Sixth Amendment — Right to Jury Trial — Nonunanimous Juries — Ramos v. Louisiana

Stare decisis is not "an inexorable command."[1] But the question of when and whether to overrule precedent frequently vexes the Justices. Last Term, in *Ramos v. Louisiana*,[2] the Court overruled *Apodaca v. Oregon*[3] and determined that the right to a unanimous jury conviction is incorporated against the states.[4] The immediate ramifications of *Ramos* are limited: Louisiana voted to eliminate nonunanimous jury convictions for felony cases after 2019, leaving Oregon as the only state to retain them.[5] Instead, *Ramos*'s lasting influence may be to further problematize the much-maligned *Marks*[6] rule. The *Marks* rule establishes that when the Court fails to generate a majority opinion in a case, "the holding may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[7] In *Ramos*, the discussion of the *Marks* rule served to deepen an unresolved circuit split on when the rule properly applies. Instead of issuing yet more conflicting dicta that will confuse lower courts, the Court should have simply resolved the case on the merits, ignoring *Marks* altogether.

On Thanksgiving morning in 2014, a New Orleans official found Trinece Fedison's dead body inside a trash can.[8] Fedison had been stabbed and had "her throat . . . slit."[9] The official immediately called 911.[10] The police's investigation eventually led them to Evangelisto Ramos, the defendant.[11] Police collected a DNA sample from Ramos and established that it matched DNA found on the trash can and on the victim's body.[12] After interviewing Ramos and finding critical inconsistences in his answers,[13] prosecutors charged him with second-degree murder.[14]

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

[2] 140 S. Ct. 1390.

[3] 406 U.S. 404 (1972).

[4] *See Ramos*, 140 S. Ct. at 1397, 1405.

[5] German Lopez, *Louisiana Votes to Eliminate Jim Crow Jury Law with Amendment 2*, VOX (Nov. 6, 2018, 10:41 PM), https://www.vox.com/policy-and-politics/2018/11/6/18052540/election-results-louisiana-amendment-2-unanimous-jim-crow-jury-law [https://perma.cc/TR5R-7NHJ].

[6] Marks v. United States, 430 U.S. 188 (1977).

[7] *Id.* at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)).

[8] State v. Ramos, 231 So.3d 44, 46–47 (La. Ct. App. 2017).

[9] *Id*. at 49.

[10] *Id.* at 46.

[11] *See id.* at 48–49.

[12] *Id.* at 51.

[13] *Id.*

[14] *Id.* at 46.

After the trial, ten jurors voted to convict Ramos, while two jurors voted to acquit.[15] Under Louisiana law, the 10–2 vote was sufficient to convict.[16] Ramos was sentenced to life imprisonment without parole.[17] He appealed various issues to a state appellate court, which found that the evidence was sufficient to convict him,[18] that prosecutors had not made improper statements at trial,[19] that his conviction was not based on racial profiling,[20] and that the Louisiana constitutional provision and statutory scheme that permitted nonunanimous jury convictions were constitutional.[21] Consequently, the appellate court affirmed his conviction.[22] Ramos petitioned for certiorari, asking the Supreme Court to review the constitutionality of nonunanimous felony convictions.[23]

The Supreme Court reversed.[24] Writing for a majority in some sections and a plurality in others,[25] Justice Gorsuch ruled that the Sixth Amendment requires conviction by a unanimous jury and that this right is incorporated against the states.[26] The Sixth Amendment promises a trial "by an impartial jury" but contains no further textual detail.[27] To discern its requirements, Justice Gorsuch looked to English common law history,[28] state practices in the Founding era,[29] and opinions and treatises written soon after the Founding.[30] All sources confirmed that a jury must reach a unanimous verdict to convict a criminal defendant of a felony.[31] And while the version of the Sixth Amendment that was ultimately ratified did not explicitly guarantee unanimity, Justice

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[15] *Id.*

[16] The Louisiana Constitution states that criminal cases for offenses committed before 2019 that are punishable by imprisonment "shall be tried before a jury of twelve . . . [only] ten of whom must concur to render a verdict." LA. CONST. art. I, § 17(A).

