

# The *Heller*-ization of Originalism: *Ramos v. Louisiana* and the Problem of Frozen Context

*Nicholas M. Mosvick & Mitchell A. Mosvick\**

In *Ramos v. Louisiana*,<sup>1</sup> the Supreme Court rendered a series of opinions in response to Evangelisto Ramos’s challenge to a Louisiana law that allowed nonunanimous jury verdicts for criminal convictions. The Court’s only clear overlapping holding interpreted the Sixth Amendment to prohibit less-than-unanimous verdicts as violating the right to a “trial, by an impartial jury.”<sup>2</sup> This holding therefore constrains states’ police powers over their own court systems via the Court’s “selective incorporation” doctrine under the Fourteenth Amendment. Such nonunanimous procedural rules are unconstitutional, said the Court, because the prevailing public meaning in 1791 of “trial by jury” always and everywhere meant only a *unanimous* jury verdict, based on “400 years” of English common-law practice, colonial agreement at ratification, some Founding-era state constitutions, and court practices at the time. *Ramos* ruled that a federal verdict supported by less than a unanimous vote in 1791 was not a jury verdict at all, and, under selective incorporation, it is not a constitutional verdict in a state court in 2020 either.

Justice Neil Gorsuch’s opinion, joined in various parts by different groups of justices, is explicit that the methodology justifying this interpretation of the Sixth Amendment lies in seeking its “original

\* Nicholas Mosvick is a senior fellow at the National Constitution Center; Mitchell Mosvick is an attorney and solicitor of England and Wales, practicing law in London. Both authors write solely in their personal capacities and not on behalf of any institution or organization.

<sup>1</sup> 140 S. Ct. 1390 (2020).

<sup>2</sup> For shorthand, we refer to the right to a “trial by jury” throughout.

public meaning.”<sup>3</sup> And Justice Gorsuch’s particular approach to pursuing that original public meaning bears a striking resemblance to Justice Antonin Scalia’s majority opinion in *District of Columbia v. Heller*.<sup>4</sup> The striking resemblance of method as applied to the use of historical evidence for interpreting ambiguous text, however, does *Ramos* no favors. The history of criminal jury trials at English common law, the diversity of thinking on judge and juror conduct in the colonies over time, and American jurists’ views of unanimity paint a far more complicated picture than Justice Gorsuch’s opinion would indicate.

*Heller* had significant, albeit disputed, linguistic and grammatical arguments to make regarding the Second Amendment’s text. The Court’s holding in *Ramos*, by contrast, barely addresses the text of the Sixth Amendment. And its arguments from the historical context lend little support for the view that the Sixth Amendment’s bare language guaranteeing a “trial by jury” required unanimity for all time.

*Ramos*’s outcome is perhaps uncontroversial for the American public of 2020.<sup>5</sup> It is a puzzling decision, however, both as a matter of its grounding in American and English history and as a practical exposition of originalist constitutional theory in the *Heller* mode. The issue is not whether many prominent statesmen and jurists, as well as a number of state constitutions, viewed unanimous verdicts as important practices in 1791. Rather, the issue is whether the Sixth Amendment text clearly supports *constitutionalizing* the unanimity requirement. The lead opinion in *Ramos* is unconvincing in this respect, and barely addresses either the text or the contrary views of

<sup>3</sup> The opinions contain overlapping and underlapping concurrences and dissents. For example, on whether *Apodaca v. Oregon* was due precedential status under the doctrine of *stare decisis* (three justices say “no,” five say “yes,” arguably one, Justice Elena Kagan, absents herself entirely by not joining any parts of the opinions on the matter); the racist origins of some of the late 19th-century attempts to allow nonunanimity (all nine justices agree this was a historical factor in Louisiana’s initial enactment in 1898, while none indicate that its modern advocacy is itself racist); the retroactivity of *Ramos* under *Teague v. Lane*; and finally, how incorporation under the Fourteenth Amendment should work (most justices accepting “selective incorporation” under the Due Process Clause of the Fourteenth Amendment, with Justice Clarence Thomas continuing his advocacy for incorporation under the Privileges or Immunities Clause).

<sup>4</sup> 554 U.S. 570 (2008).

<sup>5</sup> Of the *amici curiae* filing in *Ramos*, 10 briefs were filed on behalf of the petitioner, Ramos, and two were filed on behalf of the respondent, Louisiana.

prominent jurists and state legislatures on the subject throughout the period before, during, and after ratification of the amendment.

Textually it is not apparent why unanimity should be required. The phrase “unanimous verdict” does not appear in the Sixth Amendment, even though so many other specific rights and restrictions do appear there. We might ask why constitutionalization of unanimity would be more obviously critical to the definition of a “trial by jury” to the 1791 public than other time-honored practices of courts, judges, and juries that came with unanimity.<sup>6</sup> We should not assume that, because James Madison and many jurists in 1791 thought unanimity in criminal jury verdicts was critical, therefore “the public” would understand the plain meaning of a right to “trial by jury” could only mean a right to “trial by a jury, [whose verdict must be unanimous].”<sup>7</sup>

Historical evidence that the Sixth Amendment’s text constitutionalized unanimity is wanting. Despite enthusiasm amongst jurists and legislators in 1791 and today for the policy values of mandating unanimity, such a view has never itself been unanimous among commentators—not in the 18th, 19th, 20th, or 21st centuries. There were movements to abandon unanimity throughout the 19th century,<sup>8</sup> the century that begat the Fourteenth Amendment and its Due Process Clause, which is the basis for constitutionalizing the

<sup>6</sup> Justice Gorsuch remarks that “[r]elatedly, the dissent suggests that, before doing anything here, we should survey all changes in jury practices since 1791.” Ramos, 140 S. Ct. at 1409, n.47. He says it would make for “an interesting study—but not one that could alter the plain meaning of the Constitution or oblivate its undisputed unanimity requirement.” *Id.*

<sup>7</sup> The right to trial by jury is the only right addressed in both the Constitution (art. III, § 2) and the Bill of Rights. Yet in neither instance did the Framers address the unanimity issue; nor did the Continental Congress or First Congress require unanimity in the extensive criminal procedure sections of either the Northwest Ordinance of 1787 or Judiciary Act of 1789.

<sup>8</sup> The late 19th century in particular saw interest in abandoning unanimity from a variety of sources across the United States, including state legislators, newspaper editorials, and an ex-president. See, e.g., Mineral Point Tribune, “The Jury System,” Feb. 9, 1876, at 5 (Wisconsin bill introduced to state legislature allowing criminal jury verdicts by 11 of 12 jurors); San Francisco Morning Call, “Unanimous Juries,” Dec. 20, 1893, at 6 (calling unanimity a “flagrantly illogical rule”); Sunday Herald (Utah), “The Jury System: Some Sensible Criticism on It by Ex-President Hayes,” Nov. 17, 1889, at 1. (President Rutherford Hayes making similar criticisms).

juror unanimity requirement in *Ramos*.<sup>9</sup> And apart from the policy divergence amongst scholars, very few commentators anytime near the Founding stated that the Sixth Amendment constitutionalized the matter.

The Court would do better to maintain judicial humility in the face of the plain fact that the text of the amendment simply does not address unanimity.<sup>10</sup> The result in *Ramos* prevents legislators from enacting and experimenting with democratic changes to jury verdict procedures. Befitting its English common-law heritage and recognizing the broader context of trial practice at the Founding, the Court should pause before freezing such a practice against all future legislative change. This would follow then—Judge Benjamin Cardozo’s warning that “[t]he half truths of one generation tend at times to perpetuate themselves in the law as the whole truths of another, when constant repetition brings it about that qualifications, taken once for granted, are disregarded or forgotten.”<sup>11</sup>

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In Part I, we first discuss the similarities in interpretive method between Justice Gorsuch’s lead opinion in *Ramos*<sup>12</sup> and those made by Justice Scalia’s majority opinion in *District of Columbia v. Heller*,

<sup>9</sup> Due to long-standing criticisms of forced unanimity by jurists, including its opportunity for corruption of juries, many jurisdictions descended from the English common law long ago abandoned requiring unanimity for all criminal verdicts, save for Australia and Canada (and now, post-*Ramos*, the United States). See Ethan J. Leib, A Comparison of Criminal Jury Decision Rules in Democratic Countries, 5 Ohio St. J. Crim. L. 629, 636–38 (2008). This includes England and Wales, the source of the common law, where after two hours’ deliberation, a jury may report a majoritarian verdict of 10 to 2 or 11 to 1 if they cannot agree unanimously. See Juries Act 1974, s. 17.

