Louisiana Law Review

Volume 82
Number 1 *Fall 2021*

Article 7

12-8-2021

Overruling Louisiana: Horizontal Stare Decisis and the Concept of Precedent

Santiago Legarre

Christopher R. Handy

Overruling Louisiana: Horizontal Stare Decisis and the Concept of Precedent*

*Santiago Legarre*** *and Christopher R. Handy****

TABLE OF CONTENTS

---

* The authors would like to thank Bill Milburn, Kaylyn Blosser, Michael Bradley, Eliza Cadenas, Nico Caluda, Michael Coenen, Ed Edmonds, Vicky Guerricagoitia, Lamb Hardie, Pat Martin, Adam McLeod, Tomás Nogueira, Angelo Ryu, Gloria Sitienei, Jim Stoner, and Mariano Vitetta for precious feedback.

** Professor of Law, Pontificia Universidad Católica Argentina and CONICET (Consejo Nacional de Invesigaciones Cientificas y Tecnicas, Argentina); Visiting Professor of Law, Notre Dame Law School, LSU Law Center, and Strathmore University Law School (Kenya).

*** J.D. Louisiana State University, Paul M. Hebert Law Center. Associate of Bradley, Murchison, Kelly & Shea LLC in New Orleans, Louisiana. Former Law Clerk at the United States Court of Appeals for the Fifth Circuit.

INTRODUCTION

The distinction between "binding" and "persuasive" authority and normativity[1] constitutes a good starting point for this Article's overall argument on the concept of precedent as it relates to overruling. Only binding authority and normativity, usually accompanied by sanctions that support their enforcement, constitute law; persuasion, instead, falls by and large within the realm of morality. In that light, one may think that in the United States only binding authority deserves the labels "stare decisis" and "precedent,"[2] given that in a common law system stare decisis is a legal principle and precedents are a source of law. The quintessential form of precedent, "vertical" precedent,[3] is strictly binding and hence clearly legal. But precedent and the strength of its authority can be broken down further: there is also a "horizontal" dimension of stare decisis that is not binding to other courts, and it too deserves the name "precedent." The terms and concepts "horizontal stare decisis" and "horizontal precedent" are far from nonsensical; they enrich the discussion of precedent, especially when they are coupled and contrasted with "vertical stare decisis" and "vertical precedent."

Vertical stare decisis, or vertical precedent, is the obligation of lower courts to follow the decisions of the higher courts within the hierarchical structure.[4] With vertical stare decisis, the court bound and the court binding are always different courts located at different levels of the judicial

---

1. By "normativity" in this Article we mean "bindingness" and "guiding force," two concepts closely related to "authority."

2. Reflecting common use, the Black's Law Dictionary refers to "stare decisis" as "[t]he doctrine of precedent." *Stare decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019). We, too, treat them as synonyms at least in some contexts.

3. There are, conversely, those that would reserve the term "stare decisis" for the horizontal dimension, as they see in the vertical dimension not so much as "stare decisis" but rather as a natural consequence of the hierarchical court system, somewhat independent from the common law style system. RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 23 (2017) (contrasting the "absoluteness of vertical precedent" with what we call here "horizontal stare decisis").

4. *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents*, 46 STAN. L. REV. 817, 818 (1994).

system.[5] For example, under the doctrine of vertical stare decisis, the Court of Appeals is bound by the decisions of the Supreme Court. In common law jurisdictions,[6] including the United States,[7] this obligation of lower courts is of a legal nature. Even though lower courts sometimes attempt to escape vertical precedent,[8] once they identify a precedent and find it to be on point, the precedent controls the lower court as legislation would. In the words of Justice Kavanaugh in *Ramos v. Louisiana*, "[T]he 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."[9] In civil law jurisdictions, precedent is treated differently. Because legislation is understood as the main source of law in a civil law jurisdiction, vertical "precedents" are to the common law what "statutes" are to the civil law[10]—legally binding rules.

