

# Gap Filling: Assessing the Constitutionality of Virtual Criminal Trials in Light of *Ramos v. Louisiana*

Justin D. Rattey\*

## ABSTRACT

Court closures in response to the COVID-19 pandemic have led some to consider the viability of virtual jury trials, with state courts already beginning to conduct virtual trials in civil and criminal cases. The Supreme Court’s recent decision in *Ramos v. Louisiana*, in which the Court held that jury verdicts must be unanimous, sheds light on the constitutionality of virtual trials in criminal cases. The answer that *Ramos* suggests—that virtual criminal trials are unconstitutional—is, at least at first glance, difficult to square with the answer offered by constitutional theory. Though the author of the Court’s opinion in *Ramos*, Justice Neil Gorsuch, is a self-described originalist, originalist theory (reflected in the scholarship of, among others, Professors Larry Solum, Randy Barnett, and Jack Balkin) would seem to allow for virtual trials because that inquiry falls in the Constitution’s “construction zone.” The Constitution says nothing about whether jury trials must be in person, affording legal actors greater (although not unlimited) latitude to adjust jury practices to account for current circumstances. This Article compares the Court’s analysis in *Ramos* to that of prominent originalist scholars to preliminarily address whether virtual jury trials are constitutional. Additionally, through that comparison, this Article demonstrates the extent to which originalist theory has succeeded in shaping Supreme Court decision-making.

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\*J.D., Georgetown Law; Ph.D. in Government, Georgetown University. I am grateful to Randy E. Barnett for helpful suggestions during the writing process, as well as to Georgetown Law’s Center for the Constitution, through which I was first exposed to much of the originalist theory relied upon in this Article. Many thanks to the editors of the *Penn State Law Review*, especially Ryan Reilly, for insightful comments and support in the publication process.

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### I. INTRODUCTION

Under the specter of the COVID-19 pandemic, countless jury trials—both criminal and civil—have been postponed.<sup>1</sup> In response, state courts in Texas (if not also elsewhere) have conducted jury trials over Zoom in both civil<sup>2</sup> and criminal cases.<sup>3</sup> The prospect of more virtual trials in criminal cases around the country has generated substantial reporting.<sup>4</sup> Virtual platforms provide an enticing solution to some of the challenges presented by the pandemic. Jurors, judges, lawyers, and court staff can be spared the health risks and logistical hurdles associated with in-person trials. Moreover, virtual meeting technologies like Zoom accommodate breakout rooms (separate virtual spaces within which a smaller segment of Zoom participants can convene), which could be used by jurors to deliberate as well as by attorneys to speak confidentially with their clients.<sup>5</sup>

But virtual trials in the criminal context also present a host of challenges. The constitutional and statutory questions raised by the mere prospect of virtual jury trials are ripe for scholarly attention. This Article considers just one: whether the Constitution requires in-person trials. After

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<sup>1</sup> See generally BARRY J. McMILLION, CONG. RESEARCH SERV., IN11346, FEDERAL JURY TRIALS AND COVID-19 (2020), <https://bit.ly/3ltweCI>.

<sup>2</sup> See Nate Raymond, *Texas Tries a Pandemic First: A Jury Trial by Zoom*, REUTERS (May 18, 2020, 7:19 AM), <https://reut.rs/3hKVqCs>. The verdict delivered in that trial was non-binding. See *id.*

<sup>3</sup> See Madison Alder, *Virtual Criminal Jury Trial Getting Texas Test—iPads Included*, BLOOMBERG L. (Aug. 11, 2020, 4:50 AM), <https://bit.ly/3hBmvIa>.