<sup>10</sup> Beyond the scope of this article is the glaring fact that the original conditions for juries in 1791 included explicit limitation of jurors to property-holding, religious, white men. No advocate would contend that such clear original conditions define the original public meaning of the word “jury” in the Sixth Amendment so as to bind the legislatures of 2020. See Brief for States of Utah et al. as Amici Curiae Supporting Respondent at 18–19, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (No. 18-5924) (meaning of jury is not so “capricious” as to limit the jury pool to male freeholders); see also Albert W. Alschuler & Andrew G. Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 877 (1994).

<sup>11</sup> *Allegheny Coll. v. Nat’l Chautauqua Bank*, 159 N.E. 173, 174 (N.Y. 1927) (Cardozo, C.J.).

<sup>12</sup> We shall refer to Justice Gorsuch’s opinion as a whole as the “lead opinion,” as it sometimes commands a majority, plurality, or bare minority on different points.

the latter widely seen as the archetype for modern original-public-meaning judicial analysis. In Part II, we discuss whether, using the “Heller method” of originalism employed in *Ramos*, the historical context underlying the text of the Sixth Amendment was so abundantly clear that jury unanimity was the only way the 1791 public could read the words “trial by jury.” We criticize each of the principal historical sources Justice Gorsuch relies on to support his claim that the context of the Sixth Amendment’s textual guarantee requires unanimity as a *constitutional* matter. The fuller historical picture is richer, more complicated, and less supportive of Justice Gorsuch’s absolutist statements concerning the “historical need for unanimity” as a piece of the “hard-won liberty” protected by the Sixth Amendment.<sup>13</sup>

In doing so, we necessarily ask whether the method outlined by the Court in *Ramos* appears to be guided by the original conditions of jury trials in criminal matters common in Georgian England and the colonies. The result is to retrospectively freeze a key aspect that the Court liked—unanimity—rather than the numerous other key elements of past jury trials they would rather not constitutionalize. We conclude by asking whether, in its approach to interpreting broad guarantees of rights (to “bear arms” or to a “trial by jury”), the *Ramos* Court (and perhaps *Heller* as well) ends up opening the door to the subjective scorekeeping of which historical conditions of 1791 “stick” from a constitutional perspective and which may be discarded as relics of a bygone era. This may lead unwittingly into the “original expectation” or “original application” interpretive trap that has been a particular target for critics of “new originalism.”<sup>14</sup>

### Part I: The *Heller*-Method in *Ramos*

It is difficult to read *Ramos* without noting the absolute assuredness of Justice Gorsuch’s lead opinion. Justice Gorsuch writes that “the text and structure of the Constitution clearly suggest that the

<sup>13</sup> *Ramos*, 140 S. Ct. at 1403, 1408.

<sup>14</sup> See, e.g., Saul Cornell, Originalism on Trial: The Use and Abuse of History in *District of Columbia v. Heller*, 69 Ohio St. L.J. 625, 626 (referring to the methodology in *Heller* as nonneutral, “admittedly clever” but merely a “parlor trick” demonstrating that “plain meaning originalism has no coherent, historical methodology”); Patrick Charles, The Second Amendment in Historiographical Crisis, Why the Supreme Court Must Reevaluate the Embarrassing “Standard Model” Moving Forward, 39 Fordham Urb. L.J. 1727 (2012).

term ‘trial by an impartial jury’ carried with it *some* meaning about the content and requirements of a jury trial” and that “[w]herever we might look to determine what the term ‘trial by an impartial jury’ meant at the time of the Sixth Amendment’s adoption[,] the answer is unmistakable and one of those requirements was unanimity.”<sup>15</sup> The lead opinion notably does not discuss that the historic process leading to juror unanimity had many more inputs than merely protection of English rights, or that the American incorporation of some, but not all, aspects of the English common law was uncertain, contested, and geographically divergent.

Gorsuch discusses the text of the Sixth Amendment itself only to rebut Louisiana’s textual arguments. First, Louisiana argued that the Sixth Amendment’s language does not require unanimity nor address whether there is a voting requirement for jury verdicts at all. Second, Louisiana points out that the original draft by James Madison of the Sixth Amendment’s text included the requirement that criminal trials “shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction.”<sup>16</sup> For reasons unexplained, “unanimity” was struck.<sup>17</sup> Gorsuch doesn’t address Louisiana’s first piece of evidence directly, save for his reply that the Sixth Amendment “surely meant *something*.”<sup>18</sup> Second, he criticizes Louisiana’s argument for “invit[ing] us to distinguish between the historic features of common-law jury trials that (we think) serve ‘important enough’ functions to migrate silently into the Sixth Amendment and those that don’t.”<sup>19</sup> Ironically, this is an elegant

<sup>15</sup> Ramos, 140 S. Ct. at 1394. Gorsuch adds that “[i]f the term ‘trial by an impartial jury’ carried any meaning at all, it surely included a requirement as long and widely accepted as unanimity.” *Id.* at 1395–96.

<sup>16</sup> 1 Annals of Cong. 435 (1789).

<sup>17</sup> Gorsuch cites Madison’s letter to Edmund Pendleton to show what little evidence there is on why the Senate acted as it did. What he does not say is that Madison’s letter, like the responses of Virginia senators Richard Henry Lee and William Grayson, show disappointment and outrage over the textual changes made by the Senate when it moved to strike language thought to be critical to criminal jury trials. Therefore, it would be perplexing to cite this evidence as showing that the altered text retained the meaning of the original proposed text. See James Madison to Edmund Pendleton, Sept. 14, 1789, in 5 *The Writings of James Madison, 1787–1790* (Gaillard Hunt ed., 1904).

<sup>18</sup> Ramos, 140 S. Ct. at 1395.

<sup>19</sup> *Id.* at 1401–02.

description of the faults of Gorsuch's approach, as he does choose which features of 1791 jury trials are "important enough" to maintain without indicating which others he would retain, nor providing a basis for making such a distinction.

Justice Gorsuch reads the Sixth Amendment text to include those features of a criminal jury trial that he believes were part and parcel of the English common-law practice that the American colonists inherited and meant to preserve in the Sixth Amendment.<sup>20</sup> His historical sources, in their entirety, are these:

- The requirement for unanimity is part of old English common law, emerging in 14th-century England, first cited in passing in the 1367 *Anonymous Case*, and preserved over "400 years" of English practice preceding the Founding;<sup>21</sup>
- Six state constitutions prior to the ratification of the Sixth Amendment included an explicit unanimity requirement, 10 of the original 13 preserved a right to jury trial explicitly, and "state courts appeared to regard unanimity as an essential feature of the jury trial";<sup>22</sup>
- Blackstone's 1769 treatise on the English common law states that only a unanimous jury of 12 could convict in serious crimes;<sup>23</sup>
- Six "[i]nfluential, postadoption treatises" confirm the understanding that, "unanimity in the verdict of the jury is indispensable";<sup>24</sup> and
- Several Supreme Court decisions state, mostly in *dicta*, that unanimity is necessary for jury verdicts.<sup>25</sup>

Those sources are strong evidence that "the public" would read the words "trial by jury" in 1791 as requiring a unanimous jury verdict.

This use of history to support a contextual claim about the implicit meaning of a textual right's scope is very closely in line with

<sup>20</sup> *Id.* at 1395–97.

<sup>21</sup> *Id.* at 1395 & nn.11, 15.

<sup>22</sup> *Id.* at 1395 & nn.11–12, 14.

<sup>23</sup> *Id.* at 1395 & n.10.

<sup>24</sup> *Id.* at 1396 & nn.16–18.

<sup>25</sup> *Id.* at 1396–97 & nn.19–22.

Justice Scalia's approach in *Heller*.<sup>26</sup> *Heller* has been declared by some to be "the triumph of Originalism"<sup>27</sup> and the "finest expression" of original-public-meaning jurisprudence by the Court.<sup>28</sup> At a minimum, any deficiencies in Justice Gorsuch's historical approach in *Ramos* warrant close study if they are the hallmarks of an original-public-meaning jurisprudence rooted in *Heller*.