[17] *Ramos*, 231 So.3d at 46.

[18] *Id.* at 51.

[19] *Id.* at 52.

[20] *Id.* at 53.

[21] *Id.* at 54.

[22] *Id.*

[23] *See* Petition for Writ of Certiorari at i, *Ramos*, 140 S. Ct. 1390 (2020) (No. 18-5924).

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

[25] Justice Gorsuch was joined by Justices Ginsburg, Breyer, Sotomayor, and Kavanaugh in Parts I, II-A, III, and IV-B-1. Accordingly, these sections commanded a majority of the court. In Parts II-B, IV-B-2, and V, Justice Gorsuch wrote for a four-Justice plurality that excluded Justice Kavanaugh. In Part IV-A, he wrote for a three-Justice plurality that excluded Justices Sotomayor and Kavanaugh.

[26] *Ramos*, 140 S. Ct. at 1397.

[27] *Id.* at 1395 (quoting U.S. CONST. amend. VI).

[28] One early English opinion stated that a "'verdict, taken from eleven, was no verdict' at all." *Id.* (quoting JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 89 n.4 (1898)).

[29] The early American states either explicitly required unanimity or interpreted generalized language about juries to require it. *See id.* at 1396.

[30] *See id.* at 1396–97.

[31] *Id.* at 1395.

Gorsuch argued that the omission could just as likely demonstrate lawmakers' attempt to avoid surplusage as it did the desire to abandon a well-established common law right.[32] He recounted a long line of cases spanning a period of over a century in which the Court had described unanimity as a core part of the Sixth Amendment guarantee.[33]

Turning to incorporation, Justice Gorsuch maintained that there was "no question" that the "Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally."[34] The Court had repeatedly described the right to a jury trial as "fundamental to the American scheme of justice" and incorporated that right against the states under the Fourteenth Amendment.[35] Moreover, previous opinions had held that "incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do against the federal government."[36] As a result, unanimity was clearly necessary for state criminal convictions.[37]

On stare decisis concerns, Justice Gorsuch ruled that this unanimity requirement was clear even at the time that *Apodaca* was decided.[38] *Apodaca*, which *Ramos* overturned,[39] held that nonunanimous jury verdicts were constitutionally permissible.[40] The case produced no majority opinion but rather reached its result via a 4–1–4 split.[41] The *Apodaca* plurality reasoned that the Sixth Amendment did not require unanimity in either federal or state trials.[42] In dissent, Justice Stewart argued that the Sixth Amendment required unanimity and that the Fourteenth Amendment fully incorporated that mandate against the states.[43]

In a separate concurrence, Justice Powell, writing only for himself, acknowledged that the Sixth Amendment required unanimity but, under his theory of "dual-track" incorporation, found that a single right can have different implications when asserted against the states than it does when asserted against the federal government.[44] As a result, he

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[32] *Id.* at 1400.

[33] *Id.* at 1397. Justice Gorsuch cited, inter alia, *United States v. Gaudin*, 515 U.S. 506, 510 (1995), *Patton v. United States*, 281 U.S. 276, 288 (1930), and *Thompson v. Utah*, 170 U.S. 343, 351 (1898).

[34] *Ramos*, 140 S. Ct. at 1397.

[35] *Id.* (quoting Duncan v. Louisiana, 391 U.S. 145, 149 (1968)).

[36] *Id.*

[37] *Id.*

[38] *See id.* at 1405.

[39] *Id.*

[40] Apodaca v. Oregon, 406 U.S. 404, 406 (1972) (plurality opinion).

[41] *Id.* at 405.

[42] *See id.* at 406.

[43] *See id.* at 414–15 (Stewart, J., dissenting).