<sup>4</sup> See, e.g., Madison Alder, *Remote Court Proceedings Useful in Emergencies, Lawyers Say (I)*, BLOOMBERG L. (June 10, 2020, 3:00 PM), <https://bit.ly/2EE0jyL> (describing the challenges, created by the Federal Rules of Criminal Procedure, for virtual criminal proceedings); Henry E. Hockeimer Jr. et al., *INSIGHT: Virtual Criminal Jury Trials Threaten Fundamental Rights*, BLOOMBERG L. (June 23, 2020, 4:00 AM), <https://bit.ly/3jrCfOx> (describing the constitutional concerns with virtual criminal trials); Matt Reynolds, *Could Zoom Jury Trials Become the Norm During the Coronavirus Pandemic?*, ABA J. (May 11, 2020, 8:00 AM), <https://bit.ly/3gHv0jy> (describing the legal hurdles to virtual, criminal trials); see also Zoe Schiffer, *The Jury Is Still Out on Zoom Trials*, VERGE (Apr. 22, 2020, 2:58 PM), <https://bit.ly/3hTzXRH> (noting that virtual trials may also benefit the criminal justice process by, for example, increasing transparency).

<sup>5</sup> In the Texas criminal trial, Zoom breakout rooms were used in just this way for jury deliberations. See Alder, *supra* note 3.

the Supreme Court's recent decision in *Ramos v. Louisiana*,<sup>6</sup> the answer to that inquiry appears clear: jury trials must be in person. The Court in *Ramos* held that jury verdicts must be unanimous, even though nothing in the Constitution expressly mandates unanimity.<sup>7</sup> Likewise, while the Constitution says nothing about whether jury trials must be in person, a parallel application of Justice Gorsuch's historical analysis in *Ramos* yields a similar conclusion about the in-person requirement. The history of the jury right, coupled with evidence from treatises and dictionaries from the Founding Era, support the conclusion that criminal jury trials must be in person.<sup>8</sup>

Somewhat surprisingly, Justice Gorsuch's analysis for the Court in *Ramos* seemingly differs from that prescribed by academic originalists.<sup>9</sup> The in-person inquiry, filtered through originalist theory, is less clear because whether jury trials must be in person ostensibly falls in what originalists describe as the "construction zone"—where legal practitioners are afforded greater (albeit not unlimited) latitude in adjusting constitutional rights.<sup>10</sup>

After discussing originalism in theory and practice,<sup>11</sup> this Article analyzes two related issues in light of *Ramos*.<sup>12</sup> First, and most directly, this Article preliminarily considers whether the Constitution requires in-person jury trials in criminal cases.<sup>13</sup> Though originalist theory would seem to accept the possibility of virtual jury trials, *Ramos* more clearly proscribes such practices.<sup>14</sup> Second, this Article explores the status of constitutional originalism in light of the Supreme Court's decision in *Ramos*.<sup>15</sup> To the extent that the Court applied originalist theory in that case, *Ramos* may signal originalism's success in shaping Supreme Court decision-making.<sup>16</sup>

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<sup>6</sup> 140 S. Ct. 1390 (2020).

<sup>7</sup> *See id.* at 1395.

<sup>8</sup> *See infra* Section III.A.

<sup>9</sup> *See infra* Section III.A.

<sup>10</sup> *See infra* Part II.

<sup>11</sup> *See infra* Part II.

<sup>12</sup> *See infra* Part III.

<sup>13</sup> *See infra* Section III.A. There are many other dimensions to the in-person inquiry that this Article necessarily omits. It does not address the Court's vast jurisprudence interpreting the criminal jury right or other relevant state and federal laws regulating jury trials. This Article also does not consider some of the other, related questions, such as whether virtual jury practices would violate the Confrontation Clause. (The Court has previously suggested that the use of virtual cross-examination procedures—via closed-circuit televisions—is unconstitutional under some circumstances. *See Coy v. Iowa*, 487 U.S. 1012, 1014, 1019–20 (1988).) Though the Confrontation Clause may create a separate prohibition against virtual jury practices, I do not consider that challenge in this Article. At least in theory, the question of whether a *jury* can be virtual is distinct from whether a *witness* can be questioned virtually.

<sup>14</sup> *See infra* Section III.A.

<sup>15</sup> *See infra* Section III.B.

<sup>16</sup> *See infra* Section III.B.