In *Heller*, Justice Scalia begins with a lengthy textual and grammatical discussion, consulting English and American dictionaries as to the meaning of key terms. Beyond the text, Justice Scalia relies upon the following sources for contextualizing the historical meaning of a right "to keep and bear arms":

- The history of the colonists in their struggle against the English and the need for normal people to have arms in this context, stating that "[b]y the time of the founding, the right to have arms had become fundamental for English subjects."<sup>29</sup> Scalia writes that "[i]n the tumultuous decades of the 1760's and 1770's, the Crown began to disarm the inhabitants of the most rebellious areas. That provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms."<sup>30</sup>
- Blackstone's commentaries on the rights to "keep arms" and "bear arms," as "Blackstone, whose works, we have said,

<sup>26</sup> *Heller* has come under criticism for its historical approach. See, e.g., Robert W. Gordon, *Taming the Past: Essays on Law in History and History in Law* 370 (2017) ("The Court's actual opinion in *Heller* ignored all the evidence an originalist could be expected to find most useful, that of what the Founders' contemporaries thought the Amendment was designed to do, while drawing heavily upon evidence from much earlier English practice and much later nineteenth-century American practice. . . ."); Reva Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 *Harv. L. Rev.* 191 (2008).

<sup>27</sup> Linda Greenhouse, "3 Defining Opinions," *N.Y. Times*, July 13, 2008, at WK4.

<sup>28</sup> Randy E. Barnett, "The Constitution Means What It Says," *Wall St. J.*, June 27, 2008, at A13. See also David G. Savage, "Supreme Court Finds History Is a Matter of Opinions," *L.A. Times*, July 13, 2008, <http://articles.latimes.com/2008/jul/13/nation/na-scotus13> ("This year the Supreme Court relied more than ever on history and the original meaning of the Constitution in deciding its major cases."); Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 *Harv. L. Rev.* 246 (2008) (declaring it "the most explicitly and self-consciously originalist opinion in the history of the Supreme Court").

<sup>29</sup> *Heller*, 554 U.S. at 593.

<sup>30</sup> *Id.* at 594.

‘constituted the preeminent authority on English law for the founding generation,’ cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen.”<sup>31</sup>

- The 1689 Declaration of Right, which enshrined that Protestants would never be disarmed by the Crown, as being pivotal to colonial notions about the importance of being able to keep and bear arms.<sup>32</sup>
- The fact that 9 of the original 13 state constitutions written before or immediately after 1791 included more specific rights to “bear arms in defense of themselves and the state” or “bear arms in defense of himself and the state.”<sup>33</sup>
- Concurrent and postadoption treatises discussing the issue.<sup>34</sup>

The *Heller* approach to ascertain the “original public meaning” of the relevant amendment is parallel to the approach Justice Gorsuch follows in *Ramos*. Both look to the historical context of English rights, especially as crystallized in late 17th-century cases or Crown actions, Blackstone’s views, the existence and number of state constitutional provisions with more specificity than the federal amendment at issue, and supportive statements in postadoption treatises.

## Part II: The Unanimity Rule in English and American History

Each of Gorsuch’s rationales for constitutionalizing unanimity listed in Part I is problematic, and the history is far less simple than portrayed. Although addressing all historical evidence in support

<sup>31</sup> *Id.* at 665–66 (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)). As discussed *infra*, Blackstone was not nearly as widely influential or discussed in public or legal teachings until postadoption, beyond his obvious popularity with Madison and a few key Founders. Blackstone’s writings on the English common law could therefore hardly have influenced the original “public meaning” of constitutional text to the “public” itself, though certainly it influenced the Framers’ intent or, at a stretch, the original lawyers’ meaning.

<sup>32</sup> *Id.* at 593–94.

<sup>33</sup> *Id.* at 584–85.

<sup>34</sup> *Heller*, 554 U.S. at 605–10. It is worth noting that *Heller*’s treatise citations were of more recent vintage than the sources cited by Justice Gorsuch in *Ramos*.

of unanimity is beyond this article's scope,<sup>35</sup> even if one accepts his strongest evidence, he essentially ignores the text itself, presses into permanence common-law conclusions meant to be in flux over time, and does not deal with the varied history of colonial jury practices. Following this logic would entail considering whether other important courtroom conditions and practices of 1791 should be included as part of the "jury trial" guarantee, as well as engaging with jurists' criticisms of unanimity throughout American history.

#### A. *The Cutting-Room Floor and Textual Counterarguments in Ramos*

Before even considering the historical context in 1791, it is critical to address the text itself. It is here that we see an immediate divergence between Justice Gorsuch's approach in *Ramos* and Justice Scalia's in *Heller*.

Both Justice Gorsuch in *Ramos* and Justice Scalia in *Heller* contend with textual objections to their contextualized original-public-meaning approach, albeit in contexts that point in different directions. In *Heller*, Scalia deals with dissenting Justice John Paul Stevens's objection that James Madison's original draft of the Second Amendment included *limiting* language on the Second Amendment right in question. In *Ramos*, Gorsuch deals with Louisiana's assertion that Madison's original draft of the Sixth Amendment included more *expansive* language requiring unanimity for criminal trials, but those words did not make it into the final text. In *Heller*, Justice Scalia wrote "[i]t is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process."<sup>36</sup> Similarly, Justice Gorsuch in *Ramos* supplements this view with a cursory note that, "rather than dwelling on text left on the cutting room floor, we are much better served by interpreting the language Congress retained and the States ratified," and that anyway, "this snippet of drafting history could just as easily support

<sup>35</sup> For example, the history of the minority of state constitutional provisions guaranteeing unanimity at the Founding, paired with the rest who simply echoed or prefaced the federal guarantee of a right to "trial by jury" generally, is both beyond the scope of this article, but also perhaps the weakest among Justice Gorsuch's assembled rationales.

<sup>36</sup> 554 U.S. at 590.

the opposite inference.”<sup>37</sup> Reva Siegel has pointed out in a similar context that this approach of waiving off such material “discounts evidence drawn from the amendment’s drafting history, appearing to favor evidence remote in time over evidence proximate in time to the amendment’s ratification.”<sup>38</sup>

While it would be precarious to conclude that the omission of Madison’s draft language simply means unanimity was rejected, Justice Gorsuch’s implication that it actually supports the implied inclusion of unanimity in the right to “trial by jury” also goes too far. Where a legislature (including the First Congress) has shown it knows how to specifically address a topic in other parts of its legislation and chooses not to do so, at minimum it raises a presumption that they did not mean to include that specific language (even by implication).<sup>39</sup> Surely, the reverse of Gorsuch’s concern that the right to an “impartial trial by jury” must “mean something” ought to raise the question of what the Sixth Amendment text already protects: (1) the rights belonging to “the accused”; (2) the right to a “trial” which must be (3) “speedy” and (4) “public”; (5) the trial being by a “jury”; (6) the jury being “impartial”; (7) the jury being “of the state and district wherein the crime shall have been [allegedly] committed,” which (8) shall not be retroactively decided; (9) to be “informed of

<sup>37</sup> 140 S. Ct. at 1400. It is true that “deleted” provisions in drafts, “snippet[s] of drafting history,” and “text left on the cutting room floor” may often cut both ways in terms of interpretive history. In *Heller*, Scalia found that the most natural interpretation of Madison’s deleted text regarding “conscientious objectors” is that those opposed to carrying weapons for potential violent confrontation would not be “‘compelled to render military service,’ in which such carrying would be required.” *Heller*, 554 U.S. at 590. Gorsuch, similarly, criticizes this use of drafting history: “Maybe the Senate deleted the language about unanimity, the right of challenge, and ‘other accustomed prerequisites’ because all this was so plainly included in the promise of a ‘trial by an impartial jury’ that Senators considered the language surplusage.” *Ramos*, 140 S. Ct. at 1400. See also *supra* note 18.

<sup>38</sup> Siegel, *supra* note 26, at 197. See also Caleb Nelson, A Critical Guide to *Erie Railroad Co. v. Tompkins*, 54 *Wm. & Mary L. Rev.* 921, 954–55 (2005) (assuming significant changes by draftsmen to the text is stylistic and not substantive is unwarranted because “after all, legal draftsmen often change the language of a bill in order to alter its meaning, not to keep its meaning the same”).

<sup>39</sup> See, e.g., *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 220 (White, J., concurring) (“While we are correctly reluctant to draw inferences from the failure of Congress to act, it would, in this case, appear improper for us to give a reading to the Act that Congress considered and rejected.”).

the nature and cause of the accusation"; (10) to confront witnesses against the accused; (11) to have "compulsory process" [right to issue subpoenas] to obtain witnesses; and (12) "to have the assistance of counsel" in defense. But for all this specificity, "unanimity" in verdicts is not included here, nor in Article III, nor in early legislation. From the drafting history it is clear that the Framers knew the precise language for how they might include it if they had wanted to, but it was left on the cutting-room floor, in Gorsuch's words.

