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TEN ANGRY MEN: UNANIMOUS JURY VERDICTS IN CRIMINAL TRIALS AND INCORPORATION AFTER *MCDONALD*

Kate Riordan*

I. INTRODUCTION

Any American who has watched a legal drama on television or in film would assume that a criminal conviction can occur only if a jury of twelve persons votes unanimously.¹ But, as with most assumptions about the legal world, this one is incorrect; it is wholly constitutional for an accused to be convicted of a crime without twelve guilty votes.² In criminal trials, the Constitution requires neither that the jury be comprised of twelve persons³ nor that the vote be unanimous.⁴

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¹ See, e.g., *TWELVE ANGRY MEN* (Metro Goldwyn Mayer 1957) (“However you decide, your verdict must be unanimous.”).

² *Apodaca v. Oregon*, 406 U.S. 404 (1972).

³ *Williams v. Florida*, 399 U.S. 78 (1970).

⁴ *Apodaca*, 406 U.S. at 404. *Apodaca*'s sister case, *Johnson v. Louisiana*, 406 U.S. 356 (1972), was decided at the same time. Petitioners challenged Louisiana's majority-verdict law, which allowed for a conviction on a nine-to-three vote. (Louisiana has since changed that law to allow for a ten-to-two conviction. LA. CODE. CRIM. PROC. ANN. art 782 (2005).) Moreover, the case in *Johnson* was tried before the announcement of *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968), which incorporated the Sixth Amendment's right to trial to the states, and therefore, “unlike *Apodaca v. Oregon*, decided today, the Sixth Amendment's guarantee of a trial by jury is not applicable here.” *Johnson*, 406 U.S. at 397 (Stewart, J., dissenting). While this Comment is focused on *Apodaca*, the *Johnson* opinion is treated as an extension of *Apodaca*, and portions of the *Johnson* opinion may be used in a discussion of *Apodaca*. Although technically they are different opinions—*Johnson* centered on whether unanimity is a violation of the Fourteenth Amendment's guarantee of due process of law and *Apodaca* centered on whether unanimity is a violation of the Sixth Amendment's right to trial—functionally, and for the purposes of this discussion, they are treated as one and the

Williams v. Florida (upholding the constitutionality of six-person juries) and *Apodaca v. Oregon* (upholding the constitutionality of non-unanimous majority verdicts in criminal trials) can be easily reconciled with one another, as they both concern common-law requirements for criminal trials upon which the Constitution is silent. But the application of these two holdings is far more problematic. *Williams*, which considered the constitutionality of Florida's six-person criminal juries, held that neither federal nor state trials need to utilize a twelve-person jury.⁵ However, *Apodaca* upheld the constitutionality of non-unanimous majority verdicts only in state criminal trials.⁶ In federal criminal trials, the Supreme Court has found that the verdict must be unanimous.⁷ *Apodaca*'s holding, the product of an odd split among the Justices, is the reason why there are at present two jurisdictions in the United States where a defendant can be found guilty of a crime by just ten out of twelve votes: the states of Oregon and Louisiana.⁸

Apodaca remains good law, and that fact is problematic for three reasons. The first and timeliest reason is that the Court set forth an incorporation standard in *McDonald v. City of Chicago* that directly undermines the current two-track approach to unanimity in criminal trials.⁹ Secondly, allowing majority verdicts in criminal trials seriously weakens the beyond-a-reasonable-doubt standard.¹⁰ And finally, empirical research has since disproven the assumptions about jury behavior upon which the plurality in *Apodaca* relied.¹¹

This is not a purely academic debate. The *Apodaca* decision not only affects Louisiana and Oregon; similar legislation has been proposed in other states that would allow for majority verdicts in criminal trials in attempts to

same (particularly as the lengthy dissents and concurrences are found in *Johnson* rather than in *Apodaca*).

⁵ *Williams*, 399 U.S. at 86.

⁶ *Apodaca*, 406 U.S. at 410–11.

⁷ *Johnson*, 406 U.S. at 369–77 (Powell, J., concurring).

⁸ OR. REV. STAT. § 136.450 (2009); LA. CODE CRIM. PROC. ANN. art. 782 (2010). In 1972, Louisiana required only nine votes, but in 1974 the Louisiana legislature amended the Louisiana Code of Criminal Procedure such that ten votes are now necessary for a conviction. 1975 La. Acts 1st Ex. Sess. 81, 82.

⁹ 130 S. Ct. 3020, 3050 (2010) (holding that the Second Amendment was fully incorporated and thus it is unconstitutional for a state or local government to deprive citizens of the right to bear arms).

¹⁰ See *infra* Part III.B.

¹¹ See *infra* Part III.C.

be “tough on crime.”¹² State representatives from both California and Colorado have introduced bills in their respective legislatures that would allow for majority verdicts in criminal cases.¹³ More recently, in 2003, the New York State Assembly considered a majority-verdict proposal couched as an anti-crime initiative aiming to “produce more convictions and put more criminals behind bars.”¹⁴ The bill’s sponsors claimed that the unanimity requirement resulted in a “higher crime rate” and “disrespect for the law.”¹⁵ As of yet, these proposals have failed and no state (besides Oregon and Louisiana) has adopted a majority-verdict provision for criminal trials.¹⁶ But in some states majority-verdict proposals are introduced fairly frequently, as there is obvious and powerful political capital to be gained from increasing conviction rates, regardless of the means by which one does so.¹⁷

Defendants in Oregon and Louisiana continue to object to their state’s practices. Scott Bowen was accused in Oregon of multiple felony sex offenses, including first-degree rape, alleged to have occurred between 1991 and 2000.¹⁸ During his trial, he requested a jury instruction that the verdict shall be unanimous.¹⁹ His request was denied and he was convicted by a vote of ten to two; “[i]n forty-eight states, the jurors would have been required to continue deliberating toward consensus But because this case arose in Oregon, petitioner stands convicted.”²⁰ The Supreme Court

¹² One scholar notes that, at the federal level, the two major parties “have participated in a kind of bidding war to see who can appropriate the label ‘tough on crime’” through their frequent enactment of tougher sentences and more criminal prohibitions. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001). While Stuntz focuses his discussion on federal criminal law, his observation that “appealing to the median voter is more likely to mean some combination of two things: generating *outcomes* (not rules) the median voter wants, and taking *symbolic stands* the median voter finds attractive” is equally applicable to political pressures at the state level. *Id.* at 530.

¹³ Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1266 (2000).

¹⁴ Matthew Tulchin, Note, *An Analysis of the Development of the Jury’s Role in a New York Criminal Trial*, 13 J.L. & POL’Y 425, 425–26 (2005) (citing Assemb. 4469, 226th Leg. Sess. (N.Y. 2003)).

¹⁵ *Id.* at 483.

¹⁶ *Id.*

¹⁷ *Id.* at 482 n.310.

¹⁸ State v. Bowen, 185 P.3d 1129, 1130 (Or. Ct. App. 2008).

¹⁹ State v. Bowen, 168 P.3d 1208, 1208 (Or. Ct. App. 2007).

²⁰ Reply Brief for Petitioner on Petition for Writ of Certiorari at 1, Bowen v. Oregon, 130 S. Ct. 52 (2009) (No. 08-1117).

denied cert in 2009.²¹

More recently, Alonso Herrera was convicted on a ten-to-two vote of unauthorized use of a vehicle.²² Again, the defendant requested a jury instruction asking that the verdict be unanimous.²³ This request was denied, the Oregon Supreme Court denied review, and a writ of certiorari was submitted to the Supreme Court.²⁴ On January 10, 2011, the Court denied cert.²⁵ Far from being merely an interesting footnote about criminal procedure, the *Apodaca* decision has had grave repercussions for accused defendants in Oregon and Louisiana.

This Comment argues that the constitutionality of majority verdicts in state criminal trials needs to be reexamined, and overturned, in light of recent Supreme Court decisions and empirical studies. Part II will include (a) a brief history of the incorporation doctrine in general and the incorporation of the Sixth Amendment in particular, and (b) an in-depth examination of the reasoning of the *Apodaca* holding. Part III will argue that the reasoning in *Apodaca*, disjointed in 1972, has lost all force in the thirty years since it was decided for three reasons. Firstly, unanimity in criminal trials satisfies the standard for incorporation the Court set forth in *McDonald* in July 2010. Secondly, majority verdicts in criminal trials implicate serious due process concerns given their weakened adherence to the beyond-a-reasonable-doubt standard. And finally, the *Apodaca* plurality's assumptions about jury behavior, which formed the bulk of its analysis, have since been proved false in empirical studies. Those studies have shown that majority-verdict juries deliberate less robustly and tend to discount the opinions of women and minorities; furthermore, concerns about the prevalence of hung juries are overblown. In short, the pillars upon which the *Apodaca* holding rested have crumbled since it was decided.

II. INCORPORATION OF THE BILL OF RIGHTS

Originally, the Bill of Rights only applied to the federal government,

²¹ Bowen v. Oregon, 130 S. Ct. 52 (2009).

²² Petition for Writ of Certiorari at 4, State v. Herrera, 131 S. Ct. 904 (Jan. 10, 2011) (No. 10-344).

²³ *Id.*

²⁴ *Id.* at 1.