## II. ORIGINALISM IN THEORY AND PRACTICE

Originalists treat the Constitution's text, as understood by the general public at the time of ratification, as authoritative.<sup>17</sup> When the meaning of a constitutional provision shifts over time—as the Commerce and Domestic Violence clauses have<sup>18</sup>—it is the public meaning at the time the provision was ratified that matters. But the Constitution is not exhaustive; its text does not answer every question. Larry Solum describes “the construction zone” as that area within which “the constitutional text does not provide determinate answers.”<sup>19</sup> The zone exists because of the inherent vagueness of language and ambiguity of constitutional provisions, as well as because of gaps and contradictions in the Constitution as a whole.<sup>20</sup> The existence of construction zones should not be surprising. The Constitution answers some questions more clearly than others. For example, while the Constitution is clear about the age requirement for Presidents (thirty-five),<sup>21</sup> it is less clear about what “speech” is protected by the First Amendment.<sup>22</sup>

Whether the Constitution requires in-person jury trials seems suitable for the type of construction that Solum and others prescribe in the construction zone. After all, the text of the Constitution says nothing about whether jury trials must be conducted in person—that is a gap in the constitutional text.<sup>23</sup>

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<sup>17</sup> This is a slight exaggeration. At a more general level, “[o]riginalists argue that the meaning of the constitutional text is fixed and that it should bind constitutional actors.” Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1244 (2019). Though there are various forms of originalism, “Original Public Meaning Originalism” is now the dominant form among both legal scholars and jurists. *See id.* at 1251, 1263.

<sup>18</sup> *See, e.g.*, Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 296–310 (2019) (tracing the “linguistic drift” in constitutional terms including “domestic violence” and “commerce”); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847, 856–62 (2003) (presenting empirical research on the original public meaning of the Commerce Clause).

<sup>19</sup> Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 458 (2013); *see id.* at 472 (“The construction zone consists of constitutional cases or issues that cannot be resolved by the direct translation of the constitutional text into rules of constitutional law that determine their outcome.”).

<sup>20</sup> *See id.* at 499 (describing why “[c]ases may fall into the construction zone”).

<sup>21</sup> *See* U.S. CONST. art. II, §1, cl. 5 (“No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.”).

<sup>22</sup> *See id.* amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

<sup>23</sup> *See* Solum, *supra* note 19, at 471 (defining a “gap” as “a situation in which the constitutional text requires the existence of a rule of constitutional law but does not provide the content of that rule”).

But, as the Court made clear in *Ramos v. Louisiana*,<sup>24</sup> gaps in the Constitution are not automatically open to construction. In *Ramos*, a nonunanimous jury convicted Evangelisto Ramos—ten jurors believed Ramos was guilty, while two voted against his conviction.<sup>25</sup> Louisiana law permitted convictions by nonunanimous juries, and the question before the Court was whether the Sixth Amendment jury right—incorporated against the states through the Fourteenth Amendment—permits convictions by nonunanimous juries.<sup>26</sup>

A challenge for the Court in *Ramos* was the Constitution's omission of any explicit discussion of unanimity.<sup>27</sup> In the House of Representatives, James Madison's proposal for what became the Sixth Amendment included "the requisite of unanimity for conviction."<sup>28</sup> But that language was ultimately lost in the Senate's version. Both parties in *Ramos* drew different conclusions from the omission of Madison's proposed language.<sup>29</sup>

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<sup>24</sup> 140 S. Ct. 1390 (2020).

<sup>25</sup> *See id.* at 1394.

<sup>26</sup> *See id.* That issue was complicated by, among other things, the racist origins of Louisiana's law and an earlier Court decision, *Apodaca v. Oregon*, 406 U.S. 404 (1972). *See id.* at 1394, 1397–1402 (discussing the origins of Louisiana's law and the "problem" presented by *Apodaca*). Because it is only tangentially relevant to the analysis in this Article and even the Court could not agree on the proper interpretation of the fractured *Apodaca* opinion, I do not address that earlier case here.