### *B. The English Common-Law Connection*

It is striking that both Justice Gorsuch in *Ramos* and Justice Scalia in *Heller* rely heavily on English common-law sources and history for their interpretations of constitutional text. Scalia argues that there was a deeply felt need for the colonists to protect their freedom to keep and bear arms as *against* the English Crown, while Gorsuch contends that there was a deeply felt need for the colonists to jealously protect a centuries-long tradition as Englishmen subject to criminal trials requiring unanimous jury verdicts.<sup>40</sup> And though the context is quite different, both cases involve rights alleged to be critically important due to the depredations of the Crown at the time of the Founding.<sup>41</sup>

Yet pinning so much interpretive value on the state of the English common law in 1791 as determinative of an American constitutional provision is a flawed enterprise. As Justice Byron White wrote in *Williams v. Florida*, "relevant constitutional history casts considerable doubt on the easy assumption in our past decisions that, if a given feature existed in a jury at common law in 1791, then it was

<sup>40</sup> See Bernadette Meyler, *Toward a Common Law Originalism*, Cornell Law School Research Paper 06-022, 1-8 (2006) (the common law was "far from a unified field at the time of the Founding, nor was it so conceived" to be a place of determinacy or fixation).

<sup>41</sup> To be fair, while the constitutional literature was replete with encomiums about the right to trial by jury, and the importance of juror independence, very little of that literature implicated the importance of the unanimity of jury verdicts in such trials. Among the complaints against the Crown listed in the Declaration of Independence was "[d]epriving us in many cases, the benefits of trial by jury." Two years earlier, in 1774, the Continental Congress resolved that colonies were entitled to "the great and estimable privilege of being tried by a jury of their peers in the vicinage." Declaration and Resolves of the First Continental Congress (Oct. 14, 1774). Neither refers to unanimity.

necessarily preserved in the Constitution.”<sup>42</sup> White was critical of past Court decisions which had assumed “every feature of the jury as it existed at common law—whether incidental or essential to that institution—was necessarily included in the Constitution wherever that document referred to a ‘jury.’”<sup>43</sup>

Justice Gorsuch cites *Patton v. United States* for the maxim that “the Sixth Amendment affords a right to ‘a trial by jury as understood and applied at common law, . . . includ[ing] all the essential elements as they were recognized in this country and England when the Constitution was adopted.’”<sup>44</sup> This rationale, however—that “all the essential elements” from the jury trials of the 1791 common law are constitutionalized—was agreed to by only four justices of the eight considering the case.<sup>45</sup> According to Justice Gorsuch’s own analysis in Part IV(A) of *Ramos’s* overruling of *Apodaca v. Oregon*, Justice George Sutherland’s opinion in *Patton* recognizing unanimity as an “essential element” of the Sixth Amendment is without precedential value and interesting only as *dicta*.<sup>46</sup> As noted, in *Williams v. Florida*, an actual majority of the Court held the opposite: not “every feature of the jury as it existed at common law—whether incidental or essential to that institution—was necessarily included in the Constitution wherever that document referred to a ‘jury.’”<sup>47</sup>

<sup>42</sup> 399 U.S. 78, 92 (1970).

<sup>43</sup> *Id.* Cf. *State v. Gann*, 254 Or. 549, 557 (1969) (“An accident of English history is not a firm foundation for a cornerstone of American constitutional law; nevertheless, a majority of the United States continued to search English legal history to determine the scope of the American constitutional guarantee of trial by jury.”).

<sup>44</sup> *Ramos*, 140 S. Ct. at 1397 (quoting *Patton v. United States*, 281 U.S. 276, 288 (1930)) (alterations original). Justice Scalia had previously articulated a similar view that whatever the merits of the common law’s evolutionary approach, its conclusions circa 1791 were to be frozen as background for interpreting the Bill of Rights. See *Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>45</sup> Chief Justice Charles Evans Hughes did not participate, and Justices Louis Brandeis, Oliver Wendell Holmes, and Harlan Stone all concurred only as to the result and did not join the reasoning of Justice Sutherland’s plurality opinion.

<sup>46</sup> Justice Gorsuch argues in Part IV(A) of his opinion that essentially no part of Justice Lewis Powell’s *Apodaca* opinion has precedential force. Only three members of the Court (including Gorsuch) joined that part of his opinion.

<sup>47</sup> 399 U.S. at 91.

The approach in *Ramos* and *Heller*, in contrast, risks treating the ever-changing, adaptable English common law as being closer to a mere statute, freezing its constitutional meaning in 1791. Yet the nature of English common law was and is based in incremental evolution, with judges slowly amending concepts over time to apply to a changing world. As Bernadette Meyler observes:

Although insisting that the common law stemmed from a time beyond memory, jurists like Sir Edward Coke and Sir Matthew Hale, whose work was received in America and lauded by members of the Founding era, implicitly developed the theory that the common law was open to alteration through suggesting that, in law, history could be strategically deployed rather than only factually invoked.<sup>48</sup>

As an example of where this kind of reasoning could quickly go astray, Louisiana's *Ramos* brief observed that if every common-law feature of a jury trial were required, it would go beyond unanimity. The size would be fixed at 12, the trial must be held in the "vicinage" where the crime occurred, and the jury pool would be limited to male "freeholders," among many other things.<sup>49</sup> In fact, in 18th-century England and the American colonies that imitated it, jurors were chosen or excluded based on their property-holding status, class, general intelligence, prior experience on juries, and—of course—their gender and race.<sup>50</sup>

Justice Oliver Wendell Holmes wrote that "[t]he law embodies the story of a nation's development through many centuries, it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."<sup>51</sup> Yet, for Gorsuch, the axiom of "jury unanimity" is a star fixed according to the common law in 1791, constitutionally mandated and unmoveable over centuries during which it has been questioned repeatedly.

<sup>48</sup> Meyler, *supra* note 40, at 7.

<sup>49</sup> Brief of Respondent at 13, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (No. 18-5924) (citing 4 William Blackstone, *Commentaries on the Laws of England* \*344).

<sup>50</sup> See *supra* note 10.

<sup>51</sup> Oliver Wendell Holmes, Jr., *The Common Law* 1 (1881).

C. *The English and Colonial History of Juror Unanimity*

The American colonies did not even follow the English common law consistently before 1791, however. Gorsuch states in a footnote that “[t]o be sure, a few of the Colonies had relaxed (and then restored) the unanimity requirement well before the founding . . . [using Carolina’s 1669 Constitution permitting majority verdicts as an example]. But, as Louisiana admits, by the time of the Sixth Amendment’s adoption, unanimity had again become the accepted rule.”<sup>52</sup> This omits quite a bit of colonial history involving far more experimentation with jury verdicts and adjudication generally, but more fundamentally it misses the point: Common-law jurists fluctuate in their view of doctrines over time, and freezing what appears to be a consensus practice in 1791 mistakes a dynamic history for a static legal monoculture.

Over the arc of the colonies’ pre-Revolution history, many experimented with majoritarian jury verdicts or non-jury trials altogether before moving towards a norm of enforced unanimity.<sup>53</sup> Experimentation by colonies ranged from the near-absence of juries in non-capital criminal cases to using majoritarian jury verdict systems.<sup>54</sup> In fact, in the early period, while juries were more widely used in noncapital trials juries in New England, Pennsylvania, West Jersey, and North Carolina, they were not initially used in Maryland, New Netherland, and Virginia.<sup>55</sup>

<sup>52</sup> Ramos, 140 S. Ct. at 1396 n.15.

<sup>53</sup> See Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* 186 (2004) (arguing that the American Revolution had ended the “transatlantic constitution” in 1776, but that it proved more difficult to erase transatlantic legal culture in which the colonies had “grown to maturity as part of a conversation about when the laws of England applied”); *id.* at 45. See also Paul Samuel Reinsch, *The English Common Law in the Early American Colonies*, in 1 *Select Essays in Anglo-American Legal History* 367, 415 (1907) (“Of Course, the more simple, popular, general parts of the English common law were from the first of great influence on colonial legal relations. This is, however, very far from declaring the common law of England a subsidiary system in actual force from the beginning of colonization. On the contrary, we find from the very first, originality in legal conceptions, departing widely from the most settled theories of the common law, and even a total denial of the subsidiary character of English jurisprudence.”).

<sup>54</sup> Reinsch, *supra* note 53, at 18.

<sup>55</sup> Alschuler & Deiss, *supra* note 10, at 871 n.17 (noting that criminal jury trials in America became more frequent in the 18th century than they had been in the 17th century, but, particularly early on, American colonies varied greatly in their use of criminal juries and despite formal declarations that the right to jury trial extended “to all persons in Criminal cases”).