²⁵ Eugene Volokh, *Supreme Court Declines to Reconsider Constitutionality of Convictions by Non-Unanimous Juries*, THE VOLOKH CONSPIRACY (Jan. 10, 2011, 11:38 AM), <http://volokh.com/2011/01/10/supreme-court-declines-to-reconsider-constitutionality-of-convictions-by-non-unanimous-juries/>.

and not the states.²⁶ However, starting with the *Slaughter-House Cases* in 1873, the Due Process Clause of the Fourteenth Amendment at least partially extended the Bill of Rights to the states as well.²⁷ In the first half of the twentieth century, the Supreme Court applied a doctrine known as “selective incorporation” to determine which provisions of the Bill of Rights were necessarily binding upon the states through the Due Process Clause.²⁸

To decide the reach of incorporation in *Palko v. Connecticut*, the Court used a standard of whether or not a particular right was “implicit in the concept of ordered liberty.”²⁹ In that case the Court determined that the Fifth Amendment’s protection against double jeopardy did not qualify as such.³⁰ Even though this holding was later overturned in *Benton v. Maryland* twenty-two years later,³¹ the *Palko* standard remains one of the most famous formulations of the incorporation doctrine.³² According to *Gideon v. Wainwright*, “a provision which is ‘fundamental and essential to a fair trial’ is made obligatory upon the States by the Fourteenth Amendment.”³³ The past fifty years have widened the scope of those provisions that necessitate incorporation, particularly in regards to personal (as opposed to economic) liberties.³⁴ In fact, as of 2011, the only rights not fully incorporated—besides the Sixth Amendment right to a unanimous jury verdict—are the Third Amendment’s protection against the quartering of soldiers, the Fifth Amendment’s requirement of a grand jury indictment, the Seventh Amendment’s right to a jury in civil cases, and the Eighth Amendment’s prohibition against excessive fines.³⁵

Most recently, the Court reaffirmed its adherence to an incorporation standard of “whether a particular Bill of Rights guarantee is fundamental to our scheme of ordered liberty and system of justice” in *McDonald v. City of*

²⁶ See, e.g., *Barron v. City of Baltimore*, 32 U.S. 243, 250–51 (1833) (holding that the Fifth Amendment applies only to the federal government).

²⁷ *The Slaughterhouse Cases*, 83 U.S. 36 (1873).

²⁸ For a discussion of the incorporation doctrine, see 2 LEE EPSTEIN & THOMAS G. WALKER, *CONSTITUTIONAL LAW FOR A CHANGING AMERICA*, 67–87 (2005).

²⁹ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

³⁰ *Id.* at 329.

³¹ 395 U.S. 784 (1969).

³² *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3032 (2010).

³³ *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (quoting *Betts v. Brady*, 316 U.S. 455, 465 (1942)). *Gideon* expressly overturned *Betts* and incorporated the Sixth Amendment right to counsel for criminal defendants.

³⁴ See EPSTEIN & WALKER, *supra* note 28.

³⁵ *McDonald*, 130 S. Ct. at 3035 n.13.

Chicago.³⁶ *McDonald*, which extended the Second Amendment's prohibition on infringing the "right of the people to keep and bear arms"³⁷ to the states, reiterated that the Court has "abandoned '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,'" and that it is "'incongruous' to apply different standards 'depending on whether the claim was asserted in a state or federal court.'"³⁸ Despite the fact that the incorporation doctrine has widened so that nearly every right guaranteed by the Bill of Rights applies equally to state and federal governments, the constitutional right to a unanimous verdict in a criminal trial applies exclusively to the federal courts.

A. INCORPORATION OF THE SIXTH AMENDMENT

The Sixth Amendment has not been fully incorporated; however, most of its provisions have been incorporated piecemeal.³⁹ The Amendment reads as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.⁴⁰

In addition to the rights mentioned in the text, the Sixth Amendment also guarantees other fundamental aspects of criminal trials, including the reasonable-doubt requirement and a jury of at least six members.⁴¹ Because these rights are "fundamental and essential to a fair trial" they are binding upon the states, even though the Sixth and Seventh Amendments do not

³⁶ *Id.* at 3034 (emphasis omitted).

³⁷ U.S. CONST. amend. II.

³⁸ *McDonald*, 130 S. Ct. at 3035 (quoting *Malloy v. Hogan*, 378 U.S. 1, 10–11 (1964)).

³⁹ *See Duncan v. Louisiana*, 391 U.S. 145 (1968) (incorporating the right to a jury trial in criminal cases); *Douglas v. Alabama*, 380 U.S. 415, 418 (1965) (incorporating the defendant's right to confront witnesses against him); *Gideon v. Wainwright*, 372 U.S. 335, 339 (1962) (incorporating the right to counsel in non-capital criminal trials); *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (incorporating the right to counsel in capital trials).

⁴⁰ U.S. CONST. amend. VI.

⁴¹ *See In re Winship*, 391 U.S. 385, 364, 367 (1970) (holding that all elements of a crime must be proven beyond a reasonable doubt, regardless of whether the defendant is tried as an adult or a juvenile); *Andres v. United States*, 333 U.S. 740, 749 (1948) (holding that in a federal trial for murder in the first degree, "the jury's decision both upon guilt and whether the punishment of death should be imposed must be unanimous.").

explicitly provide for them.⁴²

In *Williams v. Florida*, the Court held that Florida's six-member jury statute satisfied the Sixth Amendment as carried to the states by *Duncan v. Louisiana*, which incorporated the Sixth Amendment right to a jury trial.⁴³ The Court found twelve-member juries were not "an indispensable component" of the goals and purposes of a jury trial.⁴⁴ For the purposes here, there are two notable aspects to the decision.

The first is that the *Williams* Court, in holding that a six-person jury would suffice for a state trial, found that the necessary consequence of the decision is that twelve-member juries are not constitutionally mandated in federal criminal trials either. "Our holding does no more than leave these considerations to Congress and the States, unrestrained by an interpretation of the Sixth Amendment that would forever dictate the precise number that can constitute a jury."⁴⁵ The Court assumed that the constitutional requirements of a fair trial applied equally to federal and state courts.⁴⁶

The second is that the Court noted that a six-person jury can fulfill the constitutionally mandated duties and purposes of a jury just as well as a twelve-person jury, "particularly if the requirement for unanimity was retained."⁴⁷ The Court declined to address "whether or not the requirement of unanimity is an indispensable element of the Sixth Amendment jury trial." However, it did state that while much of its historical analysis applied equally to the unanimity requirement and the twelve-man jury, "the former, unlike the latter, may well serve an important role in the jury function, for example, as a device for insuring that the Government bear the heavier burden of proof."⁴⁸

And yet, just two years later, the Court held that the Sixth Amendment did not impose a unanimity requirement on the states, while at the same time finding that unanimity *was* required in federal court.⁴⁹ *Apodaca v. Oregon* and its sister case, *Johnson v. Louisiana*, upheld state procedures that allowed criminal verdicts on non-unanimous majority votes. Oregon allows criminal defendants to be convicted on a ten-to-two vote, unless the

⁴² *Betts v. Brady*, 316 U.S. 455, 465 (1942).

⁴³ *Williams v. Florida*, 399 U.S. 78, 86 (1970); *see also* *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

⁴⁴ *Williams*, 399 U.S. at 100.

⁴⁵ *Id.* at 103.

⁴⁶ *Id.*

⁴⁷ *Id.* at 100.

⁴⁸ *Id.* at 100 n.46.

⁴⁹ *Johnson v. Louisiana*, 406 U.S. 366, 375 (1972) (Powell, J., concurring).

charge is for murder, in which case eleven votes are required.⁵⁰ Louisiana allowed for even fewer votes; only nine guilty votes out of twelve were required for a conviction.⁵¹ *Apodaca* found that unanimity was not essential to the function of the jury and therefore did not merit incorporation to the states; unanimity was, however, constitutionally mandated in federal criminal cases.⁵² *Apodaca*, then, not only rejected the dictum (from just two years prior) that the unanimity requirement “may well serve an important role in the jury function,” but it also rejected *Duncan*’s notion that the rights of defendants in criminal trials should not depend on whether the case was tried in state or federal court.⁵³

What is interesting about the *Apodaca* holding—and indeed it is this feature that generates doubt about its value—is that a plurality of the Court did not subscribe to any of its reasoning. Four justices agreed that unanimity in verdicts is not necessary for a fair trial in either federal or state courts and thus concluded there was no constitutionally mandated unanimity requirement regardless of jurisdiction.⁵⁴ In reaching this conclusion, Justice White, in an opinion joined by Justice Blackmun, Justice Rehnquist, and Chief Justice Burger, stated that majority verdicts do not compromise the function of the jury and that the reasonable-doubt standard applies to each individual juror rather than to the jury as a group.⁵⁵ Another four—Justices Stewart, Brennan, Marshall, and Douglas—took the opposite view, that unanimity was constitutionally required in both federal and state courts.⁵⁶ Justice Powell broke the tie and found that unanimity

⁵⁰ OR. REV. STAT. § 136.450 (2009).

⁵¹ LA. CODE CRIM. PROC. ANN. art. 782 (2010). In 1972, the state did indeed only require nine votes, but now ten votes are necessary for a conviction. 1975 La. Acts 1st Ex. Sess. 81, 82.

⁵² *Apodaca v. Oregon*, 406 U.S. 404, 410 (1972).

