasis added)).

215 See *supra* Part I.B.3.

216 See *supra* text accompanying note 159. An extensive discussion of the Sixth Amendment unanimity requirement is also found in a certiorari petition that requests the Court to overrule *Apodaca v. Oregon*, 406 U.S. 404 (1972). See Petition for Writ of Certiorari at 7–8, *Lee v. Louisiana*, 555 U.S. 823 (2008) (No. 07-1523). See generally Shari Seidman Diamond et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201 (2006) (discussing importance of unanimity).

217 BLACKSTONE, *supra* note 195, at \*342.

218 See *id.* at \*343.

219 *Id.*

liberties of England cannot but subsist, so long as this *palladium* remains sacred and inviolate . . . .”<sup>220</sup>

At the time of the founding in America, unanimity was mentioned in the debates in the states, almost as if this was simply accepted required practice.<sup>221</sup> There is also evidence that although the incidents of jury trial were not explicitly stated in the Bill, the jury trial was not divested of those incidents.<sup>222</sup>

In the early nineteenth century, Justice Story more generally discussed the essential nature of the different components of the criminal jury trial right.

[U]nless the whole [common law] system is incorporated, . . . a corrupt legislature, or a debased and servile people, may render the whole little more, than a solemn pageantry. If, on the other hand, the people are enlightened, and honest, and zealous in defence of their rights and liberties, it will be impossible to surprise them into a surrender of a single valuable appendage of the trial by jury.<sup>223</sup>

The evidence of incorporation of unanimity in the Thirty-ninth Congress at the time of the adoption of the Fourteenth Amendment consists of general references to the incorporation of the Bill of Rights, again mostly related to the Privileges or Immunities Clause.<sup>224</sup> Moreover, non-unanimous jury verdicts were not common at this time.<sup>225</sup>

In summary, examining the Sixth Amendment criminal jury unanimity requirement through the lens of selective incorporation shows that the requirement was incorporated. Evidence from the time of the founding through the adoption of the Fourteenth Amendment demonstrates that the Sixth Amendment criminal jury unanimity requirement was a fundamental right and thus was incorporated

220 *Id.* Blackstone listed possible incursions on liberties that included “introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience.” *Id.* at \*343–44.

221 Ratification of the State of New York, 1 ELLIOT’S DEBATES, *supra* note 202, at 327, 328 (the debates in the New York Convention on the adoption of the Federal Constitution on July, 26, 1788) (“No person can be found guilty without the unanimous consent of such jury.”).

222 3 ELLIOT’S DEBATES, *supra* note 202, at 530–31 (James Madison’s remarks in the Virginia Convention on June 20, 1788) (explaining peremptory challenges to jurors exist along with jury trial right although no express provision for peremptory challenges).

223 STORY, *supra* note 190, § 1784.

224 *See, e.g., supra* note 210.

225 *See* Calabresi & Agudo, *supra* note 211, at 77. The Constitution of Vermont required unanimous jury verdicts in criminal cases at the time of the adoption of the Fourteenth Amendment. *See id.*



against the states through the Due Process Clause of the Fourteenth Amendment.

### 3. The Seventh Amendment Civil Jury Trial Right

The civil jury right also has a long, significant history.<sup>226</sup> In his discussion of the civil jury, Blackstone wrote of the jury as fundamental to liberty, saying that “[i]n magna carta [trial by jury] is more than once insisted on as the principal bulwark of our liberties; but especially . . . that no freeman shall be hurt in either his person or property” without trial by jury.<sup>227</sup> Coke, whom Blackstone cited here, had stated that “lands, tenements, goods, and chattels shall not be seised into the kings [sic] hands, contrary to this great charter, and the law of the land; nor any man shall be disseised of his lands, or tenements, or dispossessed of his goods, or chattels, contrary to the law of the land.”<sup>228</sup> “Law of the land,” the term in the Magna Carta, was equivalent to “due process” in the Constitution, and thus it follows that due process included trial by jury.<sup>229</sup>

At the time of the founding, Alexander Hamilton stated that there was agreement that the civil jury was valuable. Any difference in opinion was based on its specific role with respect to liberty: “the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.”<sup>230</sup> Hamilton himself thought the civil jury was not related to the preservation of liberty. He could not “readily discern the inseparable connection between the existence of liberty and the trial by jury in civil cases” as the trial by jury in criminal cases solely related to liberty.<sup>231</sup> Moreover, he stated that “[t]he excellence of the trial by jury in civil cases appears to depend on circumstances foreign to the preservation of liberty.”<sup>232</sup> Despite this disagreement on the role of the civil jury to liberty, the importance of the civil jury to the founders was evident. When concern was expressed that including a provision for the criminal jury

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226 The most comprehensive modern history is found in Professor Wolfram’s article on the Seventh Amendment. See Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1972) (discussing the federal right to a civil jury trial); see also Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966) (arguing that the Seventh Amendment was not intended to codify a rigid form of jury practice).