<sup>27</sup> It could be asserted that the Court in *Ramos* is engaged in interpretation rather than construction. A court engages in interpretation when it ascertains "the linguistic meaning or semantic content of" a statutory or constitutional term. Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 96 (2010). This might seem to be what the Court is doing in *Ramos* when "look[ing] to determine what the term 'trial by an impartial jury . . . ' meant at the time of the Sixth Amendment's adoption." *Ramos*, 140 S. Ct. at 1395. If all the Court was doing in *Ramos* was interpreting the text of the Constitution, our inquiry into the constitutionality of virtual criminal trials would be quite different. *See Solum, supra*, at 115–18 (describing the implications of "the interpretation-construction distinction" for constitutional theory). But, though ostensibly engaging in interpretation, what the Court actually does in *Ramos* is *construction*, "the process that gives a text legal effect (either my [sic] translating the linguistic meaning into legal doctrine or by applying or implementing the text)." *Id.* at 96. Whether the Sixth Amendment requires unanimous jury verdicts is a matter of how to give legal effect (not linguistic meaning) to "the common law, state practices in the founding era, or opinions and treatises written soon afterward," *Ramos*, 140 S. Ct. at 1395, that support the unanimity requirement. In short, it is better to understand the Court's project in *Ramos* as one of construction rather than interpretation.

<sup>28</sup> 1 ANNALS OF CONG. 452 (1789).

<sup>29</sup> *Compare* Brief for Petitioner at 23 n.9, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (No. 18-5924) ("As best as scholars can determine, the unanimity requirement seems to have been deleted incident to a heated debate over the vicinage requirement." (citing Kate Riordan, *Ten Angry Men: Unanimous Jury Verdicts in Criminal Trials and Incorporation After McDonald*, 101 J. CRIM. L. & CRIMINOLOGY 1403, 1419–21 (2011); Robert H. Miller, *Six of One Is Not a Dozen of the Other: A Reexamination of Williams v. Florida and the Size of State Criminal Juries*, 146 U. PA. L. REV. 621, 639–45 (1998))), *with* Brief of Respondent at 6, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (No. 18-5924)

The Court held that unanimity is constitutionally required, striking down Louisiana’s law.<sup>30</sup> Rejecting Louisiana’s assertion that the deletion was a clear indication that unanimity is not constitutionally required, the Court concluded that the evidence was at best ambiguous.<sup>31</sup> In fact, the Court noted, “[m]aybe the Senate deleted the language about unanimity . . . because [it] was so plainly included in the promise of a ‘trial by an impartial jury’ that Senators considered the language surplusage.”<sup>32</sup>

### III. THE (POSSIBLE) TENSION BETWEEN THEORY AND PRACTICE

The tension between originalist theory and judicial practice—exemplified in *Ramos*—makes the in-person inquiry more difficult. That tension is, at least at first glance, surprising given that the author of the Court’s opinion, Justice Neil Gorsuch, self-describes as an originalist.<sup>33</sup>

#### A. *The Constitutionality of Virtual Criminal Trials*

Within construction zones, originalist theorists are not unified about how to approach constitutional questions. The contrasting views championed by Jack Balkin, on the one hand, and Randy Barnett and Evan Bernick, on the other, reflect two extremes in this debate.<sup>34</sup> Balkin would grant legislatures and courts much greater latitude to “implement[] and apply[] the Constitution using all of the various modalities of interpretation: arguments from history, structure, ethos, consequences, and precedent.”<sup>35</sup> If we adopt Balkin’s stance, we might—at least under present conditions—accept virtual juries as constitutionally permissible in light of the risks of in-persons trials and the ethical balancing of interests.

Barnett and Bernick defend a more constrained approach. They argue that, within a “‘construction zone,’ judges should identify the original functions of individual clauses and structural design elements to formulate rules that are consistent with the Constitution’s letter and calculated to implement its spirit.”<sup>36</sup> Of course, the “spirit” of the

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(concluding, from the omission of Madison’s proposed language, that “[t]here is accordingly no reason to read an *implicit* unanimity requirement into the Sixth Amendment’s general reference to an ‘impartial jury’”).

<sup>30</sup> See *Ramos*, 140 S. Ct. at 1395.

<sup>31</sup> See *id.* at 1400.

<sup>32</sup> *Id.*

<sup>33</sup> See Ed Pilkington, *Originalism: Neil Gorsuch’s Constitutional Philosophy Explained*, GUARDIAN (Feb. 2, 2017, 6:00 AM), <https://bit.ly/3jtT9vT>.

<sup>34</sup> For a sample of other approaches to constitutional construction, see generally Solum, *supra* note 19.

<sup>35</sup> JACK M. BALKIN, *LIVING ORIGINALISM* 4 & 341 n.2 (2011); see also *id.* at 129–273 (describing, in great detail, his proposed process of constitutional construction).

