
ESSAY

PRECEDENT ON PRECEDENT

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In Ramos v. Louisiana, decided in the spring of 2020, the U.S. Supreme Court held that the Sixth Amendment guarantees criminal defendants charged with serious offenses the right to unanimous convictions in state jury trials. A majority of the Justices agreed on that much. But a majority could not agree on fundamental and trans-substantive underlying questions about the nature and power of precedent. The decision involves a convoluted debate about whether, when, and how past cases are binding on new ones. On these questions, the court is radically fractured, offering up a cacophony of no fewer than five distinct views on stare decisis, with no more than three Justices agreeing on any one of them. This Essay illuminates the Justices' conflicting approaches to precedent, shedding light on their covert assumptions and their implications for the future of stare decisis.

INTRODUCTION

In the recent case of *Ramos v. Louisiana*, the U.S. Supreme Court held that the “Sixth Amendment right to a jury trial—as incorporated against the States by way of the Fourteenth Amendment—requires a unanimous verdict to convict a defendant of a serious offense.”¹ A majority of the Justices agreed on that much. A majority also agreed that the racist history of the state laws allowing for nonunanimous jury verdicts was important to take into account and weighed against the constitutionality of those laws.² But a majority could

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¹ *Ramos v. Louisiana*, 140 S. Ct. 1390, 1394 (2020).

² Joined by Justices Ginsberg, Breyer, Sotomayor, and Kavanaugh, Justice Gorsuch highlighted the racist origins of both Louisiana’s and Oregon’s laws, which were designed to minimize the

not agree on underlying questions about the nature and power of precedent, and the Justices took the case as an opportunity to advance their own distinct views on the topic.³ The decision showcases a convoluted debate about whether, when, and how past cases are binding on new ones. On these trans-substantive questions, the Court is radically fractured, offering up a cacophony of five different conceptions of precedent, with no more than three Justices agreeing on any one of them.

In *Apodaca v. Oregon*, a fractured decision⁴ issued almost fifty years ago, the Court took up the same question and affirmed three defendants' convictions of serious offenses in state trials against constitutional challenges,

influence of Black and other minority representation on juries. *Id.*; see also *id.* at 1410. For a more sustained discussion of this history, see Brief *Amici Curiae* of the American Civil Liberties Union and the ACLU Foundation of Louisiana, in Support of Petitioner at 23-28, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (No. 18-5942). Justice Sotomayor emphasized the point in her concurrence, asserting that “the racially biased origins of the Louisiana and Oregon laws uniquely matter here.” *Ramos*, 140 S. Ct. at 1408, 1410 (Sotomayor, J., concurring). Justice Kavanaugh also independently called out the original racist motivations for the state laws in his concurrence in part. *Id.* at 1417-19 (Kavanaugh, J., concurring in part) (“[T]he Jim Crow origins and racially discriminatory effects (and the perception thereof) of nonunanimous juries in Louisiana and Oregon should matter and should count heavily in favor of overruling . . .”). In contrast, Justice Alito’s dissent, joined by Chief Justice Roberts and Justice Kagan, insisted that the racist history of the state laws allowing nonunanimous convictions had “nothing” to do with “the broad constitutional question before [the Court],” accusing the other Justices of “contributing to the worst current trends” with irrational and uncivil discourse. *Id.* at 1426-27. Justice Thomas, who concurred in the judgment, was silent on the issue. Even if the discussion of the racist history of the laws in the other opinions is ultimately dicta, the suggestion that this discussion is irrational or uncivil is troubling, even alarming. It seems appropriate, to say the least, to inform readers, who may otherwise be ignorant of the legal history, of the racial animus that originally motivated the laws at issue and the racist purposes that they did and may still serve. Although I set aside this point of disagreement between the dissent and the other Justices for the purposes of this essay, it warrants its own sustained attention, and several other commentaries focus on the issue. See, e.g., Leah Litman, *The Supreme Court Is Split on How to Talk About Race*, SLATE (Apr. 22, 2020, 6:53 PM), <https://slate.com/news-and-politics/2020/04/supreme-court-racism-ramos-v-louisiana.html> [<https://perma.cc/FJ6E-446A>]; Emily Coward, *Ramos v. Louisiana and the Jim Crow Origins of Nonunanimous Juries*, N.C. CRIM. L. (Apr. 29, 2020, 12:26 PM), <https://nccriminallaw.sog.unc.edu/ramos-v-louisiana-and-the-jim-crow-origins-of-nonunanimous-juries> [<https://perma.cc/FZ4E-J4YX>]; Ian Millhiser, *Justice Alito’s Jurisprudence of White Racial Innocence*, VOX (Aug. 13, 2020, 9:27 AM), <https://www.vox.com/2020/4/23/21228636/alito-racism-ramos-louisiana-unanimous-jury> [<https://perma.cc/2WY7-A4U2>].

³ As other scholars have noted, “the U.S. Supreme Court has become unusually preoccupied with issues of precedent” since its recent shift in composition, a preoccupation related to “the possibility that the Court will soon overrule major . . . precedents,” particularly on the topic of abortion, but also in other areas. Richard M. Re, *Precedent as Permission*, 99 TEX. L. REV. (forthcoming 2021) (manuscript at 2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3555144 [<https://perma.cc/U336-GM6K>].

⁴ A note on terminology: a *fractured* or *plurality decision* is one that has no majority opinion, and a *plurality opinion* is the concurring opinion, in a plurality decision, that received the most votes of all the concurrences.

even though the jury verdicts were nonunanimous.⁵ In *Ramos*, then, the Court had to confront *Apodaca*: would it follow the case, even though all Justices seemed to believe that *Apodaca* was problematic, or would it overrule?

