UNWILLING TO REMEDY THE PAST: THE COST TO STATE RELIANCE INTERESTS TRUMPS ANY BENEFITS OF REDRESSING CONSTITUTIONAL VIOLATIONS IN *EDWARDS V. VANNOY*

INTRODUCTION

Thedrick Edwards will spend his life in prison based on a conviction that is illegal in all fifty states.[1] Indeed, the Sixth Amendment promises that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial [and unanimous] jury . . ."[2] Surely, that right is enforced against the states by the Fourteenth Amendment.[3] Thus, "a verdict by 11 is no verdict at all."[4]

However, until *Ramos v. Louisiana*,[5] a verdict by eleven proved sufficient to sustain felony convictions in two states.[6] Seemingly, *Ramos* restored jury-unanimity to Louisiana and Oregon.[7] But the Court's holding meant nothing for those who were previously convicted by Louisiana's unconstitutional jury scheme.[8] Indeed, almost five percent of those incarcerated in Louisiana were convicted non-unanimously.[9] Included in that five percent is Thedrick Edwards, a Black man who fell victim to this Jim Crow practice.[10] Despite *Ramos*'s holding, Mr. Edwards will not benefit from Louisiana's restoration of this right, solely because his conviction became final before the *Ramos* decision.[11]

---

1. *See* Edwards v. Vannoy, 141 S. Ct. 1547, 1574 (2021) (Kagan, J., dissenting).

2. U.S. Const. amend. VI. *E.g.*, *Edwards*, 141 S. Ct. at 1576 (Kagan, J., dissenting) ("So by the time the Framers drafted the Sixth Amendment, 'the right to a jury trial *meant* a trial in which the jury render[ed] a unanimous verdict.'") (emphasis in original); Patton v. United States, 281 U.S. 276, 288 (1930) ("[T]rial by jury as understood and applied at common law . . . includes all the essential elements as they were recognized . . . . Those elements were: (1) That the jury should consist of twelve men; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous.").

3. U.S. Const. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

4. Transcript of Oral Argument at 3, *Edwards*, 141 S. Ct. 1547 (2021) (No. 19-5807); s*ee also Edwards*, 141 S. Ct. at 1573 (Kagan, J., dissenting) (citing Ramos v. Louisiana, 140 S. Ct. 1390 (2020)).

5. *Ramos*, 140 S. Ct. 1390.

6. *See* La. Const. art. 1, § 17(A) (amended 2018)); Transcript of Oral Argument, *supra* note 4, at 31-32.

7. Transcript of Oral Argument, *supra* note 4, at 31-32.

8. *Id.* at 3.

9. *Id.* at 20.

10. *Id.* at 55; *see also Ramos*, 140 S. Ct. at 1394.

11. Transcript of Oral Argument, *supra* note 4, at 3 ("On paper, [*Ramos*] restored the full breadth of the Sixth Amendment's jury trial right to Louisianans. But . . . [t]his laudable ruling would only apply to cases then pending or recently adjudicated.").

As Mr. Edwards's lawyer poignantly asked, "Why should the Sixth Amendment mean something less to Mr. Edwards?"[12]

In *Edwards v. Vannoy*, the Court mischaracterized the unanimity requirement; unanimity is a "watershed rule."[13] Unanimity is an ancient requirement that is inherent to the Sixth Amendment's right to a jury trial.[14] Its observance is essential to maintain the fairness and accuracy of a proceeding.[15]

Part I of this Casenote engages with the decisive facts of *Edwards* and establishes its procedural posture upon arrival to the Court. Part II canvasses the origins of Louisiana's non-unanimous jury scheme and contextualizes the rule with the Court's retroactivity jurisprudence. Part III analyzes the Court's reasoning in *Edwards*. Finally, Part IV addresses *Edwards*'s deviation from recent Louisiana jurisprudence and suggests that the Court incorrectly denied *Ramos* watershed status.[16]

I. FACTS AND HOLDING

19-year-old Thedrick Edwards was indicted in Louisiana's 19th Judicial District Court for several felonies.[17] Mr. Edwards confessed to the police following an investigation that revealed him as the primary suspect.[18] He ultimately pleaded not guilty

---

12. Transcript of Oral Argument, *supra* note 4.

13. *See* Teague v. Lane, 489 U.S. 288, 313 (1989) (explaining that watershed rules are "central to an accurate determination of innocence or guilt.").

14. *See Ramos*, 140 S. Ct. at 1395 (". . .the answer is unmistakable. A jury must reach a unanimous verdict in order to convict.").

15. *See* Edwards v. Vannoy, 141 S. Ct. 1547, 1578 (2021) (Kagan, J., dissenting) ("The majority doesn't contest anything I've said about the foundations and functions of the unanimity requirement.").

16. The Court addressed other issues in *Edwards*, namely, whether AEDPA's relitigation bar precluded Mr. Edwards's claim. However, for purposes of this Casenote, the author will not be discussing whether AEDPA barred Mr. Edwards's claim. *Edwards*, 141 S. Ct. at 1562 (Thomas, J., concurring) ("we could also have resolved this case by applying the statutory text of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).").

17. Brief for Petitioner at 3, *Edwards*, 141 S. Ct. 1547 (2021) (No. 19-5807); Petition for Writ of Certiorari at 1, 3, *Edwards*, 141 S. Ct. 1547 (2021) (No. 19-5807), 2019 WL 9531983, at *3 ("The defendant was indicted for five counts of armed robbery, one count of aggravated rape, two counts of aggravated kidnapping and one count of attempted armed robbery.").

18. Brief for Petitioner, *supra* note 17, at 3-4 ("Mr. Edwards was interrogated multiple times . . . [and] [initially] stated that he did not have anything to do with the offenses . . . [Detectives] chained him to a wall for 45 minutes, [sic] and encouraged him to cooperate in the investigation.").

and invoked his right to a jury trial.[19] Before trial, Mr. Edwards moved to suppress his videotaped confession; the court denied his motion.[20] During jury selection, the State struck all but one Black person from the jury.[21] Subsequently, a non-unanimous jury convicted Mr. Edwards — the sole Black juror voting for acquittal.[22] At the time, however, Louisiana permitted non-unanimous jury verdicts.[23] Accordingly, the trial court sentenced Mr. Edwards to life imprisonment without parole, and the Louisiana First Circuit Court of Appeal affirmed.[24] After Mr. Edwards's conviction became final on direct review, Louisiana courts denied his application for post-conviction relief.[25]

Mr. Edwards then filed a writ of habeas corpus[26] in the Middle District of Louisiana and argued that his "non-unanimous jury verdict violated his constitutional right to a unanimous jury."[27] The district court denied the petition as foreclosed by *Apodaca v. Oregon*,[28] and Mr. Edwards appealed to the United States Fifth Circuit Court of Appeals.[29] The Fifth Circuit refused to issue a certificate of appealability, effectively rejecting Edwards's ap-

---

19. *Edwards*, 141 S. Ct. at 1552.

20. *Id.* at 1552-53; Brief for Petitioner, *supra* note 17, at 4 (arguing that the police obtained his confession through intimidation).

21. Brief for Petitioner, *supra* note 17, at 4-5 ("[T]he State used four of its six peremptory strikes on Black venirepersons, struck five Black jurors for cause . . . and used its final strike peremptorily after a Black juror was seated on the petit jury (*i.e.*, a 'black strike').").

22. *See id.* at 5 (Eleven of the twelve jurors returned a guilty verdict as to some crimes, and ten of twelve jurors returned a guilty verdict as to the others. The sole Black juror voted for acquittal on every offense.).

23. *See* Edwards v. Vannoy, 141 S. Ct. 1547; 1553 (2021); La. Const. art. 1, § 17(A) (amended 2018) ("A case for an offense committed prior to January 1, 2019, in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict.").

24. State v. Edwards, No. 2018-2011, p. 1 (La. App. 1 Cir. 06/12/2009); 2009 WL 1655544.

25. *Edwards*, 141 S. Ct. at 1553.

26. The federal habeas corpus statute provides that a federal court "shall entertain an application for a writ of habeas corpus . . . only on the ground that he is in custody in violation of the Constitution . . ." 28 U.S.C.A. § 2254(a) (West, Westlaw through PL 117-52).

27. State v. Edwards, 2009-1612 (La. 12/17/10); 51 So. 3d 27 (mem.); *See* Brief for Petitioner, *supra* note 17, at 8.

28. Apodaca v. Oregon, 406 U.S. 404, 411 (1972) (plurality opinion) (holding that unanimity is not required in state criminal trials).