227 3 WILLIAM BLACKSTONE, COMMENTARIES \*350.

228 1 COKE, *supra* note 190, at 46.

229 See STORY, *supra* note 190, § 1783.

230 THE FEDERALIST NO. 83, *supra* note 201, at 499 (Alexander Hamilton).

231 *Id.*

232 *Id.* at 500.

trial in the Constitution implied that no civil jury trial right existed, the founders quoted Blackstone on the general importance of the jury trial to protect property, liberty, and life.<sup>233</sup> Hamilton also recognized that the jury was “an excellent method of determining questions of property,” and therefore it would be ideal to have a constitutional provision for a civil jury trial.<sup>234</sup>

The issue at the time of the founding was not whether there should be a civil jury trial right in the states but the extent of the jury trial right given the differences among the states.<sup>235</sup> Indeed, the fact that the Bill of Rights was insisted upon as a condition for the ratification of the Constitution is an indication of the fundamental nature of the rights in the Bill, including the civil jury.<sup>236</sup> Finally, the importance of the civil jury trial right at the time of the founding is indicated by the significant number of states that adopted civil jury trial rights in the time period surrounding the ratification of the Constitution. Eleven of fourteen states protected the civil jury trial right.<sup>237</sup>

After the adoption of the Constitution and the Bill of Rights, Justice Story suggested the importance of the civil jury to liberty when he discussed the appellate jurisdiction of the Supreme Court of law and fact to which some in the convention had objected; he discussed the “great securities [to the people’s] civil, as well as [ ] their political, rights and liberties” necessitated that the Court could review fact only in equity, admiralty, and maritime cases, or the jury trial in both civil and criminal cases would be a “mere mockery.”<sup>238</sup> He more directly stated the Seventh Amendment:

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233 1 ELLIOT’S DEBATES, *supra* note 202, at 503–05 (reprinting a letter from Richard Henry Lee to Edmund Randolph). Various states emphasized the importance of the jury trial generally. *See, e.g., id.* at 328 (reprinting the debates in New York regarding adopting the Federal Constitution) (“That the trial by jury, in the extent that it obtains by the common law of England, is one of the greatest securities to the rights of a free people, and ought to remain inviolate.”).

234 THE FEDERALIST NO. 83, *supra* note 201, at 501 (Alexander Hamilton).

235 *See id.* Indeed a jury provision was not included because of the essentially impossible task of guaranteeing the states the jury trial of each state in the federal courts. *See* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 168 (Max Farrand ed., 1911) (James Wilson in the Pennsylvania Convention, Dec. 11, 1787) (“In some of the States they have courts of chancery and other appellate jurisdictions, and those States are as attached to that mode of distributing justice, as those that have none are to theirs.”).

236 *See* STORY, *supra* note 190, § 1774.

237 *See* Luther, *supra* note 207; *cf.* McDonald v. City of Chicago, 130 S. Ct. 3020, 3037 (2010) (describing number of states protecting right to bear arms at time of founding).

238 STORY, *supra* note 190, § 1757.

is a most important and valuable amendment; and places upon the high ground of constitutional right the inestimable privilege of a trial by jury in civil cases, a privilege scarcely inferior to that in criminal cases, which is conceded by all [persons] to be essential to political and civil liberty.<sup>239</sup>

In his *Commentaries*, Kent suggested the fundamental nature of the civil jury. He stated that:

[i]n October, 1765, a convention of delegates from nine colonies assembled at New York, and made and published a declaration of rights, in which they insisted that the people of the colonies were entitled to all the inherent rights and liberties of English subjects, of which the most essential were, the exclusive power to tax themselves, and the privilege of trial by jury.<sup>240</sup>

In his discussion of the meaning of due process, Kent cited Coke and among other things further described that “[t]he *judgment of his peers* means, trial by a jury of twelve men according to the course of the common law; and even in private suits at common law, the right of trial by jury is preserved in the Constitution of the United States . . . .”<sup>241</sup> Kent also discussed the importance to personal security of protection from slander and libel and discussed the role of the civil jury to aid in this protection.<sup>242</sup>

Similar to other rights in the Bill, some evidence of their incorporation, albeit mainly pursuant to the Privileges or Immunities Clause, is in the statements of the Thirty-ninth Congress.<sup>243</sup> Moreover, while the Framers of the Fourteenth Amendment did not often explicitly discuss the civil jury right, the intention of the Framers to protect freed people, including their property, necessitated the civil jury trial right. Without the ability to bring a suit with a jury trial right against states and individuals for violation of their property rights, property rights for freed people could be illusory, particularly in states that did not fully recognize the rights of freed people.<sup>244</sup> Related to this, the fundamentality of rights may have relationships to each other. If, for

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239 See *id.* § 1762.