Justice Gorsuch presented yet a third way forward: joined by Justices Ginsburg and Breyer, he insisted that *Apodaca*, because of its fractured nature, was not a binding precedent at all.⁶ The three dissenting Justices were aghast at Justice Gorsuch's suggestion that a plurality decision like *Apodaca* was not binding, and they insisted that the decision was an important and longstanding precedent that the Court had a duty to follow.⁷ Meanwhile, Justices Sotomayor and Kavanaugh, who both concurred in the judgment of the Court, agreed with the dissent that *Apodaca* constituted binding precedent, but they each argued—for different reasons and in separate opinions—that it should be overruled.⁸ Finally, Justice Thomas, who wrote his own opinion concurring in the judgment only, also accepted *Apodaca* as a precedent but disagreed with all of the other Justices about what that meant, suggesting that he was under no obligation to “adhere” to the case or, for that matter, seemingly any other constitutional decisions with which he disagreed.⁹

Ramos presents a dizzying array of views about the nature and power of precedent. This Essay illuminates each of these views, revealing their covert assumptions and momentous implications.

I. NOT MY PRECEDENT

Writing in *Ramos* for himself, Justice Ginsburg, and Justice Breyer, Justice Gorsuch suggests that a minority view cannot create binding precedent and most certainly cannot overrule existing precedent, especially if the minority view is endorsed by only one Justice.¹⁰ The matter of the precedential value of a minority view is critical to the *Ramos* case because *Apodaca* is a plurality decision, with no majority of Justices agreeing on a theory or set of reasons that would support the judgment.

Justice Blackmun's plurality opinion in *Apodaca*, joined by three other Justices, maintained that the Sixth Amendment right to a jury trial imposes the same requirements on state and federal proceedings and does *not* require

⁵ *Apodaca v. Oregon*, 406 U.S. 404 (1972). The eponymous defendant-petitioner had been convicted by an 11-1 verdict, as had a second defendant; a third defendant had been convicted by a 10-2 vote. *Id.* at 406.

⁶ *Ramos*, 140 S. Ct. at 1402-04 (plurality opinion).

⁷ *Id.* at 1427-29 (Alito, J., dissenting).

⁸ *Id.* at 1409-10 (Sotomayor, J., concurring); *id.* at 1416-20 (Kavanaugh, J., concurring).

⁹ *Id.* at 1423 (Thomas, J., concurring).

¹⁰ *Id.* at 1402-03 (plurality opinion).

unanimous verdicts.¹¹ In a concurring opinion joined by no other Justices, Justice Powell insisted that the right to a jury trial under the Sixth Amendment is different in state and federal trials, and that it requires unanimous verdicts in federal but not state trials.¹² Four dissenting Justices maintained that the right applies equally in state and federal trials and that it requires unanimous verdicts in both.¹³ Courts have taken Justice Powell's concurring opinion, as the "narrowest" view or the middle view, as controlling (a point I discuss later in this Section).

Justice Gorsuch emphatically rejects the idea that Justice Powell's position, or for that matter any part of *Apodaca*, is controlling.¹⁴ A rule that allowed a single Justice to make binding law and repudiate existing precedent, asserts Justice Gorsuch, "would do more to destabilize than honor precedent."¹⁵ And, according to Justice Gorsuch, the suggestion "that a single Justice writing only for himself" has the authority to replace existing precedent with his own views is both "new and dubious."¹⁶ The Justice even declares that "no case has before suggested that a single Justice may overrule precedent."¹⁷ Inexplicably, Justice Gorsuch seems to put weight on the fact that the would-be controlling view in *Apodaca* was endorsed by only one justice. It is hard to see how this quantitative detail could be determinative, however. Justice Gorsuch says nothing about why allowing one Justice to set precedent is impermissible, whereas two Justices or a more substantial minority would be okay. And so I infer from Justice Gorsuch's claims that he rejects the idea that a minority view can bind future courts. If he rejects that idea, then he must think that truly fractured decisions do not create precedent. Justice Gorsuch's view of precedent is a convenient one in the context of the *Ramos* decision, since the primary case standing in the way of the Court's desired conclusion is a plurality decision, and one in which the opinion that is the most likely contender for precedential status was endorsed by only one Justice.

The idea that Justice Powell's *Apodaca* opinion contains the controlling view derives from the case of *Marks v. United States*.¹⁸ In *Marks*, the Court

¹¹ *Apodaca*, 406 U.S. at 406 (plurality opinion).

¹² *Johnson v. Louisiana*, 406 U.S. 366, 369 (Powell, J., concurring). *Apodaca* was decided together with the companion case of *Johnson*, and some of the *Apodaca* opinions are formally part of the *Johnson* decision but are actually opinions in both cases.

¹³ *Apodaca*, 406 U.S. at 414-16 (Stewart, J., dissenting); see also *Johnson*, 406 U.S. at 382-83 (Douglas, J., dissenting); *id.* at 400 (Marshall, J., dissenting); *id.* at 395-96 (Brennan, J., dissenting).

¹⁴ *Ramos*, 140 S. Ct. at 1402 (plurality opinion).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 1403.