Horizontal stare decisis, or horizontal precedent, is the obligation of a court to follow its own prior decisions. In other words, with horizontal stare decisis, the court bound and the court binding share the same ranking in the judicial system. Indeed, they are the same court at two different points in time. For example, under horizontal stare decisis the Supreme Court is bound by its own precedents, though "bound" in a way significantly different from the way the Supreme Court binds lower courts with vertical stare decisis. Horizontal stare decisis is a softer, policy-laden question, closer to persuasive authority—a matter of "respect."[11] At the horizontal level, this respect results in a general principle, bindingness,

---

5. Santiago Legarre, *Precedent in Argentine Law*, 57 LOY. L. REV. 781, 784 (2011) (discussing vertical stare decisis and distinguishing it from horizontal precedent).

6. In some civil law jurisdictions, such as Argentina, there is a similar, but different, doctrine of "soft vertical precedent." *See* Santiago Legarre & Christopher R. Handy, *A Civil Law State in a Common Law Nation, a Civil Law Nation with a Common Law Touch: Judicial Review and Precedent in Louisiana and Argentina*, 95 TUL. L. REV. 445 (2021).

7. One notable exception in some instances is Louisiana. *See* Mary Garvey Algero, *The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation*, 65 LA. L. REV. 775 (2005).

8. The most important technique is distinguishing cases based on facts. *See* HARRY W. JONES, JOHN M. KERNOCHAN & ARTHUR W. MURPHY, LEGAL METHOD: CASES AND MATERIALS 132 (1980).

9. Ramos v. Louisiana, 140 S. Ct. 1390, 1416 n.5 (2020) (Kavanaugh, J., concurring in part).

10. *See generally* CUETO RÚA, JUDICIAL METHODS OF INTERPRETATION OF THE LAW (1981).

11. *Ramos*, 140 S. Ct. at 1416 n.5 (Kavanaugh, J., concurring in part).

and an exception, overruling. Together, the principle and exception translate into a soft obligation to observe horizontal stare decisis that is ripe for policy considerations.

The soft nature of horizontal stare decisis results in a power of overruling that is absent in vertical stare decisis. However, it is not the possibility of overruling precedent that makes horizontal stare decisis weaker. *Because* horizontal stare decisis is more policy laden, it needs this flexibility that includes the possibility of overruling. Something analogous happens with vertical stare decisis: it is not hard law because it sanctions departure; rather it is *because* of its hard nature that vertical stare decisis brings with it, or needs, a sanction against non-compliance. So with vertical stare decisis it is true that in the absence of compliance by the lower court, the higher court will likely overturn the lower court's decision. This works as a kind of sanction against the non-complying court[12] that is absent in horizontal stare decisis.

One could question the use of the terms "horizontal stare decisis" and "horizontal precedent" because of this weaker, softer binding force at the horizontal level. Horizontal stare decisis and precedent are closer to the persuasive or to the world of moral guidelines—the domain of what is "wise"[13] and to some uncertain extent optional.[14] Nevertheless, as this Article will attempt to show, the authority of horizontal precedent is not merely persuasive. There are shades of normativity and, consequently, degrees of bindingness.[15] Horizontal precedent is in reality somewhere within the range of the obligatory, closer to a rule than to the absence of any rule at all. Vertical stare decisis and precedent, in contrast, are a matter of hard law, not a matter of policy.

---

12. *See* H.L.A. HART, THE CONCEPT OF LAW 10–11, 16, 213, 217–18 (Oxford U. Press, 2d ed. 1994).

13. We borrow this use of the term "wise" from Justice Brandeis's dissent in *Burnet v. Coronado Oil & Gas Co*., 285 U.S. 393, 406 (1932), discussed *infra* Section II.A.

14. Professor Re's "permissive" theory of precedent, elaborated in his recent article *Precedent as Permission*, goes along the same way. Richard M. Re, *Precedent as Permission*, 99 TEX. L. REV 907 (2021) [hereinafter Re, *Precedent as Permission*]; *see also* Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 143 (suggesting that stare decisis does not generally pose serious constraints). Both Re and Schauer refer to the horizontal dimension of precedent when they argue their points.

15. Santiago Legarre, *Towards a New Justificatory Theory of Comparative Constitutional Law*, 1 STRATHMORE L.J. 90, 91 (2015) (distinguishing between "comparative constitutional law" and "comparative constitutionalism").