<sup>36</sup> Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 6 (2018) (quoting Solum, *supra* note 19, at 458).

Constitution's jury requirement is not entirely clear.<sup>37</sup> If the purpose of the jury right is to protect criminal defendants, we might treat the in-person inquiry as part of the jury right and therefore as waivable by consenting defendants.<sup>38</sup> If, on the other hand, the jury right is about preserving the community's deliberative role in the criminal justice process, virtual juries will be less likely to survive constitutional muster. The deliberative power of the jury, and the ability of jurors to evaluate the credibility of witnesses, is almost certainly diluted by virtual proceedings.<sup>39</sup>

Lack of consensus within originalism, coupled with the complexities of understanding the "purpose" of the constitutional jury right, leave us without a clear answer; but it appears that originalist theory at least *may* accommodate virtual jury trials. If, by contrast, we mirror the Court's analysis in *Ramos*, we are far less likely to affirm virtual criminal juries. *Ramos* begins with an examination of the historical genesis of the unanimity requirement. "The requirement of juror unanimity emerged in 14th century England and was soon accepted as a vital right protected by the common law."<sup>40</sup>

Like unanimity, the in-person requirement is a staple of historical jury practices. The modern Anglo-American origins of the jury trial right stretch back at least as far as the Magna Carta.<sup>41</sup> But the pre-Revolutionary jury was different in that it was "[d]rawn from the immediate neighborhood where the crime occurred, [and] the jurors were chosen for their knowledge of the crime or their ability to find out."<sup>42</sup> The early role of jurors as *witnesses* compounds the conclusion that they were expected to be present at trials.

Though the idea of jurors as witnesses was abandoned in favor of the Sixth Amendment's promise of an "impartial jury,"<sup>43</sup> the demand that

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<sup>37</sup> See generally Justin D. Rattey, *Whose Jury?: Mediating Between the Competing Individual and Collective Jury Rights* (May 28, 2020) (unpublished article as part of Ph.D. dissertation, Georgetown University), <https://ssrn.com/abstract=3612477> (describing the alternative framings of the criminal jury right as an individual or a collective right).

<sup>38</sup> Cf. FED. R. CRIM. P. 23(a) (providing for waiver of the jury trial right by the criminal defendant).

<sup>39</sup> See, e.g., *Mattox v. United States*, 156 U.S. 237, 242–43 (1895) (noting the importance of "compelling [the witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief").

<sup>40</sup> *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020) (citing J. THAYER, EVIDENCE AT THE COMMON LAW 86–90 (1898); W. FORSYTH, HISTORY OF TRIAL BY JURY 200 (J. Morgan ed., 2d ed. 1875); 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 318 (rev. 7th ed. 1956); Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 397 (1996)).

<sup>41</sup> See CLAY S. CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE 13–14 (Cato Inst. Press 2014) (1998).

<sup>42</sup> See Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 406 (2009) (citing JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 64 (2003)).

<sup>43</sup> U.S. CONST. amend. VI.

jury trials take place in close proximity to alleged offenses survived. The Founding Fathers were well-aware of the dangers of distant (perhaps also virtual) justice. Among those grievances alleged in the Declaration of Independence was that the King “depriv[ed] us in many cases, of the benefits of Trial by Jury,” and “transport[ed] us beyond Seas to be tried for pretended offences.”<sup>44</sup> To convey the importance of locally drawn juries, the First Congress went beyond the demands of Article III—which required that jury trials be conducted “in the State” of the alleged offense(s)<sup>45</sup>—in ratifying the “state *and district*” requirement in the Sixth Amendment.<sup>46</sup> By ensuring even greater localization of jury trials, the drafters of the Sixth Amendment may have been partially responding to the concerns expressed by anti-federalists about the injustice of having to travel great distances for trials.<sup>47</sup> The “state and district” requirement may thus support the conclusion that jury trials must be in person.