29. Petition for Writ of Certiorari, *supra* note 17, at 1.

peal.[30] While incarcerated, Mr. Edwards petitioned for certiorari,[31] asking the Supreme Court to recognize that "the Constitution requires a unanimous jury in state criminal trials."[32] Respondent Darrel Vannoy, Warden of the Louisiana State Penitentiary, sought affirmance of the district court's denial of a certificate of appealability.[33]

While Edwards's petition was pending, the Court decided *Ramos* and repudiated *Apodaca*.[34] In *Ramos*, the Court held that the Fourteenth Amendment incorporates the Sixth Amendment right to a unanimous jury against the States, "consistent with longstanding authority."[35] The Court granted certiorari in *Edwards*'s case to determine whether *Ramos* would apply retroactively to overturn final convictions on federal collateral review.[36] Ultimately, the Court affirmed the Fifth Circuit and held that *Ramos* does not apply retroactively on federal collateral review. The Court's decision essentially indicates that no new rules of criminal procedure will ever satisfy *Teague v. Lane*'s watershed exception.[37]

II. LEGAL BACKGROUND

Implicit in the adage, "trial by an impartial jury," is the requirement that a jury must be unanimous to convict.[38] Indeed,

30. Edwards v. Vannoy, No. 18-31095, 2019 WL 8643258, at *1 (5th Cir. May 20, 2019). Mr. Edwards sought to take an appeal from the district court's denial of his constitutional claims based on a *Batson* violation, his conviction by a non-unanimous jury, a Confrontation Clause violation, the non-disclosure of a witness's plea discussion, and an involuntary confession. *Id.*

31. 28 U.S.C.A. § 1257(a) (West, Westlaw through PL 117-52O). "Final judgements or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treatises or statutes of, or any commission held or authority exercised under, the United States." *Id.*

32. Edwards v. Vannoy, 141 S. Ct. 1547, 1553 (2021).

33. Respondent's Brief in Opposition at 2, *Edwards*, 141 S. Ct. 1547 (2021) (No. 19-5807), 2020 WL 4450456, at *2.

34. Ramos v. Louisiana, 140 S. Ct. 1390, 1410 (2020).

35. Brief for Petitioner, *supra* note 17, at 9.

36. *Edwards*, 141 S. Ct. at 1554.

37. *Id.* at 1562.

38. *Ramos*, 140 S. Ct. at 1395 ("Wherever we might look to determine what the term 'trial by an impartial jury trial' meant at the time of the Sixth Amendment's

the Court recognized unanimity's essential function in *Brown v. Louisiana* when it held that non-unanimous six-person juries are unconstitutional in state criminal trials and that this holding should apply retroactively.[39] The Court recognized that "the Sixth Amendment right to a jury trial is 'fundamental to the American scheme of justice' and incorporated against the States under the Fourteenth Amendment."[40] In Louisiana, however, the Sixth Amendment has a rather unique history.

In Louisiana, the Sixth Amendment's unanimity requirement became obsolete when the state adopted its unique non-unanimity rule at the state's 1898 constitutional convention.[41] The *Ramos* Court recited the history of that convention, noting that "[its] avowed purpose . . . was to establish the supremacy of the white race . . . ."[42] To that end, Louisiana devised "a racial architecture . . . [to] circumvent the Reconstruction Amendments and marginalize the political power of [B]lack citizens."[43] That architecture included a non-unanimous jury scheme, designed specifically to dilute the influence of Black jurors.[44] Thus,

---

adoption—whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward—the answer is unmistakable. A jury must reach a unanimous verdict in order to convict."). *E.g.*, Patton v. United States, 281 U.S. 276, 288 (1930).

39. Edwards v. Vannoy, 141 S. Ct. 1547, 1579 n.6 (2021) (Kagan, J., dissenting); *see also* Brown v. Louisiana, 447 U.S. 323, 324 (1980); Burch v. Louisiana, 441 U.S. 130, 134 (1979); Brief for Petitioner, *supra* note 17, at 34 ("[T]he question in *Brown* was whether the rule announced in *Burch*—which held that non-unanimous juries are unconstitutional in state criminal trials for non-petty offenses—should apply retroactively."); *In re* Winship, 397 U.S. 358 (1970); V. v. City of New York, 407 U.S. 203, 205 (1972) (holding that the rule from *In re Winship*, that a jury must find guilt "beyond a reasonable doubt," applied retroactively).

40. Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020) (quoting Duncan v. Louisiana, 391 U.S. 145, 148-150 (1968)); *see also* Malloy v. Hogan, 378 U.S. 1, 10-11 (1964) (citation omitted) ("The Court thus has rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'").

41. *Ramos*, 140 S. Ct. at 1394.

42. *Id*.

43. Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 LA. L. REV. 360, 374-75 (2012); *see also Edwards*, 141 S. Ct. at 1577 (Kagan, J., dissenting).

44. *Edwards*, 141 S. Ct. at 1577 (Kagan, J., dissenting).

the 1898 convention successfully "[stole] suffrage from African American citizens"[45] and silenced their voices on the jury.[46]

A. THE SUPREME COURT PERMITS AN UNCONSTITUIONAL PRACTICE: *APODACA V.. OREGON*

In 1972, the Court upheld the constitutionality of non-unanimous juries in *Apodaca v. Oregon*.[47] There, the question centered on whether the Sixth Amendment permitted felony convictions by non-unanimous juries in state courts.[48] The Court focused its inquiry on "the function served by the jury in contemporary society," and whether a unanimity requirement contributed to that function.[49] The Court identified that "the purpose of trial by jury is to prevent oppression by the Government by providing a 'safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.'"[50] "[I]n a splintered decision,"[51] four Justices concurred that the Sixth Amendment required unanimity in state courts, while four other Justices did not believe that a unanimity requirement would materially contribute to that function.[52]

Justice Powell, writing alone, supplied the decisive fifth vote to uphold the petitioner's conviction. Justice Powell's rationale proved sympathetic to the notion that "the Sixth Amendment requires a unanimous jury"; however, he did not believe that the

---

45. *See* Smith & Sarma, *supra* note 43, at 375.

46. *See* Jamila Johnson & Talia MacMath, *State Ct. Must Combat Mass Incarceration by Granting Broader Retroactivity to New Rules than is Provided under the Federal* Teague v. Lane *Test*, 111 J. CRIM. L. & CRIMINOLOGY ONLINE 33, 47 (2021).

47. Apodaca v. Oregon, 406 U.S. 404, 406 (1972) (plurality opinion); *accord* Johnson v. Louisiana, 406 U.S. 356 (1972).

48. *Apodaca*, 406 U.S. at 406.

49. *See id*. at 410.

50. *Id*. at 410 (quoting Duncan v. Louisiana, 391 U.S. 145, 156 (1968)).

51. Brief of Law Professors and Social Scientists as Amici Curiae in Support of Petitioner at 3, *Edwards*, 141 S. Ct. 1547 (2021) (No. 19-5807).

52. *Compare Apodaca*, 406 U.S. at 414 (Stewart, J., dissenting) ("Until today, it has been universally understood that a unanimous verdict is an essential element of a Sixth Amendment jury trial."), *with Apodaca*, 406 U.S. at 410 ("[A] jury will come to such a judgement as long as it consists of a group of laymen representative of a cross section of the community who have the duty and opportunity to deliberate . . ."), *and Apodaca*, 406 U.S. at 413 (opining that minority groups "will be present during all deliberations, and their views will be heard. [It] cannot [be] assume[d] that the majority of the jury will refuse to weigh the evidence and reach a decision upon rational grounds . . .").

Fourteenth Amendment incorporated that right against the states.[53] Yet, Justice Powell's "[deciding] rationale was foreclosed by precedent."[54] In *Malloy v. Hogan*, the Court "rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights[.]'"[55] And eight years later, in *Johnson v. Louisiana*, the Court reaffirmed that proposition.[56] Therefore, prior to *Apodaca*'s decision, the prevailing constitutional interpretation supported incorporation of the Sixth Amendment unanimity requirement at both the state and federal levels.[57]

Although forty-eight of the fifty states properly used unanimous juries,[58] Louisiana and Oregon, relying on *Apodaca*, continued to permit non-unanimous convictions throughout the twentieth and early twenty-first centuries.[59] Ultimately, in 2018, "Louisiana repealed its non-unanimity rule and replac[ed] it with a law requiring unanimous jury verdicts in every felony trial."[60] However, the new law applied prospectively only to claims then-pending or recently adjudicated.[61] Thus, until 2019, "[Louisiana] continue[d] to allow nonunanimous verdicts [in criminal cases]."[62]

The consequences were dire. Indeed, a 2018 study highlighted the prejudicial effect that non-unanimous juries inflicted on Black defendants in Louisiana.[63] That study revealed, out of 199

---

53. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1398 (2020).