The terminology "vertical stare decisis" and "horizontal stare decisis" reflects part of the truth: stare decisis is one phenomenon with two dimensions, both of them very important and significantly interconnected. Moreover, the concept of stare decisis in the horizontal dimension is well settled in past and present Supreme Court jargon—we enjoy good company in our choice of words, as this Article will reveal.

Part I of this Article will introduce, dissect, and synthetize the ways in which two 2020 U.S. Supreme Court cases, *Ramos v. Louisiana* and *June Medical v. Russo*, approach horizontal precedent and overruling. This section will pay special attention to the way in which the so-called "*Marks* doctrine" features in those cases. Part II will pinpoint the dimensions of stare decisis, explore when stare decisis is strongest and weakest, and specifically define precedent. Part III will dig further into the *Marks* doctrine, introduce whether *Ramos* and *June Medical* are "*Marks* precedents," explore the idea of "unMarksable" cases—cases in which the *Marks* doctrine cannot apply—and analyze the precedential value of *Apodaca v Oregon*. Part IV will demonstrate how the discussed principles of precedent affect *Ramos* and *June Medical*.

I. *RAMOS* AND *JUNE MEDICAL*: AN INTRODUCTION

The U.S. Supreme Court's 2020 term offered some of the Court's most robust discussions about stare decisis and precedent in modern times. *Ramos v. Louisiana*[16] and *June Medical Services L.L.C. v. Russo*,[17] both cases out of Louisiana, tasked the Court with some difficult questions about the role of precedent, horizontal stare decisis, and overruling. Furthermore, both cases feature fractured decisions and analysis of prior fractured decisions, thus exposing fundamental questions about precedent and the *Marks* doctrine.

A. Ramos v. Louisiana

In *Ramos v. Louisiana*, the Supreme Court held that the Sixth Amendment to the U.S. Constitution requires unanimous jury verdicts for criminal convictions and applies equally to state and federal criminal

16. Ramos v. Louisiana, 140 S. Ct. 1390 (2020).
17. June Med. Services L.L.C. v. Russo, 140 S. Ct. 2103 (2020).

trials.[18] *Ramos* reversed the unanimous[19] decision of the three-judge panel of the Fourth Circuit Court of Appeal of Louisiana, which upheld article 1, section 17 of the Louisiana Constitution and Louisiana Code of Criminal Procedure article 782.[20] Both laws allowed criminal convictions when only 10 out of 12 jurors voted to convict, and courts in Louisiana had repeatedly upheld both laws per the U.S. Supreme Court case *Apodaca v. Oregon*.[21] The Supreme Court overruled Louisiana, however, with a fractured decision in *Ramos*.[22]

Justice Gorsuch penned the opinion of the Court, joined to various extents by Justices Ginsburg, Breyer, Sotomayor, and Kavanaugh. Justice Thomas concurred in the judgment. Justices Alito, Roberts, and Kagan dissented. The split in the majority can be traced to disagreements over the treatment of *Apodaca v. Oregon* as precedent.[23] A dissection of the decision yields four broad groups: (1) those who did not view *Apodaca* as precedent at all (Justices Gorsuch, Ginsburg, and Breyer); (2) those who viewed *Apodaca* as precedent but wished to overrule it (Justices Sotomayor and Kavanaugh); (3) one who wished to impose a new constitutional framework on the issue (Justice Thomas); and (4) those who viewed *Apodaca* as precedent and wished to stand by it because they thought there were no grounds for overruling (Justice Alito, Chief Justice Roberts, and Justice Kagan, the dissenters). No doubt with this split in mind, Justice Kavanaugh in *Ramos* concluded, "As I read the Court's various opinions today, six Justices treat the result in *Apodaca* as a precedent for purposes of stare decisis analysis. A different group of six Justices concluded that *Apodaca* should be and is overruled."[24] The first group is comprised of Justices Sotomayor, Kavanaugh, Thomas, Alito, Kagan, and Chief Justice Roberts. The second group is comprised of

18. *Ramos*, 140 S. Ct. at 1397 ("There can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally.").