[44] *See* Johnson v. Louisiana, 406 U.S. 356, 375 (1972) (Powell, J., concurring). Justice Powell's *Apodaca* concurrence was formally written as a concurrence in *Johnson v. Louisiana*, 406 U.S. 356, a companion case.

voted to uphold the conviction in that case.[45] But, as Justice Gorsuch noted, the other eight Justices conclusively rejected dual-track incorporation.[46] Therefore, even when *Apodaca* was decided, the Sixth Amendment required unanimity in all settings.[47]

Joined only by Justices Ginsburg and Breyer, Justice Gorsuch even contended that *Apodaca* had no precedential force whatsoever.[48] Typically, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[49] This interpretive edict is commonly known as the *Marks* rule after the case that developed it.[50] The challenge with *Apodaca*, Justice Gorsuch noted, is that it is unclear which opinion was the narrowest.[51] Justice Powell's opinion was flatly inconsistent with that of the *Apodaca* plurality.[52] To view his concurrence as a precedent would require the Court to accept that "a single Justice writing only for himself has the authority to bind th[e] Court to propositions it has already rejected."[53] Complicating matters further, Louisiana appeared to disclaim reliance on Justice Powell's concurrence as a governing precedent.[54] So, while *Apodaca* resolved the issue for that particular conviction, it provided no binding legal principle that the Court was bound to apply in later cases.

Again joined by a majority of the Court, Justice Gorsuch reasoned in the alternative that even if *Apodaca* established a precedent, overturning it was warranted under the circumstances.[55] Here, the Court relied heavily on the idea that stare decisis has the least force in the constitutional context.[56] To justify overturning *Apodaca*, Justice Gorsuch held that the opinion was poorly reasoned and inconsistent with related and subsequent decisions. The *Apodaca* plurality spent "almost no time grappling with" the long history of explicit statements that the Sixth Amendment requires unanimity.[57] And it did almost

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[45] *See id.* at 366.

[46] *Ramos*, 140 S. Ct. at 1398; *see also Johnson*, 406 U.S. at 375 (Powell, J., concurring).

[47] *See Ramos*, 140 S. Ct. at 1405.

[48] *See id.* at 1402 (plurality opinion).

[49] Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).

[50] *See, e.g.*, Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. 1943, 1944 (2019).

[51] *Ramos*, 140 S. Ct. at 1403 (plurality opinion).

[52] *Id.* at 1402.

[53] *Id.*

[54] Brief of Respondent at 47, *Ramos*, 140 S. Ct. 1390 (2020) (No. 18-5924) ("[N]either party is asking the Court to accord Justice Powell's solo opinion in *Apodaca* precedential force.").

[55] *See Ramos*, 140 S. Ct. at 1405.

[56] *See id.*

[57] *Id.*

nothing to reckon with the racist origins of the state's laws.[58] Moreover, *Apodaca* sat uneasily with prior case law, relying on a dual-track theory of incorporation that was foreclosed even when it was decided and that the Court had since squarely rejected.[59]

Finally, writing for a plurality of four Justices, Justice Gorsuch maintained that reliance interests, the last consideration in overturning precedent, did not favor upholding *Apodaca*.[60] Only Louisiana and Oregon allowed nonunanimous convictions,[61] and Louisiana voted to abolish the practice for cases after 2019.[62] Therefore, only a fraction of pending cases in two states might need to be retried.[63] Justice Gorsuch acknowledged that defendants convicted by nonunanimous jury verdicts who had exhausted their appeals might try to collaterally attack their sentences.[64] Those defendants could argue that this decision represented a "watershed" rule of criminal procedure that should apply to them retroactively.[65] Justice Gorsuch stopped short of making an explicit judgment on retroactivity, however, stating only that the Court would benefit from adversarial presentation of the question in a future case.[66]

Justice Sotomayor concurred in all of Justice Gorsuch's opinion except the part contending that *Apodaca* lacked precedential force and denying that the *Marks* rule applied to the instant case.[67] Her opinion stressed three points. First, Justice Sotomayor maintained that *Apodaca* had precedential force.[68] However, she argued that overruling *Apodaca* was not only warranted but also compelled because the decision was "uniquely irreconcilable" with two strands of constitutional precedent.[69] *Apodaca* conflicted with both the long history of affirmations that the Sixth Amendment requires unanimity and the Court's steadfast rejection of Justice Powell's "dual-track" incorporation theory.[70]

Second, the interests at stake favored overruling precedent far more convincingly in this case than on other occasions in which the Court had

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[58] *Id.* Louisiana's laws were explicitly intended to "establish the supremacy of the white race." *See* OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA 374 (New Orleans, H.J. Hearsey 1898). *See generally* Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1611–20 (2018) (describing racist motives for adopting nonunanimous juries).