54. *Id.*; *See* Johnson v. Louisiana, 406 U.S. 356 (1972) (Powell, J., concurring) (reasoning that "due process does not require that the States apply the federal jury-trial right with all its gloss" and that in either case, unanimous or not, the judgment of laymen is sufficiently interposed between the accused and his accuser).

55. Malloy v. Hogan, 378 U.S. 1, 10-11 (1964) (citation omitted).

56. *Johnson*, 406 U.S. at 384 (Douglas, J., dissenting) (citing *Malloy*, 378 U.S. at 10-11).

57. *See Ramos*, 140 S. Ct. at 1405 (explaining that Justice Powell's dual-track theory of incorporation was foreclosed in 1972).

58. *Id.* at 1394.

59. *See* La. Const. art. 1, § 17(A) (amended 2018) (requiring ten, instead of nine, out of twelve jurors to concur in a guilty verdict); *See* Johnson & MacMath, *supra* note 46, at 49 ("[I]n 1973, the State amended its Constitution to require ten, instead of nine, out of twelve jurors to concur in a guilty verdict.").

60. *See* Johnson & MacMath, *supra* note 46, at 50.

61. La. Const. art. 1, § 17(A) (citing 2018 La. Reg. Sess., Act 722).

62. *Ramos*, 140 S. Ct. at 1407 (citing 2018 La. Reg. Sess., Act 722).

63. Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1636 (2018) ("[T]he *Russell-Simerman* dataset provides a unique way . . . [to analyze] how black and white jurors—evaluating the exact same evidence in real-life-settings—view guilt and innocence.").

cases decided by racially mixed nonunanimous juries, 190 resulted in "guilty" verdicts and only nine in "not guilty" verdicts.[64] Significantly, white jurors cast 64.1% of the total guilty verdicts, while Black jurors only cast 31.3%.[65] These statistics confirmed that Louisiana's non-unanimity rule effectively suppressed the views of racial minorities: "[B]lack jurors found themselves casting 'empty votes'—that is, 'not guilty' votes overridden by the supermajority vote of the other jurors . . . ."[66] Louisiana's success in silencing minority jurors is not surprising—the State originally adopted this rule to reduce African American participation in the courts.[67] From its adoption at the constitutional convention in 1898 until 2019, Louisiana relied on this rule, which operated exactly how it was intended to operate in the Jim Crow era.[68]

B. RETROACTIVITY AND *TEAGUE*: THE WATERSHED EXCEPTION

Traditionally, criminal defendants were limited to using federal habeas corpus only for jurisdictional challenges to the courts that had rendered their convictions.[69] Gradually, the Court recognized that habeas relief includes a remedy for deprivations of due process, as well as federal constitutional claims previously decided by state courts.[70] This recognition created new opportunities for prisoners to challenge the constitutionality of their convictions, forcing the Court to confront questions of retroactivity on federal collateral review.[71] In *Linkletter v. Walker*, the Court established a balancing test for determining retroactivity.[72] However, the *Linkletter* test accounted heavily for states' interests in

64. Frampton, *supra* note 63, at 1636-37.

65. *Id.*

66. *Id.* at 1637.

67. *Id.* at 1597-98.

68. *Id.* at 1599.

69. Jeffrey G. Ho, Finality, *Comity and Retroactivity in Criminal Procedure: Reimagining the* Teague *Doctrine after* Edwards v. Vannoy, 73 STAN. L. REV. 1551, 1563 (2021).

70. *See* Ho, *supra* note 69, at 1563; Teague v. Lane, 489 U.S. 288, 295 (1989).

71. *Id.* at 1564.

72. Linkletter v. Walker, 381 U.S. 618, 629 (1965) ("we must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retroactive application will further or retard its operation.").

comity, finality in judgments, and "respect for the [state court's] judicial process."[73]

Furthermore, pre-*Teague* doctrines failed to distinguish between direct and collateral review, which led to similarly situated defendants being treated differently: the Court would deny retroactivity in one case, but not in others.[74] Thus, the ensuing inconsistencies prompted the *Teague* Court to adopt a framework specifically tailored to address retroactivity in the realm of collateral review.[75]

Teague held that *new* procedural rules ordinarily do not apply retroactively on federal collateral review unless they qualify as watershed rules.[76] A rule is new if it "breaks new ground, or imposes a new obligation on the States or the Federal Government."[77] For a new rule to qualify as watershed, it must be "implicit in the concept of ordered liberty" *and* "implicate the fundamental fairness of a trial."[78] The Court suggested, however, that because such rules are central to an accurate determination of innocence or guilt, it is "unlikely that many such components of basic due process have yet to emerge."[79]

---

73. Ho, *supra* note 69, at 1559; *see* Solem v. Stumes, 465 U.S. 638, 642 (1984) ("[T]he criteria guiding resolution of the [retroactivity] question implicate . . . the extent of the reliance by law enforcement authorities on the old standards . . . .").

74. *See Teague*, 489 U.S. at 303; Edwards v. Arizona, 451 U.S. 477, 484-487 (1981) (holding the invocation of the right to counsel prevents further questioning from police); *Solem*, 465 U.S. 638 (using *Linkletter* standard to deny retroactive application of Edwards v. Arizona); *see also* Ho, *supra* note 69, at 1565 ("[t]he [C]ourt held that one new rule should be applied to all cases on direct review, another new rule to all cases in which trial had not yet started, another new rule to all cases in which tainted evidence had not yet been introduced at trial, and other new rules to only future cases.").

75. *See* Edwards v. Vannoy, 141 S. Ct. 1547, 1554 (2021) (citing *Linkletter*, 381 U.S. 618 (1965)). Application of *Linkletter* led to the disparate treatment of similarly situated defendants on direct review. *Teague*, 489 U.S. at 303 (comparing Miranda v. Arizona, 384 U.S. 436 (1966) with Johnson v. New Jersey, 384 U.S. 719 (1966)).

76. *See* Teague v. Lane, 489 U.S. 288, 292 (1989).

77. *See id.* at 301 (citation omitted). Alternatively, *old* rules that are dictated by precedent always apply retroactively. *See id.* at 309. The Court has held that a rule is not new if it is merely an application of a principle that has governed other decisions. *See id.* at 307 (citing Yates v. Aiken, 484 U.S. 211 (1988)); Ho, *supra* note 69, at 1587.

78. *Teague*, 489 U.S. at 311-12; *see also* Jasjaap S. Sidhu, *Note: Reviving* Teague*'s "Watershed" Exception*, 44 HARV. J.L. & PUB. POL'Y 599, 610 (2021).

79. *Teague*, 489 U.S. at 313. *See Edwards*, 141 S. Ct. at 1570 (noting that a "rule fitting that bill, *Teague* said, would do two things: (1) 'significantly improve' existing procedures for determining factual guilt or innocence and (2) 'implicate the fundamental fairness of the trial.'"); *see also* Sawyer v. Smith, 497 U.S. 227 (1990).

Teague's standard is exacting and "expressly calibrated to address States' interests in the finality of their criminal judgements."[80] Its requirements capture a "small subset of procedural rules" that are needed to fairly adjudicate a defendant's guilt.[81] Included in that small core is the Sixth Amendment's right to counsel as recognized in *Gideon v. Wainwright*.[82] Like in *Gideon*, a new rule must "remedy an impermissibly large risk of an inaccurate conviction."[83] This has proven to be a difficult standard to satisfy. Besides *Gideon*, the Court has rejected watershed status for every proposed new rule, consistently expressing uncertainty that any new rules will emerge.[84]

C. *RAMOS* RESTORED UNANIMITY TO STATE CRIMINAL TRIALS

Ultimately, *Ramos* restored unanimity to state criminal trials when it held that "the Sixth Amendment's Jury Trial Clause requires unanimity, and that this requirement applies to states via the Fourteenth Amendment."[85] The Court believed that "the original meaning and [the] Court's precedents" established two things: (1) that the Sixth Amendment requires unanimous jury verdicts and (2) the Fourteenth Amendment incorporates the Sixth Amendment against the States.[86]

---

80. Ramos v. Louisiana, 140 S. Ct. 1390, 1407 (2020).

81. *Edwards*, 141 S. Ct. at 1575 (Kagan, J., dissenting) (citing Graham v. Collins, 506 U.S. 461, 478 (1993)).