19. With a three-judge panel composed of Chief Judge McKay, Judge Lombard, and Judge Lobrano, Chief Judge McKay authored the opinion of the court in which Judge Lobrano concurred in result but without reasons. State v. Ramos, 231 So. 3d 44 (La. Ct. App. 4th Cir. 2017).

20. *Id.* at 54.

21. Apodaca v. Oregon, 406 U.S. 404 (1972) (traditionally thought to uphold state laws allowing non-unanimous jury convictions).

22. Justice Alito, dissenting, made reference to the "badly fractured majority" and explained that in *Ramos* the majority was divided "into four separate camps." *Ramos*, 140 S. Ct. at 1432. *See also infra* text at note 24 (where Justice Kavanaugh says something to a similar effect).

23. *Apodaca*, 406 U.S. 404.

24. *Ramos*, 140 S. Ct. at 1416 n.6 (Kavanaugh, J., concurring in part).

Justices Gorsuch, Ginsburg, Breyer, Sotomayor, Kavanaugh, and Thomas. With regard to Justices Gorsuch, Ginsburg, and Breyer, however, it seems like a stretch to affirm that they concluded "that Apodaca should be and is overruled." If *Apodaca* was not a precedent at all, it certainly did not need overruling, or rather, it could not be the object of overruling.

To repeat, Justices Gorsuch, Ginsburg, and Breyer arrived at the conclusion that *Apodaca* was not precedent, not even by way of the *Marks* doctrine. The *Marks* doctrine is the limited instruction from the Supreme Court in *Marks v. United States*, which states, "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 . . . .'"[25] *Marks* was relevant to the *Ramos* Court's analysis because the deciding vote in *Apodaca* to uphold non-unanimous jury verdicts was Justice Powell with a detailed concurring opinion.[26]

In Section IV.A. of Justice Gorsuch's opinion, a section joined only by Justices Breyer and Ginsburg, the plurality found that all parties to the *Ramos* case "accept[ed] that *Apodaca* yielded no controlling opinion at all."[27] In finding *Marks* inapplicable, Justice Gorsuch further wrote for the plurality, "In particular, both sides admit that Justice Powell's opinion cannot bind us."[28] This reasoning stemmed from the belief that Justice Powell's concurring opinion in *Apodaca* was incompatible with *Marks*—the concurring opinion was not the narrowest grounds.[29] In *Apodaca*, Justice Powell agreed that the Sixth Amendment required unanimity, but he endorsed a dual-track rule of incorporation that would not incorporate the Sixth Amendment's unanimous jury right against the states through the Fourteenth Amendment.[30] Justice Gorsuch observed that the Supreme Court had already foreclosed on a dual-track Sixth Amendment jury theory prior to *Apodaca*.[31]

---

25. Marks v. United States, 430 U.S. 188, 193 (1977) (internal quotations and citations omitted).

26. Johnson v. Louisiana, 406 U.S. 366 (1972). *Apodaca v. Oregon* and *Johnson v. Louisiana* both concerned the constitutionality of non-unanimous jury verdicts and were decided on the same day. Justice Powell's concurrence attributed to *Apodaca* is found at the *Johnson* citation.

27. *Ramos*, 140 S. Ct. at 1403 (plurality opinion).

28. *Id*.

29. *Id.*

30. *Johnson*, 406 U.S. at 375.

31. *Ramos*, 140 S. Ct. at 1402 (plurality opinion) ("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)."). The full

Accordingly, Justice Gorsuch and company found the logic of Justice Powell's concurring opinion outside the rationale of the other justices in the *Apodaca* majority and were unable to create a single rationale: "[T]o accept [Justice Powell's] reasoning as precedential, we would have to embrace a new and dubious proposition: that a single Justice writing only for himself has the authority to bind this Court to propositions it has already rejected."[32] Without a majority rationale, Justice Gorsuch's three-justice plurality rejected *Apodaca* as a precedent; furthermore, they also rejected the result of *Apodaca* as precedent. Justice Gorsuch appears to assert that the result of *Apodaca* is necessarily entangled in its reasoning:

> In *Apodaca,* 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. Where does the convenient "state court" qualification come from? Neither the *Apodaca* plurality nor the dissent included any limitation like that—their opinions turned on the meaning of the Sixth Amendment. What the dissent characterizes as *Apodaca*'s result turns out to be nothing more than Justice Powell's reasoning about dual-track incorporation dressed up to look like a logical proof.[33]