[59] *Ramos,* 140 S. Ct. at 1405 (citing Timbs v. Indiana, 139 S. Ct. 682, 687 (2019)).

[60] *Id.* at 1407–08 (plurality opinion).

[61] *Id.* at 1406.

[62] *See* Lopez, *supra* note 5.

[63] *Ramos,* 140 S. Ct. at 1406 (plurality opinion).

[64] *Id.* at 1407.

[65] *Id.* (quoting Teague v. Lane, 489 U.S. 288, 311 (1989)).

[66] *Id.*

[67] *See id.* at 1408–09 (Sotomayor, J., concurring); *see also id.* at 1402–04 (plurality opinion).

[68] *Id.* at 1408 (Sotomayor, J., concurring).

[69] *Id.* at 1409.

[70] *Id.*; *see also* Timbs v. Indiana, 139 S. Ct. 682, 687 (2019).

overruled precedent.[71] Here, in the context of criminal procedure rules that implicated fundamental constitutional protections, "*stare decisis* is at its nadir."[72] The Court should not hesitate to overturn precedent when "the State's power to imprison" hung in the balance.[73] Third, the racially biased origins of the Louisiana and Oregon laws should weigh heavily.[74] While many laws are entangled with some history of racial bias, both the racial animus that originally motivated the law's passage and the legislature's failure to grapple with its legacy should diminish the status of precedents that uphold it.[75]

Justice Kavanaugh also concurred, expounding at length on his theory of stare decisis.[76] Noting that every current member of the Court had previously voted to overrule precedent, Justice Kavanaugh reasoned that while adherence to precedent is typically desirable, special circumstances may warrant overruling it.[77] His opinion laid out three criteria that he believed to be critical in evaluating whether to overturn precedent: (1) whether the prior decision was egregiously wrong, (2) whether it caused significant negative jurisprudential or real-world consequences, and (3) whether it would unduly upset reliance interests.[78] Here, Justice Kavanaugh found that while *Apodaca* had precedential force, it was egregiously wrong; that it had resulted in the conviction of defendants who would otherwise walk free; and that the reliance interests in favor of upholding the decision were minimal.[79] He made clear that the racist origins of the nonunanimity rule were "significant to [his] analysis" and strongly supported overruling *Apodaca*.[80] As part of his analysis of Louisiana's reliance interests, Justice Kavanaugh also addressed the retroactivity question: whether *Ramos* should apply to defendants whose convictions had already been finalized. In Justice Kavanaugh's view, *Ramos* should not apply retroactively because it was

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[71] *Ramos,* 140 S. Ct. at 1409 (Sotomayor, J., concurring). Justice Sotomayor pointedly noted that the Court had not hesitated to overrule precedents with massive regulatory consequences in recent years, citing *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), as an example.

[72] *Ramos*, 140 S. Ct. at 1409 (Sotomayor, J., concurring) (quoting Alleyne v. United States, 570 U.S. 99, 116 n.5 (2013)).

[73] *Id.*

[74] *Id.* at 1410.

[75] *Id.*

[76] *See id.* at 1410; 1414–19 (Kavanaugh, J., concurring in part). Justice Kavanaugh joined Justice Gorsuch's opinion except for Parts II-B, IV-A, IV-B-2, and V. Part II-B argued that *Apodaca* itself recognized that the Sixth Amendment required unanimity. *Id.* at 1398–99 (plurality opinion). Part IV-A denied that the *Marks* rule applied to *Apodaca* and that *Apodaca* had precedential force. *See id.* at 1402–04. Part IV-B-2 reasoned that reliance interests did not favor upholding *Apodaca*. *Id.* at 1407–08. Part V brought together the arguments from the rest of the opinion. *See id.* at 1408.