¹⁸ *Marks v. United States*, 430 U.S. 188, 193 (1977).

considered the precedential effect of *Memoirs v. Massachusetts*,¹⁹ a plurality decision concerning obscenity laws and the First Amendment. The *Marks* Court reviewed the Sixth Circuit Court of Appeals' determination that, because no standard advanced in *Memoirs* "commanded the assent of more than three Justices at any one time," the case "never became the law."²⁰ And the Court concluded that the lower court was mistaken.²¹ "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices," wrote Justice Powell for the majority in *Marks*, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . ."²²

In *Memoirs*, Justice Brennan's opinion concurred in the judgment most narrowly, since the standard his opinion advanced would provide First Amendment protection to the material in question, but would protect less material than the other opinions concurring in the judgment.²³ Two other Justices joined Brennan's *Memoirs* opinion, but the Court in *Marks* put no weight on the number of Justices supporting the view. If Brennan had been alone, presumably his opinion would be no less binding from the perspective of the *Marks* Court. Indeed, in many cases courts have interpreted the opinion of a single Justice as controlling under the *Marks* rule.²⁴ Moreover, the *Marks* Court interpreted *Memoirs* as partially overruling or at least curtailing a previous decision, *Roth v. United States*,²⁵ which set a higher bar for First Amendment protection than that proposed by the *Memoirs* plurality and which was decided by majority opinion.²⁶ The *Marks* Court thus determined that the obscenity test endorsed by three Justices in *Memoirs* effectively

¹⁹ *Memoirs v. Att'y Gen. of Massachusetts*, 383 U.S. 413 (1966).

²⁰ *Marks*, 430 U.S. at 192.

²¹ *Id.* at 193.

²² *Id.* at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, & Stevens, JJ.)).

²³ *Id.* at 192-94.

²⁴ See, e.g., *Smith v. Univ. of Wash., L. Sch.*, 233 F.3d 1188, 1196-1201 (9th Cir. 2000) (treating Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), joined by no other Justices, as binding under *Marks*); *United States v. Hughes*, 849 F.3d 1008, 1011-15 (11th Cir. 2017) (taking Justice Sotomayor's lone concurrence in *Freeman v. United States*, 564 U.S. 522 (2011), as binding under *Marks* and noting that "eight sister circuits" have done the same, *rev'd on other grounds*, 138 S. Ct. 1765 (2018); *United States v. Robison*, 505 F.3d 1208, 1219-24 (11th Cir. 2007) (taking Justice Kennedy's lone concurrence in *Rapanos v. United States*, 547 U.S. 715 (2006), as binding under *Marks*); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir.2007) (same); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724-25 (7th Cir. 2006) (same).

²⁵ *Roth v. United States*, 354 U.S. 476 (1957).

²⁶ *Marks*, 430 U.S. at 192-96.

replaced the *Roth* standard, suggesting that a minority view contained in a plurality decision can indeed create, and even overrule, precedent.²⁷

The idea that the view from a plurality decision that most narrowly supports the result is binding under *Marks*, even if that view was endorsed by only one justice, is a common and long-standing one. And *Marks* is by no means an obscure case. Indeed, the merits of the *Marks* rule were debated at length just two terms ago in *Hughes v. United States*, which was ultimately decided on other grounds.²⁸

Under the narrowest grounds approach, Justice Powell's *Apodaca* opinion is arguably the binding one, since Powell concurred in the judgment, but on a basis narrower than the other concurring Justices. Powell's view is narrower in the sense that he would find that a nonunanimous verdict is constitutionally permissible—the result of *Apodaca*—in fewer cases than the other Justices concurring in the judgment. This is because Powell believed that unanimity is required in federal trials, whereas those who joined the plurality opinion believed that unanimity is not required in state or federal trials. Another way of putting this point is that Powell would side with the *Apodaca* dissent in some cases, whereas the Justices who joined the plurality opinion would not. Powell's endorsement of the outcome in *Apodaca* is narrower in this sense.

In *Ramos*, Justice Gorsuch is apparently alarmed by the dissent's suggestion that “[e]very occasion on which the Court is evenly split [presents] an opportunity for single Justices to overturn precedent to bind future majorities.”²⁹ Justice Gorsuch's aversion to a rule that affords binding effect to the view of a single justice is understandable. One of the most salient criticisms of *Marks* as an approach to precedent is precisely that it enables a minority of Justices—and even a single justice—to create binding law.³⁰ But Justice Gorsuch's ardent claim that a rule empowering a minority of Justices

²⁷ *Id.* But see Maxwell L. Stearns, *Modeling Narrowest Grounds*, GEO. WASH. L. REV. (forthcoming) (manuscript at 28-32) (on file with author) (arguing that plurality decisions cannot overrule majority ones).

²⁸ *Hughes v. United States*, 138 S. Ct. 1765 (2018). As the *Ramos* dissent notes, “[t]he *Marks* rule is controversial, and two Terms ago, we granted review in a case that implicated its meaning. But we ultimately decided the case on another ground and left the *Marks* rule intact.” *Ramos v. Louisiana*, 140 S. Ct. 1390, 1430 (2020) (citation omitted).

²⁹ *Ramos*, 140 S. Ct. at 1403 (plurality opinion).

³⁰ As Ryan C. Williams explains, *Marks* has been understood “as an instruction to search for the opinion reflecting the views of the Court's median or ‘swing’ Justice—typically, the fifth vote—and accord that [opinion] full precedential effect.” Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 813-17 (2017). Williams observes that this understanding “strikes many jurists and commentators as problematic”; “[p]erhaps most controversially, the fifth vote approach treats as binding *all* aspects of the opinion reflecting the median Justice's views, including propositions that no other participating Justice . . . assented to.” *Id.* at 815.

to set precedent was unheard of until now is so peculiar that one has to wonder if it is disingenuous.