⁵³ *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (“[T]he Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment’s guarantee.”).

⁵⁴ *Apodaca*, 406 U.S. at 411.

⁵⁵ *Id.* at 411–12. Justice Blackmun filed a concurring opinion, adding only that he did not think the majority-verdict policy was a “wise one” but that did not mean it was “constitutionally offensive.” *Johnson v. Louisiana*, 406 U.S. 356, 365 (1972) (Blackmun, J., concurring). He also noted that a majority-verdict system that allowed for a seven-to-five conviction would “afford [him] great difficulty.” *Id.* at 366.

⁵⁶ *Apodaca*, 406 U.S. at 414 (Stewart, J., dissenting); *Johnson*, 406 U.S. at 380 (Douglas, J., dissenting); *id.* at 395 (Brennan, J., dissenting); *id.* at 399 (Marshall, J., dissenting). In keeping with the disjointed spirit of the opinion, the dissenters filed four different opinions. But they all agreed that unanimity was a constitutional requirement, binding on the federal and state governments.

was required for federal courts, but it should not be incorporated to the states.⁵⁷ Therefore, Justice Powell's opinion is the sole reason why unanimity remains unincorporated through the Fourteenth Amendment, despite the Court's frequent dicta placing unanimity among the elements of a fair trial. In fact, the most telling component of *Apodaca* is that eight out of nine Justices believed that unanimity requirements should apply equally to the state and federal courts.⁵⁸

B. *APODACA V. OREGON*

Robert Apodaca, Henry Morgan Cooper, Jr., and James Arnold Madden were "convicted of assault with a deadly weapon, burglary in a dwelling, and grand larceny" during different trials in Oregon state courts.⁵⁹ All of the juries returned non-unanimous verdicts.⁶⁰ Apodaca and Madden were convicted by a vote of eleven to one; Cooper was convicted by a vote of ten to two (the minimum vote for a conviction).⁶¹ The Oregon Court of Appeals affirmed their convictions, the Supreme Court of Oregon denied review, and all three defendants petitioned the Supreme Court of the United States on the basis that majority verdicts in criminal trials violate the Sixth Amendment, which applied to the states through the Fourteenth Amendment.⁶² In *Johnson v. Louisiana*, decided on the same day as *Apodaca*, Mr. Johnson was arrested in his home in Louisiana without an arrest warrant after the victim of an armed robbery identified Johnson as the perpetrator from photographs.⁶³ Johnson was found guilty by a nine-to-three vote, and the Louisiana courts rejected his challenges, whereupon the Court granted cert.⁶⁴

⁵⁷ *Johnson*, 406 U.S. at 395–96 (Brennan, J., dissenting).

⁵⁸ *Id.* ("In any event, the affirmance must not obscure that the majority of the Court remains of the view that, as in the case of every specific of the Bill of Rights that extends to the States, the Sixth Amendment's jury trial guarantee, however it is to be construed, has identical application against both State and Federal Governments.").

⁵⁹ *Apodaca*, 406 U.S. at 405–06.

⁶⁰ *Id.*

⁶¹ *Id.* at 406.

⁶² *Id.*; see *Duncan v. Louisiana*, 391 U.S. 145, 149–50 (1968) (incorporating the Sixth Amendment right to a jury trial).

⁶³ *Johnson*, 406 U.S. at 358. There is a functional difference between the validity of the claims in *Apodaca* and *Johnson*: due to the timing of *Duncan v. Louisiana*, the Sixth Amendment was not applicable to Johnson's case, and therefore Johnson did not have a right to a jury at all. However, again, in terms of analysis of the relevant issues at hand, the opinions can be treated as one and the same.

⁶⁴ *Id.*

In deciding these two companion cases, Justice White, joined by Justice Blackmun, Justice Rehnquist, and Chief Justice Burger, followed the Court's reasoning in *Williams* and held that the Sixth Amendment did not require unanimity in state or federal criminal trials.⁶⁵ The plurality found, as in *Williams*, that there was an "inability to divine 'the intent of the Framers' when they eliminated references to the 'accustomed requisites'" in the language of the Sixth Amendment.⁶⁶ Due to this impossibility, the Justices needed to "turn to other than purely historical considerations" in "determining what is meant by a jury."⁶⁷ The opinion thus focused upon the jury trial's "interposition between the accused and his accuser of the commonsense judgment of a group of laymen,"⁶⁸ and the jury's role as a "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge."⁶⁹ In these cases, the Court asked whether majority verdicts lessen the reliability of the jury's verdict or diminish the quality of jury deliberations—questions that the plurality answered in the negative.⁷⁰ But current jury research contradicts the intuition of the plurality.⁷¹

The plurality ultimately concluded that there was "no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one."⁷² The Court also noted with approval that majority verdicts would reduce the number of hung juries, which are costly to the judicial system in terms of perceived wasted resources and the subsequent costs of relitigating.⁷³

The plurality likewise rejected the petitioners' argument that majority verdicts threaten the reasonable-doubt standard, stating that the burden of proof constitutionally mandated in criminal trials is not found in the Sixth Amendment.⁷⁴ Furthermore, Justice White wrote that there was "no basis" for thinking that "when minority jurors express sincere doubts" they would be ignored by the fellow jurors, "even if deliberation has not been

⁶⁵ *Apodaca*, 406 U.S. at 406.

⁶⁶ *Id.* at 410. For a discussion of the legislative history of the Sixth Amendment, see *infra* Part III.A.

⁶⁷ *Id.*

⁶⁸ *Id.* (quoting *Williams v. Florida*, 399 U.S. 78, 100 (1970)).

⁶⁹ *Id.* (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)).

⁷⁰ Taylor-Thompson, *supra* note 13, at 1310.

⁷¹ *Id.*; see also *infra* Part III.C.

⁷² *Apodaca*, 406 U.S. at 411.

⁷³ *Id.*

⁷⁴ *Id.* at 411–12; see also *In re Winship*, 397 U.S. 358, 363–64 (1970).

exhausted and minority jurors have grounds for acquittal which, if pursued, might persuade members of the majority to acquit.”⁷⁵ Justice White asserted: “That rational men disagree is not in itself equivalent to a failure of proof by the State, nor does it indicate infidelity to the reasonable-doubt standard.”⁷⁶ Notably, the plurality rejected the contention that “majority jurors, aware of their responsibility and power over the liberty of the defendant, would simply refuse to listen to arguments presented to them in favor of acquittal, terminate discussion, and render a verdict.”⁷⁷

The petitioners also claimed that majority verdicts interfere with the “effective application” of the requirement that jury panels reflect a cross section of the community.⁷⁸ In response, the plurality stated that, despite the prohibition against systematic exclusion of groups from juries,⁷⁹ it cannot be said that “every distinct voice in the community has a right to be represented on every jury and a right to prevent conviction of a defendant in any case.”⁸⁰ Furthermore, the Court made some very optimistic assumptions that the voices of ethnic and racial minorities would be heard and seriously considered and stated that there was “no proof” that votes would be cast “for guilt or innocence based on prejudice rather than the evidence.”⁸¹

The dissenting voices, Justices Douglas, Brennan, Marshall, and Stewart, came to the opposite conclusions.⁸² They found that the Sixth Amendment required unanimity in federal criminal trials and that the Fourteenth Amendment required that this provision be applied to the states.⁸³ Justice Brennan worried in his dissent, “if we construe the Bill of

⁷⁵ *Johnson v. Louisiana*, 406 U.S. 356, 361 (1972).

⁷⁶ *Id.* at 362.

⁷⁷ *Id.* at 361.

⁷⁸ *Apodaca*, 406 U.S. at 412–13; see *Whitus v. Georgia*, 385 U.S. 545, 510–12 (1967); *Smith v. Texas*, 311 U.S. 128, 131–32 (1940); *Norris v. Alabama*, 294 U.S. 587, 589 (1935); *Strauder v. West Virginia*, 100 U.S. 303, 309–10 (1880).

⁷⁹ See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) (forbidding gender-based exclusions from the jury); *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (forbidding race-based exclusions).

⁸⁰ *Apodaca*, 406 U.S. at 413 (1972).

⁸¹ *Id.* at 413–14.

⁸² *Id.* at 414 (Stewart, J., dissenting); *Johnson*, 406 U.S. at 380 (Douglas, J., dissenting); *id.* at 395 (Brennan, J., dissenting); *id.* at 399 (Marshall, J., dissenting).

⁸³ *Johnson*, 406 U.S. at 380 (Douglas, J., dissenting). Indeed, in the *Johnson* dissent (from the majority’s conclusion that the Sixth Amendment right to a jury did not apply), Justice Stewart, with whom Justices Brennan and Marshall agreed, argued that if the Fourteenth Amendment alone requires that a state must “accord the right of trial by jury in a

Rights and the Fourteenth Amendment to permit States to ‘experiment’ with the basic rights of people, we open a veritable Pandora’s box.”⁸⁴

Thus Justice Powell’s concurring opinion decided that the Sixth Amendment required unanimous verdicts in federal court, but not in state court.⁸⁵ Had Justice Powell joined the White opinion wholly, it is possible that there would still be literature calling for a reexamination of *Apodaca* due to the empirical conclusions about jury behavior that were not available to the Justices in 1972. But because Justice Powell’s decisive opinion held that the unanimity requirement applies to federal and not state courts, the Court needs to reexamine the issue under the incorporation standards recently affirmed in *McDonald*.⁸⁶

Justice Powell concurred in the plurality result that a defendant may be constitutionally convicted in state court by a majority verdict, but he was “not in accord with a major premise upon which that judgment is based.”⁸⁷ Justice Powell disagreed that the jury trial, as applied to the states under the Fourteenth Amendment, needed to be “identical in every detail” to federal jury trials under the Sixth Amendment.⁸⁸ “I do not think that all the elements of jury trial within the meaning of the Sixth Amendment are necessarily embodied or incorporated into the Due Process Clause of the Fourteenth Amendment.”⁸⁹ It is that precise holding that is most directly contradicted by the Court’s standard of incorporation set out in *McDonald*.