This conclusion begs the question of whether *Apodaca* is truly an anomaly and whether a case can ever be completely non-precedential for purposes of stare decisis.[34]

In contrast to Justice Gorsuch's plurality opinion, Justices Sotomayor and Kavanaugh viewed *Apodaca* as precedent and explored horizontal stare decisis from a policy perspective. Justice Sotomayor set forth three policy arguments for overruling *Apodaca*. First, she agreed with the majority that *Apodaca*'s reasoning was "on shaky ground from the start."[35] She found that *Apodaca*'s problematic split rationale made the case weaker precedent from a policy perspective even though it was still precedent.[36] Second, Justice Sotomayor reasoned that stare decisis is

---

incorporation of the right to trial by jury began in *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968).

32. *Ramos*, 140 S. Ct. at 1402 (plurality opinion).

33. *Id*. at 1404.

34. This question is addressed in Section III.B of this Article.

35. *Id*. at 1409 (Sotomayor, J., concurring in part).

36. *Id*. ("But put simply, this is not a case where we cast aside precedent 'simply because a majority of this Court now disagrees with' it.") (quoting Alleyne v. United States, 570 U.S. 99, 133 (2013)).

weakest, or "at its nadir,"[37] when the Court considers issues of criminal procedure "that implicate fundamental constitutional protections."[38] She contrasted issues of criminal procedure with issues of private economic rights, which she identified as the issues where stare decisis is strongest. Finally, Justice Sotomayor reasoned that the racist history of Louisiana's non-unanimous jury law and the fact that the Louisiana legislature never "truly grappled with the [law's] sordid history in reenacting [it]" provided further policy reasons to downplay any stare decisis effects of *Apodaca*.[39] Based on these reasons, Justice Sotomayor found *Apodaca* precedentially weak and appropriate to overrule.

Like Justice Sotomayor, Justice Kavanaugh set forth his own policy reasons to overrule *Apodaca*. Justice Kavanaugh first recognized that stare decisis is not an "inexorable command," and the Court may, under certain circumstances, overrule erroneous precedent.[40] Second, Justice Kavanaugh, similar to Justice Sotomayor, reasoned that stare decisis is more flexible in constitutional cases than in cases of statutory interpretation.[41] Justice Kavanaugh then identified the Court's past factors for deciding whether the Court should observe stare decisis.[42] These factors, according to the Justice, had been applied inconsistently in the past; therefore, Justice Kavanaugh crafted a stare decisis analysis with three considerations.[43]

Justice Kavanaugh's first consideration was whether a prior decision is "grievously or egregiously wrong."[44] The Justice instructed that the Court should examine "the precedent's reasoning, consistency and coherence with other decisions, changed law, changed facts, and

---

37. *Id*. (quoting *Alleyne*, 570 U.S. at 116 n.5).
38. *Id*.
39. *Id*. at 1410.
40. *Id*. at 1412 (Kavanaugh, J., concurring in part).
41. *Id*. at 1413.
42. *Id*. at 1414.

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.

43. *Id*. at 1414–15.
44. *Id.*

workability."[45] Justice Kavanaugh's second consideration was whether "the prior decision caused significant negative jurisprudential or real world consequences."[46] The third consideration was whether "overruling the prior decision unduly upset reliance interests."[47]

In applying this framework, Justice Kavanaugh first found that *Apodaca* was egregiously wrong because it was an outlier case, even at the time it was decided, and was contrary to long-standing precedent that the Sixth Amendment required unanimous juries. Second, the Justice found that *Apodaca* caused negative consequences because it created inequity in criminal convictions across the nation, and it created avenues for strongly racist policies.[48] Third, Justice Kavanaugh found that overruling *Apodaca* would not upset reliance interests because only Louisiana and Oregon allowed non-unanimous juries under *Apodaca*.[49] The Justice also posited that the change would be prospective only and that Louisiana had already changed its law to provide for unanimous juries.[50]

Finally, Justice Thomas's concurrence reevaluated stare decisis as a controlling doctrine, at least at the horizontal level. Justice Thomas wrote,