82. *See Edwards*, 141 S. Ct. at 1557 (citing Gideon v. Wainwright, 372 U.S. 335, 344-345 (1963)); *see also* Brief of Amicus Curiae the National Association of Criminal Defense Lawyers in Support of Petitioner at 1-2, 13, *Edwards*, 141 S. Ct. 1547 (2021) (No. 19-5807), 2020 WL 4450435 ("*Whorton* tells us that *Gideon* qualified as a watershed rule because 'the risk of an unreliable verdict is intolerably high' when a defendant is denied assistance of counsel."); *see also* Whorton v. Bockting, 549 U.S. 406, 416 (2007).

83. *See* Teague v. Lane, 489 U.S. 288, 312 (1989) (citations omitted).

84. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968) (holding that the jury trial right in criminal cases is fundamental to the American scheme of justice protected by the Fourteenth Amendment); DeStefano v. Woods, 392 U.S. 631 (1968) (holding that the jury right established in *Duncan* was non-retroactive); Batson v. Kentucky, 476 U.S. 79 (1986) (holding that racial discrimination in jury selection was violative of the Sixth and Fourteenth Amendments); Allen v. Hardy, 478 U.S. 255 (1968) (per curiam) (holding that the rule announced in *Batson* was non-retroactive).

85. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020); *see also* Johnson & MacMath, *supra* note 46, at 47.

86. *See Ramos*, 140 S. Ct. at 1416 (Kavanaugh, J., concurring) ("Why stick by an erroneous precedent that is egregiously wrong as a matter of constitutional law . . . ?").

The Court criticized *Apodaca*'s failure to address "the racially discriminatory *reasons* that Louisiana and Oregon adopted their peculiar rules."[87] Those reasons, it explained, contributed to its overruling of *Apodaca*.[88] In spite of Louisiana and Oregon's purported interests in comity and finality, neither interest merited upholding *Apodaca*.[89] Ultimately, the "American people's reliance in their constitutional liberties prevailed over whatever interest Louisiana and Oregon held in maintaining *Apodaca* as good law."[90]

The *Ramos* Court declined to explicitly answer the retroactivity question, but it did recognize important characteristics of the watershed exception.[91] The majority acknowledged that *Teague* "left open the possibility of an exception for 'watershed rules' [that] '[implicate] the fundamental fairness and accuracy of the trial.'"[92] The dissent worried, though, that prisoners might abuse new procedural rules on collateral review.[93] The Court stopped short, however, of declaring the new rule retroactive.[94]

---

87. *See Ramos,* 140 S. Ct. at 1401 (majority opinion).

88. *See id.* at 1416 (Kavanaugh, J., concurring) ("*Apodaca* is egregiously wrong.").

89. The first reliance interest concerned the fact that Louisiana and Oregon might need to retry defendants convicted of felonies by non-unanimous verdicts whose cases are still pending on direct appeal. *See id.* at 1406 (majority opinion). The second reliance interest concerned Louisiana and Oregon's interest in the finality of their criminal judgements. *Id.* The Court rejected the dissent's argument that *Apodaca* generated enormous reliance interests, and that overturning *Apodaca* would open the floodgates of re-litigation because prior convictions in only two States were potentially affected. *Id.* While Louisiana and Oregon faithfully contended that retrying hundreds of cases would impose a cost, the majority acknowledged that "new rules of criminal procedure usually do, often affecting significant numbers of pending cases across the whole country" but did not find the states' arguments persuasive. *Id.*

90. Min K. Lee, *Stare Decisis on Thin Ice: Mulling over the Supreme Court after* Ramos v. Louisiana, 45 SETON HALL LEGIS. J, 295, 305 (2021).

91. Ramos v. Louisiana, 140 S. Ct. 1390, 1407 (2020).

92. *Id.* (citation omitted).

93. *Id.* at 1437 (Alito, J., dissenting) (arguing that more guilty than innocent people would be let free).

94. *See id.* at 1407 (majority opinion) (noting that "[w]hether the right to jury unanimity applies to cases on collateral review is a question for a future case where the parties will have a chance to brief the issue and [the Court] will benefit from their adversarial presentations."); *but see id.* at 1420 (Kavanaugh, J., concurring) ("[T]oday's decision will not apply retroactively on federal habeas corpus review and will not disturb convictions that are final.").

III. THE *EDWARDS* DECISION

The Court granted certiorari in *Edwards v. Vannoy* to determine whether the *Ramos* unanimity rule applied retroactively to overturn final convictions on federal collateral review.[95] The Court analyzed two questions: (1) whether *Ramos* announced a new rule of criminal procedure, as opposed to applying a settled rule, and (2) if it announced a new rule, whether *Ramos* satisfied *Teague*'s exception for new watershed rules of criminal procedure.[96] Ultimately, the Court ruled by a six-three vote that *Ramos* announced a new rule; however, it did not satisfy *Teague*'s watershed exception standard.[97] Thus, the Court held that *Ramos* does not apply retroactively on federal habeas review.[98]

A. *RAMOS* ANNOUNCED A NEW RULE AND NEW RULES OF CRIMINAL PROCEDURE DO NOT ORDINARILY APPLY RETROACTIVELY ON FEDERAL HABEAS REVIEW

The majority[99] observed that, under *Teague*, new rules of criminal procedure apply on collateral review only if they qualify as watershed rules.[100] Thus, the Court first ascertained whether the *Ramos* holding constituted a new rule.[101] The Court noted that "a rule is new unless it was *dictated* by precedent"[102] or "apparent to all reasonable jurists [when] the defendant's conviction became final."[103] It clarified that, for purposes of *Teague*, a decision that overrules an earlier case is considered a new rule for retroactivity purposes.[104]

Ultimately, the majority held that *Ramos* announced a new rule because until *Ramos*, courts understood *Apodaca* to permit non-unanimous juries in state criminal trials.[105] It added that, although *Ramos* adhered to the original meaning of the Sixth Amendment's jury trial right, "reasonable jurists who considered

---

95. *See* Edwards v. Vannoy, 141 S. Ct. 1547, 1551 (2021).

96. *Id.* at 1555.

97. *See id.* at 1555-58.

98. *Id.* at 1551.

99. Justice Kavanaugh penned the majority opinion and was joined by Chief Justice Roberts, Justice Alito, Justice Gorsuch, and Justice Barrett. *See id.* at 1550.

100. *See id.* at 1556.

101. *See id.* at 1555.

102. *Id.* (citing Teague v. Lane, 489 U.S. 288, 301 (1989)).

103. *Id.* at 1556 (citation omitted).

104. *See id.* at 1555 (citing Whorton v. Bockting, 549 U.S. 406, 416 (2007)).

105. *Id.* at 1556.

the question before *Ramos* interpreted *Apodaca* to allow non-unanimous jury verdicts in state criminal trials."[106] Thus, *Ramos* announced a new rule by holding that a state jury must be unanimous to convict a defendant of a felony.[107]

B. JURY UNANIMITY IS NOT A WATERSHED RULE BECAUSE IT IS NOT FUNDAMENTAL TO THE FAIRNESS OF A PROCEEDING

Because *Ramos* announced a new rule, the Court then determined whether *Ramos* constituted a watershed rule.[108] The majority noted that the watershed exception only applies when a rule "alter[s] 'our understanding of the bedrock procedural elements essential to the fairness of a proceeding.'"[109] It noted that the *Teague* standard is demanding—so much so that, besides *Gideon*, the Court "has rejected *every* claim that a new procedural rule qualifies as a watershed rule."[110]

For instance, regarding *Ramos*'s significance for criminal defendants, the majority perceived the jury-unanimity right as subordinate to the general right to a jury trial, which the Court had declined to apply retroactively.[111] Following the Court's decision in *Duncan v. Louisiana*, holding that defendants have a constitutional right to a jury trial in state criminal cases, "the Court in *DeStefano* [*v. Woods*] declined to retroactively apply the jury right [from *Duncan*]."[112] Furthermore, *Ramos*'s reliance on the original meaning of the Constitution proved irrelevant to the majority; the Court previously rejected the argument that reliance on the original meaning of the Sixth Amendment warranted a rule's retrospective application.[113] Likewise, the majority disagreed that *Ramos* should apply retroactively given its effect of preventing

106. Edwards v. Vannoy, 141 S. Ct. 1547, 1555-56 (2021) (noting that Edwards's "argument conflate[d] the merits question presented in *Ramos* with the retroactivity question presented [in *Edwards*].").

107. *See id.* at 1556.

108. *Id.*

109. *Id.* at 1557.

