AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Criminal Justice/Juries and Lawyers/Juries

**Ramos v. Louisiana, \_\_\_ U.S. \_\_\_** (2020)

*Evangelisto Ramos was arrested and charged with the murder of Trinece Fedison.* *He was convicted in a Louisiana Court of second degree murder by a 10-2 vote. Louisiana at that time was one of two states (Oregon was the other) that, following the Supreme Court’s decision in* Apodaca v. Oregon *(1972) permitted non-unanimous juries to convict, as long as the vote was greater than 9-3. Ramos appealed his conviction on the ground that Apodaca was inconsistent with the Sixth Amendment, as incorporated by the Fourteenth Amendment, which, in his view required juries in criminal cases to be unanimous. The Louisiana Court of Appeal rejected this claim. Ramos appealed to the Supreme Court of the United States.*

 *The Supreme Court by a 6-3 vote overturned Ramos’s conviction. Justice Neil Gorsuch’s plurality opinion overruled* Apodaca *and held that the Sixth and Fourteenth Amendments required unanimous juries. The justices in the majority wrote four separate opinions. What are the commonalities (other than the result in each opinion)? What are the differences? Justice Gorsuch begins with the racist origins of the Louisiana rule. What is the legal significance of the rule’s origins? Is Justice Alito correct when he claims the origins of the rule have no legal relevance. The justices debate whether reliance justifies maintaining the* Apodaca *rule. What reasons do the judges in the majority give? What reasons do the dissents give? Who has the better of the argument? All five opinions talk about* stare decisis *extensively. Did* Ramos merit *such an extended discussion. To what extent did each justice vote and write with an eye on how their principles might influence subsequent decisions whether to overrule such precedents as* Roe v. Wade*?*

Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91) announced the judgment of the Court

Accused of a serious crime, Evangelisto Ramos insisted on his innocence and invoked his right to a jury trial. Eventually, 10 jurors found the evidence against him persuasive. But a pair of jurors believed that the State of Louisiana had failed to prove Mr. Ramos’s guilt beyond reasonable doubt; they voted to acquit.

In 48 States and federal court, a single juror’s vote to acquit is enough to prevent a conviction. But not in Louisiana. Along with Oregon, Louisiana has long punished people based on 10-to-2 verdicts like the one here. So instead of the mistrial he would have received almost anywhere else, Mr. Ramos was sentenced to life in prison without the possibility of parole.

Why do Louisiana and Oregon allow nonunanimous convictions? Though it’s hard to say why these laws persist, their origins are clear. Louisiana first endorsed nonunanimous verdicts for serious crimes at a constitutional convention in 1898. According to one committee chairman, the avowed purpose of that convention was to “establish the supremacy of the white race,” and the resulting document included many of the trappings of the Jim Crow era: a poll tax, a combined literacy and property ownership test, and a grandfather clause that in practice exempted white residents from the most onerous of these requirements.

Nor was it only the prospect of African-Americans voting that concerned the delegates. Just a week before the convention, the U. S. Senate passed a resolution calling for an investigation into whether Louisiana was systemically excluding African-Americans from juries. Seeking to avoid unwanted national attention, and aware that this Court would strike down any policy of overt discrimination against African-American jurors as a violation of the Fourteenth Amendment,[3](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad740370000017248576c4cb80ac3db%3FNav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.History*oc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f7b14c4ccaeebc9cd1be1e16e2343580&list=CASE&rank=3&sessionScopeId=3a8aa29a882bda4f1c4a3c25fcb6f0ad60da48945fe38c363775d4c3b48ffa28&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.History*oc.Search%29#co_footnote_B00042050796536) the delegates sought to undermine African-American participation on juries in another way. With a careful eye on racial demographics, the convention delegates sculpted a “facially race-neutral” rule permitting 10-to-2 verdicts in order “to ensure that African-American juror service would be meaningless.”

Adopted in the 1930s, Oregon’s rule permitting nonunanimous verdicts can be similarly traced to the rise of the Ku Klux Klan and efforts to dilute “the influence of racial, ethnic, and religious minorities on Oregon juries.” In fact, no one before us contests any of this; courts in both Louisiana and Oregon have frankly acknowledged that race was a motivating factor in the adoption of their States’ respective nonunanimity rules.