Examples of experimentation abound. For instance, under the Duke of York's laws of 1665, proceedings of the earliest courts in the New York, New Jersey and Pennsylvania colonies were informal and the "major part of this jury could give a verdict."<sup>56</sup> Under the 1661–62 Virginia Code, the law of juries was written with "special carefulness and precision," yet it departed from the English requirement that the jurors shall come from the immediate neighborhood of the place where the act was committed.<sup>57</sup> And while Gorsuch mentions Carolina's 1669 Constitution and its nonunanimous provision, he fails to mention its profoundly influential drafter—John Locke.<sup>58</sup>

New England saw even greater experimentation. In Massachusetts, for a brief period, trial by jury was abolished and, even once restored, colonial magistrates had considerable powers over the jury.<sup>59</sup> In Connecticut, "a majority of the jury could decide the issue," and if the jury failed to agree, or in the case of equal division, the magistrate had a casting vote.<sup>60</sup> At the time, Connecticut was independent of England in legal matters and thus, like Massachusetts, could depart far from the common law in its system of popular courts and in the "absence or radical modification of the jury trial."<sup>61</sup> Separately, the New Haven colony (later merged principally into the Connecticut colony) initially did not even utilize the institution of jury trial due to its theocratic system

<sup>56</sup> Reinsch, *supra* note 53, at 38. The Duke's Law stated: "A verdict shall be so esteemed when the major part of the jury is agreed, and the minor shall be concluded by the major without allowance of any protest by any of them to the contrary; except in case of life and death where the whole jury is be unanimous in their verdict." Charter to William Penn and Laws of the Province of Pennsylvania, Passed Between the Years 1682 and 1700, Preceded by Duke of York's Laws in Force from the Year 1676 to the Year 1682, with an Appendix Containing Laws Relating to the Organization of the Provincial Courts and Historical Matter 34 (1879).

<sup>57</sup> Reinsch, *supra* note 53, at 47. This had changed by the 18th century, as by 1750, "juries held a less conspicuous position in Virginia than any other mainland province, mattering mostly in trials for life." See John M. Murrin & A.G. Roeber, Trial by Jury: The Virginia Paradox, in *The Bill of Rights: A Lively Heritage* 109–29 (John Kukla ed., 1987).

<sup>58</sup> "Every jury shall consist of twelve men; and it shall not be necessary they should all agree, but the verdict shall be according to the consent of the majority." The Fundamental Constitutions of Carolina, March 1, 1669, Avalon Project, [https://avalon.law.yale.edu/17th\\_century/nc05.asp](https://avalon.law.yale.edu/17th_century/nc05.asp).

<sup>59</sup> Reinsch, *supra* note 53, at 47.

<sup>60</sup> *Id.* at 26.

<sup>61</sup> *Id.*

of laws—although it did allow appeal to the local church elders.<sup>62</sup> In Rhode Island, a modified form of jury trial was instituted in the late 17th century and the laws of the colony were seen as “very unmethodical” and “very arbitrary and contrary to the laws” of England.<sup>63</sup> While consensus did grow over the course of the 18th century towards unanimity, it happened largely after English authorities in the 1690s moved to secure colonial compliance with the laws of England.<sup>64</sup>

*D. The Reality of 18th-Century English and Colonial Criminal Jury Trials*

Insistence on juror unanimity, on the premise that it was a guarantor of juror independence and the rights of the accused, was of relatively recent vintage at the time of the Founding. The far muddier history of how unanimity worked in practice in the centuries leading up to the Founding era is not treated at all in Justice Gorsuch’s opinion. Unanimity prior to *Bushell’s Case* in 1670 was routinely achieved by coercion, torture, the threat thereof to jurors, and not by their freely given, independent deliberation. Even after *Bushell’s Case*, the practices of English, colonial, and early state juries were still extremely coercive toward jurors, and nearly all aspects of judicial and juror procedure were vastly different than modern practices in ways that showed jurors to be far less independent and far more subject to threats and overbearing judicial control than American courts in 2020 would tolerate.

English Lord Chief Justice Alexander Cockburn described the practice of forced unanimity in stark terms:

Our ancestors insisted on unanimity as the essence of the verdict, but were unscrupulous how that unanimity was obtained. . . . It was a contest between the strong and the weak, the able-bodied, and the infirm, as to who best could bear hunger and thirst, and all the discomforts incident to the confinement [of jurors].<sup>65</sup>

<sup>62</sup> *Id.*; Judge Jon C. Blue, *The Case of the Piglet’s Paternity: Trials from the New Haven Colony, 1639–1663*, 16 (2015).

<sup>63</sup> Reinsch, *supra* note 53, at 29.

<sup>64</sup> Bilder, *supra* note 53, at 56–57 (discussing the creation of new royal charters during the period which required the submission of laws for review by the Privy Council, which allowed for “divergence” but not “repugnance” to the laws of England).

<sup>65</sup> Maximus A. Lesser, *The Historical Development of the Jury System 194–95* (1894). Cockburn was lord chief justice of the Courts of England and Wales from 1859 to 1875.

During the 14th century, when unanimity became the rule, jurors were harshly regulated. Jurors were allowed and sometimes expected to investigate the case themselves ahead of any trial they would be involved in, but, by the 1370s, it was treated as an irregularity to communicate with jurors once sworn in. If jurors were spoken to by either party or given food or drink, the verdict could be quashed in favor of a new trial.<sup>66</sup>

In his 1730 second edition of *State Trials*, a compendium of trials from King Richard II to George I, Sollom Emlyn observed that the history of forced verdicts convinced him that the rule of unanimity should be abandoned, rather than celebrated:

The law requires that the twelve men, of which a jury consists, shall all agree before they give in a verdict; if they don't, they must undergo a greater punishment than the criminal himself. They are to be confined in one room without meat, drink, fire or candle, till they are agreed. . . . To what end therefore are they to be restrained in this manner? It may indeed force them to an outward seeming agreement against the dictates of their consciences, but can never be a means of informing their judgment or convincing their understanding. . . . [S]uppose it should be thought requisite that two-thirds should be of a mind, and if so many could agree to find the prisoner guilty, he should be convicted, and if they did not, he should be acquitted. Would not this be a sufficient security for innocence? Sure it would be much better to make a provision in case of non-agreement, than by forcible methods to extort the appearance of one, for it is all one to the prisoner, whether he be convicted without the concurrence of all or by a concurrence which is sincere, but forced.<sup>67</sup>

For most of the jury's common-law history, English courts allowed a mechanism whereby a writ of attain would allow a second jury to be impaneled to review a "false" verdict given by the first jury. "False" verdicts were thought to come from corruptness or false-swearing (as by coming to the "false" conclusion while under oath,

<sup>66</sup> 3 William Blackstone, *Commentaries on the Laws of England* 375–76 (Edward Christian ed., 12th ed. 1794).

<sup>67</sup> 1 *Complete Collection of State Trials and Proceedings for High-Treason, and Other Crimes and Misdemeanours: From the Reign of King Richard II to the End of the Reign of King George I*, vi-vii (2d ed. 1730).

jurors were essentially engaging in perjury). Jurors subject to attainment would be fined, imprisoned, or both.<sup>68</sup> In 1670, this method of controlling juries by fine or imprisonment was declared illegal in *Bushell's Case*,<sup>69</sup> and the writ of attainment and punishment of the jury for a wrongful verdict became at least formally unlawful.<sup>70</sup>

Thus, unanimity prior to 1670, and for the bulk of Gorsuch's "400 years" of unbroken practice, was routinely achieved by coercion, torture, and even judicial threats to jurors and not by their freely given independent deliberation.<sup>71</sup> Although *Bushell's Case* represented a judicial attempt to prohibit some of the most egregious practices applied to juries to create unanimity, coercive practices continued thereafter—including in the early American states after ratification of the Sixth Amendment.<sup>72</sup>

In the Founding era, checks on judicial control of juries were limited. Lawyers were rarely present in court and judges played a significant role in conducting trials, though this would change rapidly in the early 19th century:

During the eighteenth century, since lawyers were rarely present, judges played a major role in conducting trials. . . . Judges examined witnesses and the accused and summed up

<sup>68</sup> 4 William Blackstone, Commentaries on the Laws of England \*338.

<sup>69</sup> The practice of attainment was judicially abolished in 1670 by *Bushell's Case*, where a juror, by writ of habeas corpus, sought his release from prison after acquitting the Quaker William Penn of unlawful assembly despite clear evidence he violated the law. (1670) 124 Eng. Rep. 1006. Formal abolishment of attainment did not occur in England until the Juries Act of 1825.