[77] *Id.* at 1411 (Kavanaugh, J., concurring in part).

[78] *Id.* at 1414–15.

[79] *Id.* at 1416–19.

[80] *Id.* at 1417.

neither a substantive rule of criminal law nor a "watershed" rule of criminal procedure.[81]

Concurring in the judgment alone, Justice Thomas argued that the unanimous jury requirement bound the states not through the Due Process Clause but through the Privileges or Immunities Clause.[82] In so doing, he adhered to his longstanding skepticism of substantive due process, which he has described as a "legal fiction,"[83] and to his unique view of stare decisis. Because the Court's precedents indicating that the Sixth Amendment required unanimity were not "demonstrably erroneous,"[84] they were entitled to deference under principles of stare decisis. And the Privileges or Immunities Clause included that requirement.[85]

Justice Alito dissented.[86] He expressed outrage at the "*ad hominem* rhetoric" of the majority, noting that Louisiana had readopted the nonunanimity rule in the 1970s for ostensibly race-neutral reasons.[87] He ridiculed the suggestion that A*podaca* did not constitute a valid precedent, arguing that, even if the Court was not bound by its reasoning, it was surely bound by its result.[88] He predicted that the Court's decision would destabilize the *Marks* rule and the precedential value of plurality opinions.[89] Further, the decision would raise the specter of overruling *Hurtado v. California*,[90] another longstanding criminal procedure precedent that rejected incorporation.[91] Finally, he warned that the rule advanced by the majority may well need to apply retroactively.[92] If *Apodaca* never constituted a precedent, then the majority's holding did not actually constitute a "new rule."[93] By that logic, *Ramos* could benefit defendants whose convictions had been finalized.[94]

The *Marks* rule intends to generate coherent precedent even when the Court could not create consensus. When the opinions that make up the majority are consistent, the rule applies without issue. But when the plurality and the concurrences conflict, circuit courts have split over whether the *Marks* rule even applies. The Court has routinely declined

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[81] *Id.* at 1419–20 (quoting Teague v. Lane, 489 U.S. 288, 311 (1989)).
[82] *Id.* at 1421 (Thomas, J., concurring in the judgment).
[83] *Id.* at 1424 (quoting Timbs v. Indiana, 139 S. Ct. 682, 692 (2019) (Thomas, J., concurring in the judgment)).
[84] *Id.* at 1423.
[85] *See id.* at 1423–24.
[86] *Id.* at 1425 (Alito, J., dissenting). Chief Justice Roberts joined the entirety of Justice Alito's dissent, and Justice Kagan joined all but Part III-D.
[87] *Id.*
[88] *See id.* at 1427–29.
[89] *See id.* at 1430–31.
[90] 110 U.S. 516 (1884).
[91] *Ramos*, 140 S. Ct. at 1435 (Alito, J., dissenting).
[92] *Id.* at 1437–38.
[93] *Id.* at 1437.
[94] *Id.*

to answer this question, choosing to sidestep *Marks*'s applicability and instead resolve the underlying issue in cases that raise the problem. Yet *Ramos* makes matters even worse, generating more conflicting dicta on the scope of the *Marks* rule that will confound lower courts and muddle subsequent cases in which the Court will need to interpret *Ramos*. Ideally, the Court would have clarified the scope of the *Marks* rule once and for all; failing that, it should have avoided creating more confusion.

Lower courts have split on the appropriate scope of the *Marks* rule's application.[95] Theoretically, the justification for *Marks* is that the general encompasses the specific: a Justice who agreed with a case's result on broader grounds would also agree with the result on narrower grounds. But this theory becomes strained when the plurality and concurring opinions that form the majority directly conflict, as they did in *Apodaca*. Recognizing this difficulty, the Ninth and D.C. Circuits have held that *Marks* undoubtedly applies when the plurality and the concurrence are "logical subset[s]" of each other, where the reasoning of one wholly subsumes the reasoning of the other and where the two opinions are logically consistent.[96] If the plurality and the concurrence conflict, only then does confusion about *Marks*'s application arise. Where the plurality and concurring opinions are not logical subsets, the Ninth and D.C. Circuits have generally adopted the opinion that they determine is the most persuasive.[97] By contrast, most other circuits have found that even in the event of a conflict, where the court can identify a narrowest opinion, the opinion should have binding force.[98]

