SUPREME COURT OF THE UNITED STATES

No. 18–5924

EVANGELISTO RAMOS, PETITIONER *v.* LOUISIANA

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, FOURTH CIRCUIT

[April 20, 2020]

JUSTICE KAVANAUGH, concurring in part.

In *Apodaca* v. *Oregon*, this Court held that state juries need not be unanimous in order to convict a criminal defendant. 406 U. S. 404 (1972). Two States, Louisiana and Oregon, have continued to use non-unanimous juries in criminal cases. Today, the Court overrules *Apodaca* and holds that state juries must be unanimous in order to convict a criminal defendant.

I agree with the Court that the time has come to overrule *Apodaca*. I therefore join the introduction and Parts I, II–A, III, and IV–B–1 of the Court's persuasive and important opinion. I write separately to explain my view of how *stare decisis* applies to this case.

I

The legal doctrine of *stare decisis* derives from the Latin maxim "*stare decisis et non quieta movere*," which means to stand by the thing decided and not disturb the calm. The doctrine reflects respect for the accumulated wisdom of judges who have previously tried to solve the same problem. In 1765, Blackstone—"the preeminent authority on English law for the founding generation," *Alden* v. *Maine*, 527 U. S. 706, 715 (1999)—wrote that "it is an established rule to abide by former precedents," to "keep the scale of justice even and steady, and not liable to waver with every new judge's opinion." 1 W. Blackstone, Commentaries on the

Laws of England 69 (1765). The Framers of our Constitution understood that the doctrine of *stare decisis* is part of the "judicial Power" and rooted in Article III of the Constitution. Writing in Federalist 78, Alexander Hamilton emphasized the importance of *stare decisis*: To "avoid an arbitrary discretion in the courts, it is indispensable" that federal judges "should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." The Federalist No. 78, p. 529 (J. Cooke ed. 1961). In the words of THE CHIEF JUSTICE, *stare decisis*' "greatest purpose is to serve a constitutional ideal—the rule of law." *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 378 (2010) (concurring opinion).

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." *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991). 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." *Vasquez* v. *Hillery*, 474 U. S. 254, 265–266 (1986).

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. Indeed, in just the last few Terms, every current Member of this Court has voted to overrule multiple constitutional precedents. See, *e.g., Knick* v. *Township of Scott*, 588 U. S. ___ (2019); *Franchise Tax Bd. of Cal.* v. *Hyatt*, 587 U. S. ___ (2019); *Janus* v. *State, County, and Municipal Employees*, 585 U. S. ___ (2018); *Hurst* v. *Florida*, 577 U. S. ___ (2016); *Obergefell* v. *Hodges*, 576 U. S. 644 (2015); *Johnson* v.

United States, 576 U. S. 591 (2015); *Alleyne* v. *United States*, 570 U. S. 99 (2013); see also Baude, Precedent and Discretion, 2020 S. Ct. Rev. 1, 4 (forthcoming) ("Nobody on the Court believes in absolute stare decisis").

Historically, moreover, some of the Court's most notable and consequential decisions have entailed overruling precedent. See, *e.g., Obergefell* v. *Hodges*, 576 U. S. 644 (2015); *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310 (2010); *Montejo* v. *Louisiana*, 556 U. S. 778 (2009); *Crawford* v. *Washington*, 541 U. S. 36 (2004); *Lawrence* v. *Texas*, 539 U. S. 558 (2003); *Ring* v. *Arizona*, 536 U. S. 584 (2002); *Agostini* v. *Felton*, 521 U. S. 203 (1997); *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44 (1996); *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992);[1] *Payne* v. *Tennessee*, 501 U. S. 808 (1991); *Batson* v. *Kentucky*, 476 U. S. 79 (1986); *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985); *Illinois* v. *Gates*, 462 U. S. 213 (1983); *United States* v. *Scott*, 437 U. S. 82 (1978); *Craig* v. *Boren*, 429 U. S. 190 (1976); *Taylor* v. *Louisiana*, 419 U. S. 522 (1975); *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969) (*per curiam*); *Katz* v. *United States*, 389 U. S. 347 (1967); *Miranda* v. *Arizona*, 384 U. S. 436 (1966); *Malloy* v. *Hogan*, 378 U. S. 1 (1964); *Wesberry* v. *Sanders*, 376 U. S. 1 (1964); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *Baker* v. *Carr*, 369 U. S. 186 (1962); *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Brown* v. *Board of Education*, 347 U. S. 483 (1954); *Smith* v. *Allwright*, 321 U. S. 649 (1944); *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943); *United States* v. *Darby*, 312 U. S. 100 (1941); *Erie R. Co.* v. *Tompkins*, 304 U. S. 64

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[1] In *Casey*, the Court reaffirmed what it described as the "central holding" of *Roe* v. *Wade*, 410 U. S. 113 (1973), the Court expressly rejected *Roe*'s trimester framework, and the Court expressly overruled two other important abortion precedents, *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416 (1983), and *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747 (1986). See *Casey*, 505 U. S., at 861; *id.,* at 870, 873 (plurality opinion).