We took this case to decide whether the Sixth Amendment right to a jury trial—as incorporated against the States by way of the Fourteenth Amendment—requires a unanimous verdict to convict a defendant of a serious offense.[7](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad740370000017248576c4cb80ac3db%3FNav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.History*oc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f7b14c4ccaeebc9cd1be1e16e2343580&list=CASE&rank=3&sessionScopeId=3a8aa29a882bda4f1c4a3c25fcb6f0ad60da48945fe38c363775d4c3b48ffa28&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.History*oc.Search%29#co_footnote_B00082050796536) Louisiana insists that this Court has never definitively passed on the question and urges us to find its practice consistent with the Sixth Amendment. By contrast, the dissent doesn’t try to defend Louisiana’s law on Sixth or Fourteenth Amendment grounds; tacitly, it seems to admit that the Constitution forbids States from using nonunanimous juries. Yet, unprompted by Louisiana, the dissent suggests our precedent requires us to rule for the State anyway. What explains all this? To answer the puzzle, it’s necessary to say a bit more about the merits of the question presented, the relevant precedent, and, at last, the consequences that follow from saying what we know to be true.

The Sixth Amendment promises that “[i]n 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.” . . . The text and structure of the Constitution clearly suggest that the term “trial by an impartial jury” carried with it *some* meaning about the content and requirements of a jury trial.

One of these requirements was unanimity. Wherever we might look to determine what the term “trial by an impartial jury trial” meant at the time of the Sixth Amendment’s adoption—whether it’s the common law, state practices in the founding era, or opinions and treatises written soon afterward—the answer is unmistakable. A jury must reach a unanimous verdict in order to convict.

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. . . . [T]he Sixth Amendment’s otherwise simple story took a strange turn in 1972. That year, the Court confronted these States’ unconventional schemes for the first time—in [*Apodaca*v. *Oregon*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and a companion case,  [*Johnson*v.*Louisiana*.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127121&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) Ultimately, the Court could do no more than issue a badly fractured set of opinions. Four dissenting Justices would not have hesitated to strike down the States’ laws, recognizing that the Sixth Amendment requires unanimity and that this guarantee is fully applicable against the States under the Fourteenth Amendment. But a four-Justice plurality took a very different view of the Sixth Amendment. These Justices declared that the real question before them was whether unanimity serves an important “function” in “contemporary society.” Then, having reframed the question, the plurality wasted few words before concluding that unanimity’s costs outweigh its benefits in the modern era, so the Sixth Amendment should not stand in the way of Louisiana or Oregon.

The ninth Member of the Court adopted a position that was neither here nor there. On the one hand, Justice Powell agreed that, as a matter of “history and precedent, ... the Sixth Amendment requires a unanimous jury verdict to convict.”[29](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad740370000017248576c4cb80ac3db%3FNav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.History*oc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f7b14c4ccaeebc9cd1be1e16e2343580&list=CASE&rank=3&sessionScopeId=3a8aa29a882bda4f1c4a3c25fcb6f0ad60da48945fe38c363775d4c3b48ffa28&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.History*oc.Search%29#co_footnote_B00302050796536) But, on the other hand, he argued that the Fourteenth Amendment does not render this guarantee against the federal government fully applicable against the States. In this way, Justice Powell doubled down on his belief in “dual-track” incorporation—the idea that a single right can mean two different things depending on whether it is being invoked against the federal or a state government.

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. . . . [In [*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))], four Justices, pursuing the functionalist approach Louisiana espouses, began by describing the “ ‘essential’ ” benefit of a jury trial as “ ‘the interposition ... of the commonsense judgment of a group of laymen’ ” between the defendant and the possibility of an “ ‘overzealous prosecutor.’ ” And measured against that muddy yardstick, they quickly concluded that requiring 12 rather than 10 votes to convict offers no meaningful improvement. Meanwhile, these Justices argued, States have good and important reasons for dispensing with unanimity, such as seeking to reduce the rate of hung juries.