240 2 KENT, *supra* note 204, at \*5.

241 *Id.* at \*13 & n.(b).

242 *Id.* at \*16–23.

243 See *supra* note 210.

244 See, e.g., IND. CONST. of 1851, art. XIII, §§ 1–2 (amended 1881) (forbidding settling of and voiding existing contracts with “Negroe[s] or Mulatto[es]”); see also An Act to Confer Civil Rights on Freedmen, and for Other Purposes, ch. 4, 1865 Miss. Laws 82 (providing for apprenticeships and indentureships of “negroes” and “mulattoes”); An Act to Regulate the Relation of Master and Apprentice, as Relates to Freedmen, Free Negroes, and Mulattoes, ch. 5, 1865 Miss. Laws 86.

example, the right to bear arms is fundamental and would be available to freed people,<sup>245</sup> arguably so too must the right to a civil jury trial. The history of the jury right is tied to differences between judges and juries, including judges' connections to government.<sup>246</sup> In other words, if no mechanism to enforce the right to bear arms against the government exists—that is, through the enforcement by a jury—then, the right could be illusory. As another example, if the states could take property for just compensation from citizens under the Fifth and Fourteenth Amendments, there must be a right for a jury to make the determination of just compensation.<sup>247</sup> Additional evidence of the fundamental nature of the civil jury right at the time of the adoption of the Fourteenth Amendment is found in the states. The constitutions of thirty-six of thirty-seven states guaranteed civil juries.<sup>248</sup>

This examination of the Seventh Amendment jury trial right through selective incorporation shows that the right was incorporated. Evidence at the time of the founding through the adoption of the Fourteenth Amendment demonstrates that the Seventh Amendment was a fundamental right and thus was incorporated against the states under the due process clause of the Fourteenth Amendment.

As stated throughout the Article, this Article examines nonincorporation through the jurisprudence of the Supreme Court. With that stated, Professor Amar has articulated a noteworthy approach to incorporation of the Seventh Amendment that is different from the jurisprudence of the Court and is important to address. Part I.B.4. described that Professor Amar has taken the view that the Fourteenth Amendment did not incorporate the Seventh Amendment. Under his view, the Seventh Amendment right in the federal courts was based on the jury right in the courts of the state where the federal court sat, and Congress could alter the right.<sup>249</sup> In support of his opinion, Professor Amar showed that the founders of the original Constitution had different opinions about the necessity or desirability of a civil jury trial right in the Constitution and that some thought the jury right should be based on each state's right.<sup>250</sup> Using his view of

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245 See *supra* Part I.C.1.

246 See Thomas, *supra* note 188, at 779–82.

247 Professor Amar recognized some interrelationship of the rights, including the First, Fourth, and Fifth Amendment rights with jury rights. See AMAR, *supra* note 2, at 23–24, 68–75, 80, 87–88. He, however, thought the Fourteenth Amendment justified putting certain matters in judges' rather than jurors' hands, including First Amendment issues. *Id.* at 242–44.

248 See Calabresi & Agudo, *supra* note 211, at 77; Luther, *supra* note 207.

249 See *supra* text accompanying notes 117–125.

250 See *supra* text accompanying notes 117–125.

the Seventh Amendment right in the federal courts and his theory of refined incorporation, Professor Amar stated that while the civil jury trial right may be fundamental, the right was not incorporated against the states, because the right was based on federalism concerns.<sup>251</sup> The question is what meaning can be derived from the support Professor Amar uses for his view that the right was based on federalism concerns.

An examination of other statements during this time period is illuminating. Alexander Hamilton discussed how the absence of a civil jury provision in the original constitution permitted Congress to legislate regarding the matter.<sup>252</sup> It follows that once the founders adopted the Seventh Amendment, Congress did not decide the scope of the jury trial right; it was determined by the language in the Seventh Amendment.