Acknowledging history and precedent, Justice Powell stated that “[i]n an unbroken line of cases reaching back into the late 1800’s, the Justices of this Court have recognized, virtually without dissent, that unanimity is one of the indispensable features of *federal* jury trial.”⁹⁰ However, with respect to state trials, Justice Powell looked to “cases decided when the intendment of that Amendment was not as clouded by the passage of time” before concluding that “due process does not require that the States apply the federal jury-trial right with all its gloss.”⁹¹ Indeed, Justice Powell had

criminal case, then only a unanimous jury can return a constitutionally valid verdict.” *Id.* at 397 (Stewart, J., dissenting).

⁸⁴ *Id.* at 387 (Brennan, J., dissenting).

⁸⁵ *See id.* at 373–74 (Powell, J., concurring).

⁸⁶ *Id.*; *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3034–36 (2010); *see infra* Part III.A.

⁸⁷ *Johnson*, 406 U.S. at 369 (Powell, J., concurring).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 371.

precedential support in his contention, quoting Justice Peckham:

When providing in their constitution and legislation for the manner in which civil or criminal actions shall be tried, it is in entire conformity with the character of the Federal Government that [the States] should have the right to decide for themselves what shall be the form and character of the procedure in such trials, . . . whether there shall be a jury of twelve or a lesser number, and whether the verdict must be unanimous or not.⁹²

Further, the Court held in 1912 that “in criminal cases due process of law is not denied by a state law which dispenses with . . . the necessity of a jury of twelve, or unanimity in the verdict.”⁹³

Justice Powell conceded that these precedents concluded that states could even do away with jury trials completely—a conclusion which was “grounded on a more limited view of due process” than the Court accepted in 1972, and which the Court rejected in *Duncan*.⁹⁴ However, Justice Powell found nothing in *Duncan* or other precedents which would “require[] repudiation of the views expressed in *Maxwell* and *Jordan* with respect to . . . the unanimity of [a jury’s] verdict.”⁹⁵ Indeed, Justice Powell found that to consider unanimity “so fundamental to the essentials of jury trial that this particular requirement of the Sixth Amendment is necessarily binding on the States” would give “unwarranted and unwise scope to the incorporation doctrine.”⁹⁶ Justice Powell thought, as did the plurality, that the function of the jury in a majority verdict was not compromised, and he endorsed the notion that states should be allowed to “become a ‘laboratory’ and to experiment with a range of trial and procedural alternatives.”⁹⁷

The history of the incorporation doctrine has been one of expansion. Of those rights that are not incorporated, the right to a unanimous verdict in a criminal trial is perhaps the most cherished to modern sensibilities. The notion that the outcome of a criminal trial hinges on whether it was brought in state or federal court is contrary to the *raison d’etre* of the incorporation doctrine.⁹⁸ Perhaps in 1972, the incorporation doctrine was not expanded

⁹² *Id.* at 371–72 (quoting *Maxwell v. Dow*, 176 U.S. 581, 605 (1900)).

⁹³ *Id.* at 372 (quoting *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912)).

⁹⁴ *Id.*

⁹⁵ *Id.*; *Maxwell*, 176 U.S. 581; *Jordan*, 225 U.S. 167.

⁹⁶ *Johnson*, 406 U.S. at 372 (Powell, J., concurring).

⁹⁷ *Id.* at 376. A key factor to the “laboratory” argument is that states would ultimately reject those experiments that were subsequently found to have failed. Arguably, majority verdicts have been empirically discredited as inferior to unanimous verdicts, *see infra* Part III.C, yet Oregon and Louisiana remain steadfast.

⁹⁸ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 (2010). The Court reiterated that

so far as to include the Sixth Amendment guarantees, but in 2010, after the incorporation of the Second Amendment in *McDonald*,⁹⁹ the answer as to whether unanimity is fundamental enough to the American criminal system as to warrant incorporation is unequivocally “yes.”

III. WHY *APODACA* SHOULD BE REVERSED

The venerable principle of *stare decisis* counsels that Supreme Court holdings should not be overturned but for very compelling reasons. But the principle is weakest when considering the continued propriety of constitutional rules of procedure, such as the holding of *Apodaca*.¹⁰⁰ The Court has proved willing to overturn cases in the past when there have been serious errors in analysis, or, as in this case, if the available social science data requires a reexamination of previously held beliefs.¹⁰¹ *Apodaca* is one such case that is ripe for reexamination.

Firstly, Part III.A argues that the *McDonald* stance against the two-tiered incorporation scheme compels the Court to reassess those provisions of the Bill of Rights that remain unincorporated.¹⁰² Under this analysis, the unanimity requirement satisfies the *McDonald* test for incorporation: it is a historically ingrained principle of Anglo-American jurisprudence and is supported by dicta and binding precedent. Furthermore, Part III.B argues that a non-unanimous jury casts doubt upon the notion of ‘beyond a reasonable doubt,’ depriving defendants in Oregon and Louisiana of due process. Finally, Part III.C argues that there are compelling policy arguments for requiring jury unanimity. The *Apodaca* Court based much of its determination that unanimity is not a fundamental right on its assumption that a majority-verdict jury would function much the same as a unanimous one.¹⁰³ However, social science has found the opposite in

different standards should not apply “depending on whether the claim was asserted in a state or federal court.” *Id.*; see also *infra* Part III.C.

⁹⁹ *Id.* at 3020.

¹⁰⁰ *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“*Stare decisis* is not an inexorable command This is particularly true in constitutional cases, because in such cases ‘correction through legislative action is practically impossible.’ Considerations in favor of *stare decisis* are at their acme in cases . . . where reliance interests are involved; the opposite is true in cases such as the present one involving procedural and evidentiary rules.” (citations omitted) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1931) (Brandeis, J., dissenting))).

¹⁰¹ See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that segregation in public schools violated the Equal Protection Clause).

¹⁰² *McDonald*, 130 S. Ct. at 3020.

¹⁰³ *Apodaca v. Oregon*, 406 U.S. 404, 410–11 (1972).

studies since the *Apodaca* holding.¹⁰⁴ Therefore, the bedrock of the *Apodaca* holding has been seriously undermined by the past forty years of empirical data.

A. *APODACA* IS CONTRARY TO THE INCORPORATION STANDARD OF *MCDONALD*

The hard stance taken on incorporation in *McDonald* is certainly the timeliest reason to reconsider *Apodaca*. Simply, the *McDonald* decision fully rejected the two-track notion of constitutional interpretation.¹⁰⁵ In ruling that the Second Amendment was fully incorporated to the states, the Court finally and completely “abandoned ‘the notion that the Fourteenth Amendment applies to the States only [in] a watered-down, subjective version of the individual guarantees of the Bill of Rights.’”¹⁰⁶ The Court rightly held that different standards should not apply “depending on whether the claim was asserted in a state or federal court.”¹⁰⁷

The Court found that the doctrine of incorporation was so settled by precedent that, unless it “turn[ed] back the clock or adopt[ed] a special incorporation test applicable only to the Second Amendment,” the right of an individual to own a firearm had to be upheld, regardless of jurisdiction.¹⁰⁸ Under the incorporation doctrine as set out through precedent, “if a Bill of Rights guarantee is fundamental” to American jurisprudence, that right is “fully binding on the States.”¹⁰⁹ As will be shown, unanimous verdicts in criminal trial are indeed ‘fundamental’ to American jurisprudence based on historical considerations and prior decisions by the Court.

The analysis is straightforward. The Court recently reaffirmed that “incorporated Bill of Rights protections ‘are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.’”¹¹⁰ And the Court has not wavered in its contention that the Sixth Amendment requires unanimous juries in federal criminal trials.¹¹¹ Yet, as discussed

¹⁰⁴ See *infra* Part III.C.

¹⁰⁵ *McDonald*, 130 S. Ct. at 3035.

¹⁰⁶ *Id.* (quoting *Malloy v. Hogan*, 378 U.S. 1, 10–11 (1964)).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 3046.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 3058.