(1938); *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937).

The lengthy and extraordinary list of landmark cases that overruled precedent includes the single most important and greatest decision in this Court's history, *Brown* v. *Board of Education*, which repudiated the separate but equal doctrine of *Plessy* v. *Ferguson*, 163 U. S. 537 (1896).

As those many examples demonstrate, the doctrine of *stare decisis* does not dictate, and no one seriously maintains, that the Court should *never* overrule erroneous precedent. As the Court has often stated and repeats today, *stare decisis* is not an "inexorable command." *E.g., ante,* at 20.

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.

Rather, applying the doctrine of *stare decisis*, this Court ordinarily adheres to precedent, but *sometimes* overrules precedent. The difficult question, then, is when to overrule an erroneous precedent.

To begin with, the Court's precedents on precedent distinguish statutory cases from constitutional cases.

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. To be sure, enacting new legislation requires finding room in a crowded legislative docket and securing the agreement of the House, the Senate (in effect, 60 Senators), and the President. Both by design and as a matter of fact, enacting new legislation is difficult—and far more difficult than the Court's cases sometimes seem to assume. Nonetheless, the Court has ordinarily left the updating or correction of erroneous statutory precedents to the legislative process. See, *e.g., Kimble*

v. *Marvel Entertainment, LLC*, 576 U. S. 446, 456–457 (2015); *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172–173 (1989); *Flood* v. *Kuhn*, 407 U. S. 258, 283–284 (1972). The principle that "it is more important that the applicable rule of law be settled than that it be settled right" is "commonly true even where the error is a matter of serious concern, *provided correction can be had by legislation*." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting) (emphasis added).[2]

In constitutional cases, by contrast, the Court has repeatedly said—and says again today—that the doctrine of *stare decisis* is not as "inflexible." *Burnet*, 285 U. S., at 406 (Brandeis, J., dissenting); see also *ante,* at 20; *Payne*, 501 U. S., at 828; *Scott*, 437 U. S., at 101. 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." *Agostini*, 521 U. S., at 235. The Court therefore "must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*." *Citizens United*, 558 U. S., at 378 (ROBERTS, C. J., concurring). It follows "that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent." *Ibid.* In his canonical opinion in *Burnet*, Justice Brandeis described the Court's practice with respect to *stare decisis* in constitutional cases in a way that was accurate then and

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[2] The Court's precedents applying common-law statutes and pronouncing the Court's own interpretive methods and principles typically do not fall within that category of stringent statutory *stare decisis*. See *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U. S. 877, 899–907 (2007); *Kisor* v. *Wilkie*, 588 U. S. ___, ___–___ (2019) (GORSUCH, J., concurring in judgment) (slip op., at 34–36).

remains accurate now: In "cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions." 285 U. S., at 406–407 (dissenting opinion).

That said, in constitutional as in statutory cases, to "overrule an important precedent is serious business." Jackson, 30 A. B. A. J., at 334. In constitutional as in statutory cases, adherence to precedent is the norm. To overrule a constitutional decision, the Court's precedents on precedent still require a "special justification," *Allen* v. *Cooper*, 589 U. S. ___, ___ (2020) (slip op., at 9) (internal quotation marks omitted); *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984), or otherwise stated, "strong grounds," *Janus*, 585 U. S., at ___ (slip op., at 34).

In particular, to overrule a constitutional precedent, the Court requires something "over and above the belief that the precedent was wrongly decided." *Allen*, 589 U. S., at ___ (slip op., at 9) (internal quotation marks omitted). As Justice Scalia put it, the doctrine of *stare decisis* always requires "reasons that go beyond mere demonstration that the overruled opinion was wrong," for "otherwise the doctrine would be no doctrine at all." *Hubbard* v. *United States*, 514 U. S. 695, 716 (1995) (opinion concurring in part and concurring in judgment). To overrule, the Court demands a special justification or strong grounds.

But the "special justification" or "strong grounds" formulation elides a key question: What constitutes a special justification or strong grounds?[3] In other words, in deciding whether to overrule an erroneous constitutional decision,

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[3]The Court first used the term "special justification" in the *stare decisis* context in 1984, without explaining what the term might entail. See *Arizona* v. *Rumsey*, 467 U. S. 203, 212. In employing that term, the Court did not suggest that it was imposing a new *stare decisis* requirement as opposed to merely describing the Court's historical practice with respect to *stare decisis*.

how does the Court know when to overrule and when to stand pat?

As the Court has exercised the "judicial Power" over time, the Court has identified various *stare decisis* factors. In articulating and applying those factors, the Court has, to borrow James Madison's words, sought to liquidate and ascertain the meaning of the Article III "judicial Power" with respect to precedent. The Federalist No. 37, at 236.