Professor Amar acknowledged that Hamilton did not think the jury trial right in the federal courts should be based on the states' rights.<sup>253</sup> Hamilton thought such a system would be irrational.<sup>254</sup> In discussing the proposal of Massachusetts which referred to "common law" and which was based on its own jury trial provision, Hamilton stated this proposal was unacceptable because each of the states had different experiences of what they considered common law jurisdiction and that a "uniform plan" would need to be adopted.<sup>255</sup> Hamilton also discussed how most cases would be subject to jury trial under the state constitutions, because most cases would be in the state courts.<sup>256</sup> Again, this opinion shows that Hamilton did not think that the state court jury rules would apply in federal court.

Similar to many parts of the Constitution, the meaning of the Seventh Amendment is not apparent.<sup>257</sup> However, some meanings may be more palpable than others. The meaning argued for by Professor Amar would require the jury trial right in a federal court in a state to depend on that state's decision at any point in time, including at the time of the adoption of the Seventh Amendment (and correspondingly under his refined incorporation theory, no incorporation of the civil jury trial right against the states). However, if the language of the Amendment, which requires that "the right of trial by jury shall

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251 See *supra* text accompanying notes 117–125.

252 See THE FEDERALIST NO. 83, *supra* note 201, at 496–97 (Alexander Hamilton).

253 See AMAR, *supra* note 2, at 89.

254 See THE FEDERALIST NO. 83, *supra* note 201, at 504 (Alexander Hamilton).

255 See *id.* at 506–07.

256 See *id.* at 498–99.

257 See Wolfram, *supra* note 226.

be preserved”<sup>258</sup> is taken seriously, there was no right to preserve in states which did not exist at the time of the adoption of the Amendment, and thus, such a meaning derived on states is nonsensical at least as to those which did not exist and which were presumably anticipated in the future. Professor Amar also stretched the language of the Amendment in another way. He tried to argue that “preserved” in the Seventh Amendment has the same meaning as the “reserved to the States” language in the Tenth Amendment, and thus that this language also supports states deciding the scope of their civil jury trial rights in their federal courts.<sup>259</sup> However, the very different “preserved” language in the Seventh and the “reserved to the States” language in the Tenth instead support different meanings for the words, which were adopted at the same time—in the Tenth for power to the states and in the Seventh for no such power to the states.<sup>260</sup> Professor Amar did leave room for criticism of his position on the Seventh Amendment, stating that his stated view of the Seventh Amendment was “not free from doubt.”<sup>261</sup>

#### 4. The Third Amendment Quartering of Soldiers and the Eighth Amendment Excessive Fines Prohibition

The Supreme Court has not decided the question of the incorporation of the Third Amendment quartering of soldiers against the states or the question of the incorporation of the Eighth Amendment excessive fines prohibition against the states.<sup>262</sup> Thus, these rights do not fall under the definition of nonincorporated rights set forth in this Article.<sup>263</sup> Unlike the Fifth Amendment grand jury right, the Sixth Amendment unanimity requirement, and the Seventh Amendment civil jury trial right, these rights rarely surface. Also, as discussed below, there is some suggestion in *McDonald* and other jurisprudence of the Court that these provisions would be incorporated if the issues came to the Court. As a result of this possibility, as well as the focus on the nonincorporated rights in this Article, these provisions will be examined only summarily.

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258 U.S. CONST. amend. VII.

259 See AMAR, *supra* note 2, at 90.

260 U.S. CONST. amends. VII, X. Professor Amar argued that because state courts would hear actions against federal officials for violations of Fourth Amendment rights, those courts should decide whether a jury trial right existed. See AMAR, *supra* note 2, at 91.

261 AMAR, *supra* note 2, at 89.

262 See *supra* text accompanying note 160.

263 See *supra* Part I.

The incorporation of the Third Amendment quartering of soldiers has never been decided, because almost never are soldiers quartered in private houses.<sup>264</sup> In *McDonald*, the Court made some suggestion that it would decide the question affirmatively. It cited a Second Circuit decision as a case of first impression that held that the Fourteenth Amendment's Due Process Clause incorporated the Third Amendment against the states.<sup>265</sup> The Second Circuit had agreed with the district court, which had held that the Third Amendment was incorporated "[u]nder any of the theories extant, perhaps most likely as a right 'so rooted in the tradition and conscience of our people as to be ranked as fundamental' and thus 'implicit in the concept of ordered liberty.'"<sup>266</sup>

The Supreme Court also has not decided the question of the incorporation of the Eighth Amendment excessive fines prohibition against the states. Because the Court has decided that the prohibition against excessive fines applies only to the direct imposition of excessive fines by governments, the excessive fines prohibition appears to have had limited application up until this point.<sup>267</sup>