¹¹¹ See *Andres v. United States*, 333 U.S. 740, 748–49 (1948); *Hawaii v. Mankichi*, 190 U.S. 197, 211–12 (1903); see also *Swain v. Alabama*, 380 U.S. 202, 211 (1965), *overruled*

above, Justice Powell's concurring opinion, written at a time when incorporation was a more limited doctrine, means that the Jury Trial Clause is subject to the "two-track," "watered-down," partial incorporation that the Court expressly rejected in *McDonald*.¹¹²

Indeed, the *McDonald* opinion already opens the door for overturning *Apodaca*. In a lengthy footnote, the Court discusses the oddness of the *Apodaca* holding, stating that the ruling "was the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation."¹¹³ It even goes so far to say that *Apodaca* does not "undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government."¹¹⁴ Furthermore, the Court quotes Justice Brennan's dissent, which reiterates that eight out of nine Justices believed that the Sixth Amendment's guarantees have "identical application against both State and Federal Governments."¹¹⁵

Beyond addressing *Apodaca* explicitly, *McDonald*, in its history of incorporation, addresses the special need for incorporation of those rights that concern criminal process.¹¹⁶ Referring to those cases that incorporated jury trials, the right to counsel, the reasonable-doubt standard, the Confrontation Clause and others, the Court stated that this line of cases proves that the Court has concluded that "to ensure a criminal trial satisfies essential standards of fairness," some trial procedures need to be identical in state and federal courts.¹¹⁷ "The need for certainty and uniformity is more pressing, and the margin for error slimmer, when criminal justice is at issue."¹¹⁸ Of course, it is impossible to predict how the Court would approach one topic based upon dicta on another one. But the Court must have found the issue of incorporation of criminal procedure guarantees fairly important in order to devote time in an opinion about gun rights.

on other grounds by *Batson v. Kentucky*, 476 U.S. 79 (1986) (supporting the proposition in dictum).

¹¹² *McDonald*, 130 S. Ct. at 3035 n.14.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 3094 (Stevens, J., dissenting).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

1. Unanimous Verdicts Are Historically Ingrained in Anglo-American Jurisprudence

Unanimous verdicts—both in civil and criminal trials—have been a feature of the Anglo-American legal system for centuries. Although a unanimous verdict was not always required at the very beginning of the jury, by 1367, during the rule of Edward III, a unanimity requirement rule was established.¹¹⁹ By the time of Edward IV's reign (1461–1483), the unanimity requirement was the norm, absent the consent of both parties.¹²⁰ Even in fourteenth century Parliaments (where the numbers were such that a unanimity requirement was vastly more impractical than for a jury), there is evidence that a majority vote was deemed insufficient to bind the community or its individual members to a legal decision.¹²¹ Blackstone stated in his *Commentaries* that “[i]t is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the *unanimous* consent of twelve of his neighbors and equals.”¹²²

At the founding of the United States, James Madison proposed that the Bill of Rights should protect those provisions of the common-law jury that were deemed most vital.¹²³ His proposed Sixth Amendment guaranteed the right to trial, “by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites.”¹²⁴ However, there was some disagreement as to the vicinage requirement and thus the Sixth Amendment was adopted in its present language, omitting any reference to unanimity.¹²⁵

There are two plausible reasons as to why the unanimity requirement was dropped from the language of the Amendment: either it was intended to have a substantive effect, or the concept of unanimity was so implicit that the Founders thought it did not require mention. The *Williams* and *Apodaca* opinions held the former, at least as it concerned unanimity and a

¹¹⁹ Douglas Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 397 (1996).

¹²⁰ *Id.*

¹²¹ M. V. CLARKE, *MEDIEVAL REPRESENTATION AND CONSENT* 251 (2d ed. 1964).

¹²² 3 WILLIAM BLACKSTONE, *COMMENTARIES* *379 (emphasis added).

¹²³ 1 ANNALS OF CONG. 435 (1789).

¹²⁴ *Id.*

¹²⁵ U.S. CONST. amend. VI. The particulars of the vicinage requirement differed regionally, and the Founders eventually omitted the requirement rather than find a solution that suited everyone. See 5 WRITINGS OF JAMES MADISON 424 n.1 (Gaillard Hunt ed., 1904).

twelve-person jury.¹²⁶ However, given other extrinsic evidence, the latter seems more probable.

In a 1789 letter, James Madison wrote of his frustration in finalizing the wording of the Sixth Amendment so that the first Congress would agree to it: “They are equally inflexible in opposing a definition of the locality of Juries. The vicinage they contend is either too vague or too strict a term.”¹²⁷ Madison further could not achieve consensus on his proposal of the insertion of “accustomed requisites” after the word ‘Juries,’ because “[t]he truth is that in most of the States the practice is different, and hence the irreconcilable difference of ideas on the subject.”¹²⁸ However, the “irreconcilable difference” was the question of from where the jurors should be drawn, not the question of unanimity. Non-unanimous verdicts were not historically common among the states.¹²⁹

Likewise, in discussing the wording of the ninth section of the Bill of Rights of the Pennsylvania Constitution in 1788, which includes an express provision that verdicts shall be unanimous, Chief Justice M’Kean found the stipulation to be unnecessary.¹³⁰ “I have always understood it to be the law, independent of this section,” he stated, “that the twelve jurors must be unanimous in their verdict, and yet this section makes this express provision.”¹³¹

Further, in 1833, Justice Story noted in his *Commentaries* that the jury trial was “now incorporated into all our State constitutions as a fundamental right, and the Constitution of the United States would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms.”¹³² In a footnote, he defined that jury right quickly and simply: “[a] trial by jury is generally understood to mean . . . a trial by jury of twelve men . . . who must unanimously concur in

¹²⁶ *Apodaca v. Oregon*, 406 U.S. 404, 410 (1972); *Williams v. Florida*, 399 U.S. 78, 97 (1970).

¹²⁷ WRITINGS OF JAMES MADISON, *supra* note 125 (emphasis omitted). The House of Representatives passed the Amendment “in substantially this form but after more than a week of debate in the Senate it returned to the House considerably altered.” *Williams*, 399 U.S. at 94 (citing S. JOURNAL, 1st Cong., 1st Sess. 77 (1789)).

¹²⁸ *Id.*

¹²⁹ Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 77 (2008).

¹³⁰ Smith, *supra* note 119, at 428 n.206.

¹³¹ *Id.* (emphasis omitted) (quoting *Respublica v. Oswald*, 1 Dall. 319, 323 (Pa. 1788)).

¹³² 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 559 (Melville M. Bigelow ed., William S. Hein & Co., Inc., ed., 1994) (1891).

the guilt of the accused Any law, therefore, dispensing with any of these requisites, may be considered unconstitutional.”¹³³ More recent Court decisions support the notion that the common-law definition of jury trial is constitutionally protected: in *Giles v. California*, the Court stated that the Sixth Amendment codifies “specific” rights “that were the trial rights of Englishmen.”¹³⁴

2. *Unanimous Verdicts Are Supported by Precedent and Other Persuasive Authority*

Furthermore, dicta of the Court imply that unanimity was taken for granted as an essential feature of the American trial. In *Thompson v. Utah*, the Court held that because Utah was still a territory, and thus a federal entity, unanimity was required in criminal trials.¹³⁵ Justice Harlan aptly asserted that he for one thought that the Constitution required unanimity because “the wise men who framed the Constitution of the United States and the people who approved it were of opinion that life and liberty, when involved in criminal prosecutions, would not be adequately secured except through the unanimous verdict of twelve jurors.”¹³⁶ To come to this conclusion, the Court went back to Hale’s *Pleas of the Crown*, which stated “[t]he law of England hath afforded the best method of trial, that is possible . . . namely, by a jury of twelve men all concurring.”¹³⁷ Justice Harlan found that the words “jury” and “trial by jury” were used in the Constitution “with reference to the meaning affixed to them” in common law at the time of its adoption.¹³⁸ While this holding applied only to the federal government, it is telling that in 1898 the Justices found it axiomatic that the Constitution mandated that verdicts should be unanimous in criminal trials.

Indeed, just one year prior to *Thompson*, the Court held that unanimity was required in civil trials; again, the Territory of Utah accepted majority verdicts, which the Court held was unconstitutional.¹³⁹ In so ruling, the Court kept its analysis short and to the point: “unanimity was one of the peculiar and essential features of trial by jury at the common law. No

¹³³ *Id.* at 559 n.2 (emphasis omitted).

¹³⁴ *Giles v. California*, 554 U.S. 353, 375 (2008).

¹³⁵ *Thompson v. Utah*, 170 U.S. 343, 350–51 (1898).

¹³⁶ *Id.* at 353.

¹³⁷ *Id.* at 350 (quoting 1 HALE, PLEAS OF THE CROWN 33 (1736)).

¹³⁸ *Id.*

¹³⁹ *American Publishing Co. v. Fisher*, 166 U.S. 464, 468 (1897).

authorities are needed to sustain this proposition.”¹⁴⁰ If no authorities are needed to say that unanimity was an essential feature of trials in civil cases, it is even less necessary to elaborate on its importance in a criminal trial.