Justice Gorsuch maintains that it is not the result of a judicial decision but rather its “reasoning—its *ratio decidendi*—that allows it to have life and effect in the disposition of future cases.”³¹ As I have argued elsewhere, I think that is exactly right.³² Results on their own cannot do any work in future cases, because results are not self-generalizing. To determine whether a past case applies to a new one, we need to ascertain the material facts of the past case; to do that, we have to consult the reasoning that led to the result.³³ The problem with a plurality decision is that, even though we have a majority agreeing on some judgment, no majority agrees on a theory or set of reasons to support that judgment.

In *Marks*, though—a decision that has been followed in many cases and by many courts³⁴—the Court declared that plurality decisions nevertheless *do* have ratios and that those ratios are to be found in the narrowest opinion concurring in the result. We can certainly debate the merits of that guidance, as many judges and scholars have done,³⁵ but it is by no means a “new” proposition.³⁶ As Justice Kavanaugh notes in his concurring opinion, “[w]hen the Court’s decision is splintered, courts follow the result, *and they also follow the reasoning or standards set forth in the opinion constituting the ‘narrowest grounds’ of the Justices in the majority.*”³⁷

³¹ *Ramos*, 140 S. Ct. at 1404 (plurality opinion).

³² Nina Varsava, *The Role of Dissents in the Formation of Precedent*, 14 DUKE J. CONST. L. & PUB. POL’Y 285, 323-25 (2019).

³³ See, e.g., Williams, *supra* note 30, at 824 (“Looking to the precedent court’s own explanation of the reasoning through which it reached its result . . . provid[es] a set of criteria through which to assess the materiality of any discernible factual similarities and differences between the two cases.”); Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1066-67 (explaining that, if only the result of judicial decisions were binding, then “cases [would] almost always be distinguishable based upon factual differences that most would agree have little or no relevance in terms of providing a material basis for different legal treatment.”); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 746-47 (1993) (“We cannot fully describe the outcome in case X if we do not know something about the reasons that count in its favor.”).

³⁴ For a list of examples, see *supra*, note 24.

³⁵ See, e.g., Richard M. Re, *Beyond the Marks Rule*, 132 HARV. L. REV. 1943, 1945 (2019) (“[T]he Marks rule is wrong, root and stem, and should be abandoned.”); Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 421, 440-42 (1992) (“[C]onsider[ing] the operation of the *Marks* ‘narrowest grounds’ doctrine, and conclud[ing] that the *Marks* rule is insupportable and should be rejected.”).

³⁶ See *Ramos*, 140 S. Ct. at 1402 (plurality opinion) (“[T]o accept [Powell’s *Apodaca*] reasoning as precedential, we would have to embrace a new and dubious proposition . . .”).

³⁷ *Id.* at 1416 n.6 (Kavanaugh, J., concurring) (emphasis added). Other plausible interpretations of the *Marks* rule are available, but this is a common one, which follows from a straightforward reading of the language used in the *Marks* case to describe the narrowest grounds approach.

Justice Gorsuch's *Ramos* opinion, which effectively denies the force of binding precedent to truly fractured decisions,³⁸ represents a significant departure from prevailing judicial norms. What is perhaps most remarkable about the opinion is Justice Gorsuch's stone-faced denial that he is saying anything at all unusual.

II. A PRECEDENT "UNDER ANY REASONABLE UNDERSTANDING OF THE CONCEPT"

A. *The Dissent's Construction*

The three Justices in the dissent are shocked by Justice Gorsuch's suggestion that *Apodaca* "was never a precedent at all."³⁹ Joined by Justice Kagan and Chief Justice Roberts, Justice Alito describes *Apodaca* as "an important and long-established decision."⁴⁰ "It is remarkable," he emphasizes, "that it is even necessary to address [the] question [of the case's precedential status]."⁴¹ The dissent asserts further that judges and scholars alike have always "thought *Apodaca* was a precedent," and "[u]nder any reasonable understanding of the concept," they were right about that.⁴²

After recognizing the vitality of the *Marks* rule and noting that the Court recently had an opportunity to overrule *Marks* but chose to leave it intact,

³⁸ The *truly* qualification is important, because Justice Gorsuch's position is consistent with the idea that some plurality decisions contain covert majority opinions—which is to say a majority-endorsed set of reasons that would support the judgment—and that these decisions are binding in their implicit majority views. Thus, Justice Gorsuch's claim that "*Marks* has nothing to do with this case" might suggest that he believes *Marks* does not apply because *Apodaca* contains no narrowest grounds view in the implicit majority opinion sense. *Ramos*, 140 S. Ct. at 1403. Justice Gorsuch might thus endorse an interpretation of *Marks* that equates "narrowest grounds" opinion with implicit majority. Some courts have interpreted *Marks* this way, insisting that the narrowest and therefore binding view of a plurality decision must represent a "logical subset" of a broader view advanced in the decision, such that a majority of Justices concurring in the judgment accepted, if only implicitly, the narrowest view. See *United States v. Epps*, 707 F.3d 337, 350 (D.C. Cir. 2013) (using the "logical subset" terminology); see also *infra* note 44, for more details. For reasons I explain elsewhere, I don't think that this interpretation of the *Marks* rule holds much weight. See Varsava, *supra* note 32, at 302-04. Alternatively, Justice Gorsuch might reject the precedential effect of *Marks* itself, as a trans-substantive interpretive rule, although he does not expressly say so. That would be consistent with statements about interpretive rules of this sort that he has made elsewhere. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2444 (2019) (suggesting that the *Auer* rule, to the extent it "prescribe[s] an interpretive methodology governing . . . every regulation. . . . '[E]xceed[s] the limits of stare decisis'"); see also Aaron-Andrew P. Bruhl, *Eager to Follow: Methodological Precedent in Statutory Interpretation*, N.C. L. REV. (forthcoming 2020) (manuscript at 6) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3562715 [<https://perma.cc/UD4V-MBHX>]) (noting Justice Gorsuch's doubts about whether stare decisis applies to all to "generally applicable interpretive methods").