Previously, in *Cooper Industries v. Leatherman Tool Group, Inc.*,<sup>268</sup> the Court, citing *Furman v. Georgia*,<sup>269</sup> actually stated that the Fourteenth Amendment's Due Process Clause incorporated the prohibition against excessive fines in the Eighth Amendment.<sup>270</sup> *Furman* concerned, however, only the Eighth Amendment cruel and unusual punishment and the excessive bail prohibitions, not the Eighth Amendment's excessive fines prohibition.<sup>271</sup>

*Schilb v. Kuebel*<sup>272</sup> and *Robinson v. California*<sup>273</sup> are the decisions cited in support of the incorporation of the cruel and unusual and excessive bail provisions of the Eighth Amendment.<sup>274</sup> Those decisions, however, do not explain the incorporation of those provi-

264 See AMAR, *supra* note 2, at 220.

265 See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3034–35 n.13 (2010) (citing *Engblom v. Carey*, 677 F.2d 957, 961 (2d Cir. 1982)).

266 *Engblom v. Carey*, 522 F. Supp. 57, 65 (S.D.N.Y. 1981) (citations omitted).

267 See *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

268 532 U.S. 424 (2001).

269 408 U.S. 238 (1972).

270 *Cooper Indus.*, 532 U.S. at 433–34.

271 See *Furman*, 408 U.S. at 239–41.

272 404 U.S. 357 (1971).

273 370 U.S. 660 (1962).

274 See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3034–35 n.12 (2010).

sions,<sup>275</sup> and thus, those decisions do not help guide whether their sister provision of the excessive fines prohibition in the Eighth Amendment was incorporated. If it is accepted that the excessive bail<sup>276</sup> and the cruel and unusual prohibitions were incorporated properly against the states, however, there is no textual reason that the excessive fines prohibition also should not have been incorporated against the states. Indeed the English Bill of Rights included the same language regarding excessive bail, excessive fines, and cruel and unusual punishment that the Framers adopted in the Eighth Amendment, and at the time of the Constitution's framing, similar provisions appeared in some of the states' constitutions.<sup>277</sup>

### B. *Stare Decisis*

In *McDonald*, the plurality recognized the possible relevance of stare decisis to incorporation questions for the Fifth Amendment grand jury right and the Seventh Amendment civil jury trial right and not for the Sixth Amendment criminal jury unanimity requirement which, as discussed above, was decided in a peculiar manner with a different rule for the federal courts and the state courts.<sup>278</sup> With

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275 Indeed *Schilb* simply stated that “the Eighth Amendment’s proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment.” *Schilb*, 404 U.S. at 365.

276 *McDonald* cited *Schilb* for the proposition that the excessive bail provision applies to the states through the Due Process Clause in the Fourteenth Amendment. See *McDonald*, 130 S. Ct. at 3034–35 n.12. One scholar has disputed the notion that the excessive bail provision was incorporated prior to *McDonald*. He said that *McDonald* itself incorporated the Eighth Amendment excessive bail prohibition. See Samuel Wiseman, *McDonald’s Other Right*, 97 VA. L. REV. IN BRIEF 23 (2011). Professor Wiseman wonders how the Court “so cavalier[ly]” incorporated this right in a footnote. *Id.* at 26 (citing *McDonald*, 130 S. Ct. at 3034–35 n.12–13). Wiseman argues that under the principles in *McDonald*, incorporation of the Eighth Amendment was necessary; there could not be excessive bail where there is a presumption of innocence. At the same time, Wiseman appreciates the limited importance of the incorporation of the Eighth Amendment. The interpretation of the Eighth Amendment protects against “only the most extreme legislatures and courts, and the most careless.” *Id.* at 29.

277 See *Furman v. Georgia*, 408 U.S. 238, 243 (1972). The prohibition against excessive fines has a long history. As stated above, it was expressly mentioned in the 1689 English Bill of Rights. Also, as one example, in 1868, Mississippi adopted a prohibition against excessive fines, along with a plethora of other rights the same as or similar to the ones in the Bill of Rights. See MISS. CONST. of 1868, art. I, § 8.