Who can profess confidence in a breezy cost-benefit analysis like that? Lost in the accounting are the racially discriminatory *reasons* that Louisiana and Oregon adopted their peculiar rules in the first place. What’s more, the plurality never explained why the promised benefit of abandoning unanimity—reducing the rate of hung juries—always scores as a credit, not a cost. . . . Our real objection here isn’t that the [*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) plurality’s cost-benefit analysis was too skimpy. The deeper problem is that the plurality subjected the ancient guarantee of a unanimous jury verdict to its own functionalist assessment in the first place. . . .

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. . . . [N]ot even Louisiana tries to suggest that [*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) supplies a governing precedent. Remember, Justice Powell agreed that the Sixth Amendment requires a unanimous verdict to convict, so he would have no objection to that aspect of our holding today. Justice Powell reached a different result only by relying on a dual-track theory of incorporation that a majority of the Court had already rejected (and continues to reject). . . .

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The dissent contends that . .. we risk defying [*Marks*v.*United States* (1977).](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118739&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) According to [*Marks*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118739&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), when “a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’ ” But notice that the dissent never actually gets around to telling us which opinion in [*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) it considers to be the narrowest and controlling one under [*Marks*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118739&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))—or why. . . . Unlike a [*Marks*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118739&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) dispute where the litigants duel over which opinion represents the narrowest and controlling one, the parties before us accept that [*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) yielded no controlling opinion at all. In particular, both sides admit that Justice Powell’s opinion cannot bind us—precisely because he relied on a dual-track rule of incorporation that an unbroken line of majority opinions before and after [*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) has rejected. . . .

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Even if we accepted the premise that [*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) established a precedent, no one on the Court today is prepared to say it was rightly decided, and *stare decisis*isn’t supposed to be the art of methodically ignoring what everyone knows to be true. . . . [W]hen it revisits a precedent this Court has traditionally considered “the quality of the decision’s reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision.”[61](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad740370000017248576c4cb80ac3db%3FNav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.History*oc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f7b14c4ccaeebc9cd1be1e16e2343580&list=CASE&rank=3&sessionScopeId=3a8aa29a882bda4f1c4a3c25fcb6f0ad60da48945fe38c363775d4c3b48ffa28&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.History*oc.Search%29#co_footnote_B00622050796536) In this case, each factor points in the same direction.

Start with the quality of the reasoning. Whether we look to the plurality opinion or Justice Powell’s separate concurrence, [*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) was gravely mistaken; again, no Member of the Court today defends either as rightly decided. . . .

Looking to [*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))’s consistency with related decisions and recent legal developments compounds the reasons for concern.  [*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) sits uneasily with 120 years of preceding case law. . . .  Until recently, dual-track incorporation attracted at least a measure of support in dissent. But this Court has now roundly rejected it. . ..

When it comes to reliance interests, it’s notable that neither Louisiana nor Oregon claims anything like the prospective economic, regulatory, or social disruption litigants seeking to preserve precedent usually invoke. No one, it seems, has signed a contract, entered a marriage, purchased a home, or opened a business based on the expectation that, should a crime occur, at least the accused may be sent away by a 10-to-2 verdict. . . . [Louisiana and Oregon] credibly claim that the number of nonunanimous felony convictions still on direct appeal are somewhere in the hundreds, and retrying or plea bargaining these cases will surely impose a cost. But new rules of criminal procedures usually do, often affecting significant numbers of pending cases across the whole country. . . .

The second and related reliance interest the dissent seizes upon involves the interest Louisiana and Oregon have in the security of their final criminal judgments. But again the worries outstrip the facts. Under [*Teague*v.*Lane*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989027119&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (1989), newly recognized rules of criminal procedure do not normally apply in collateral review. . . .

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Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), concurring.

. . . . I write separately . . . to underscore three points. First, overruling precedent here is not only warranted, but compelled. Second, the interests at stake point far more clearly to that outcome than those in other recent cases. And finally, the racially biased origins of the Louisiana and Oregon laws uniquely matter here.