³⁹ *Ramos*, 140 S. Ct. at 1426 (Alito, J., dissenting).

⁴⁰ *Id.* at 1425.

⁴¹ *Id.* at 1427.

⁴² *Id.* at 1429.

Justice Alito nevertheless asserts that Justice Powell's concurring opinion in *Apodaca* is *not* binding.⁴³ He insists instead that the Court is bound only by "the narrow common ground between Justice Powell and the plurality"—the common ground being that nonunanimous verdicts in which "at least 10 of the 12 jurors vote to convict" are not unconstitutional in state criminal trials.⁴⁴ The Justice even claims that "nobody thought for a second that *Apodaca* committed the Court to Justice Powell's view that the [Sixth Amendment right to a jury trial] has different dimensions in state and federal cases."⁴⁵

This is a curious development in the dissenting opinion. After all, according to Justice Alito earlier in the same opinion, "in a case where there is no opinion of the Court, the position taken by a single Justice in the majority can constitute the binding rule for which the decision stands [under *Marks*]."⁴⁶ Alito had gone on to note that, contrary to Justice Gorsuch's suggestion, he was "aware of no case holding that the *Marks* rule is inapplicable when the narrowest ground is supported by only one Justice" and "[c]ertainly the lower courts have understood *Marks* to apply in that situation."⁴⁷ *Apodaca* would seem to be a prime candidate for this type of *Marks* construction, as a decision without a majority opinion and with an opinion—i.e., Justice Powell's concurrence in the judgment—that supports the judgment more narrowly than any other.⁴⁸ Moreover, Alito had quoted, approvingly, the Court's understanding of *Apodaca*'s holding as articulated in the recent case of *Timbs v. Indiana*: "[T]he Sixth Amendment requires jury unanimity in federal, but not state, criminal proceedings."⁴⁹ This is precisely Justice Powell's, and no other *Apodaca* Justice's, position.⁵⁰

And it is not only the Supreme Court that has taken Powell's position as the holding of *Apodaca*, but also other courts, both state and federal, as well

⁴³ *Id.* at 1431.

⁴⁴ *Id.* Some courts have, on occasion, taken this kind of common ground approach to plurality decisions. *See, e.g.*, *United States v. Epps*, 707 F.3d 337, 348 (D.C. Cir. 2013) (suggesting that the controlling view "must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment." Stated differently, *Marks* applies when, for example, 'the concurrence posits a narrow test to which the plurality must necessarily agree as a logical consequence of its own, broader position.'" (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991))).

⁴⁵ *Ramos*, 140 S. Ct. at 1431 (Alito, J., dissenting).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *See supra* Part I, for an explanation of this point.

⁴⁹ *Ramos*, 140 S. Ct. at 1428 (Alito, J., dissenting) (quoting *Timbs v. Indiana*, 139 S. Ct. 682, 687 n.1 (2019)).

⁵⁰ *Johnson v. Louisiana*, 406 U.S. 356, 369 (1971) (Powell, J., concurring). Note that *Apodaca* and *Johnson* are companion cases. Powell's concurrence is for both cases. *See supra* note 12.

as non-judicial commentators.⁵¹ In an amicus brief in support of the petitioner in *Ramos*, a group of legal scholars and social scientists advised the Court to set aside “Justice Powell’s controlling approach in *Apodaca*.”⁵² And in another amicus brief, eight states and the District of Columbia asserted that “Justice Powell’s sole concurrence represents *Apodaca*’s formal holding” under the *Marks* rule.⁵³ And yet the *Ramos* dissent insists that only the portion of Justice Powell’s opinion that a majority of the *Apodaca* Court accepted is controlling, and moreover that no one ever thought otherwise.⁵⁴

The dissent seems to want to have its cake—the *Marks* rule, as a precedent about precedent, must be respected—and eat it too—Justice Powell’s view is not binding because a majority of Justices rejected it. Proposing to treat only the limited points of overlap between Powell and the plurality in *Apodaca* as precedential—points that a majority of the Justices who concurred in the judgment of the case apparently accepted⁵⁵—the dissent, holding onto the majoritarian principle for dear life, in effect attempts to generate a position that was accepted by a majority in *Apodaca* and is general enough to be applied in other cases. But *Marks* dispenses with the idea, otherwise fundamental to our system of precedent, that only a majority-endorsed position can create binding law, and so it is peculiar that the *Ramos* dissent felt compelled to subject *Apodaca* to this kind of reconstructive surgery.