278 See *McDonald*, 130 S. Ct. at 3046 n.30 (plurality opinion); *supra* text accompanying note 169–70. Apparently, the Court believed stare decisis did not apply to the decision on the Sixth Amendment criminal jury unanimity requirement. See *McDonald*, 130 S. Ct. at 3035 n.14.



respect to the Second Amendment right to bear arms, the plurality did not perform any *stare decisis* analysis when it decided that the Due Process Clause incorporated the Second Amendment against the states. They stated that previous decisions in *Cruikshank*, *Presser*, and *Miller* did not preclude incorporation because those decisions “all preceded the era in which the Court began the process of ‘selective incorporation’ under the Due Process Clause, and [the Court had] never previously addressed the question whether the right to keep and bear arms applies to the States under that theory.”<sup>279</sup> This language suggests that the plurality did not conduct a *stare decisis* analysis because the nonincorporation of the Second Amendment was decided prior to selective incorporation.<sup>280</sup> However, if this is the case, the plurality should not have suggested that a *stare decisis* analysis was necessary to analyze the questions of the incorporation of the Fifth Amendment grand jury right and the Seventh Amendment civil jury trial right because the nonincorporation of both of those provisions also occurred prior to selective incorporation.<sup>281</sup>

The question becomes whether some basis for *stare decisis* existed for nonincorporation of the Fifth Amendment grand jury right and the Seventh Amendment civil jury trial right that did not exist for the nonincorporation of the Second Amendment right to bear arms. Unlike the right to bear arms that was decided in the past under the Privileges or Immunities Clause and not under the Due Process Clause, in *Hurtado*, nonincorporation of the grand jury right was decided under the Due Process Clause.<sup>282</sup> It is unclear under what part of the Constitution nonincorporation of the Seventh Amendment was decided because *Bombolis* mentioned neither the Fourteenth Amendment nor due process.<sup>283</sup> Arguably, *stare decisis* analyses are appropriate for the grand jury right and the civil jury trial right, because nonincorporation occurred or might have occurred already under the Due Process Clause.

With that said, a *stare decisis* analysis also may have been appropriate for the right to bear arms. At least two justices believed that the

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279 *McDonald*, 130 S. Ct. at 3031 (plurality opinion)

280 *See McDonald*, 130 S. Ct. at 3031.

281 *See id.* at 3035 n.14.

282 *See supra* Part I.B.2. Subsequently, the Court also decided that the Privileges or Immunities Clause did not incorporate the grand jury right. *See Maxwell v. Dow*, 176 U.S. 581, 584–602 (1900).

283 *See supra* Part I.B.4. At the time of *Bombolis*, the Court already had stated that the Privileges or Immunities Clause did not incorporate the Seventh Amendment. *See Maxwell*, 176 U.S. 581, 594–95 (1900); *Walker v. Sauvinet*, 92 U.S. 90 (1875); *Edwards v. Elliott*, 88 U.S. at 532 (1874).

Privileges or Immunities Clause was the proper basis for incorporation of the Second Amendment. First, although Justice Thomas concurred with the plurality on the judgment, he expressly stated that the Privileges or Immunities Clause was the proper manner to incorporate the Second Amendment.<sup>284</sup> Second, in his concurrence, Justice Scalia wrote about his “acquiesc[ence]” regarding “substantive due process” including the incorporation of the Second Amendment under the Due Process Clause.<sup>285</sup> This statement suggests that Justice Scalia believed that the Privileges or Immunities Clause was the correct manner to incorporate the Second Amendment. He used originalism to argue that the right to bear arms was fundamental, but he did not actually believe that under originalism the Due Process Clause permitted incorporation of such substantive rights.<sup>286</sup> Many scholars have written that if rights in the Bill are to be incorporated against the states, incorporation must occur under the Privileges or Immunities Clause.<sup>287</sup> Why Justice Scalia and other justices articulated the incorporation decision under the Due Process Clause is not clear. It could have been in order not to upset the years of precedent on incorporation under the Due Process Clause.<sup>288</sup> It also could have been that the decision under the Due Process Clause avoided a stare decisis analysis, because previous Second Amendment decisions were decided under the Privileges or Immunities Clause.<sup>289</sup> Despite these possible justifications, because at least two justices, and possibly more who comprised the majority in *McDonald*, believed that the Privileges or Immunities Clause was the appropriate basis for the incorporation of the right to bear arms in *McDonald*, the nonincorporation of the right to bear arms under the Privileges or Immunities Clause arguably should have been subject to a stare decisis analysis. Justice Thomas

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284 See *McDonald*, 130 S. Ct. at 3058–88 (Thomas, J., concurring).

285 *Id.* at 3050 (Scalia, J., concurring) (discussing its long history and limited application).

286 See *id.* at 3048–50; cf. Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. OF CONTEMP. LEGAL ISSUES 409 (2009) (discussing original public meaning originalism in the context of the question of the incorporation of the Bill of Rights under the Privileges or Immunities Clause).