<sup>70</sup> William Searle Holdsworth, A History of English Law 388 (1903); William Forsyth, History of Trial by Jury 146–47 (1852).

<sup>71</sup> See John B. Langbein, The Criminal Trial Before the Lawyers, 45 U. Chi. L. Rev. 263, 299 n.107 (1978) (citing J.B. Thayer, Sir Matthew Hale, and Alfred Havighurst as authorities recounting cases where jurors were fined for disobeying judicial orders to bring a unanimous verdict of guilt).

<sup>72</sup> See *Renico v. Lett*, 559 U.S. 766, 780 (2010) (Stevens, J., dissenting) ("At common law, courts went to great lengths to ensure the jury reached a verdict. Fourteenth-century English judges reportedly loaded hung juries into oxcarts and carried them from town to town until a judgment 'bounced out.' . . . Well into the 19th and even the 20th century, some American judges continued to coax unresolved juries toward consensus by threatening to deprive them of heat, sleep, or sustenance or to lock them in a room for a prolonged period of time."); *People v. Sheldon*, 156 N.Y. 268 (1898) (citing numerous state court decisions overturning verdicts compelled by coercion and citing Blackstone, Coke, and Emyln).

the case at the end of the trial, often clearly stating their own views on the merits of the prosecution. Although, following *Bushell's Case* (1670), judges were no longer allowed to fine or otherwise punish juries who failed to come up with the verdict they wanted, they could still put pressure on juries, demanding, for example, why they had reached a particular conclusion, or asking them to reconsider their verdict. . . . The increasing participation of lawyers altered the role of the judges. They continued to exercise supreme authority in the courtroom, but during the nineteenth century their role gradually shifted to one of arbitrating the adversarial contest between barristers, settling any arguments over the law and summing up for the jury.<sup>73</sup>

A good portrait of the power of the trial judge to control juries in this post-*Bushell's Case* era comes from the account given by Judge Ryder. His extensive notes on his time as a criminal court judge of the Old Bailey in London in the 1750s and 1760s gives perhaps the most accurate portrait of the type of judge-jury relationship in English criminal cases with which the Founding generation would have been familiar. In numerous cases Judge Ryder recounts summing up the case for the jury and suggesting his view of the merits and what their decision should be. Although, if it were for acquittal, he sometimes seemed to permit the Crown to call a rebuttal witness—*against the Judge's stated view on the merits*—before the jury made its decision. Citing one case among many, Judge Ryder recounted how, in a case where one drinking companion accused another of highway robbery, “I told the jury I thought there was no ground to find [the accused] guilty on this single evidence [a he-said, he-said, as it were], and the jury found him Not Guilty.”<sup>74</sup> In this period, jurors barely had time to deliberate in any event, even after being tipped by the judge as to what their verdict should be. Cases in England were heard at a

<sup>73</sup> Trial Procedures, The Proceedings of the Old Bailey, 1674–1913, <https://www.oldbaileyonline.org/static/Trial-procedures.jsp>.

<sup>74</sup> John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. Chi. L. Rev. 1, 23 (1983) (quoting and citing from the aforementioned accounts of his life conducting trials in mid-18th-century England).

fantastically fast pace, with minimized procedures, best characterized as hyper-expedited trials.<sup>75</sup>

Notably, under English practice at the Founding, while the prosecution could be represented by counsel, felony defendants had only been allowed to be represented by defense counsel beginning in the 1730s.<sup>76</sup> This meant that judges often acted as chief enquirer, questioning witnesses, and thereby shaping the jury's view of the facts, with the accused left to attempt their own defense.<sup>77</sup> In England, it was not until the 1836 Prisoners' Counsel Act that defense counsel was even allowed the right to address the jury directly at all. Prior to that time, judicial discretion was required for defense counsel to examine and English courts varied greatly in granting it.<sup>78</sup> Other judicial powers beyond those mentioned by Judge Ryder existed in the American colonies and early states and compounded the evidentiary deficiencies created by the neutering of defense counsel. If a trial judge thought the jury was heading toward the "wrong" conclusion, he could provisionally terminate the case before it went to verdict, allowing the prosecution or defense to have a retrial and pick a new jury.<sup>79</sup> If the case reached deliberations, but the jury returned with the "wrong" verdict in the judge's view, the judge could send them back to deliberate further. Astonishingly, even after the jury rendered its preliminary verdict, it continued to remain open "to the judge to reject a proffered verdict, probe its basis, argue with the

<sup>75</sup> Langbein, *supra* note 71, at 277–78 (in the early 18th century, "[o]rdinary criminal trials took place with what modern observers will see as extraordinary rapidity."); see also *id.* at 274 ("in the 1730s a single session lasted several days and processed fifty to one hundred cases of felony (plus a handful of serious misdemeanors)," and two juries of 12 men, "[t]he one London jury and the one Middlesex jury tried all these cases").

<sup>76</sup> *Id.* at 282.

<sup>77</sup> See *id.* at 284–300 (judicial dominance and jury subordination continued in the 65 years after *Bushell's Case* and thus the case made no practical difference to the conduct of criminal procedure for a century).

<sup>78</sup> *Id.* at 313–14 n.80 (recounting historical development of defense counsel participation, noting that "[t]he prohibition upon defense counsel addressing the jury in summation continued to be enforced until it was abolished by statute in 1836," and citing an example of a prosecutor objecting to defense counsel's request to cross-examine a witness in 1741).

<sup>79</sup> *Id.* at 287–88.

jury, give further instruction, and require redeliberation.”<sup>80</sup> Therefore the fact that “the jury would lightly disclose the reasoning for a verdict became especially important . . . because it enabled the court to probe the basis of the proffered verdict, hence to identify the jury’s ‘mistake’ and to correct it.”<sup>81</sup>

Thus, unanimity in jury verdicts has historically often been trumpeted as an individual right against oppression, but, for much of its history, *forced unanimity* was the rule. As we have recounted, this was often forced toward the judge’s view as to the correct outcome, and serious punishments awaited jurors who wished to exercise their “independence.” Further, unanimity in 1791 and earlier was also very much a *protection of the Court’s judgment* against appeal and of the judiciary against criticism.<sup>82</sup> The illiberal nature of trial procedures, lack of effective counsel, and judicial control of juries bequeathed by the English common law and practiced in the American states were part and parcel of the system within which juror unanimity practically operated. All of this suggests that there were many other critical elements to the history and practice of unanimity and jury deliberation in the Founding era rather than a single-minded fixation on unanimity alone. This fuller story should give the Court pause about plucking the unanimity concept out of its historical context and importing it into the Sixth Amendment.

#### *E. The Postadoption Treatises and Unaddressed Critics of Unanimity*

If the history of jury practices leading up to the Founding was much more diverse than the *Ramos* decision imagines, what support remains for constitutionalizing unanimity? Justice Gorsuch’s final

<sup>80</sup> *Id.* at 291–95.

<sup>81</sup> *Id.* at 294–95.

<sup>82</sup> See Sir Matthew Hale, *The History of the Common Law* 293 (4th ed. 1792) (commenting that the unanimity requirement granted “a great weight, value and credit” to a verdict); John P. Dawson, *A History of Lay Judges* 126 (1960) (relating that unanimity was embraced by English judges so that they could “divest themselves of any duty to assemble or appraise the evidence. The fact-finding function was imposed instead on groups of laymen, whose ignorance was disguised by a group verdict and whose sources of knowledge the judges refused to examine.”); John v. Ryan, *Less than Unanimous Jury Verdicts in Criminal Trials*, 58 *J. Crim. L., Criminology & Police Sci.* 212 (1967) (recounting historical theory of the development of English juror unanimity that, “[t]o shift the pressure from themselves, the [English] judges originated the unanimity rule”) (citations omitted).

major turn is to postadoption (of the Sixth Amendment) treatises, mirroring Justice Scalia's similar mustering in *Heller*. In *Ramos*, Gorsuch omits discussion of any disagreeable postadoption views on juror unanimity. Such views, however, were expressed by prominent Anglo-American scholars and jurists, including influential members of the Founding generation and later widely known jurists.