The Supreme Court has had opportunities to resolve the question of when the *Marks* rule properly applies but has repeatedly declined to do so. In *Grutter v. Bollinger*,[99] the Court explicitly recognized that lower courts had struggled to decide whether "[i]n the wake of [the Court's] fractured decision in *Bakke*, . . . Justice Powell's diversity rationale," expounded in a solo concurrence, "is nonetheless binding precedent under *Marks*."[100] Despite that acknowledgment, the majority avoided the *Marks* question and resolved the dispute on the merits.[101] Similarly, in

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[95] *See* Hughes v. United States, 138 S. Ct. 1765, 1771–72 (2018) (explaining the circuit split).

[96] *See* United States v. Davis, 825 F.3d 1014, 1022 (9th Cir. 2016) (en banc); United States v. Epps, 707 F.3d 337, 350 (D.C. Cir. 2013) (quoting King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc)).

[97] *Hughes*, 138 S. Ct at 1771; *see Davis*, 825 F.3d at 1026; *Epps*, 707 F.3d at 351.

[98] *See, e.g.*, United States v. Benitez, 822 F.3d 807, 811 (5th Cir. 2016); United States v. Graham, 704 F.3d 1275, 1277–78 (10th Cir. 2013); United States v. Browne, 698 F.3d 1042, 1045 (8th Cir. 2012); United States v. Dixon, 687 F.3d 356, 359 (7th Cir. 2012); United States v. Thompson, 682 F.3d 285, 289–90 (3d Cir. 2012); United States v. Rivera-Martinez, 665 F.3d 344, 348 (1st Cir. 2011); United States v. Smith, 658 F.3d 608, 611 (6th Cir. 2011); United States v. Brown, 653 F.3d 337, 340 n.1 (4th Cir. 2011).

[99] 539 U.S. 306 (2003).

[100] *Id.* at 325.

[101] *Id.*

Hughes v. United States,[102] faced with uncertainty about the force of Justice Sotomayor's solo concurrence in *Freeman v. United States*,[103] the Court resolved the statutory question rather than addressing *Marks*.[104]

Ramos did not follow this approach. Oddly, despite discussing *Marks*, the Justices did not generate a clear majority supporting any particular interpretation of the rule. Three main approaches dominated their discussion. First, the three-Justice plurality comprising Justices Gorsuch, Ginsburg, and Breyer seemed to implicitly adopt the logical-subset rule. Their view appeared to be that when the narrowest opinion conflicts with precedent or with the other opinions required to form a majority, the *Marks* rule simply cannot apply.[105]

Second, the three-Justice dissent featuring Justice Alito, Chief Justice Roberts, and Justice Kagan affirmatively embraced the position that the *Marks* rule applies even when there is a logical conflict between the opinions required to form the majority. Justice Alito wrote that *Marks* applied to such a case so as to bind future courts in the result but not in the reasoning.[106]

Third, concurring Justices Sotomayor and Kavanaugh neither affirmatively endorsed nor rejected the logical-subset interpretation of *Marks*. On one hand, they both declined to join Part IV-A of Justice Gorsuch's opinion, which discussed how the *Marks* rule did not apply when interpreting *Apodaca*.[107] On the other hand, both Justices criticized *Apodaca* in ways that made it difficult to determine if, like the three-Justice dissent, they found Justice Powell's solo concurrence to be the controlling opinion. Justice Sotomayor disparaged *Apodaca* for conflicting both with precedents indicating that the Sixth Amendment demands unanimity and with precedents rejecting dual-track incorporation.[108] Similarly, Justice Kavanaugh argued that *Apodaca* conflicted with "two lines of decisions — the Sixth Amendment jury cases and the Fourteenth Amendment incorporation cases."[109]

However, these criticisms of Sixth Amendment unanimity and dual-track incorporation do not both apply to any single opinion in *Apodaca*. Justice Powell's solo concurrence may be criticized for endorsing

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[102] 138 S. Ct. 1765 (2018).