The Court in *Ramos* drew further support for its holding from state practices around the time of ratification<sup>48</sup> as well as “postadoption treatises,” which “confirm[ed the Court’s] understanding” of the unanimity requirement.<sup>49</sup> These sources, too, seem to support the in-person requirement. Joseph Story, for example, urged that the jury trial “be preserved in its purity and dignity.”<sup>50</sup> He echoed William Blackstone, who had worried about the introduction of “new and arbitrary methods of trial.”<sup>51</sup> Neither Story nor Blackstone (nor any other prominent early-American scholar) expressly demanded in-person jury trials. Nonetheless, they uniformly discussed jury trials in ways that show they assumed those trials would be in person. Early-American dictionaries confirm this understanding: jurors were defined as those who “*attend courts* to try

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<sup>44</sup> DECLARATION OF INDEPENDENCE (U.S. 1776).

<sup>45</sup> U.S. CONST. art. III, § 2, cl. 3

<sup>46</sup> *Id.* amend. VI (emphasis added).

<sup>47</sup> *See, e.g.*, Letter from Richard Henry Lee to Edmund Randolph (Oct. 16, 1787), in 4 THE FOUNDERS’ CONSTITUTION 391 (Philip B. Kurland & Ralph Lerner eds., 1987); Federal Farmer, No. 2 (Oct. 9, 1787), in 4 THE FOUNDERS’ CONSTITUTION 392 (Philip B. Kurland & Ralph Lerner eds., 1987).

<sup>48</sup> “[T]he young American States” regarded “unanimity as an essential feature of the jury trial.” *Ramos v. Louisiana*, 140 S. Ct. 1390, 1396 (2020) (citing *Commonwealth v. Bowden*, 9 Mass. 494, 495 (1813); *People v. Denton*, 2 Johns. Cas. 275, 277 (N.Y. 1801); *Commonwealth v. Fells*, 36 Va. (9 Leigh) 613, 614–15 (1838); *State v. Doon & Dimond*, 1 R. Charlton 1, 2 (Ga. Super. Ct. 1811); *Respublica v. Oswald*, 1 U.S. (1 Dall.) 319, 323 (Pa. 1788)).

<sup>49</sup> *Id.* In line with those early treatises, the Court noted that it had “repeatedly” reaffirmed the unanimity requirement throughout American history. *Id.* It was not “a case where the original public meaning was lost to time and only recently recovered.” *Id.*

<sup>50</sup> 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1774 (Boston, Hilliard, Gray, & Co. 1833). Story worried that “a corrupt legislature, or a debased and servile people, may render the whole [jury process] little more, than a solemn pageantry.” *Id.* § 1785.

<sup>51</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*343. The Court in *Ramos* referenced the same section of Blackstone’s *Commentaries*. *See Ramos*, 140 S. Ct. at 1395.



matters,”<sup>52</sup> and, after the presentation of evidence, jurors were required “to be *kept together* till they bring in their verdict.”<sup>53</sup> State jury practices similarly accord with the in-person requirement,<sup>54</sup> and there is no evidence of virtual—at the Founding, “distant” would have been the more accurate term—trials like those complained of in the Declaration of Independence.

Beyond the sources of constitutional meaning to which the Court in *Ramos* cited, other areas of criminal law compound the conclusion that jury trials must be in person. For instance, as the Court has previously interpreted the Confrontation Clause,<sup>55</sup> “face-to-face confrontation” protects “the integrity of the fact-finding process.”<sup>56</sup> Moreover, the Constitution and state laws have long preserved the right of criminal defendants to be present for their trials.<sup>57</sup> It is no real stretch to conclude from the fact that witnesses were required to be examinable in person, and that defendants were guaranteed the right to be present at their trials, that jurors were also expected to perform their duties in person.

### B. *The Status of Originalism at the Supreme Court*

As the foregoing analysis demonstrates, the inquiry into whether in-person criminal trials are constitutionally required exposes a potential rift between originalist theory and judicial practice. While, under current Supreme Court doctrine, in-person jury trials are likely required, originalist theory is more open-ended about that inquiry. The different

<sup>52</sup> 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 2 (New York, S. Converse 1828) (emphasis added).

<sup>53</sup> GILES JACOB, A NEW LAW-DICTIONARY 6R (J. Morgan ed., London, W. Strahan & W. Woodfall, 10th ed. 1782) (emphasis added).