Moreover, it is questionable whether a majority of Justices in *Apodaca* would have even approved of the rule that Justice Alito derives from the case.⁵⁶ As Justice Gorsuch observes, the dissent’s approach in effect imposes

⁵¹ See *McDonald v. City of Chicago*, 561 U.S. 742, 766 n.14 (2010) (citing *Apodaca* to support the claim that “[t]he Court has held that although the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials, it does not require a unanimous jury verdict in state criminal trials.”); *Rauf v. State*, 145 A.3d 430, 480 n.300 (Del. 2016) (Strine, C.J., concurring) (asserting that, in *Apodaca*, “the U.S. Supreme Court held that the Sixth Amendment applies differently to the federal government than to the states”); *State v. King*, No. 2013-0135, 2014 WL 3400565, at *22 (La. Ct. App. July 10, 2014) (asserting that, in “*Apodaca v. Oregon*, . . . the court specifically held that while the Sixth Amendment requires a unanimous verdict in a federal criminal trial, the Sixth Amendment, applicable to the states through the Fourteenth Amendment . . . does not impose a similar requirement on state criminal proceedings” (citation omitted)), *rev’d on different grounds*, 167 So. 3d 600 (La. 2015); *State v. Bellanger*, 183 A.3d 550, 558 n.2 (Vt. 2018) (noting that, in *Apodaca*, “[t]he U.S. Supreme Court . . . implicitly held that, even though the Sixth Amendment requires juror unanimity in federal criminal trials, the Sixth Amendment unanimity guarantee does not extend to criminal trials in state courts.”).

⁵² Brief of Law Professors and Social Scientists as *Amici Curiae* in Support of Petitioner at 25, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (No. 18-5924).

⁵³ Brief for States of New York, California, Illinois, Michigan, Minnesota, Nevada, Vermont, and Virginia, and the District of Columbia as *Amici Curiae* in Support of Petitioner at 25, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (No. 18-5924) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)).

⁵⁴ *Ramos*, 140 S. Ct. at 1431 (Alito, J., dissenting).

⁵⁵ *Id.* at 1429.

⁵⁶ The dissent’s approach is problematic for another reason as well, which is that it generates unprincipled holdings. See Varsava, *supra* note 32, at 327-40.

a qualification on the view of the Justices joining the *Apodaca* plurality opinion that those Justices explicitly rejected.⁵⁷ For those Justices, the fact that the conviction at issue occurred in a state proceeding was completely immaterial. Indeed, that fact was material only for Justice Powell. And so Alito makes it seem as though he has extracted a majority rule from *Apodaca*, when the rule, insofar as it delineates material conditions for a particular outcome, expresses the position of Justice Powell alone.

B. Choose Your Majority

It is not only the *Ramos* dissent that attempts to generate a holding from *Apodaca* by drawing out a proposition that a majority of the Justices endorsed. And indeed, this is an intuitive approach, given that in most cases holdings are found in majority opinions. But when it comes to plurality decisions, the approach can be problematic, even untenable. A close look at the *Apodaca* decision throws this into relief.

If we look to all opinions in a plurality decision and cobble together majority views to generate holdings, then we might end up with an inconsistent set of holdings from a single case. Applying the majority-view approach to precedent to the *Apodaca* case generates (at least) the following set of holdings:

1. The Sixth Amendment guarantees the same rights in federal and state trials (8 votes: 4 from the plurality and 4 from the dissents);
2. The Sixth Amendment guarantees the right to unanimous verdicts in federal trials (5 votes: 1 from the concurrence and 4 from the dissents); and
3. The Sixth Amendment does not guarantee the right to unanimous verdicts in state trials (5 votes: 4 from the plurality and 1 from the concurrence).

We can maintain any two of these propositions simultaneously without contradiction, but not all three. And yet, when applying a plurality decision as a precedent, courts often do consider all opinions from the decision and treat majority-endorsed views as binding, even if we need to count the votes of dissenters to get to five.⁵⁸ *Apodaca* shows how such an approach can give

⁵⁷ *Ramos*, 140 S. Ct. at 1404 (asking where “the convenient ‘state court’ qualification” in the dissent’s construction of the *Apodaca* holding comes from, and pointing out that “[n]either the *Apodaca* plurality nor the dissent included any limitation like that—their opinions turned on the meaning of the Sixth Amendment”).

⁵⁸ See, e.g., *United States v. Johnson*, 467 F.3d 56, 64-66 (1st Cir. 2006) (suggesting that a position endorsed by a majority of Justices divided across the judgment can constitute the holding of a plurality decision); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16-17 (1983) (indicating that majority agreement across the judgment in the plurality decision of *Will v.*

rise to a contradictory set of holdings and to competing, strategic claims about a case's binding effect.

The petitioner in *Ramos* maintained that, under *Apodaca*, the Sixth Amendment guarantees criminal defendants the right to unanimous verdicts in federal trials, since a majority of the Justices in *Apodaca* (the four dissenting Justices plus Justice Powell) endorsed that view.⁵⁹ In oral arguments, Justice Ginsburg advanced the same idea, suggesting that, since Justice Powell plus the four Justices in the dissent agreed that “unanimity is required in federal trials,” that proposition is binding under *Apodaca*.⁶⁰ A majority of Justices in *Apodaca* also agreed that the Sixth Amendment guarantees the same jury trial rights in federal and state court. These two propositions logically entail that the Sixth Amendment guarantees a right to unanimous verdicts in *state* trials. And yet, another majority in *Apodaca* insisted that the Sixth Amendment guarantees no such thing.