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.

But the Court has articulated and applied those various individual factors without establishing any consistent methodology or roadmap for how to analyze all of the factors taken together. And in my view, that muddle poses a problem for the rule of law and for this Court, as the Court attempts to apply *stare decisis* principles in a neutral and consistent manner.

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? A garden-variety error or disagreement does not suffice to overrule. In the view of the Court

that is considering whether to overrule, the precedent must be egregiously wrong as a matter of law in order for the Court to overrule it. In conducting that inquiry, the Court may examine the quality of the precedent's reasoning, consistency and coherence with other decisions, changed law, changed facts, and workability, among other factors. A case may be egregiously wrong when decided, see, *e.g.*, *Korematsu* v. *United States*, 323 U. S. 214 (1944); *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), or may be unmasked as egregiously wrong based on later legal or factual understandings or developments, see, *e.g.*, *Nevada* v. *Hall*, 440 U. S. 410 (1979), or both, *ibid.*

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. See, *e.g., Brown* v. *Board of Education*, 347 U. S., at 494–495; *Barnette*, 319 U. S., at 630–642; see also *Payne*, 501 U. S., at 825–827.

Third, would overruling the prior decision unduly upset reliance interests? This consideration focuses on the legitimate expectations of those who have reasonably relied on the precedent. In conducting that inquiry, the Court may examine a variety of reliance interests and the age of the precedent, among other factors.

In short, the first consideration requires inquiry into how wrong the precedent is as a matter of law. The second and third considerations together demand, in Justice Jackson's words, a "sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other." Jackson, 30 A. B. A. J., at 334.

Those three considerations together provide a structured methodology and roadmap for determining whether to overrule an erroneous constitutional precedent. The three considerations correspond to the Court's historical practice and encompass the various individual factors that the Court has applied over the years as part of the *stare decisis* calculus. And they are consistent with the Founding understanding and, for example, Blackstone's shorthand description that overruling is warranted when (and only when) a precedent is "manifestly absurd or unjust." 1 Blackstone, Commentaries on the Laws of England, at 70.

Taken together, those three considerations set a high (but not insurmountable) bar for overruling a precedent, and they therefore limit the number of overrulings and maintain stability in the law.[4] Those three considerations also constrain judicial discretion in deciding when to overrule an erroneous precedent. To be sure, applying those considerations is not a purely mechanical exercise, and I do not claim otherwise. I suggest only that those three considerations may better structure how to consider the many traditional *stare decisis* factors.

It is inevitable that judges of good faith applying the *stare decisis* considerations will sometimes disagree about when to overrule an erroneous constitutional precedent, as the Court does in this case. To begin with, judges may disagree about whether a prior decision is wrong in the first place—and importantly, that disagreement is sometimes the *real* dispute when judges joust over *stare decisis*. But even when judges agree that a prior decision is wrong, they may disagree about whether the decision is so egregiously wrong as to justify an overruling. Judges may likewise disagree

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[4] Another important factor that limits the number of overrulings is that the Court typically does not overrule a precedent unless a party requests overruling, or at least unless the Court receives briefing and argument on the *stare decisis* question.

about the severity of the jurisprudential or real-world consequences caused by the erroneous decision and, therefore, whether the decision is worth overruling. In that regard, some judges may think that the negative consequences can be addressed by narrowing the precedent (or just living with it) rather than outright overruling it. Judges may also disagree about how to measure the relevant reliance interests that might be affected by an overruling. And on top of all of that, judges may also disagree about how to weigh and balance all of those competing considerations in a given case.[5]

This case illustrates that point. No Member of the Court contends that the result in *Apodaca* is correct. But the Members of the Court vehemently disagree about whether to overrule *Apodaca*.

II

Applying the three broad *stare decisis* considerations to this case, I agree with the Court's decision to overrule *Apodaca*.

First, *Apodaca* is egregiously wrong. The original meaning and this Court's precedents establish that the Sixth Amendment requires a unanimous jury. *Ante,* at 6–7; see, *e.g., Patton* v. *United States*, 281 U. S. 276, 288 (1930); *Thompson* v. *Utah*, 170 U. S. 343, 351 (1898). And the original meaning and this Court's precedents establish that the Fourteenth Amendment incorporates the Sixth Amend-

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[5]To be clear, the *stare decisis* issue in this case is one of horizontal *stare decisis*—that is, the respect that this Court owes to its own precedents and the circumstances under which this Court may appropriately overrule a precedent. By contrast, vertical *stare decisis* is absolute, as it must be in a hierarchical system with "one supreme Court." U. S. Const., Art III, §1. In other words, the state courts and the other federal courts have a constitutional obligation to follow a precedent of this Court unless and until it is overruled by this Court. See *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989).