> 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."[51]

After finding that the Court should only consider whether the Court's precedents are within the realm of permissible interpretation, Justice

---

45. *Id*. at 1415.
46. *Id*.
47. *Id.*
48. *Id*. at 1417–18.
49. *Id*. at 1419.
50. *Id.*
51. *Id*. at 1421 (Thomas, J., concurring in judgment) (quoting Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring)). It would seem that the newly appointed Justice Amy Coney Barrett would agree with this position. *See* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1728 (2013) ("I tend to agree with those who say that a justice's duty is to the Constitution and that it is thus more legitimate for her to enforce her best understanding of the Constitution rather than a precedent she thinks clearly in conflict with it.").

Thomas set forth his own analysis.[52] Taking a historical approach, Justice Thomas found that the practice of unanimous jury verdicts was common and a permissible gloss on the Sixth Amendment.[53] He then, perhaps unsurprisingly,[54] reasoned that the Sixth Amendment should be incorporated against the states through the Privileges and Immunities Clause rather than the Due Process Clause.[55]

B. June Medical Services L.L.C. v. Russo

In *June Medical Services L.L.C. v. Russo*, the Supreme Court struck down a Louisiana law requiring hospital admitting privileges for abortion providers as unconstitutional.[56] The decision affirmed the original ruling of the United States District Court for the Middle District of Louisiana.[57] The Supreme Court's ruling also followed a stay that it had issued on the Fifth Circuit Court of Appeals' stay of the Middle District's ruling.[58] *June Medical* involved, in large part, an examination of *Whole Woman's Health v. Hellerstedt* (*WWH*), a case involving a nearly identical Texas law that the Supreme Court had struck down just four years prior to the *June Medical* decision.[59] It is crucial to note that Chief Justice Roberts had dissented in *WWH*.

In contrast to *Ramos*, the *June Medical* majority judgment was split into a much more straightforward 4–1. On the merits, the four member plurality, led by Justice Breyer, primarily analyzed whether the district court applied the proper standards from *Planned Parenthood v. Casey*[60] and *WWH* in determining whether the Louisiana abortion law was

52. Justice Thomas has made clear that he rejects the factor tests that the Court has laid out for stare decisis analyses. *Gamble*, 139 S. Ct. at 1981–88 (Thomas, J., concurring).

53. *Ramos*, 140 S. Ct. at 1422–23 (Thomas, J., concurring in judgment).

54. A staple of Justice Thomas's jurisprudence is a rejection of incorporation under the Due Process Clause in favor of incorporation under the Privileges and Immunities Clause. *See, e.g.*, McDonald v. Chicago, 561 U.S. 742 (2010) (Thomas, J., concurring in part and concurring in judgment); Timbs v. Indiana, 139 S. Ct. 682, 692 (2019).

55. *Ramos*, 140 S. Ct. at 1423–25 (Thomas, J., concurring in judgment).

56. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2132 (2020).

57. June Med. Servs. L.L.C. v. Kliebert, 250 F. Supp. 3d 27, 90 (M.D. La. 2017).

58. June Med. Servs. L.L.C. v. Gee, 139 S. Ct. 663 (2019).

59. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

60. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

unconstitutional.[61] After reviewing the record, the plurality found that the district court had properly applied the correct legal standards—primarily the undue-burden test and substantial-obstacle test.[62] The plurality then went on to find that the district court's fact-finding was not "clearly erroneous" under the appellate standard of review for questions of fact.[63]

The deciding fifth vote in *June Medical* came from Chief Justice Roberts.[64] The Chief Justice's opinion concurring in the judgment reveals that stare decisis was his primary reason for voting to strike down the law:[65] stare decisis, with regard to *WWH* insofar as it endorsed *Casey*, the overruling of which had not been requested by the relevant parties.[66] In addition, he wished to clarify the *Casey* standards to avoid what he considered to have been their misinterpretation in *WWH*. Citing *Ramos*, the Chief Justice reiterated that stare decisis is not an "inexorable command."[67] Nevertheless, he found, "The doctrine also brings pragmatic benefits. Respect for precedent '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.'"[68]