In a dissenting opinion, Justice Brennan noted that,

[r]eaders of today's opinions may be understandably puzzled why convictions by 11–1 and 10–2 jury votes are affirmed . . . , when a majority of the Court agrees that the Sixth Amendment requires a unanimous verdict in federal criminal jury trials, and a majority also agrees that the right to jury trial guaranteed by the Sixth Amendment is to be enforced against the States according to the same standards that protect that right against federal encroachment.⁶¹

Brennan went on to suggest that, “arguab[ly], . . . the affirmance of the convictions . . . is not inconsistent with a view that today's decision . . . is a holding that only a unanimous verdict will afford the accused in a state criminal prosecution the jury trial guaranteed him by the Sixth Amendment.”⁶² This is a surprising proposition given that it concerns a decision in which a state law allowing for nonunanimous verdicts in criminal trials was found to be constitutional. Justice Brennan relied on the fact that a majority of Justices agreed that the Sixth Amendment right to a jury trial means the same thing in state and federal court (holding number one above) and another majority agreed that the Sixth Amendment guarantees a right to unanimous verdicts in federal court (holding number two). What he elided is that yet another majority

Calvert Fire Ins. Co., 437 U.S. 655 (1978), is authoritative). For a discussion of *Moses H. Cone's* treatment of *Will v. Calvert*, and other cases exemplifying the same phenomenon, see Varsava, *supra* note 32, at 313–16, 316 n.117.

⁵⁹ Reply Brief for Petitioner at 3–4, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (No. 18–5924).

⁶⁰ Transcript of Oral Argument at 35, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (No. 18–5924).

⁶¹ *Johnson v. Louisiana*, 406 U.S. 356, 395 (1972) (Brennan, J., dissenting). Note that *Apodaca* and *Johnson* are companion cases. Brennan wrote a single dissent for the pair of cases. See *supra* note 12.

⁶² *Id.*

maintained that criminal defendants do *not* have a constitutional right to unanimous verdicts in state trials (holding number three).

This kind of majoritarian approach to precedent-formation, which multiple players in the *Apodaca* and *Ramos* decisions embraced, suggests that to construct a plurality decision's holding we can mine all of its opinions and latch onto any majority view we favor. If we are free to do that, then we can indeed take *Apodaca* to stand for the rule that Justice Brennan proposed—but we can just as well take the case to stand for exactly the opposite.

III. THREE WAYS TO OVERRULE A PRECEDENT

Next we have separate opinions from Justices Sotomayor and Kavanaugh: they both accept *Apodaca* as a binding precedent without pause but then explain, each appealing to a different set of reasons, why it needs to be overruled. Sotomayor claims that “overruling [*Apodaca*] is not only warranted, but compelled.”⁶³ She explains that the Court must overrule a previous decision if, as in *Apodaca*, that decision mistakenly upheld unconstitutional trial procedures and individuals might be imprisoned as a result.⁶⁴ This standard would set a relatively low bar for overruling precedent in the criminal procedure realm.

Justice Kavanaugh writes separately just “to explain [his] view of how *stare decisis* applies to this case.”⁶⁵ He believes that *Apodaca* is binding, at least in its “bottomline result” that “state criminal juries need not be unanimous,” but that the case should now be overruled.⁶⁶ Kavanaugh does not confine his analysis to the criminal procedure domain. He takes the opportunity to point out that “in just the last few Terms, every current Member of this Court has voted to overrule multiple constitutional precedents,” and he enumerates seven examples.⁶⁷ Reaching further back into history, Kavanaugh observes

⁶³ *Ramos v. Louisiana*, 140 S. Ct. 1390, 1408 (2020) (Sotomayor, J., concurring).

⁶⁴ *See id.* at 1409.

⁶⁵ *Id.* at 1410 (Kavanaugh, J., concurring).

⁶⁶ *Id.* at 1416 n.6. Kavanaugh maintains that, under *Marks*, the narrowest or “middle-ground” opinion is controlling. But he suggests that it is “difficult to discern which opinion’s reasoning” in *Apodaca* is the narrowest one, and that even if a plurality decision has no such opinion, “the result of the decision still constitutes a binding precedent . . .” *Id.* For reasons I explain above, however, Justice Powell’s *Apodaca* opinion would seem to readily qualify under *Marks* as the narrowest one in support of the judgment. *See supra*, Part I.

⁶⁷ *Id.* at 1411 (listing cases including *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), and *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485 (2019)).

that “some of the Court’s most notable and consequential decisions have entailed overruling precedent,”⁶⁸ and he names thirty of them.⁶⁹

One might reasonably wonder, and worry, whether Kavanaugh is trying to clear the air for future decisions in which he plans to vote to overrule precedent.⁷⁰ The Justice suggests that the Court has lacked a “consistent methodology or roadmap” for overruling, and proceeds to develop such a roadmap.⁷¹ He proposes three considerations—whether the precedent is “grievously or egregiously wrong,” has major adverse consequences, and implicates significant reliance interests—ostensibly collected from the Court’s existing “precedents on precedent,” which “together provide a structured methodology and roadmap for determining whether to overrule an erroneous constitutional precedent.”⁷² Then, “[a]pplying [his] three broad *stare decisis* considerations to this case,” Kavanaugh concludes that *Apodaca* is ripe for overruling.⁷³

Justice Thomas, meanwhile, seems to have no patience for wrongly decided cases: if a decision is “demonstrably erroneous”—which he believes is true of *Apodaca*—he simply won’t adhere to it.⁷⁴ He even notes that he does not intend to follow *Ramos* itself going forward, since the decision seems to rest implicitly on due process incorporation, which he rejects.⁷⁵ In a concurrence in another recent case, *Gamble v. United States*, Thomas suggested that the Court is not even permitted to follow precedent that represents an impermissible interpretation of constitutional or statutory text; and, in the case of precedent that is *not* erroneous in that sense, the court is merely *permitted* (and not required) to follow it.⁷⁶ In sharp contrast to the *stare decisis*

⁶⁸ *Id.* at 1411.