<sup>54</sup> Apart from the virtual cases referenced above, *see supra* Part I, there is no evidence that any state courts have previously deviated from in-person jury trials.

<sup>55</sup> *See* U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”).

<sup>56</sup> *Coy v. Iowa*, 487 U.S. 1012, 1019–20 (1988) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987)); *see also* Raymond LaMagna, Note, *(Re)constitutionalizing Confrontation: Reexamining Unavailability and the Value of Live Testimony*, 79 S. CAL. L. REV. 1499, 1499 (2006) (“In response to notorious abuses in England, where defendants were convicted without witnesses testifying live at trial, confrontation was included in the Bill of Rights by the Framers.”).

<sup>57</sup> *See Riggins v. Nevada*, 504 U.S. 127, 142 (1992) (Kennedy, J., concurring) (“It is a fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial, while the accused is either on the stand or sitting at the defense table. This assumption derives from the right to be present at trial, which in turn derives from the right to testify and rights under the Confrontation Clause.” (citing *Taylor v. United States*, 414 U.S. 17, 19 (1973) (per curiam))); James G. Starkey, *Trial in Absentia*, 53 ST. JOHN’S L. REV. 721, 723 n.16 (1979) (listing constitutional and statutory provisions “in virtually every jurisdiction” preserving the right of defendants to be present at their trials); *see also* Eugene L. Shapiro, *Examining an Underdeveloped Constitutional Standard: Trial in Absentia and the Relinquishment of a Criminal Defendant’s Right to Be Present*, 96 MARQ. L. REV. 591, 595–607 (2012) (discussing the limited circumstances in which a defendant may relinquish his or her right to be present at trial).

answers and different degrees of confidence associated with *Ramos* and originalism are suggestive about the status of originalism at the highest level of the federal judiciary. First, this tension illuminates the extent of originalism's success in shaping Supreme Court decision-making. On the one hand, the tension between the conclusions reached by theory and practice may suggest that originalism has yet to fully transform the Court's approach to criminal procedure. Justice Gorsuch's ostensibly originalist opinion can perhaps be partially explained by the internal politics of the Court and his need to command a majority of the Justices' votes. But the more obvious explanation is that the Court—and even Justice Gorsuch—continues to struggle over how to realize originalist theory in its jurisprudence.

On the other hand, *Ramos* might exemplify a good-faith attempt at practicing originalism. As the parties' competing interpretations of Madison's omitted "unanimity" language demonstrate,<sup>58</sup> and in light of the sparsity of historical evidence, the question before the Court was a difficult one. Justice Gorsuch may be lauded for making the best of a tough situation. To the extent that his opinion reflects a good-faith effort at preserving the "spirit" of the Sixth Amendment jury right, *Ramos* demonstrates the success of originalist theory at the highest level of the federal judiciary.

A second, tentative conclusion that can be drawn from this examination is about tone. The confident tone of *Ramos*—unwavering in its conclusion about the unanimity requirement—may suggest a degree of reticence towards the more open-ended features of originalist theory. It seems unlikely that the Court will accept the existence of nebulous "construction zones," which would require ceding power to legislatures *and* exposing potentially significant areas of jurisprudence to questioning.<sup>59</sup>

#### IV. CONCLUSION

This Article does not conclude that virtual criminal jury trials are unconstitutional. An expanded analysis would consider the Supreme Court's jurisprudence beyond *Ramos* and would dig deeper into the relevant history of the Sixth and Fourteenth Amendments, only the surface of which has been brushed here. Instead, this Article sheds light on the relationship between originalist theory and judicial practice through an examination of the constitutionality of virtual jury trials. It also exposes the difficulties confronting jurists and scholars who must wade between

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<sup>58</sup> See *supra* note 29.

<sup>59</sup> Of course, the Court can continue to implicitly recognize areas unregulated by the Constitution. The Court does so all the time when it upholds state and federal laws. The explicit acknowledgement that constitutional "construction zones" exist would be a step further.

constitutional theory and judicial practice. If we are to protect the jury, that “great bulwark of . . . civil and political liberties,”<sup>60</sup> through the COVID-19 pandemic, that difficult work must be done.

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<sup>60</sup> STORY, *supra* note 50, § 1773.