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. . . [P]put simply, this is not a case where we cast aside precedent “simply because a majority of this Court now disagrees with” it. . . . What matters instead is that, as the majority rightly stresses,  [*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) is a universe of one—an opinion uniquely irreconcilable with not just one, but two, strands of constitutional precedent well established both before and after the decision. The Court has long recognized that the Sixth Amendment requires unanimity. . . . Justice Powell’s theory of dual-track incorporation also fared no better: He recognized that his argument on that score came “late in the day.”  Moreover, “[t]he force of *stare decisis* is at its nadir in cases concerning [criminal] procedur[e] rules that implicate fundamental constitutional protections.” . . .

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This case . . . threatens no broad upheaval of private economic rights. Particularly when compared to the interests of private parties who have structured their affairs in reliance on our decisions, the States’ interests here in avoiding a modest number of retrials—emphasized at such length by the dissent—are much less weighty. They are certainly not new: Opinions that force changes in a State’s criminal procedure typically impose such costs. . . .

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Finally, the majority vividly describes the legacy of racism that generated Louisiana’s and Oregon’s laws. . . . . Where a law otherwise is untethered to racial bias—and perhaps also where a legislature actually confronts a law’s tawdry past in reenacting it—the new law may well be free of discriminatory taint. That cannot be said of the laws at issue here. While the dissent points to the “legitimate” reasons for Louisiana’s reenactment, Louisiana’s perhaps only effort to contend with the law’s discriminatory purpose and effects came recently, when the law was repealed altogether.

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Justice [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), concurring in part.

I agree with the Court that the time has come to overrule [*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). . . . I write separately to explain my view of how *stare decisis* applies to this case.

. . . . This Court has repeatedly explained that*stare decisis* “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”  The doctrine “permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.”  The doctrine of *stare decisis* does not mean, of course, that the Court should never overrule erroneous precedents. All Justices now on this Court agree that it is sometimes appropriate for the Court to overrule erroneous decisions. . . .

On the other hand, as Justice Jackson explained, just “because one should avoid Scylla is no reason for crashing into Charybdis.” Jackson, Decisional Law and Stare Decisis, 30 A. B. A. J. 334 (1944). So no one advocates that the Court should *always*overrule erroneous precedent.

In statutory cases, *stare decisis* is comparatively strict, as history shows and the Court has often stated. That is because Congress and the President can alter a statutory precedent by enacting new legislation. . . . In constitutional cases, by contrast, the Court has repeatedly said—and says again today—that the doctrine of *stare decisis*is not as “inflexible.”  The reason is straightforward: As Justice O’Connor once wrote for the Court, *stare decisis* is not as strict “when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions.”  The Court therefore “must balance the importance of having constitutional questions *decided* against the importance of having them *decided right.*” . . .

That said, in constitutional as in statutory cases, to “overrule an important precedent is serious business.” . . . In particular, to overrule a constitutional precedent, the Court requires something “over and above the belief that the precedent was wrongly decided.” . . . To overrule, the Court demands a special justification or strong grounds.

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As the Court has exercised the “judicial Power” over time, the Court has identified various *stare decisis* factors. . . . The *stare decisis* factors identified by the Court in its past cases include:

• the quality of the precedent’s reasoning;

• the precedent’s consistency and coherence with previous or subsequent decisions;

• changed law since the prior decision;

• changed facts since the prior decision;

• the workability of the precedent;

• the reliance interests of those who have relied on the precedent; and

• the age of the precedent.

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As I read the Court’s cases on precedent, those varied and somewhat elastic *stare decisis* factors fold into three broad considerations that, in my view, can help guide the inquiry and help determine what constitutes a “special justification” or “strong grounds” to overrule a prior constitutional decision.

*First*, is the prior decision not just wrong, but grievously or egregiously wrong? . . .

*Second*, has the prior decision caused significant negative jurisprudential or real-world consequences? In conducting that inquiry, the Court may consider jurisprudential consequences (some of which are also relevant to the first inquiry), such as workability, as well as consistency and coherence with other decisions, among other factors. Importantly, the Court may also scrutinize the precedent’s real-world effects on the citizenry, not just its effects on the law and the legal system. . . .

*Third*, would overruling the prior decision unduly upset reliance interests? . . .