110. *Id.*

111. *Id.* at 1558 (citing Duncan v. Louisiana, 391 U.S. 145 (1968); DeStefano v. Woods, 392 U.S. 631 (1968)). The Court could not "discern a principled basis for retroactively applying the subsidiary *Ramos* jury-unanimity right when the Court in *DeStefano* declined to retroactively apply the broader jury right itself." *Id.*

112. Edwards v. Vannoy, 141 S. Ct. 1547, 1558 (2021) (citing *DeStefano*, 392 U.S. at 633).

113. *See id.* at 1159 (citing Crawford v. Washington, 541 U.S. 36 (2004); Whorton v. Bockting, 549 U.S. 406 (2007)).

racial discrimination in the jury room.[114] It noted that in *Batson v. Kentucky*, "the Court overruled precedent" and effectively prohibited "discrimination on the basis of race when exercising individual peremptory challenges."[115] Despite *Batson*'s significance, in *Allen v. Hardy*, the Court refused to give *Batson* retroactive effect; it opined that *Batson* only marginally improved the factfinding process.[116] On these facts, the majority declared that the purported watershed exception is "moribund" and that no new rules of criminal procedure can satisfy the watershed exception.[117]

The Court justified its decision on the basis of stare decisis, explaining that it "carefully adhere[d] to *Ramos* and tracked [its] many longstanding [retroactivity precedents]."[118] By virtue of those decisions, it stressed that no additional watershed rules would likely emerge.[119] The Court understood that it "would occasionally announce new rules of criminal procedure"; however, it remained adamant that such new rules would not likely "apply retroactively on federal collateral review."[120]

Moreover, the majority worried that applying new constitutional rules retroactively would frustrate state reliance inter-

---

114. *See Edwards*, 141 S. Ct. at 1558 (noting that the "argument for retroactivity cannot prevail in light of [*Batson*] and [*Allen*].").

115. *Id*. at 1559 (citing Batson v. Kentucky, 476 U.S. 79, 92-93 (1986)).

116. *Id*.; Allen v. Hardy, 478 U.S. 255, 261 (1986) ("By serving a criminal defendant's interest in neutral jury selection procedures, the rule in *Batson* may have some bearing on the truthfinding [sic] function of a criminal trial. But [*Batson*] serves other values as well. Our holding ensures that States do not discriminate against citizens who are summoned to sit in judgement against a member of their own race and strengthens public confidence in the administration of justice.").

117. *Edwards*, 141 S. Ct. at 1559 ("We recognize that the Court's many retroactivity precedents taken together raise a legitimate question: If landmark and historic criminal procedure decisions . . . do not apply retroactively on federal collateral review, how can any additional new rules of criminal procedure apply retroactively on federal collateral review?"). The majority suggested that maintaining the watershed exception "offers false hope to defendants, distorts the law, misleads judges, and wastes the resources of defense counsel, prosecutors, and courts." *Id.* at 1560.

118. *See id.* at 1560-61 ("[W]e then took account of the overall jurisprudential landscape of the last several decades in *Teague* cases and acknowledged what has become unmistakably clear: The purported watershed exception is moribund."). "No *stare decisis* values would be served by continuing to indulge the fiction that *Teague*'s purported watershed exception endures." *Id.*

119. *See id.* at 1559-61.

120. *See id.* at 1557-60 (citing Teague v. Lane, 489 U.S. 288, 313 (1989)).

ests,[121] and that "applying *Ramos* retroactively would potentially overturn decades of convictions obtained in reliance on *Apodaca*."[122] The watershed analysis is "expressly calibrated to address the reliance interests States have in the finality of their criminal judgements."[123] Consequently, the majority concluded that Louisiana and Oregon's reliance interests outweighed the benefits of reopening final judgements to redress constitutional violations.[124]

C. THE DISSENT

Alternatively, the dissent argued that *Ramos* squarely constituted a watershed rule.[125] It opined that, but for the majority's elimination of *Teague*'s exception, *Ramos* would have satisfied *Teague*'s watershed inquiry.[126] As a result, the dissent charged the majority with abandoning stare decisis, pointing out that no party had requested that *Teague*'s watershed exception be overruled.[127] It also posited that the majority erroneously relied on dissimilar precedents to justify its denial of *Ramos*'s watershed status.[128]

The dissent recalled what *Teague* declared and *Ramos* reaffirmed regarding watershed rules: they are "implicit in the concept of ordered liberty" and essential to the fairness of a trial.[129] It noted that *Ramos* characterized unanimity as "vital," "essential," "indispensable," and "fundamental" to the American scheme

---

121. *See* Edwards v. Vannoy, 141 S. Ct. 1547, 1554-55 (2021) (quoting *Teague*, 489 U.S. at 309) ("[A]pplying 'constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system.'").

122. *See id.* at 1554-55 (explaining that conducting retrials would require significant state resources and "inflict[] substantial pain on crime victims who must testify again"); *but see Ramos*, 140 S. Ct. at 1419 (Kavanaugh, J., concurring) ("[O]verruling *Apodaca* would not unduly upset reliance interests. Only Louisiana and Oregon employ non-unanimous juries in criminal cases.").

123. *Edwards*, 141 S. Ct. at 1560.

124. *Id*. at 1555; *see also* Ho, *supra* note 69, at 1551 (explaining that the Court has justified its approach to retroactivity by emphasizing *comity*, which is respect for the judicial process of the state courts, and *finality*, which is the closure a judgement of conviction is supposed to bring) (emphasis added).

125. *See Edwards*, 141 S. Ct. at 1574 (Kagan, J., dissenting). Justice Kagan's dissent was joined by Justice Breyer and Justice Sotomayor. *Id.* at 1573.

126. *See id.*

127. *See id.*

128. *See id.* at 1578-79.

129. *Id.* at 1574-75 (citing Teague v. Lane, 489 U.S. 288, 311-12 (1989)).

of justice.[130] *Ramos* even recognized that requiring a jury to be unanimous can prevent racial prejudice from resulting in wrongful convictions.[131] To be sure, *Ramos* overruled *Apodaca* to ensure *fair* and dependable trials, as consistent with the Sixth Amendment.[132] Thus, the dissent argued that "*Ramos*'s reasoning [aligned with] th[e] Court's description of watershed rules."[133] Specifically, the dissent reasoned that "the justifications given to support . . . overruling [*Apodaca*] are elements to consider when deciding on a rule's watershed status."[134]

Moreover, the dissent invoked the Sixth Amendment's history to support *Ramos*'s watershed status, emphasizing that "the right to a jury trial *meant* a trial in which the jury renders a unanimous verdict."[135] Twice before, the Court had "retroactively applied rules that are similarly integral to jury verdicts."[136] However, unlike those decisions, *Ramos* relied on strong claims of racial injustice.[137] Therefore, the dissent argued that *Ramos* deserved prospective and retrospective application because "allowing a conviction by a non-unanimous jury 'impair[s]' the 'purpose and functioning of the jury,' undermining the Sixth Amendment's very essence."[138]

---

130. Edwards v. Vannoy, 141 S. Ct. 1547, 1573 (2021) (quoting *Ramos*, 140 S. Ct. at 1395-97).

131. *Id.* at 1575 (citing *Ramos*, 140 S. Ct. at 1417-19 (Kavanaugh, J., concurring)) ("explaining how a non-unanimity rule poses a special danger of canceling Black jurors' votes.").

132. *Id.* at 1575.

133. *Id.*

134. *Id.* at 1575 n.3 ("*Ramos* overruled precedent (rather than just announcing a new rule) on grounds strikingly reminiscent of *Teague*'s criteria for watershed status.").

135. *Id.* at 1576 (citation omitted).

136. *See id.* at 1576 ("In Ivan V. v. City of New York, 407 U.S. 203 (1972), we gave 'complete retroactive effect' to the rule of *In re* Winship, 397 U.S. 358 (1970), that a jury must find guilt 'beyond a reasonable doubt.' And in Brown v. Louisiana, 447 U.S. 323 (1980), the Court retroactively applied the rule of Burch v. Louisiana, 441 U.S. 190 (1979), that a six-person guilty verdict must be unanimous.").

137. *See id.* at 1577.

138. *Id.* (citing Brown v. Louisiana, 447 U.S. 323, 331-35 (1980) (plurality opinion)) ("It 'raises serious doubts about the fairness of a trial' . . . [a]nd it fails to 'assure the reliability of [a guilty] verdict.'"); *see also* Ramos v. Louisiana, 140 S. Ct. 1390, 1418 (2020) (Kavanaugh, J., concurring) (explaining that the racist origins of Louisiana and Oregon's non-unanimity rule should matter and should count heavily in favor of overruling *Apodaca*).