Relying on *Casey* as precedent, Chief Justice Roberts sought to clarify the perceived introduction of a burdens-and-benefits balancing test set forth by the majority in *WWH* and restated by the plurality in *June Medical*.[69] The Chief Justice first stated that *Casey*'s undue-burden test was the controlling test in *WWH*.[70] He then observed that *WWH*'s directive that "courts consider the burdens a law imposes on abortion access together with the benefits those laws confer" must be read in conjunction with *Casey*.[71] Chief Justice Roberts finally explained that, contrary to the

61. *June Med.*, 140 S. Ct. at 2120 (plurality opinion) ("Turning to the merits, we apply the constitutional standards set forth in our earlier abortion-related cases, and in particular in *Casey* and *Whole Woman's Health*.").

62. *Id.*

63. *Id.* at 2121.

64. *Id.* at 2133 (Roberts, C.J., concurring in judgment).

65. *Id*. at 2134 ("The legal doctrine of *stare decisis* requires us, absent special circumstances, to treat like cases alike. The Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons. Therefore, Louisiana's law cannot stand under our precedents.").

66. *Id.* at 2135 ("Neither party has asked us to reassess the constitutional validity of [*Casey*'s] standard.").

67. *Id*. at 2134 (quoting Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020)).

68. *Id*. (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)).

69. *Id*. at 2135–38.

70. *Id*. at 2135.

71. *Id.*

dissent's suggestion in *June Medical*, there is no balancing test alone; rather, the undue-burden inquiry requires a finding that a restriction imposes a substantial obstacle to abortion.[72] Benefits, on the other hand, can be relevant "in considering the threshold requirement that the State have a 'legitimate purpose' and that the law be 'reasonably related to that goal.'"[73] Ultimately, the Chief Justice found that this was, at least in part, the analysis used in *WWH* and also the analysis used by the district court in *June Medical*.[74] Considering that *Casey* was unquestioned and unquestionably governing the situation, under principles of stare decisis, Chief Justice Roberts found that similar results to *WWH* should follow for *June Medical*.

II. *RAMOS* AND *JUNE MEDICAL*: THE FURTHER QUESTIONS

In order to understand the significance of precedent in *Ramos* and *June Medical*, a more in-depth discussion of the horizontal and vertical dimensions of stare decisis is helpful. Furthermore, one must fundamentally understand what constitutes precedent. Finally, to explore the significance of *Ramos* and *June Medical*, it is necessary to look at precedent in light of the *Marks* doctrine, which is instructive regarding the nature of precedent in fractured decisions.

A. Rise of Horizontal Stare Decisis

The favored terminology in this Article, "horizontal and vertical dimensions of stare decisis," was very recently endorsed by one Supreme Court Justice in *Ramos v. Louisiana*. Justice Kavanaugh, concurring in part, wrote that "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.'"[75]

Justice Kavanaugh's opinion with its accompanying footnote in *Ramos* is helpful, as it constitutes a small treatise on stare decisis, rather unusual in a Supreme Court case but highly useful for the learner. Although, like Justice Kavanaugh, we favor using "stare decisis" and "precedent" flexibly, we also think it is as crucial to distinguish which

72. *Id*. at 2138.
73. *Id.*
74. *Id*. at 2141–42.
75. Ramos v. Louisiana, 140 S. Ct. 1390, 1416 n.5 (2020) (Kavanaugh, J., concurring in part).

dimension of stare decisis and precedent one is talking about. Otherwise, the flexibility will inevitably introduce confusion and other negative side effects.

To dig deeper into the meaning of "horizontal stare decisis"[76] one needs to examine the famous 1932 decision in *Burnet v. Coronado Oil & Gas Co.* and Justice Brandeis's dissent.[77] This dissent has garnered much authority since its publication,[78] and it is instructive to explain the true nature of horizontal stare decisis and when prior cases may be overruled. In *Burnet*, Justice Brandeis suggested both why it makes sense to include the horizontal facet within the doctrine of precedent and how that facet differs from the vertical dimension of precedent.