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Applying the three broad *stare decisis* considerations to this case, I agree with the Court’s decision to overrule [*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

*First*, [*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))is egregiously wrong. The original meaning and this Court’s precedents establish that the Sixth Amendment requires a unanimous jury. . . .

*Second*, [*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))causes significant negative consequences. It is true that [*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))is workable. But [*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))sanctions the conviction at trial or by guilty plea of some defendants who might not be convicted under the proper constitutional rule (although exactly how many is of course unknowable). . . .

In addition, and significant to my analysis of this case, the origins and effects of the non-unanimous jury rule strongly support overruling [*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). Louisiana achieved statehood in 1812. And throughout most of the 1800s, the State required unanimous juries in criminal cases. But at its 1898 state constitutional convention, Louisiana enshrined non-unanimous juries into the state constitution. Why the change? The State wanted to diminish the influence of black jurors, who had won the right to serve on juries through the Fourteenth Amendment in 1868 and the Civil Rights Act of 1875. . . .

In light of the racist origins of the non-unanimous jury, it is no surprise that non-unanimous juries can make a difference in practice, especially in cases involving black defendants, victims, or jurors. After all, that was the whole point of adopting the non-unanimous jury requirement in the first place. And the math has not changed. Then and now, non-unanimous juries can silence the voices and negate the votes of black jurors, especially in cases with black defendants or black victims, and only one or two black jurors. The 10 jurors “can simply ignore the views of their fellow panel members of a different race or class.”

. . . .

*Third*, overruling [*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))would not unduly upset reliance interests. Only Louisiana and Oregon employ non-unanimous juries in criminal cases. To be sure, in those two States, the Court’s decision today will invalidate some non-unanimous convictions where the issue is preserved and the case is still on direct review. But that consequence almost always ensues when a criminal-procedure precedent that favors the government is overruled. . . .

. . . .

Importantly, moreover, this Court applies a separate non-retroactivity doctrine to mitigate the disruptive effects of overrulings in criminal cases. Under the Court’s precedents, new constitutional rules apply on direct review, but generally do not apply retroactively on habeas corpus review. . . .

. . . .

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), concurring in the judgment.

I agree with the Court that petitioner Evangelisto Ramos’ felony conviction by a nonunanimous jury was unconstitutional. I write separately because I would resolve this case based on the Court’s longstanding view that the Sixth Amendment includes a protection against nonunanimous felony guilty verdicts, without undertaking a fresh analysis of the meaning of “trial ... by an impartial jury.” I also would make clear that this right applies against the States through the Privileges or Immunities Clause of the Fourteenth Amendment, not the Due Process Clause.

. . . .

This Court first decided that the Sixth Amendment protected a right to unanimity in [*Thompson v. Utah* (1898)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1898180010&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). . . . The Court has repeatedly reaffirmed the Sixth Amendment’s unanimity requirement. . . . The question then becomes whether these decisions are entitled to *stare decisis* effect. As I have previously explained, “the Court’s typical formulation of the *stare decisis* standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions—meaning decisions outside the realm of permissible interpretation—over the text of the Constitution and other duly enacted federal law.”  There is considerable evidence that the phrase “trial ... by ... jury” in the Sixth Amendment was understood since the founding to require that a felony guilty verdict be unanimous. Because our precedents are thus not outside the realm of permissible interpretation, I will apply them.

Blackstone—“the preeminent authority on English law for the founding generation”

—wrote that no subject can “be affected either in his property, his liberty, or his person, but by the unanimous consent” of a jury. Such views continued in scholarly works throughout the early Republic. The uniform practice among the States was in accord. Despite isolated 17th-century colonial practices allowing nonunanimous juries, “unanimity became the accepted rule during the 18th century, as Americans became more familiar with the details of English common law and adopted those details in their own colonial legal systems.” . . . . There is also considerable evidence that this understanding persisted up to the time of the Fourteenth Amendment’s ratification. State courts, for example, continued to interpret the phrase “trial by jury” to require unanimity in felony guilty verdicts. . . . .

 . . . .