The dissent also questioned the majority's disregard for stare decisis in overruling *Teague*'s exception.[139] It explained that the Court's duty is to fairly apply the prevailing law until a party requests a change.[140] But the majority, on its own, without hearing countervailing arguments, overruled the exception.[141] The dissent observed that while *Teague* "said there would not be 'many' (retroactive) watershed rules," it never said that there would be none.[142]

Moreover, the dissent criticized the majority's reliance "on decisions holding non-retroactive various other—even though dissimilar—procedural rules."[143] It echoed that "watershed rules are only a small subset of procedural rules"[144] that "significantly improve existing procedures for determining factual guilt or innocence . . . ."[145] Thus, the majority's reliance on sentencing decisions proved indiscriminative. *Teague* "explains why sentencing procedures are not watershed": sentencing procedures do not implicate the factfinding process of trial.[146] The dissent categorized *Ramos* as watershed, arguing that the unanimity rule directly implicates the factfinding process because it remedies an impermissibly large risk of an inaccurate conviction.[147]

In addition, the dissent maintained that none of the majority's precedent cases corresponded on every level to *Ramos*'s significance.[148] Nor did the dissent understand the majority's ra-

---

139. Edwards v. Vannoy, 141 S. Ct. 1547, 1580 (2021) (Kagan, J., dissenting).

140. *Id.* at 1581.

141. *Id.* The dissent also maintained that the majority's only justification for overruling the decision, that the Court had not identified a new rule as watershed and so *Teague* proved to be an empty promise, was "sketch[y]" and did not meet the standard that is usually required to overrule precedent. *Id.*

142. *See id.* at 1580.

143. *Id.* at 1578.

144. *Id.* at 1579.

145. *Id.* at 1571 (majority opinion) (quoting Teague v. Lane, 489 U.S. 288, 312-13 (1989)).

146. *See id.* at 1579 (Kagan, J., dissenting) (citations omitted) ("[a] watershed rule . . . must go to the jury's 'determination of innocence or guilt.'").

147. *See id*. at. 1576-78 ("[unanimity] is as central to the Nation's idea of a fair and reliable guilty verdict. When can the State punish a defendant for committing a crime? . . . Only when 'the truth of [an] accusation' is 'confirmed by the unanimous suffrage' of a jury . . . .") (citation omitted).

148. *Id.* at 1579 n.6. Justice Kagan provided that "[I]n addressing the unanimity rule's 'significance,' the majority notes that the Court once held the jury-trial right non-retroactive." *Id.* (citing DeStefano v. Woods, 392 U.S. 631 (1968); Duncan v. Louisiana, 391 U.S. 145 (1968)). In addressing *Ramos*'s "return to the 'original

tionale for comparing the unanimity right's significance to that of decisions like *Brown* when no court had made this comparison before.[149] Such comparison proved mistaken because, the dissent emphasized, "watershed rules are only a small subset of procedural rules."[150] Besides, the Court had previously given a unanimity rule retroactive effect "despite its earlier holding that the jury trial right was not."[151] Accordingly, the dissent supported retroactive application of *Ramos* because of the rule's impact on the fundamental fairness of a trial; it also recognized the rule's necessary role in preventing an impermissibly large risk of inaccurate convictions.[152]

IV. ANALYSIS

Despite unanimity's centrality to the Sixth Amendment's jury trial right, the *Edwards* majority understated *Ramos*'s significance for preventing racial discrimination in the jury room. Jury unanimity is entrenched in our nation's legal tradition and is essential to ensure that convictions are obtained accurately.[153] Increasingly, Louisiana jurisprudence is beginning to recognize the "historic injustices" that Louisiana's unique non-unanimity rule inflicted on its Black citizens.[154] As recently as last year, at least one justice of the Louisiana Supreme Court would have retroactively applied the jury-unanimity rule in an apparent effort to remedy those historic injustices.[155] Accordingly, the Supreme Court needs to adopt a modified approach to retroactivity that is

---

meaning,' the majority points to [the Court's] decision that an originalist rule about hearsay evidence should not apply backward." *Id.* (citing Whorton v. Bockting, 549 U.S. at 421 (2007); Crawford v. Washington, 541 U.S. 36 (2004)). In addressing *Ramos*'s "role in 'preventing racial discrimination,' the majority invokes [the Court's] denial of retroactivity to a rule, making it easier to prove race-based peremptory strikes." *Id.* (citing Allen v. Hardy, 478 U.S. 255 (1986); Batson v. Kentucky, 476 U.S. 79 (1986)).

149. Edwards v. Vannoy, 141 S. Ct. 1547, 1579 n.6 (2021) (Kagan, J., dissenting).

150. *Id.* at 1579 (citing Graham v. Collins, 506 U.S. 461, 478 (1993)).

151. *Id.* (citing majority opinion at 1558 n.5).

152. *Id.* at 1581-82 (Kagan, J., dissenting).

153. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1416-17 (2020) (Kavanaugh, J., concurring) ("*Apodaca* sanctions the conviction at trial or by guilty plea of some defendants who might not be convicted under the proper constitutional rule . . . .").

154. State v. Gipson, 2019-01815, p. 1 (La. 6/3/20); 296 So. 3d 1051, 1052 (Johnson, C.J., dissenting) ("I am persuaded that we should take this opportunity to squarely address the historic injustices done to Louisiana's African American citizens by the use of the non-unanimous jury rule.").

155. *See id.* (arguing that *Ramos* "should be applied retroactively to cases on state collateral review").

better suited to address the historic injustices imposed on Louisiana's Black citizens.

A. UNWILLING TO REMEDY THE PAST: *EDWARDS*'S IMPACT AND THE MAJORITY'S MISTAKES

Edwards's elimination of *Teague's* watershed exception drastically altered the Court's retroactivity doctrine.[156] Now, prisoners who exhausted their appeals before the decision in *Ramos* "can receive no aid from the change in law [that *Ramos*] made."[157] Prisoners, like Mr. Edwards, who were convicted by an unconstitutional practice, will find no redress on federal collateral review.[158] In effect, the Court narrowed the scope of habeas relief—essentially barring prisoners from *ever* benefitting from new procedural rules on collateral review.[159] Moreover, *Edwards* forecloses the discovery of *any* new rules of criminal procedure, regardless of the rule's "[importance] to adjudicative fairness."[160] Effectively, the Court extinguished a well-established principle of retroactivity law.[161]

By eliminating this exception, *Edwards* contradicted *Teague*'s justification for establishing the watershed exception in the first place. *Teague* considered that "[t]ime and growth in social capacity . . . will properly alter our understanding of [the] *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction."[162] So, while *Teague* expressed doubt that new components of due process would emerge, it still recognized the utility of the exception.[163] *Ramos* also accepted that "[jury unanimity] may serve purposes evading [the Court's] current notice."[164] Thus, because the possibility for evolution of

156. Ho, *supra* note 69, at 1568.

157. Edwards v. Vannoy, 141 S. Ct. 1547, 1574 (2021) (Kagan J., dissenting).

158. *See Gipson*, 2019-01815, p. 1; 296 So. 3d at 1052 (Johnson, C.J., dissenting) (quoting Danforth v. Minnesota, 552 U.S. 264, 291 (2008)).

159. *See Edwards*, 141 S. Ct. at 1581 (Kagan, J., dissenting) ("[T]he Court curtail[ed] *Ramos*'s effects by expunging *Teague*'s provision . . . limit[ing] the consequences of any similarly fundamental change in criminal procedure that may emerge in the future.").

160. *Id.* at 1574.

161. *Id.*

162. Teague v. Lane, 489 U.S. 288, 301 (1989) (quoting Mackey v. United States, 401 U.S. 667, 693-94 (1971)) (emphasis in original).

163. *See id.*

164. Ramos v. Louisiana, 140 S. Ct. 1390, 1402 (2020) ("As judges, it is not our role to reassess whether the right to a unanimous jury is 'important enough' to retain.

what constitutes a watershed rule was meant to persist, the Court cannot reasonably declare that the exception is "moribund."[165]

The *Edwards* Court discarded precedent to support "judicial efficiency" and states' reliance interests. However, the Court's high regard for states' reliance interests is discredited by the fact that Louisiana and Oregon's reliance on *Apodaca* proved illegitimate.[166] The prevailing constitutional standards have always required jury-unanimity in state and federal trials.[167] *Apodaca* is an outlier in the Court's jurisprudence; Justice Powell's theory of dual-track incorporation "was dead on arrival."[168] Thus, a proper retroactivity analysis should account for any such reliance on *Apodaca*, especially when said reliance upholds a law that is pointedly racist and unfair towards minorities—like Louisiana's.[169]

By holding *Ramos* non-retroactive, the *Edwards* Court implicitly condoned the egregious discriminatory practices that it explicitly denounced in *Ramos*. Evidently, the practical implications of affording relief concerned the majority more than the ethical implications of not doing so.[170] The *Edwards* dissent correctly acknowledged that consequences should follow from its holding in *Ramos*.[171] Indeed, in *Ramos*, the Court had accepted that retroactive application of new procedural rules would surely impose a cost and affect a significant number of pending cases.[172] However, the *Edwards* court proved unwilling to pay that price and accept the consequences that *should* have followed *Ramos*. Seemingly, the majority did not hesitate to contradict itself and deny *Ramos* watershed status.