⁶⁹ *Id.* at 1411-12 (listing cases including *Obergefell v. Hodges*, 576 U.S. 644 (2015), *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)).

⁷⁰ In the subsequent case of *June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103 (2020), Kavanaugh cast a vote in favor of overruling *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), insofar as that decision articulated a “cost-benefit standard” or “balancing test” for assessing the constitutionality of laws restricting abortion. *See id.* at 2182 (Kavanaugh, J., dissenting), 2154 (Alito, J., dissenting).

⁷¹ *Ramos*, 140 S. Ct. at 1414-16 (Kavanaugh, J., concurring in part).

⁷² *Id.* at 1412-15 (Kavanaugh, J., concurring in part).

⁷³ *Ramos*, 140 S. Ct. at 1416 (Kavanaugh, J., concurring in part).

⁷⁴ *See id.* at 1423-24 (Thomas, J., concurring) (“I do not adhere to this Court’s decisions applying due process incorporation, including *Apodaca* and—it seems—the Court’s opinion in this case.”).

⁷⁵ *Id.*

⁷⁶ *Gamble v. United States*, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring) (explaining that, “if the Court encounters a decision that is demonstrably erroneous—*i.e.*, one that is not a permissible interpretation of the text—the Court should correct the error” and “[f]ederal courts may (but need not) adhere to an incorrect decision as precedent, but only when traditional tools of legal interpretation show that the earlier decision adopted a textually permissible interpretation of the law”); *see Re, supra* note 3, at 3, 9-14 (describing and assessing Thomas’s view of precedent as articulated in *Gamble* and other cases,

jurisprudence of each of the other Justices, then, Thomas's approach would seem to afford effectively no binding force to precedent.

CONCLUSION

To take stock, then, three Justices in *Ramos*—Gorsuch, Breyer, and Ginsburg—believe that *Apodaca* is not a binding precedent at all and holds no sway over the present case. Another three Justices—Sotomayor, Kavanaugh, and Thomas—believe that *Apodaca* is technically precedential, but that circumstances justify overruling it. The remaining three Justices—Alito, Roberts, and Kagan—would follow *Apodaca*, not because it was correctly decided, but out of a duty to abide by past decisions.

The dissenting Justices, somewhat surprisingly given their disapproval of the other Justices' treatment of precedent, insist at length on the importance of adhering to “precedent[s] about precedent.”⁷⁷ “If individual Justices apply different standards for overruling past decisions,” Justice Alito explains, “the overall effects of the doctrine will not be neutral.”⁷⁸ Then, in a stunning passage at the end of the decision, the dissent (minus Kagan, who does not sign onto this part) almost dares the majority to continue to brush aside precedent in the future: “By striking down a precedent upon which there has been massive and entirely reasonable reliance, the majority sets an important precedent about *stare decisis*. I assume that those in the majority will apply the same standard in future cases.”⁷⁹

The great irony is that, to the extent that *Ramos* has set a precedent about precedent, it is the Justices in the *dissent* who will feel most compelled to follow it going forward—after all, they apparently endorse a stricter approach to precedent than any of the other Justices. By drawing attention to the *Ramos* decision as a precedent about precedent, and to their own commitment to *stare decisis*, the dissenting Justices seem to be committing themselves for the future to the relaxed doctrine of precedent that they accuse the *Ramos* majority

and observing that the view is “distinctive—and perhaps shocking”). As Re notes, however, in another recent opinion, *Allen v. Cooper*, Thomas described a past case as “binding precedent,” suggesting some inconsistency or imprecision in his views. 140 S. Ct. 994, 1007 (2020) (Thomas, J., concurring in part).

⁷⁷ *Ramos*, 140 S. Ct. at 1432 n.16 (Alito, J., dissenting) (quoting *Alleyn v. United States*, 570 U.S. 99, 134 (2013)).

⁷⁸ *Id.*

⁷⁹ *Id.* at 1440 (Alito, J., dissenting). Although the plurality portion of Justice Gorsuch's opinion indicates that he (along with Justices Ginsberg and Breyer) believe that the Court is not overruling *Apodaca* since that case was never a precedent to begin with, the opinion does go on to suggest (in a part joined by a majority of the Court) that, even if *Apodaca* were a precedent, it should now be overruled. *Id.* at 1404-08 (explaining that “when it revisits a precedent this Court has traditionally considered ‘the quality of the decision's reasoning[,] its consistency with related decisions[,] legal developments since the decision[,] and reliance on the decision,’” and maintaining that “[i]n this case, each factor points in the same direction”—i.e., toward overruling).

of creating. We can hardly expect the *Ramos* majority, exercising as it does limited respect for previous cases in *Ramos* itself, to feel compelled, out of respect for precedent, to take the same approach to precedent in future cases!

Of course, a “precedent” that stands for the view that precedent is not all that binding is self-defeating, or at least undermining.⁸⁰ Presumably, in a future case, *Ramos* could be applied to *Ramos* itself to justify a departure from the *Ramos* approach to precedent. Once we start pondering *Ramos* as a precedent on precedent, it’s hard not to get tied up in knots trying to figure out what the decision will mean for the future of stare decisis.

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⁸⁰ Other commentators have similarly observed that the Justices who currently seem to be the strongest proponents of stare decisis “have come perilously close to announcing—self-defeatingly?—that stare decisis has itself been overruled.” *See Re, supra* note 3, at 2.