The remaining question is whether that right is protected against the States. In my view, the Privileges or Immunities Clause provides this protection. . . . The Privileges or Immunities Clause provides that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” At the time of the Fourteenth Amendment’s ratification, “the terms ‘privileges’ and ‘immunities’ had an established meaning as synonyms of ‘rights.’ ”  “[T]he ratifying public understood the Privileges or Immunities Clause to protect constitutionally enumerated rights” against abridgment by the States.  The Sixth Amendment right to a trial by jury is certainly a constitutionally enumerated right.

. . . .

I have already rejected our due process incorporation cases as demonstrably erroneous, and I fundamentally disagree with applying that theory of incorporation simply because it reaches the same result in the case before us. Close enough is for horseshoes and hand grenades, not constitutional interpretation. The textual difference between protecting “citizens” (in the Privileges or Immunities Clause) and “person[s]” (in the Due Process Clause) will surely be relevant in another case. And our judicial duty—not to mention the candor we owe to our fellow citizens—requires us to put an end to this Court’s due process prestidigitation, which no one is willing to defend on the merits.

. . . .

Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), with whom THE CHIEF JUSTICE joins, and with whom Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91) joins [in part],

The doctrine of *stare decisis* gets rough treatment in today’s decision. Lowering the bar for overruling our precedents, a badly fractured majority casts aside an important and long-established decision with little regard for the enormous reliance the decision has engendered. If the majority’s approach is not just a way to dispose of this one case, the decision marks an important turn.

. . . .

Too much public discourse today is sullied by *ad hominem* rhetoric, that is, attempts to discredit an argument not by proving that it is unsound but by attacking the character or motives of the argument’s proponents. The majority regrettably succumbs to this trend. At the start of its opinion, the majority asks this rhetorical question: “Why do Louisiana and Oregon allow nonunanimous convictions?”  And the answer it suggests? Racism, white supremacy, the Ku Klux Klan. Non-unanimous verdicts, the Court implies, are of a piece with Jim Crow laws, the poll tax, and other devices once used to disfranchise African-Americans. *Ibid*.

If Louisiana and Oregon originally adopted their laws allowing non-unanimous verdicts for these reasons, that is deplorable, but what does that have to do with the broad constitutional question before us? The answer is: nothing.

For one thing, whatever the reasons why Louisiana and Oregon originally adopted their rules many years ago, both States readopted their rules under different circumstances in later years. Louisiana’s constitutional convention of 1974 adopted a new, narrower rule, and its stated purpose was “judicial efficiency.” . . . . The more important point, however, is that today’s decision is not limited to anything particular about Louisiana or Oregon. The Court holds that the Sixth Amendment requires jury unanimity in *all*state criminal trials. If at some future time another State wanted to allow non-unanimous verdicts, today’s decision would rule that out—even if all that State’s lawmakers were angels.

. . . .

Consider what it would mean if [*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) was never a precedent. It would mean that the entire legal profession was fooled for the past 48 years. Believing that [*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))was a precedent, the courts of Louisiana and Oregon tried thousands of cases under rules allowing conviction by a vote of 11 to 1 or 10 to 2, and appellate courts in those States upheld these convictions based on [*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). . . . This Court, for its part, apparently helped to perpetuate the illusion, since it reiterated time and again what [*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) had established. . . . [W]henever defendants convicted by non-unanimous verdicts sought review in this Court and asked that [*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) be overruled, the Court denied those requests—without a single registered dissent. . . .

Under any reasonable understanding of the concept, [*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))was a precedent, that is, “a decided case that furnishes a basis for determining later cases involving similar facts or issues.” Even though there was no opinion of the Court, the decision satisfies even the narrowest understanding of a precedent as this Court has understood the concept: The decision prescribes a particular outcome when all the conditions in a clearly defined set are met. In [*Apodaca,*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) this means that when (1) a defendant is convicted in state court, (2) at least 10 of the 12 jurors vote to convict, and (3) the defendant argues that the conviction violates the Constitution because the vote was not unanimous, the challenge fails. . . .

. . . .