Of the jurists Gorsuch does rely on, none stands out more than William Blackstone. Just as Justice Scalia did in *Heller*, Gorsuch takes Blackstone's views to be critical to his originalist enterprise, and he is the only jurist that Gorsuch quotes in the body of his opinion. Gorsuch invokes Blackstone for the proposition that "no person could be found guilty of a serious crime unless 'the truth of every accusation . . . should . . . be confirmed by the unanimous suffrage of twelve of his equals and neighbors'" and that a "'verdict, taken from eleven, was no verdict' at all."<sup>83</sup>

Recent scholarship has cautioned that the Court may sometimes accord exaggerated prominence to Blackstone in discerning original public meaning.<sup>84</sup> The reception of Blackstone's *Commentaries* among both the drafters of the Constitution and the ratifying public in 1791 was far more middling than the Court assumes. It is true that in the immediate postratification period Blackstone gained traction as the preeminent teacher of the English "common law" to American lawyers.<sup>85</sup> However, "[w]hile instructors may have embraced his works by 1800, he seems not to have occupied any privileged position in the minds of instructors in the decades preceding the Constitutional Convention."<sup>86</sup> There is less reason, therefore, to assume the ratifying public was relying on Blackstone's view on jury unanimity in its reading of the Sixth Amendment text. And any member of "the public" with any knowledge of the history of colonial experimentation with nonunanimity would not necessarily have found Blackstone to be obviously right in his view that a verdict rendered by a less-than-unanimous jury was "no verdict at all."

<sup>83</sup> Ramos, 140 S. Ct. at 1396 (some internal quotations omitted).

<sup>84</sup> Martin Minot, *The Irrelevance of Blackstone: Rethinking the Eighteenth-Century Importance of the Commentaries*, 104 Va. L. Rev. 1359 (2018); Davison M. Douglas, *Foreword: The Legacy of St. George Tucker*, 47 Wm. & Mary L. Rev. 1111, 1112–13 (2006).

<sup>85</sup> Minot, *supra* note 84, at 1384 (noting that the works of Sir Edmund Coke, Sir Matthew Hale, and Matthew Bacon were more commonly read by the Founders).

<sup>86</sup> *Id.* at 1383.

Nor are Blackstone's own views on the application of English common law to the colonies necessarily helpful to Gorsuch's reliance on importing the English common law. Blackstone, in his 1765 *Commentaries*, rejected the notion that the American colonies were automatically subject to the English common law:

[If] an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force. . . . But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country. Our American plantations are principally of this latter sort; being obtained in the last century, either by right of conquest and driving out the natives (with what natural justice I shall not at present enquire) or by treaties. And therefore the common law of England, as such, has no allowance or authority there[.]<sup>87</sup>

Beyond Blackstone, the jurists critical of unanimity often expressed an alternative view that majoritarian voting requirements were superior to unanimity or endorsed unanimity only with serious misgivings regarding the coercion involved in producing it. This is largely consistent with Justice Gorsuch's sources. Outside of Joseph Story's *Commentaries* and Thomas Cooley's Reconstruction-era commentaries,<sup>88</sup> the sources Gorsuch cites do not relate the criticality and importance of unanimity to *the Sixth Amendment itself*

<sup>87</sup> 1 Blackstone, *Commentaries on the Laws of England* 107 (4th ed. 1770). See also Bilder, *supra* note 53, at 39 (writing that Blackstone's *Commentaries* reveal that among English legal commentators there was uncertainty over the application of English common law to the colonies right up to the Revolution, while for colonial attorneys and crown officers, the "relationship between English law and the colonies was an evolving set of arguments, not a simple rule").

<sup>88</sup> Thomas M. Cooley, *Constitutional Limitations* 319–20 (1871) ("wherever the right of this trial [by jury] is guaranteed by the constitution without qualification or restriction, it must be understood as retained in all those cases which were triable by jury at the common law, and with all the common-law incidents to a jury trial, so far, at least, as they can be regarded as tending to the protection of the accused").

as many of the cited sources are taken out of context.<sup>89</sup> Yet even Cooley goes on to qualify his support that the Sixth Amendment guarantee of a jury trial requires unanimity; he notes that “this is a very old requirement in the English Common law, and it has been adhered to, notwithstanding very eminent men have assailed it as unwise and inexpedient,” citing critics such as John Locke, William Forsyth, Francis Lieber, and Jeremy Bentham.<sup>90</sup> All other treatises Gorsuch cites state a normative view that the rule of unanimity is how jury trials *should* be conducted, not that the Bill of Rights compels them to be as a constitutional matter.

Early American jurists who criticized unanimity included the influential Founder and Supreme Court justice James Wilson. In his *Lectures of Law* in 1792, Wilson discussed at length the illiberal history of producing unanimity by restraint and coercion. He ultimately supported the rule of unanimity as good policy on “popular sovereignty” grounds.<sup>91</sup> But Wilson was also harshly critical of the history of the rule:

Unanimity produced by restraint! Is this the principle of decision in a trial by jury? Is that trial, which has been so long considered as the palladium of freedom—Is that trial brought to its consummation by tyranny’s most direful engine—force upon opinion—upon opinion given under all the sanctions and solemnities of an oath?<sup>92</sup>

<sup>89</sup> Gorsuch cites Nathan Dane’s *Digest of American Law* as stating the Constitution required unanimity. But Dane appears to be referring to the original 17 amendments submitted by James Madison to the Senate in September 1789, which included the “unanimity” language later discarded by the Senate as discussed in Part I. 6 Nathan Dane, *Digest of American Law* 226 (1824) (“... By the 10th article of said amendments, the jury in *criminal* matters must be unanimous”). In a different volume not cited by Gorsuch, Dane does say that the federal Crimes Act of 1790 would require a unanimous jury verdict for capital or infamous crimes under the act because “trial by jury” was “fully declared in all our constitutions, and repeatedly in our laws.” 7 Nathan Dane, *Digest of American Law* 335 (1824).

<sup>90</sup> Cooley, *supra* note 88, at 320 n.1.

<sup>91</sup> That is, the state or society was always a party to criminal prosecutions and thus, under the social contract, the party injured transferred the right of punishment to the state that was represented through the medium of the selected jury. Thus, a unanimous sentiment of 12 jurors was necessary to convict a citizen. Mark David Hall & Kermit L. Hall eds., 2 *Collected Works of James Wilson* 985 (2007).

<sup>92</sup> *Id.* at 975.

Wilson recited the long history of English compulsion of jurors and remarked that, “[e]very other agreement produced by duress is invalid and unsatisfactory: what contrary principles can govern this?”<sup>93</sup> Wilson suggested that instead a verdict should be the sum of 12 different opinions reduced to an average result to form a “useful and satisfactory” verdict and that would not cause men to “counterfeit” the verdict by forming “disingenuous” unanimity.<sup>94</sup> Contemporaneous to Wilson’s lectures, English barrister and Cambridge professor Edward Christian, in his 1794 edition of Blackstone’s *Commentaries*, likewise deemed the unanimity principle “repugnant to all experience of human conduct, passion and understanding,” which “could hardly in any age have been introduced into practice by the deliberate act of a legislature.”<sup>95</sup> And in 1801, then-New York Supreme Court justice James Kent called the doctrine of compelling a jury to unanimity by hunger and fatigue “a monstrous doctrine” that was “altogether repugnant to a sense of humanity and justice.”<sup>96</sup>

Similarly, while concluding for jurisprudential reasons that criminal trials should retain a unanimity requirement, the towering 19th-century jurist William Forsyth also expressed doubts about the provenance of unanimity. In his 1852 book *History of Trial by Jury*, Forsyth recognized the same history of forced unanimity noted by both Wilson and Blackstone, writing that it was “impossible to deny there are strong reasons to be urged against the [unanimity] requirement” because in many cases the unanimous verdict was “apparent and not real . . . purchased at the sacrifice of truth.”<sup>97</sup> Significantly, he quotes at length from the English commissioners appointed in 1830 to report upon the Courts of Common Law, who said,

*It is difficult to defend the justice or wisdom of the [principle of unanimity]. It seems absurd that the rights of a party,*

<sup>93</sup> *Id.* at 974–75.

<sup>94</sup> *Id.* at 989–90.

<sup>95</sup> Blackstone (Edward Christian ed.), *supra* note 66, at 376 n.20.

<sup>96</sup> *People v. Olcott*, 2 Johns. Cas. 301, 309 (N.Y. 1801) (such a verdict could not “receive the sanction of public opinion”).

<sup>97</sup> William Forsyth, *History of Trial by Jury* 205–06 (1852) (noting that the “marvel” of juries was that they should agree at all, because the truth was that “verdicts are often the result of the surrender or compromise of individual opinion” as one or more jurymen “find themselves in a minority, and many causes concur to render them less tenacious of their opinion than we might expect”).

in questions of a doubtful and complicated nature, should depend upon his being able to satisfy twelve persons that one particular state of facts is the true one. . . . [There seems little reason] why the present principle of keeping them together till unanimity be produced by a sort of duress of imprisonment, should be retained. *And the interests of justice seem manifestly to require a change of law upon this subject.*<sup>98</sup>

Like Wilson, Forsyth concluded that unanimity should still be required in criminal cases, but only after carefully considering the history of the practice.