287 See, e.g., Brief for Academics for the Second Amendment as Amicus Curiae Supporting Petitioners, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08–1521), 2009 WL 4099518; Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071 (2000); Lash, *supra* note 89 (arguing the original meaning of the Privileges or Immunities clause leads to application of the Bill of Rights against the states).

288 See *McDonald*, 130 S. Ct. at 3030–31.

289 See *id.*

was, however, the only justice to conduct a *stare decisis* analysis for the incorporation of the Second Amendment in *McDonald*.<sup>290</sup>

Putting aside the criticism of the plurality's failure to perform a *stare decisis* analysis in *McDonald* for the Second Amendment right to bear arms, the question is whether *stare decisis* prevents the incorporation of the Fifth Amendment grand jury right and the Seventh Amendment civil jury trial right. In *McDonald*, in its brief discussion of the possibility of *stare decisis* for the Fifth Amendment grand jury trial right and the Seventh Amendment civil jury trial right, the Court stated that as a result of *Hurtado*, most states do not require grand juries, and as a result of *Bombolis*, states do not require civil juries for small claims.<sup>291</sup> To the extent that these facts are relevant to whether *stare decisis* should apply, eighteen states currently require grand juries for crimes punishable by prison for a year or longer, and although states do not require civil juries for small claims matters, forty-six states require civil juries for non-small claims matters.<sup>292</sup> The relevance of current state jury rights to *stare decisis* is questionable, however. Many cities had gun regulations, which may have been in violation of the Second Amendment after *McDonald*, and these facts did not influence the Court's decision.<sup>293</sup> The recent *Citizens United v. Federal Election Commission*<sup>294</sup> case, in which the Court decided that the First Amendment prohibited certain limitations on the political speech of corporations, was another recent example where the Court decided to overrule precedent and where legislatures' actions would need to be overruled. In the Court's discussion of *stare decisis* there, it stated "[b]eyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned."<sup>295</sup> The Court decided that

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290 See *id.* at 3084–88 (Thomas, J., concurring).

291 See *id.* at 3046 n.30 (plurality opinion).

292 See Luther, *supra* note 207. Also forty-seven states require a unanimous criminal jury verdict. See *id.*

293 See *McDonald*, 130 S. Ct. at 3047; Joan Biskupic, *High Court to Define Reach of Gun-Control Laws*, USA TODAY (Mar. 16, 2010, 12:53 PM), [http://www.usatoday.com/news/washington/judicial/2010-02-26-gun-control-laws\\_N.htm](http://www.usatoday.com/news/washington/judicial/2010-02-26-gun-control-laws_N.htm) ("It sets up another major constitutional question with ramifications for scores of mostly urban gun regulations"); cf. Brief for States of Illinois, Maryland, and New Jersey as Amici Curiae in Support of Respondents, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08–1521), 2010 WL 59029, at \*27–33 (discussing reliance of states on Court's decisions not to incorporate the Second Amendment, Seventh Amendment, and Fifth Amendment grand jury rights).

294 130 S. Ct. 876 (2010).

295 *Id.* at 912 (quoting *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009)).

*Austin v. Michigan Chamber of Commerce*,<sup>296</sup> the case being overruled, was not well reasoned.<sup>297</sup> Moreover, despite the fact that legislatures may have relied on *Austin* and prohibited expenditures, this action was not sufficient because “legislative acts [cannot] prevent us from overruling our own precedents, thereby interfering with our duty ‘to say what the law is.’”<sup>298</sup>

Additionally, *McDonald*, and prior to that, *District of Columbia v. Heller*, suggested that some regulation of a right was possible after incorporation.<sup>299</sup> Similarly here, if the Fifth Amendment grand jury right and Seventh Amendment civil jury trial right are incorporated, states may have some flexibility to lessen the impact of incorporation.<sup>300</sup>

Ultimately, the Court has recognized that stare decisis has less force for constitutional questions like the Second Amendment question in *McDonald*, the First Amendment question in *Citizens United*, and the Fifth and Seventh Amendment incorporation questions here.<sup>301</sup> Also, given that the rights were fundamental,<sup>302</sup> applying stare decisis for only the nonincorporation decisions on the grand jury and the civil jury appears unprincipled. In his dissent in *BMW v. Gore*,<sup>303</sup> Justice Scalia stated “[w]hen . . . a constitutional doctrine adopted by the Court is not only mistaken but also unsusceptible of principled application, I do not feel bound to give it stare decisis effect—indeed, I do not feel justified in doing so.”<sup>304</sup>

Moreover, as described above, significant weight should be given against the application of stare decisis where the previous decisions

296 494 U.S. 652 (1990).