With humility, we must accept that [jury unanimity] may serve purposes evading our current notice. We are entrusted to preserve and protect that liberty . . . .").

165. *See* Edwards v. Vannoy, 141 S. Ct. 1547, 1561 (2021).

166. *See Ramos*, 140 S. Ct. at 1409 (noting that the states' interests "in avoiding a modest number of retrials . . . are much less weighty."); Reply Brief for Petitioner at 19, *Edwards*, 141 S. Ct. 1546 (2021) (No. 19-5807), 2020 WL 6379085, at *19 ("[Louisiana] has no legitimate interest in avoiding retroactivity . . . .").

167. *Ramos*, 140 S. Ct. at 1405.

168. *Id.* at 1406; Transcript of Oral Argument, *supra* note 4, at 4.

169. *See Edwards*, 141 S. Ct. at 1574 (Kagan, J., dissenting).

170. *See* Johnson & MacMath, *supra* note 46, at 42.

171. Edwards v. Vannoy, 141 S. Ct. 1547, 1582 (2021) (Kagan, J., dissenting).

172. Ramos v. Louisiana, 140 S. Ct. 1390, 1408 (2020) ("But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right.").

In reality, giving *Ramos* retroactive effect would only require *two* states, Louisiana and Oregon, to retry cases, and those retrials would be limited to people convicted by non-unanimous juries.[173] The majority emphasized the inefficiency and burden that would result from applying *Ramos* retroactively.[174] However, "applying *Ramos* retroactively would potentially affect about 1,600 cases in Louisiana, for which fewer than 1,000 have proof of a non-unanimous verdict."[175] Surely, applying *Ramos* retroactively is not an impossible task.[176] Additionally, when one takes into account the number of individuals eligible for parole and the number of individuals incarcerated for accompanying unanimous jury convictions, the pool of prospective retrials is further limited.[177] In light of these statistics, the Court was overly concerned about judicial efficiency: by all accounts, retrying the limited number of defendants who were convicted by nonunanimous juries is a manageable task.[178]

Ideally, the interest in addressing constitutional violations should always prevail over any purported interest in not disrupting state convictions. As the Court stated in *Ramos*, "[n]either Louisiana nor Oregon claim[ed] anything like the prospective economic, regulatory, or social disruption litigants . . . usually invoke."[179] Although the *Edwards* Court showed genuine concern for the disruption of state reliance interests, that concern was not a sufficient justification to deny *Ramos* watershed status. The Court's concern for reliance interests is immaterial in relation to the necessity of remedying past constitutional violations. Considering the racially discriminatory history of Louisiana's nonunanimity rule, the Court's concern for state reliance interests cannot be a valid justification for its denial of *Ramos*'s watershed status.

---

173. Reply Brief for Petitioner, *supra* note 166, at 16. In addition, for cases challenging the constitutionality of a conviction, the burden shifts to the petitioner to show that they were convicted by a non-unanimous jury. *Id.*

174. Edwards v. Vannoy, 141 S. Ct. 1547, 1554-55 (2021).

175. Reply Brief for Petitioner, *supra* note 166, at 16. The reason for the discrepancy is because the jury was not polled in every case, so it would not be possible to establish that a defendant was convicted by a non-unanimous jury.

176. Transcript of Oral Argument, *supra* note 4, at 13. Roughly 145,000 cases were filed per year in Louisiana when *Edwards* was argued. *Id.*

177. *Id.* at *12.

178. *See* Transcript of Oral Argument, *supra* note 4, at 12-13.

179. Ramos v. Louisiana, 140 S. Ct. 1390, 1406 (2020).

B. *RAMOS* IS A WATERSHED RULE BECAUSE HISTORY AND PRACTICE REVEAL THAT JURY UNANIMITY IS ESSENTIAL TO THE FAIRNESS OF A PROCEEDING

The *Edwards* majority contradicted itself by failing to recognize that jury-unanimity is a watershed rule.[180] The discriminatory background of non-unanimous juries and their continuing disparate effect on minority jurors reveals that *Ramos* is necessary to preserve the fairness and accuracy of a proceeding.[181]

The majority correctly recognized that watershed rules alter "our understanding of the bedrock procedural elements essential to the fairness [and accuracy] of a proceeding,"[182] and that such rules are "implicit in the concept of ordered liberty."[183] But the majority failed to recognize that unanimity "*is itself* part and parcel of the Sixth Amendment right to trial by an impartial jury . . . ."[184] Historically, "the right to a jury trial *meant* a trial in which the jury renders a unanimous verdict."[185] Repeatedly, the Court has commented on unanimity's essential role in ensuring "fair and dependable adjudications . . . ."[186] Consequently, *Apodaca* markedly contravened the Court's Sixth Amendment juris-

---

180. *See Edwards*, 141 S. Ct. at 1578-79 (Kagan, J., dissenting) ("As to every feature of the unanimity rule conceivably relevant to watershed status, *Ramos* has already given the answer—check, check, check—and today's majority can say nothing to the contrary.").

181. *See Ramos*, 140 S. Ct. at 1418 (Kavanaugh, J., concurring).

182. *Edwards*, 141 S. Ct. at 1557 (quoting Whorton v. Bockting, 549 U.S. 406, 417-18 (2007)).

183. *See id.* at 1557 (quoting Beard v. Banks, 542 U.S. 406, 417 (2004)).

184. Brief of Law Professors & Social Scientists as Amici Curiae Supporting Petitioner, *supra* note 51, at 14 (emphasis in original).

185. Edwards v. Vannoy, 141 S. Ct. 1547, 1576 (2021) (Kagan, J., dissenting) (quoting *Ramos*, 140 S. Ct. at 1400 (2020)) (emphasis in original); *see also* Brief of Law Professors & Social Scientists as Amici Curiae Supporting Petitioner, *supra* note 51, at 18 ("[T]he Framers recognized that a unanimous jury requirement is critical to the constitutional right to a fair jury trial.").

186. *Edwards*, 141 S. Ct. at 1575 (Kagan, J. dissenting); *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1418 (2020) (Kavanaugh, J., concurring) ("non-unanimous juries can silence the voices and negate the votes of [B]lack jurors, especially in cases with [B]lack defendants."); Brown v. Louisiana, 447 U.S. 323, 334 (1980) (citing Linkletter v. Walker, 381 U.S. 618, 639 (1965) ("It is difficult to envision a constitutional rule that more fundamentally implicates 'the fairness of the trial-the very integrity of the fact-finding process.'"); Burch v. Louisiana, 441 U.S. 130, 134 (1979) ("we believe that conviction by a nonunanimous six-member jury in a state criminal trial for a nonpetty [sic] offense deprives an accused of his constitutional right.").

prudence and flouted the well-understood notion that unanimity is essential to the American scheme of justice.[187]

The dissent correctly pointed out *Edwards*'s incompatibility with the majority's retroactivity precedents, identifying that the bulk of its precedent came from sentencing decisions.[188] For example, *Ramos*, unlike *Batson*, is watershed because it significantly increases the likelihood that a conviction is obtained accurately.[189] *Batson* merely established race-neutral standards for selecting jurors—standards that do not directly implicate the determination of innocence or guilt.[190] A unanimous jury implicates the determination of innocence or guilt because its function ensures that *all* jurors' votes will be accounted for, even if the ultimate result is a hung jury. The accuracy of a conviction should not be determined by whether the jury reaches a "guilty" or "not guilty" verdict. Rather, accuracy should be measured by assuring that all votes are considered. For example, if one juror votes not guilty, but they are outnumbered by a majority guilty verdict, the resulting guilty verdict cannot be deemed an accurate determination of a defendant's innocence or guilt if it does not account for all the jurors' votes. An accurate conviction must account for *all* votes. Where *Batson* challenges reach only as far as voir dire, the unanimous jury right goes to the heart of the fact-finding process.