In both the antebellum and Reconstruction periods, widely respected 19th-century German-American jurist and Columbia constitutional law professor Francis Lieber publicly advocated a move toward a majority rule for jury verdicts. He had previously taken the position in 1853, in his treatise *On Civil Liberty and Self-Government*, noting that John Locke himself opposed the unanimity rule by writing a majority requirement into Carolina's 1669 Constitution.<sup>99</sup> Lieber proposed to the New York Constitutional Convention of 1867 that the unanimity requirement be replaced with the rule that, "each jury shall consist of twelve jurors, the agreement of two-thirds of whom shall be sufficient for a verdict, in all cases, both civil and penal, except in capital cases, when three-fourths must agree to make a verdict valid."<sup>100</sup> In the proposal, Lieber observed that nowhere but in England and the United States is unanimity required to make a verdict, despite its origins in the "strange logic of hunger, cold and darkness."<sup>101</sup> He further argued that the practice of retrying a case after a jury was hung due to a nonunanimous verdict resulted in an implicit violation of the protection against double jeopardy.<sup>102</sup> Finally, Lieber declared that juror unanimity was "merely accommodative

<sup>98</sup> *Id.* at 251–52 (emphasis added).

<sup>99</sup> Francis Lieber, *On Civil Liberty and Self-Government* 238 (1853) ("The jury trial has been mentioned here as one of the guarantees of liberty, and it might not be improper to add some remarks on the question whether the unanimous verdict ought to be retained, or whether a verdict as the result of two-thirds or a simple majority of jurors agreeing ought to be adopted. . . . It is my firm conviction, after long observation and study that the unanimity principle ought to be given up, would be of no value.").

<sup>100</sup> Francis Lieber, *The Unanimity of Juries*, 15 Am. L. Reg. 727, 730 (1867).

<sup>101</sup> *Id.* at 728–29.

<sup>102</sup> *Id.* at 731.

unanimity” and not “an intrinsically truthful one” since any refractory juror could “defeat the ends of justice by holding out.”<sup>103</sup>

Other later treatise writers, like Maximus Lesser, noted the innumerable policy reasons for eliminating unanimity, primarily that it would make corruption “less practicable.”<sup>104</sup> And John Norton Pomeroy, whose 1864 work Gorsuch cites as an influential post-adoption treatise confirming the unanimity requirement, wrote that while it was “a long and widely accepted” practice,

the force of the argument against the practice of requiring unanimity in juries is overwhelming; no other deliberative bodies, whether legislative or judicial, follow it, and strenuous endeavors have been made by the best judicial writers in England to bring this national institution in a conformity with reason but as yet all attempts at a reform have proved unavailing.<sup>105</sup>

None of these points contrary to unanimity, made by scholars from the Founding era and onward, are cited or discussed. The numerous “postadoption treatises” Gorsuch cites simply do not present strong support for the idea that the Sixth Amendment itself constitutionalizes unanimity, much less show an overwhelming consensus that unanimity was the only permissible answer to how to conduct a common-law trial.

## Conclusion

The concept of mandatory unanimity in jury verdicts has been contested throughout American history.<sup>106</sup> Underlying Justice Gorsuch’s view is the premise that we must freeze some conditions existing in

<sup>103</sup> *Id.* at 730.

<sup>104</sup> Lesser, *supra* note 65, at 194–95.

<sup>105</sup> John Norton Pomeroy, *An Introduction to Municipal Law* §135, 78 (1864). Pomeroy goes on to note the English jury has historically been “generally, almost uniformly” a “passive instrument in the hands of judges and prosecuting officers, and have blindly registered their decrees.” *Id.* at §136, 79.

<sup>106</sup> We do not discuss those post-Reconstruction advocates for nonunanimity who did so on the basis of racism. Many scholars, jurists, courts, and legislators advocated majoritarian verdict rules on jurisprudential grounds without mention of race. Indeed, whether racism animated Louisiana’s 1898 supermajority jury verdict procedure, there is no evidence that its advocacy for preserving its majoritarian verdicts in 2020 was so animated. See Ramos, 140 S. Ct. at 1454 (Alito, J., dissenting).

1791 with respect to the Anglo-American practice of criminal jury trials. This logically leads to the question whether other critical and accepted trial conditions from 1791 were meant to be likewise preserved for all time by the bare language of the Sixth Amendment. The American people of 2020 would find the routine processes of jury trials in the Founding era, which occurred alongside the unanimity mandate, deeply unsettling and surprising.<sup>107</sup> Justice Gorsuch's paeans to the ancient "English" right to a unanimous jury verdict also ring a bit less sonorously once one understands that 1791 juries were often deprived of light, warmth, food, and water, and exhorted toward reaching the "right" verdict by powerful trial judges confining them until they agreed to a unanimous verdict.

A more textual approach would consider that Madison's original draft of the Sixth Amendment included "unanimous" only to have the Senate strike it before proceeding to a vote before the Congress of 1791. The majority opinion in *Heller* saw a somewhat analogous challenge in the deletion from the Second Amendment of language regarding "standing armies," conscientious objectors, and the division between the military and civil power. But, as noted earlier, the Second Amendment's final text created potential uncertainty over whether the militia clause limited the "right to bear arms." There is no such grammatical complexity in the Sixth Amendment—it simply does not mention unanimity or verdict rules. Madison's original draft of the Sixth Amendment would clearly have made unanimity integral to the guarantee of an "impartial trial by jury." The final text does not, and we cannot say for certain why that is.

It is worth questioning whether the methodology of *Ramos*, broadly following *Heller* in interpreting the historical context of the Bill of Rights, is sensible for the Court in interpreting vague constitutional guarantees like the right to "trial by jury." There are other, more modest approaches to solving this problem consistent with original public meaning. The Court need not conclude that something which was proclaimed as critical in 1791, out of its context, simply must

<sup>107</sup> Compare *supra* Part II(C) (discussing English and early American procedure whereby a trial judge could cut off proceedings midstream, prior to verdict, allowing the prosecution or defense to have a retrial and pick a new jury) with *United States v. Jorn*, 400 U.S. 470, 487 (1971) (barring retrial of criminal case where first judge acted "abruptly" by cutting off prosecutor "in midstream" and discharged the jury without giving the parties an opportunity to object).

be found in the Constitution, notwithstanding a textual vacuum. Sometimes “original conditions” and “original public meaning” may dovetail; at other times they may not. If the public’s reading of the words “trial by jury” could *not* plausibly be read to refer to majoritarian, nonunanimous trials by juries in Carolina in the late 1600s, in Scottish trials in 1791 (allowing a majority verdict), or in a 10-2 verdict from a jury of 12, as in *Ramos*’s trial, then there should be convincing historical evidence. There is not. With the text indeterminate and the history mixed, the better *historical* answer may be that unanimity simply is not constitutionalized by the Sixth Amendment. That *Ramos* determined otherwise anchors criminal procedure to 1791 standards unmoored from context and therefore places unanimity outside the legislative power of Congress or state legislatures.<sup>108</sup>

The justices should be more cautious about not only the use of history and the import of the English common law, but the underlying historical conditions for trial procedure they are freezing in 1791. In constitutionalizing the rule of unanimity, *Ramos* risks damaging “original public meaning” as an interpretive method, making it seem reducible to a process of finding historical evidence for a common view at the time of ratification. This is problematic when the 2020 *Ramos* Court treats that common view as fundamental while the 1972 *Apodaca* Court did not, with precisely the same history to draw on and no change to the original understanding during those 48 years. Ultimately, this is problematic for an originalism that seeks original understandings and not merely original conditions.

<sup>108</sup> See Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 *Notre Dame L. Rev.* 403, 408 (1992) (noting that a major barrier to American criminal procedure reform lies in “[a] legal system of fixed rules made impervious to significant modification by Supreme Court decisions constitutionalizing or otherwise federalizing the rules of criminal procedure”); Albert W. Alschuler, *Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System*, 50 *U. Chi. L. Rev.* 931, 995–98 (1983) (remarking on the unlikelihood that incorporation of the Sixth Amendment would be used to preclude state experimentation with trial procedures including different jury and lay adjudication methods, and stating “[i]t would be strange and unfortunate if the federal Constitution were read to preclude states from seeking workable alternatives to our existing regime of criminal justice—a regime so costly”).