In the 1953 case of *Hibdon v. United States*, the Sixth Circuit ruled that a defendant cannot waive his right to a unanimous verdict, unlike his right to trial or a jury comprised of less than twelve.¹⁴¹ In support of the holding, the court stated that even though “the requirement of a unanimous verdict is nowhere defined in the Constitution,” it is “the inescapable element of due process that has come down to us from earliest time.”¹⁴² The court also looked to the Federal Rules of Criminal Procedure, finding its provision that “[t]he verdict shall be unanimous” to be persuasive.¹⁴³ Furthermore, the court cited the fact that Rule 29(a) of the First Preliminary Draft of the Federal Rules of Criminal Procedure provided the parties could stipulate to a majority verdict so long as the court approved.¹⁴⁴ However, this proposal “was so vigorously criticized by bench and bar” because it did not provide “sufficient protection to a defendant” that it was eliminated from the final Rule.¹⁴⁵ Like other courts, *Hibdon* found that the implications of the reasonable-doubt standard were the most compelling reason to mandate unanimity:

To sustain the validity of a verdict by less than all of the jurors is to destroy this test of proof for there cannot be a verdict supported by proof beyond a reasonable doubt if one or more jurors remain reasonably in doubt as to guilt . . . the right to unanimous verdict cannot under any circumstances be waived, that it is of the very essence of our traditional concept of due process in criminal cases, and that the verdict in this case is a nullity because it is not the unanimous verdict of the jury as to guilt.¹⁴⁶

Of course, the Sixth Circuit’s decision is not binding upon the Supreme Court. But it is telling that a federal court of appeals found the right to be so vital to the American trial that it could not even be waived—unlike the trial itself. Beyond these cases, there lies an almost unbroken line of decisions that “canonized the virtues of jury unanimity.”¹⁴⁷

¹⁴⁰ *Id.* at 468.

¹⁴¹ 204 F.2d 834, 838 (1953).

¹⁴² *Id.* at 838.

¹⁴³ *Id.* at 836 (quoting FED. R. CRIM. P. 31(a)).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 838.

¹⁴⁷ Taylor-Thompson, *supra* note 13, at 206; *see also* Patton v. United States, 281 U.S. 276, 288 (1930) (noting that the right to a jury trial is best understood as a right to the common-law jury, which requires a unanimous verdict of twelve); Maxwell v. Dow, 176

Another source that is not binding upon the Court but should be considered persuasive is the American Bar Association's view. After the ABA's own research of jury trials, in 1976 the ABA's Commission on Standards of Judicial Administration published its Standards as related to Trial Courts.¹⁴⁸ Standard 2.10 states that "[t]he verdict of the jury [in criminal cases] should be unanimous."¹⁴⁹ This standard has not changed in the past forty years.¹⁵⁰ The Court has recently affirmed its confidence in the conclusions by the ABA, stating in 2005 that the Court "long ha[s] referred to these ABA Standards as guides to determining what is reasonable."¹⁵¹ The ABA, in an amicus brief on this topic (in support of *Bowen v. Oregon*, decided before *McDonald*) aptly summed up its position on why *Apodaca* should be reexamined:

Because each member of the *Apodaca* Court agreed on the importance of thorough jury deliberations, attention to minority viewpoints, and community confidence in jury verdicts, and because the ABA's review of research and empirical data, as well as the consensus of the legal community, has concluded that the opposite occurs through the non-unanimous decision process, the ABA supports petitioner's request that *Apodaca* be revisited.¹⁵²

In short, the right to unanimous juries in criminal trials satisfies the *McDonald* standard for incorporation: it is historically ingrained in Anglo-American jurisprudence, there is persuasive dicta in favor of the right, and other sources to which the Court has looked to guidance before are unwavering in their support of it.

B. THE IMPORTANCE OF UNANIMITY IN SATISFYING "BEYOND A REASONABLE DOUBT"

Majority verdicts in criminal trials undermine the beyond-a-reasonable-doubt standard. The Court not only mentioned the importance

U.S. 581, 586 (1900) ("[A]s the right of trial by jury in certain suits at common law is preserved by the Seventh Amendment, such a trial implies that there shall be a unanimous verdict of twelve jurors in all Federal courts where a jury trial is held.").

¹⁴⁸ Brief of Amicus Curiae American Bar Association in Support of Petitioner at 3, *Bowen v. Oregon*, 130 S. Ct. 52 (2009) (No. 08-1117). This exact provision remains in STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY § 15(1.1)(c) (1996).

¹⁴⁹ Brief of Amicus Curiae American Bar Association in Support of Petitioner, *supra* note 148, at 3.

¹⁵⁰ *Id.*

¹⁵¹ *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003)).

¹⁵² Brief of Amicus Curiae American Bar Association in Support of Petitioner, *supra* note 148, at 4.

of unanimity in those cases which concerned themselves with trial procedure; one of the more dramatic statements as to the importance of unanimous verdicts was in an opinion on the applicability of search and seizure laws to phone calls.¹⁵³ Referring to it as an “indestructible principle” of American criminal law, the Court stated in *Billeci v. United States* that “[g]uilt must be established beyond a reasonable doubt. All twelve jurors must be convinced beyond that doubt.”¹⁵⁴ The opinion continued, “[t]hese principles are not pious platitudes recited to placate the shades of venerated legal ancients. They are working rules of law binding upon the court.”¹⁵⁵ The practical implications of these requirements were clear: “the prosecutor in a criminal case must actually overcome the presumption of innocence, all reasonable doubts as to guilt, and the unanimous verdict requirement.”¹⁵⁶

Regarding majority verdicts, Justice Marshall stated in *Johnson* that when a “prosecutor has tried and failed to persuade those [minority] jurors of the defendant’s guilt . . . it does violence to language and to logic to say that the government has proved the defendant’s guilt beyond a reasonable doubt.”¹⁵⁷

Indeed, *In re Winship* solidified that the reasonable-doubt standard was constitutionally required.¹⁵⁸ The *Apodaca* dissenters operated under many of the same assumptions as the *Winship* Court.¹⁵⁹ The Constitution does not contain the phrase “beyond a reasonable doubt,” but the Court found that common-law adherence to the burden was persuasive of the necessity for constitutional protection.¹⁶⁰ “Although virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it as a requirement of due process, such adherence does ‘reflect a profound judgment about the way in which law should be enforced and justice administered.’”¹⁶¹ Furthermore, the *Winship* Court relied upon dicta from past decisions: “Expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge

¹⁵³ *Billeci v. United States*, 184 F.2d 394 (1950).

¹⁵⁴ *Id.* at 403 (emphasis added).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Johnson v. Louisiana*, 406 U.S. 356, 401 (1972) (Marshall, J., dissenting).

¹⁵⁸ *In re Winship*, 397 U.S. 358, 368 (1970).

¹⁵⁹ *See Johnson*, 406 U.S. at 400–01 (Marshall, J., dissenting).

¹⁶⁰ *In re Winship*, 387 U.S. at 361–62 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968)).

¹⁶¹ *Id.*

beyond a reasonable doubt is constitutionally required.”¹⁶²

Similarly, there is virtually unanimous adherence to the doctrine of unanimity in common law; the federal government and forty-eight states require unanimous verdicts in criminal trials. Also like the reasonable-doubt standard, many instances of the Court’s dicta take the unanimity requirement for granted. It is difficult to see how within just two years the Court did not find these same authorities to be persuasive. Indeed, in Justice Douglas’s dissent from *Johnson*, he reasoned as much, referencing *Winship*:

The Constitution does not mention unanimous juries. Neither does it mention . . . that guilt must be proved beyond a reasonable doubt in all criminal cases. Yet it is almost inconceivable that anyone would have questioned whether proof beyond a reasonable doubt was in fact the constitutional standard. And, indeed, when such a case finally arose we had little difficulty disposing of the issue.¹⁶³

And again, during the same term as *Winship*, the Court mentioned in *Williams* that, should the issue of unanimity be brought to the Court, it would be more problematic to dismiss it as a constitutional necessity.¹⁶⁴ Unlike the twelve-person jury, unanimity “may well serve an important role . . . as a device for insuring that the Government bear the heavier burden of proof.”¹⁶⁵ Despite the Court’s foresight, it ultimately came down the other way.

Of course, it is not that the *Apodaca* plurality ignored the reasonable-doubt requirement in their analysis. Instead, it was determined that a majority verdict did not, in and of itself, imply that the *Winship* reasonable-doubt burden had not been met.¹⁶⁶ A crucial question was whether the burden of proof applied to the mind of each individual juror “or to the ‘group mind’ of the jury as an entity.”¹⁶⁷ If the Court adopted the theory that the reasonable-doubt standard applied to the group mind, “majority verdicts would clearly be violative of due process since any dissenting juror would cast a reasonable doubt upon the entire jury.”¹⁶⁸

Clearly, the plurality in *Apodaca* determined that the reasonable-doubt standard applies to the mind of an individual juror, which is why a majority

¹⁶² *Id.* at 362.

¹⁶³ *Johnson*, 406 U.S. at 381 (Douglas, J., dissenting).

¹⁶⁴ *Williams v. Florida*, 399 U.S. 78, 100 n.46 (1970).

¹⁶⁵ *Id.*

¹⁶⁶ *Johnson*, 406 U.S. at 362.

¹⁶⁷ R.L.M., Note, *Majority Verdicts in Criminal Trials*, 40 TENN. L. REV. 91, 95 (1972).