While *Batson* is undoubtedly significant in preventing discrimination in jury selection, the same discriminatory effect achieved through race-based peremptory strikes can be achieved through non-unanimous juries.[191] The possibility of circumventing *Batson* poses a substantial risk to the legitimacy of Louisiana's past convictions because "[t]he overrepresentation of nonwhite jurors among the group casting 'empty votes' for acquittal appears both in parishes where Black jurors are relatively scarce and in parishes where Black jurors serve in significant

187. *See Edwards*, 141 S. Ct. at 1575 (Kagan, J., dissenting).

188. *See Edwards*, 141 S. Ct. at 1578-79 ("[T]he majority's kitchen-sink list becomes yet less probative of the issue here because most of its bulk comes from decisions on sentencing.").

189. *See* Reply Brief for Petitioner, *supra* note 166, at 11 (quoting *Ramos*, 140 S. Ct. at 1396, 1401) ("In addition to its 'ancient' origins, jury unanimity is an 'essential' and 'indispensable' feature of the factfinding process.").

190. *See* Batson v. Kentucky, 476 U.S. 79, 96-97 (1986).

191. *See* Frampton, *supra* note 63, at 1638-39.

numbers."[192] Thus, there is a distinct possibility that many of the nonunanimous convictions obtained in Louisiana were achieved through unconstitutional means.

Empirical evidence also confirms that "a unanimous jury requirement reduces the frequency of error by strengthening deliberations and by fostering greater consideration of minority viewpoints."[193] Louisiana's non-unanimity rule proved uniquely detrimental to minorities in Louisiana. *The Advocate*, a prominent Louisiana newspaper, published statistics indicating that "a much smaller share of [B]lack people show up in the pools of people who respond to jury summons than in the populace as a whole."[194] This statistic, coupled with the fact that nonunanimous juries were designed to silence minority jurors, reveals how this rule effectively works to the disadvantage of Black jurors. As previously mentioned, the disparity between the number of "empty votes" for acquittal cast by nonwhite jurors and white jurors is present in both predominately Black and white parishes.[195] When taken together, the devastating effect that non-unanimous juries can inflict on minorities throughout Louisiana becomes more pronounced: the silencing of minority voices and wrongful incarceration resulting from a racist system.

Furthermore, experimental studies involving simulated jury deliberations revealed that when jurors are aware that they are not required to reach a unanimous verdict, they will stop deliberating once the requisite number of votes is received.[196] While jury deliberations can undoubtedly be burdensome, often resulting in hung juries, that result should not be construed as an example of judicial inefficiency; rather, it should be accepted as an example

192. Frampton, *supra* note 63, at 1638. Frampton's data is based on research conducted by *The Advocate* over several years. *Infra* note 194.

193. Brief of Law Professors & Social Scientists as Amici Curiae Supporting Petitioner, *supra* note 51, at 2-3.

194. Jeff Adelson, et al., *How an Abnormal Louisiana Law Deprives, Discriminates and Drives Incarceration: Tilting the Scales*, THE ADVOCATE (Apr. 1, 2018, 8:05 AM), https://www.theadvocate.com/baton_rouge/news/courts/article_16fd0ece-32b1-11e8-8770-33eca2a325de.html; *see* Johnson & MacMath, *supra* note 46, at 50 ("The [*Advocate*] series, which won a Pulitzer Prize, included an empirical analysis revealing that Black defendants were more likely than white defendants to be convicted by non-unanimous verdicts.").

195. Frampton, *supra* note 63, at 1638.

196. Brief of Law Professors & Social Scientists as Amici Curiae Supporting Petitioner, *supra* note 51, at 7.

of the jury *properly* performing its duty.[197] Therefore, unanimity is essential to preserving the integrity of jury deliberations because it promotes complete and thorough deliberations, decreasing the probability that a minority juror's perspective will be cast aside. In addition, many of the pre-*Teague* decisions that held new rules non-retroactive relied on the *Linkletter* standard, which accounted heavily for state reliance interests.[198] It is suggested, however, that the Court did not deny watershed status to those earlier cases because they lacked significance, but instead because of the Court's concerns for comity and finality.[199] These interests should be minimized, though, when a state's reliance is based entirely on a discriminatory and unconstitutional law.[200] While *Teague*'s watershed inquiry did not consider aspects of race, the Court's repeated emphasis on the racial origins of non-unanimous juries suggests that such origins should play a more significant role in the retroactivity analysis.

For instance, when a state relies on a pointedly discriminatory law, its actual impact needs to be contextualized in order to provide an appropriate remedy. The integrity of the criminal justice system depends on the accuracy of criminal convictions, and if people are left without recourse from past constitutional violations, it will speak volumes about the Court's willingness to disregard the Constitution.

Although *Danforth v. Minnesota* authorizes state courts to adopt their own retroactivity standards,[201] state courts might perceive the Supreme Court's general inaction as a basis to deny relief to those harmed by non-unanimous juries.[202] Unfortunately, trends indicate that courts in Louisiana are not utilizing *Danforth*'s authority to grant wider retrospective relief on collat-

197. Brief of Law Professors & Social Scientists as Amici Curiae Supporting Petitioner, *supra* note 51, at 8 n.3.

198. *See, e.g.*, Ho, *supra* note 69, at 1591 & n.236.

199. *See id.* at 1587-88.

200. *See id.* at 1599 n.274.

201. Danforth v. Minnesota, 522 U.S. 264, 277 (2008).

202. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1407 (2020) (citing Brief of State of Utah et al. as Amici Curiae in Support of Respondent, State of Louisiana at 1-2, 140 S. Ct. 1390 (2020) (18-5924), 2019 WL 4054628, at *1-2 (explaining that fourteen jurisdictions expressed interest in experimenting with relaxing their own unanimity requirements if the Court returned a favorable decision for Louisiana).

eral review.[203] Evidently, Louisiana is not interested in remedying the past injustices inflicted on its citizens. To ensure that relief is granted, and that states are held accountable for providing remedies to their citizens, the Supreme Court should develop a new retroactivity rule that can address the historic injustices inflicted on minorities.

Ideally, a new rule would incorporate a standard akin to strict scrutiny, the standard that the Court uses to analyze discriminatory laws.[204] Thus, where a law is purposefully discriminatory towards or has a discriminatory effect on a suspect class of citizens, does not further a compelling government interest, and culminates in a constitutional violation, the retroactivity analysis should take such factors into consideration. While the nonunanimity rule is facially neutral—that is, it does not explicitly discriminate against a particular group—its blatant discriminatory effect cannot be ignored. Indeed, there is vast evidence to suggest that Louisiana conceived this rule for the express purpose of silencing Black jurors.[205]

CONCLUSION

"[Non-]unanimity is a vestige of a racist justice system that disempowers minority jurors."[206] The risks posed by nonunanimous juries threaten the integrity of the judicial system and affect Black people and other minorities.[207] The nonunanimous jury rule works to the disadvantage of any minority because it ensures that their voices will be effectively suppressed. While *Ramos* repudiated a law that purposely aimed to disenfranchise Black people—and proved successful for the better part of 120 years—simply denouncing the old rule will not suffice to address the harm inflicted on countless American citizens. By holding *Ramos* non-retroactive, the *Edwards* Court failed to remedy the historic injustices inflicted on all Americans and, specifically, on

---

203. *E.g.*, State v. Nelson, 21-461 (La. App. 3d. Cir. 11/10/21); 2021 WL 5232244 (concluding that *Ramos* does not apply retroactively to defendant's conviction for manslaughter).

204. *See generally* Roy G. Spece, Jr. & David Yokum, *Scrutinizing Strict Scrutiny*, 40 VT. L. REV. 285 (2015).

205. *E.g.*, *Ramos*, 140 S. Ct. at 1394 (footnote omitted).

206. Petition for Writ of Certiorari, *supra* note 17, at 12.

207. *See* Brief of Law Professors & Social Scientists as Amici Curiae Supporting Petitioner, *supra* note 51, at 10.

Black Americans.[208] Furthermore, by eliminating *Teague*'s exception, the Court curtailed the effects of its holding in *Ramos*—a holding that attributed significant importance to the racial aspects of non-unanimous juries.[209] This contradiction reveals the Court's unwillingness to prioritize fashioning a remedy to cure the injustice inflicted by non-unanimous juries. Although the *Edwards* Court erroneously discarded *Teague*'s watershed analysis, it also proved that it is time to develop a new test that is calibrated to address the invidious racism and numerous constitutional violations committed by Louisiana.

Park Hegeler

208. *See* Smith & Sarma, *supra* note 43, at 385 ("In other words, if you eliminate intent and focus solely on impact, non-unanimous juries today serve the same purpose that white supremacists intended them to serve when they designed the system more than a century ago.").

209. Edwards v. Vannoy, 141 S. Ct. 1547, 1581 (2021) (Kagan, J., dissenting).