[103] 564 U.S. 522 (2011).

[104] *See Hughes*, 138 S. Ct. at 1772.

[105] *See Ramos*, 140 S. Ct. at 1403 (plurality opinion) ("*Marks* has nothing to do with this case. . . . Justice Powell's opinion cannot bind us — precisely because he relied on a dual-track rule of incorporation that an unbroken line of majority opinions before and after *Apodaca* has rejected.").

[106] *See id.* at 1429 (Alito, J., dissenting) ("*Apodaca* expressly agreed on [a] result and that result is a precedent that had to be followed.").

[107] *See supra* note 25.

[108] *Ramos*, 140 S. Ct. at 1409 (Sotomayor, J., concurring).

[109] *Id.* at 1416 (Kavanaugh, J., concurring in part).

dual-track incorporation, but it explicitly acknowledged that the Sixth Amendment required unanimity.[110] To the contrary, the plurality opinion was flawed in rejecting the Sixth Amendment's unanimity requirement, but it correctly rejected dual-track incorporation.[111] As a result, it is difficult to discern which *Apodaca* opinion these Justices consider to be controlling. Correspondingly, it is not clear how they understand the *Marks* rule to apply.

Where does that leave the *Marks* rule? Three Justices appeared to endorse a narrow logical-subset application, three Justices explicitly affirmed a broad application, and three were equivocal.[112] *Marks* now stands in an uncertain position. Quite apart from the direct criticism of the rule's logic,[113] there is now further uncertainty about its application. Whenever lower courts, bound by stare decisis, interpret a plurality opinion, they are compelled to continue revisiting the question of *Marks*'s applicability. To make matters worse, they have little guidance on how to do so from a Supreme Court that vacillates between ignoring *Marks* to resolve the underlying question and generating confusing and conflicting dicta on how it applies.[114]

Plurality decisions are becoming more common.[115] Increased uncertainty over how to properly interpret them risks reigniting uncertainty over important, politically charged precedents that have generated reliance.[116] Indeed, one of the underlying ironies of *Ramos* is that it is a "badly fractured"[117] set of decisions articulating no consensus theory about how to interpret badly fractured opinions. Ideally, the Court would have conclusively resolved the split on *Marks*'s applicability and provided much needed guidance to lower courts. But where it cannot clarify, it should at least seek not to confuse. The Court should have resolved *Ramos* purely on its merits and left the murky *Marks* dispute for another case.

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[110] *See* Johnson v. Louisiana, 406 U.S. 356, 369–70 (1972) (Powell, J., concurring).

[111] *See* Apodaca v. Oregon, 406 U.S. 404, 406–13 (1972) (plurality opinion).

[112] Justice Thomas declined to discuss the *Marks* issue altogether because he resolved the case based on the Privileges or Immunities Clause rather than the Due Process Clause at issue in *Apodaca*. *See Ramos*, 140 S. Ct. at 1424 (Thomas, J., concurring in the judgment).

[113] *See, e.g.*, Justin F. Marceau, *Lifting the Haze of* Baze*: Lethal Injection, the Eighth Amendment, and Plurality Opinions*, 41 ARIZ. ST. L.J. 159, 222 (2009); Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 864–65 (2017).

[114] *See* Williams, *supra* note 113, at 821 ("Unlike lower courts, the Supreme Court . . . [can determine] how much weight to give its own prior precedents. This means that . . . [the] majority can simply dispense with the *Marks* analysis and endorse its preferred rationale directly.").

[115] *Id.* at 799.

[116] Consider just two examples: In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the plurality opinion advanced the diversity rationale for affirmative action that now dominates the Court's jurisprudence. And in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the plurality opinion shaped the rationale that permits photo ID requirements for voting.

[117] *Ramos*, 140 S. Ct. at 1425 (Alito, J., dissenting).