¹⁶⁸ *Id.*

verdict does not cast doubt upon the sufficiency of the evidence. Writing in the *Johnson* opinion, Justice White explained that the reasonable-doubt standard was not threatened by majority verdicts, because “the mere fact” that there were three holdout jurors “does not in itself demonstrate that, had the nine jurors of the majority attended further to reason and the evidence, all or one of them would have developed a reasonable doubt.”¹⁶⁹ Justice White did concede, however, that “the State’s proof could perhaps be regarded as more certain if it had convinced all 12 jurors instead of only nine.”¹⁷⁰ However, it has not been determined what majority would no longer be constitutionally sufficient. *Apodaca* held that a nine-to-three conviction was constitutionally permissible, but would a seven-to-five verdict be considered adequate? In his *Johnson* concurrence, Justice Blackmun, for one, stated that if a state employed a seven-to-five standard it “would afford [him] great difficulty,” but that he found nine votes to be a “substantial majority.”¹⁷¹

Indeed, proponents of majority verdicts usually cite efficiency as their main concern, and majority verdicts would certainly increase the efficiency of jury deliberations.¹⁷² However, even the supporters of majority verdicts acknowledge that reasonable-doubt concerns increase as the majority’s size decreases. “Part of [the] price” of greater efficiency in the courts “would be a weakening of the reasonable doubt standard.”¹⁷³ The debate between majority and unanimous verdicts is even portrayed as a trade-off between the accuracy of the verdict and the efficiency of the deliberations: “[w]ith unanimity, however, the reasonable doubt standard would be satisfied, although the inefficiency factor would then have its strongest effect.”¹⁷⁴ Indeed, the Oregon and Louisiana legislatures acknowledged this trade-off; when the charge is first-degree murder, both states require unanimity.¹⁷⁵ The only conceivable reason why the legislatures would have done so would be so that those verdicts have greater certainty.¹⁷⁶ In all lesser

¹⁶⁹ *Johnson*, 406 U.S. at 361.

¹⁷⁰ *Id.* at 362.

¹⁷¹ *Id.* at 366.

¹⁷² See, e.g., Michael H. Glasser, *Letting the Supermajority Rule: Nonunanimous Jury Verdicts in Criminal Trials*, 24 FLA. ST. U. L. REV. 659, 675 (1997); Robert F. Holland, *Improving Criminal Jury Verdicts: Learning from the Court-Martial*, 97 J. CRIM. L. & CRIMINOLOGY 101, 125 (2006).

¹⁷³ R.L.M., *supra* note 167, at 97.

¹⁷⁴ *Id.* at 98.

¹⁷⁵ OR. CONST. art. I, § 11; LA. CODE CRIM. PROC. art. 782(A).

¹⁷⁶ Reply Brief for Petitioner on Petition for Writ of Certiorari, *supra* note 20, at 7–8.

crimes, the states have decided, as the Oregon Supreme Court put it, “to make it easier to obtain convictions.”¹⁷⁷ While arguments as to the relative benefits in the accuracy of the verdict versus the efficiency of the proceeding and number of convictions are well and good in an academic discourse, they have no part in the American courts, the overriding goal of which should be to ensure the innocent are not wrongfully convicted.

Like the unanimity requirement, the reasonable-doubt standard is not expressly provided for in the language of the Sixth Amendment. But it had for so long been assumed at common law that this was the required standard that the Court had no trouble holding that it was constitutionally required for both federal and state courts. Problematically, majority verdicts do in fact lessen the burden of proof. Justice Blackmun and indeed the Oregon and Louisiana legislatures effectively conceded this point, for otherwise there would be no reason to require a greater number of votes for the most serious crimes.

C. THE *APODACA* COURT WAS INCORRECT IN ASSUMING MAJORITY VERDICTS DO NOT AFFECT THE FUNCTION OF THE JURY

The plurality in *Apodaca* held unanimity was not constitutionally required under the assumption that a jury instructed to come to a majority verdict would function the same as one instructed to come to a unanimous verdict; any difference in the deliberations would be slight enough not to raise any doubts about due process.¹⁷⁸ The Justices who came to this conclusion, however, relied on nothing more than their own assumptions, experiences as judges, and one empirical study, for the proposition that majority verdicts will result in fewer hung juries.¹⁷⁹ Nevertheless, the plurality assumed that non-unanimous jury deliberations would be “as robust, and that minority viewpoints would be as thoroughly represented, as in deliberations by” unanimous juries.¹⁸⁰ While those opinions may have been valid based on the information from which the Justices drew, there have since been countless jury behavior studies that tell quite a different story.

¹⁷⁷ Oregon *ex rel.* Smith v. Sawyer, 501 P.2d 792, 793 (Or. 1972).

¹⁷⁸ *Apodaca v. Oregon*, 406 U.S. 404, 410–11 (1972).

¹⁷⁹ *Id.*; HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 461 (1966).

¹⁸⁰ Brief of Jeffrey Abramson et al. as Amici Curiae in Support of Petitioner at 1–2, *Bowen v. Oregon*, 130 S. Ct. 52 (2009) (No. 08-1117). Cert for *Bowen v. Oregon* was denied prior to the decision in *McDonald*.

1. Majority Verdicts and Robust Deliberations

The most obvious disadvantage, functionally, of a majority-verdict jury is that the jurors are “quite conscious” that a majority vote will suffice.¹⁸¹ This fact was anticipated by Justice Douglas in *Johnson*, who felt that majority verdicts, “eliminate[] the circumstances in which a minority of jurors (a) could have rationally persuaded the entire jury to acquit, or (b) while unable to persuade the majority to acquit, nonetheless could have convinced them to convict only on a lesser-included offense.”¹⁸² In a study by Professor Shari Diamond of actual Arizona civil juries (in which only six of eight jurors must agree), some of the juries did attempt to persuade jurors initially in the minority, even when those votes were not necessary to return a verdict.¹⁸³ In other cases, the majority, knowing that the vote would be sufficient for a verdict, “terminated any attempt to resolve differences, and ended the debate when the required minimum vote was reached.”¹⁸⁴

Even more telling are data from the Appellate Division of the Oregon Office of Public Defense Services. The Division analyzed felony jury trial records for 46.5% of all felony jury trials in Oregon between 2007 and 2008; the juries were polled in 63% of those trials, and in 65.5% of trials in which the final vote was known, the jury reached a non-unanimous verdict on at least one of the counts.¹⁸⁵ This means that in nearly two thirds of all the trials in which the final vote was known, at least one of the jurors dissented on at least one of the counts.¹⁸⁶ Proponents of majority votes frequently frame their argument around the notion that they are trying to prevent the occasional irrational or obstinate juror from hijacking the

¹⁸¹ Brief of Shari Seidman Diamond et al. as Amici Curiae in Support of Petitioner at 2, *Herrera v. Oregon*, 131 S. Ct. 904 (2011) (No. 10-344).

¹⁸² Eugene R. Sullivan, *The Great Debate V: A Debate on Judicial Reform, England v. United States*, 38 AM. CRIM. L. REV. 321, 328 (2001) (quoting *Johnson v. Louisiana*, 406 U.S. 356, 396 (1972) (Douglas, J., dissenting)).

¹⁸³ Shari Seidman Diamond, Mary R. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201, 212–13 (2006).

¹⁸⁴ Brief of Amicus Curiae American Bar Association in Support of Petitioner, *supra* note 148, at 6; Diamond, Rose & Murphy, *supra* note 183.

¹⁸⁵ OREGON OFFICE OF PUBLIC SERVICES APPELLATE DIVISION, ON THE FREQUENCY OF NON-UNANIMOUS FELONY VERDICTS IN OREGON 4 (2009); Brief of Amicus Curiae American Bar Association in Support of Petitioner, *supra* note 148, at 7.

¹⁸⁶ Brief of Amicus Curiae American Bar Association in Support of Petitioner, *supra* note 148, at 7.

deliberations.¹⁸⁷ However, the results from Oregon—which reveal that majority verdicts are common, perhaps occurring even in a majority of all felony trials—cast doubt on that argument.

Robust deliberations are necessary for more important reasons than that all jurors feel as though they had a say in the final verdict. They provide an opportunity for jurors “to persuade their fellow jurors to change course”; but this need not be the complete turnaround of *Twelve Angry Men* to be important to the deliberations.¹⁸⁸ Deliberation “allows dissenters to point out nuances that might lead to a consensus that not all charges have been proved, or that a lesser included charge is more appropriate, after a more thoughtful and through consideration of the evidence.”¹⁸⁹ Otherwise, in a majority-verdict system, the reaction to minority viewpoints can be as harsh as one found in Professor Diamond’s study, wherein one juror informed another, “All right, no offense, but we are going to ignore you.”¹⁹⁰ Majority-verdict deliberations tend to be more verdict-driven, meaning that the jurors are more likely to take the first ballot during the first ten minutes of deliberation and to vote frequently until they reach a verdict.¹⁹¹ Unanimous-verdict juries, on the other hand, tend to be more evidence-driven, generally delaying their first votes until the evidence has been discussed.¹⁹² As will be discussed shortly, this tendency can have an effect on the participation (or lack thereof) of women jurors.¹⁹³

2. Majority Verdicts and Group Representation

From a functional standpoint, juries are supposed to be drawn from a representative cross section of the community.¹⁹⁴ The Court has rejected both gender- and race-based attempts to exclude jurors;¹⁹⁵ members of all groups have a right to be part of the judicial system. Justice Brennan, in his dissent in *Johnson*, addressed this issue: “In my opinion, the right of all

¹⁸⁷ Diamond, Rose & Murphy, *supra* note 183, at 204.

¹⁸⁸ Brief of Jeffrey Abramson et al. as Amici Curiae in Support of Petitioner, *supra* note 180, at 11.

¹⁸⁹ *Id.*

¹⁹⁰ Diamond, Rose & Murphy, *supra* note 183, at 216.