297 See *Citizens United*, 130 S. Ct. at 911–12.

298 *Id.* at 913 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

299 See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 626–28 (2008).

300 The extent of this flexibility would depend on the substance of the right being intact. See Suja A. Thomas, *The Seventh Amendment, Modern Practice, and the English Common Law*, 82 WASH. U. L.Q. 687, 696 (2004) (discussing substance of the civil jury trial right).

301 See *CSX Transp. Inc. v. McBride*, 131 S. Ct. 2630 (2011) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989)) (regarding stare decisis in statutory interpretation); *Patterson*, 491 at 172–73 (“Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.”).

302 See *supra* Part II.A.

303 517 U.S. 559 (1996).

304 *Id.* at 599 (Scalia, J., dissenting) (discussing the inappropriate application of the Fourteenth Amendment Due Process Clause to strike down state jury damage award in civil case).

were not well reasoned. In *Citizens United*, the fact that the previous decision in *Austin* was not well reasoned had significant weight in the decision not to apply stare decisis.<sup>305</sup> Further, Justice Thomas's analysis in *McDonald* not to apply stare decisis to the former privileges or immunities cases also was based on the improper reasoning of those decisions.<sup>306</sup> Thus, here, as described above, where the nonincorporation decisions were not well reasoned, indeed based on the wrong theory of incorporation, according to the Court now, there should be significant weight against stare decisis as well.

Here, also, special consideration against stare decisis should be given where the power of the jury is involved. The jury shares with and competes with the judiciary for power.<sup>307</sup> However, the jury can possess power only when power is given to it.<sup>308</sup> Thus the jury cannot do anything to regain power when power is taken away from it.<sup>309</sup> Accordingly, stare decisis should not preclude changing the nonincorporation decisions.<sup>310</sup>

### C. Assessing a Theory of Nonincorporation for the Court

After *McDonald*, there were several possible theories of nonincorporation of rights in the Bill of Rights under the Court's jurisprudence.<sup>311</sup> Under one, the nonincorporated rights of the grand jury, the criminal jury unanimity requirement, and the civil jury were not fundamental.<sup>312</sup> As shown above, however, the nonincorporated rights were fundamental rights.<sup>313</sup> Under a second theory of nonincorporation, the nonincorporated rights would not be incorporated because of stare decisis.<sup>314</sup> As described above, though, there is no reason stare decisis should apply to these rights in particular.<sup>315</sup> A third possible theory of nonincorporation after *McDonald* is a

305 See *supra* text accompanying notes 296–98.

306 See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3084–88 (2010) (Thomas, J., concurring).

307 See Thomas, *supra* note 188.

308 See *id.*

309 See *id.*

310 Professor Kurt Lash has balanced originalism, popular sovereignty, and stare decisis, and he has concluded that “erroneous judicial entrenchment of a constitutional right” and “[e]rroneous failures to intervene to rectify a distortion in the political process” preclude stare decisis. Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1460, 1466 (2007).

311 See *supra* Part I.C.2.

312 See *supra* Part I.C.2.

313 See *supra* Part II.A.

314 See *supra* Part I.C.2.

315 See *supra* Part II.B.

jury theory of nonincorporation because all of the nonincorporated rights are jury rights.<sup>316</sup> However, under the Court's jurisprudence, there is no justifiable reason to preclude jury rights specifically from incorporation.<sup>317</sup> The final theory of nonincorporation is none or in other words, no nonincorporation.<sup>318</sup> No nonincorporation indeed would be consistent with the Court's jurisprudence.

#### CONCLUSION

The Supreme Court has changed course from the nonincorporation of rights in the Bill of Rights to the incorporation of some of these same rights. After the recent decision of the Supreme Court in *McDonald v. Chicago*, very few rights, which the Supreme Court previously decided were not incorporated, remain not incorporated. Only the previously nonincorporated rights of the Fifth Amendment grand jury, the Sixth Amendment criminal jury unanimity requirement, and the Seventh Amendment civil jury trial have not been incorporated. A few possible theories of nonincorporation exist. However, as this Article has described, none of these theories is defensible under the Court's jurisprudence. Accordingly, it is an appropriate time for the Court to incorporate these remaining rights, and in doing so, the Court's jurisprudence on incorporation itself will be more justifiable.

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316 *See supra* Part I.C.2.

317 *See supra* Part I.C.2.

318 *See supra* Part I.C.2.