Our three colleagues . . . argue that [*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) is not binding because a case has no *ratio decidendi* when a majority does not agree on the reason for the result.  This argument, made in passing, constitutes an attack on the rule that the Court adopted in *Marks v. United States* (1977), for determining the holding of a decision when there is no majority opinion. Under the [*Marks*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118739&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) rule, “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” . . .

. . . .

. . . . Here is the problem. No one questions that the Sixth Amendment incorporated *the core* of the common-law jury-trial right, but did it incorporate *every feature* of the right? Did it constitutionalize the requirement that there be 12 jurors even though nobody can say why 12 is the magic number? And did it incorporate features that we now find highly objectionable, such as the exclusion of women from jury service? At the time of the adoption of the Sixth Amendment (and for many years thereafter), women were not regarded as fit to serve as a defendant’s peers. Unless one is willing to freeze in place late 18th-century practice, it is necessary to find a principle to distinguish between the features that were incorporated and those that were not. To do this, Justice White’s opinion for the Court in [*Williams*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1970134247&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) looked to the underlying purpose of the jury-trial right, which it identified as interposing a jury of the defendant’s peers to protect against oppression by a “ ‘corrupt or overzealous prosecutor’ ” or a “ ‘compliant, biased, or eccentric judge.’ ” The majority decries this “functionalist” approach but provides no alternative. It does not claim that the Sixth Amendment incorporated every feature of common-law practice, but it fails to identify any principle for identifying the features that were absorbed. . . .

. . . .

[O]ur cases do not hold that *every* provision of the Bill of Rights applies in the same way to the Federal Government and the States. A notable exception is the Grand Jury Clause of the Fifth Amendment, a provision that, like the Sixth Amendment jury-trial right, reflects the importance that the founding generation attached to juries as safeguards against oppression. In *Hurtado v. California* (1884), the Court held that the Grand Jury Clause does not bind the States and that they may substitute preliminary hearings at which the decision to allow a prosecution to go forward is made by a judge rather than a defendant’s peers. That decision was based on reasoning that is not easy to distinguish from Justice Powell’s in [*Apodaca.*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) [*Hurtado*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1884280037&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) remains good law and is critically important to the 28 States that allow a defendant to be prosecuted for a felony without a grand jury indictment. . . .

. . . .

What convinces me that [*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) should be retained are the enormous reliance interests of Louisiana and Oregon. For 48 years, Louisiana and Oregon, trusting that [*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) is good law, have conducted thousands and thousands of trials under rules allowing non-unanimous verdicts. Now, those States face a potential tsunami of litigation on the jury-unanimity issue.

At a minimum, all defendants whose cases are still on direct appeal will presumably be entitled to a new trial if they were convicted by a less-than-unanimous verdict and preserved the issue in the trial court. . . . These cases on direct review are only the beginning. Prisoners whose direct appeals have ended will argue that today’s decision allows them to challenge their convictions on collateral review, and if those claims succeed, the courts of Louisiana and Oregon are almost sure to be overwhelmed.

. . . .

[*Teague*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989027119&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) applies only to a “new rule,” and the positions taken by some in the majority may lead to the conclusion that the rule announced today is an old rule. Take the proposition, adopted by three Members of the majority, that [*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) was never a precedent. Those Justices, along with the rest of the majority, take the position that our cases established well before [*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))both that the Sixth Amendment requires unanimity and that it applies in the same way in state and federal court. Thus, if [*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) was never a precedent and did not disturb what had previously been established, it may be argued that today’s decision does not impose a new rule but instead merely recognizes what the correct rule has been for many years.

. . . .

The reliance in this case far outstrips that asserted in recent cases in which past precedents were overruled. Last Term, when we overturned two past decisions, there were strenuous dissents voicing fears about the future of *stare decisis*. In *Franchise Tax Bd. of Cal.*v.*Hyatt* (2019), the dissent claimed only the airiest sort of reliance, the public’s expectation that past decisions would remain on the books.  And in [*Knick*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2048538046&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) *v. Township of Scott* (2019)*,* the dissent disclaimed any reliance at all. . . .

. . . .

By striking down a precedent upon which there has been massive and entirely reasonable reliance, the majority sets an important precedent about *stare decisis*. I assume that those in the majority will apply the same standard in future cases.

. . . .