¹⁹¹ *Id.* at 208 (citing REID HASTIE ET AL., *INSIDE THE JURY* 165 (1983)).

¹⁹² *Id.*

¹⁹³ Taylor-Thompson, *supra* note 13, at 1300.

¹⁹⁴ Taylor v. Louisiana, 419 U.S. 522, 537 (1975).

¹⁹⁵ See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140–41 (1994) (forbidding gender-based exclusions from the jury); see also *Batson v. Kentucky*, 476 U.S. 79, 85–86 (1986) (forbidding race-based exclusions).

groups in this Nation to participate in the criminal process means the right to have their voices heard.”¹⁹⁶ Majority verdicts threaten this principle because, “[w]hen verdicts must be unanimous, no member of the jury may be ignored by the others. When less than unanimity is sufficient, consideration of minority views becomes nothing more than a matter of majority grace.”¹⁹⁷ While this is true of all jurors, majority verdicts may disproportionately exclude the views of women and minorities.

Studies have found that men and women remember evidence and testimony differently, and in particular, men tend to neglect conduct in the context of relationships and conceptualize moral issues in a rights-oriented—and consequently more abstract—manner.¹⁹⁸ Without adequate discussion, therefore, different perspectives and evaluations of the evidence may be missed by the group as a whole. Furthermore, in mock-jury studies, it has been observed that women speak less frequently during deliberations.¹⁹⁹ When women do offer their opinions, men tend to interrupt them or ignore their comments.²⁰⁰ In general, women also “take longer than men to enter” into the discussion.²⁰¹ The combination of these factors implies that when a verdict can be returned on a majority vote, where deliberations are shorter and more result-oriented, the viewpoints of women are more likely to be disregarded. When unanimity is required, the viewpoints of all jurors—including women—demand a more thorough examination.²⁰² It does little good attempting to ensure that juries are fully representative if the decisionmaking scheme tends to de facto exclude the viewpoints of women.

There is even more evidence suggesting that jury deliberations benefit from the viewpoint of racial minorities.²⁰³ Unconscious stereotyping, which can automatically occur even by individuals who do not espouse any racist notions, will affect how an individual processes information and evidence shown at trial; and “jurors belonging to the stereotyped group will recall information differently.”²⁰⁴ Diverse juries will deliberate longer and

¹⁹⁶ *Johnson v. Louisiana*, 406 U.S. 356, 396 (1972) (Brennan, J., dissenting).

¹⁹⁷ Sullivan, *supra* note 182, at 328 (quoting *Johnson v. Louisiana*, 406 U.S. 356, 396 (1972) (Brennan, J., dissenting)).

¹⁹⁸ Taylor-Thompson, *supra* note 13, at 1302.

¹⁹⁹ *Id.* at 1299.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 1292.

²⁰⁴ *Id.*

consider a wider range of information, and white jurors make fewer inaccurate statements when in a diverse group than when they are in a homogenous group.²⁰⁵

The most problematic findings are those that show how ethnicity changes perceptions of credibility and guilt. Studies by Bodenhausen and Lichtenstein show that subjects who knew the accused's ethnicity were more likely to find him guilty than those who had no such knowledge.²⁰⁶ In fact, those who knew the defendant's ethnicity "recommended on average a sentence twice as long" as those who made the recommendation ignorant of the defendant's ethnicity.²⁰⁷

One study examining the results from empirical data compiled on the effect of race on jury behavior found, simply, "anti-Black bias exerted an overall significant effect on the sentencing decisions of mock jurors."²⁰⁸ The presence of jurors who are of a different race from the accused increases the likelihood that conscious and unconscious biases influence whether or not the accused will be found guilty.²⁰⁹ Under a majority-verdict system, any power of minority jurors to bring to the attention of their fellow jurors information or evidence they may have missed, or to challenge their fellow jurors to consider a viewpoint that challenges stereotypes and assumptions, is lost.²¹⁰

Importantly, the jury serves a critical symbolic role in the judicial system. Researchers have found in several different studies that jurors who were required to arrive at a unanimous vote reported greater satisfaction from their deliberations and had more confidence in their verdicts.²¹¹ Those jurors "also rated their deliberations as more serious and thorough."²¹² Interestingly, both the holdouts *and* the prevailing members of majority-verdict juries rated the deliberations as less thorough and their fellow jurors

²⁰⁵ Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 606–07 (2006).

²⁰⁶ Galen V. Bodenhausen & Meryl Lichtenstein, *Social Stereotypes and Information-Processing Strategies: The Impact of Task Complexity*, 52 J. PERSONALITY & SOC. PSYCHOL. 871, 875 (1987).

²⁰⁷ Taylor-Thompson, *supra* note 12, at 1292.

²⁰⁸ Laura T. Sweeney & Craig Haney, *The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies*, 10 BEHAV. SCI. & L. 179, 190 (1992).

²⁰⁹ Taylor-Thompson, *supra* note 13, at 1295.

²¹⁰ *Id.*

²¹¹ Diamond, Rose & Murphy, *supra* note 183, at 208.

²¹² *Id.*

as less open-minded than did those jurors on unanimous juries, implying that the loss of quality in the deliberations does not only negatively affect the “loser” voters.²¹³

3. Concerns About Hung Juries Are Overblown

Furthermore, the notion that the number of hung juries would significantly decrease if majority verdicts were accepted is misguided. It is true that hung juries in criminal cases are more likely in jurisdictions where unanimity is required.²¹⁴ However, hung-jury rates are only on average around 6.2% of criminal trials; if a ten-to-two vote sufficed for a verdict, the rate would only be reduced to 3.6%.²¹⁵ The National Center for State Courts study of felony juries found that in those cases in which the minority at the beginning of deliberations consisted of one or two jurors, only 2.9% ended in a hung jury.²¹⁶ In 83% of the trials that end in a hung jury, the minority position was supported by at least three jurors at the beginning of deliberations.²¹⁷ “Jury deadlocks predominantly reflect genuine disagreement over the weight of the evidence, rather than the irrationality or stubbornness of one or two unreasonable jurors.”²¹⁸ There is even evidence that, where the judge was polled as to what he or she would have ruled had the trial been a bench trial, a substantial number of judges came to the same conclusion as the holdout jurors.²¹⁹ This finding “suggests that the conflict on some of these juries posed precisely the kind of challenge to the majority position that a deliberative process should welcome.”²²⁰

As the majority in *Apodaca* based the bulk of its analysis on the effect of unanimity on the function of the jury, it is clear that the holding has been dramatically undermined by subsequent empirical research. Indeed, far from confirming the Justices’ assumptions that a jury would behave no differently in a majority-verdict rather than a unanimous-verdict trial, it has

²¹³ *Id.* at 225.

²¹⁴ *KALVEN & ZEISEL*, *supra* note 179.

²¹⁵ Diamond, Rose & Murphy, *supra* note 183, at 207–08.

²¹⁶ Brief of Jeffrey Abramson et al. as Amici Curiae in Support of Petitioner, *supra* note 180, at 13 (citing PAULA HANNAFORD-AGOR ET AL., NAT’L CTR. FOR STATE COURTS, ARE HUNG JURIES A PROBLEM? 66 *tbl.*5.2 (2002), available at http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesProblemPub.pdf).

²¹⁷ *Id.*

²¹⁸ Brief of Jeffrey Abramson et al. as Amici Curiae in Support of Petitioner, *supra* note 180, at 13.

²¹⁹ Diamond, Rose & Murphy, *supra* note 183, at 222.

²²⁰ *Id.*

since been shown that majority-verdict juries have faster, less robust deliberations and are likely to discount the opinions of women and minorities. Furthermore, the concerns about the increase in hung juries are overblown. If a decision of the Supreme Court rests upon assumptions that turn out to be false, the decision must necessarily be reexamined in light of newer, more accurate research.

IV. CONCLUSION

The Court's stance against a two-tiered system of incorporation in *McDonald* compels a reexamination of those rights that have as yet not been incorporated to the states, and overturning *Apodaca* should be one of the priorities of the Court in the coming terms. Jury unanimity is clearly fundamental to the Anglo-American system of justice. Unanimous juries were required in the fourteenth century, and unanimity was since enshrined in common law as one of the irrefutable rights of an Englishman. Unanimity in verdicts protects the defendant from the power of the government, ensures the state is held to a very high standard of proof, and helps to build the community's confidence in the judicial system. The assumption in *Apodaca* that juries behave the same regardless of the number of votes required for a verdict has been proven dead wrong. It has been shown, time and again, that jury deliberations under a majority-vote scheme are inferior to those under a unanimous scheme: unanimous-verdict juries are lengthier, more thorough, take into account more viewpoints, and protect the participation of women and minorities.

The policy reasons are striking, and that is because fundamental fairness requires that a defendant be subject to the same criminal process regardless of whether the claim is brought in federal or state court. If Mr. Apodaca, Mr. Johnson, Mr. Bowen, or Mr. Herrera were tried in another jurisdiction, it is very possible that they would have been acquitted. But because—relying on nothing more than intuition—unanimity was deemed not an 'essential' right to be incorporated, the men were convicted. *McDonald* requires otherwise; the Court's stance on the incorporation of all those rights that are fundamental to the American system compels a reexamination, and rejection, of the holding in *Apodaca*.