The prevailing reading of Justice Brandeis's *Burnet* dissent is that his commentary is not about horizontal stare decisis in general but about horizontal stare decisis *dealing with constitutional matters*[79]—a reading unfortunately endorsed by Justice Kavanaugh in *Ramos*.[80] According to this reading, when the consideration of precedents dealing with constitutional matters is at stake, the doctrine of stare decisis is more flexible.[81] This interpretation is supported by the passage: "[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has *often* overruled its earlier decisions."[82] There is no doubt that this passage refers to horizontal stare decisis. When it comes to vertical stare decisis, the subject matter at stake

---

76. The term "horizontal stare decisis" has been used by others. *See, e.g.*, Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1015 (2003). Justice Kavanaugh also used the term in his *Ramos* opinion, illustrating that the High Court is aware of the distinctions between the dimensions of stare decisis. *Ramos*, 140 S. Ct. at 1416 n.5.

77. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932) (Brandeis, J., dissenting).

78. Significantly, in one of our two cases, Justice Kavanaugh made reference to Justice Brandeis's "canonical opinion in *Burnet*." *Ramos*, 140 S. Ct. at 1413 (Kavanaugh, J., concurring in part).

79. *See* D. H. Chamberlain, *The Doctrine of Stare Decisis as Applied to Decisions of Constitutional Questions*, 3 HARV. L. REV. 125, 128–31 (1889).

80. *Ramos*, 140 S. Ct. at 1413 (Kavanaugh, J., concurring in part) (quoting *Burnet*, 285 U.S. at 406 (Brandeis, J., dissenting)).

81. *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989); Agostini v. Felton, 521 U.S. 203, 235 (1997).

82. *Burnet*, 285 U.S. at 406–07 (emphasis added). While not alluding exactly to constitutional questions, but to "cases concerning [criminal] procedur[e] rules that implicate fundamental constitutional protections," Justice Sotomayor put it nicely in *Ramos*, "the force of *stare decisis* is at its nadir." *Ramos*, 140 S. Ct. at 1409 (Sotomayor, J., concurring).

is quite irrelevant. Given the hierarchical system of courts, lower courts will in principle always abide by the holdings of higher courts' rulings. These rulings are hard law for a lower court.

The preceding, prevailing reading of Justice Brandeis's dissent is unobjectionable but incomplete. Justice Brandeis's construction regarding constitutional questions in *Burnet* also applies to any precedent at the horizontal level, regardless of its subject matter. Even though the Justice always referred to "stare decisis" in general, the context reveals that Justice Brandeis had only *horizontal* precedent in mind.

Before Justice Brandeis stated his famous line on "cases involving the Federal Constitution," he first affirmed that "[s]tare decisis is not . . . [a] universal inexorable command."[83] Despite this line, vertical stare decisis actually is an inexorable command. In *Ramos*, Justice Kavanaugh described vertical stare decisis as "absolute."[84] Calling vertical precedent "hard" law helps represent this salient feature of the vertical dimension of stare decisis.

Next Justice Brandeis opined that "[t]he rule of stare decisis, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided."[85] Here, too, it is evident that vertical stare decisis is out of the question. "The discretion of the court" clearly refers to the Supreme Court when it decides, horizontally, whether its own precedent "shall be followed or departed from" by the Court itself.[86]

Finally, the Justice wrote that "[s]tare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."[87] Justice Brandeis offers the Court discretion to make a policy decision for those situations in which it is called to consider whether to apply "stare decisis" or, instead, to overrule prior jurisprudence. Policy decisions are clearly absent from the domain of vertical stare decisis, as lower courts may not indulge in the same policy considerations when they consider the precedent of higher courts.

---

83. *Burnet*, 285 U.S. at 405.

84. *Ramos*, 140 S. Ct. at 1416 n.5 (Kavanaugh, J., concurring in part) ("By contrast, vertical *stare decisis* is absolute, as it must be in a hierarchical system with 'one supreme Court.'").

85. *Burnet*, 285 U.S. at 405–06 (quoting Hertz v. Woodman, 218 U.S. 205, 212 (1910)).

86. *Id.*

87. *Id.* at 406.

It is clear from Justice Brandeis's dissent in *Burnet* that the three very significant references to "stare decisis" are references to horizontal stare decisis. Thus, *horizontal* stare decisis is (1) the "wise policy," but only *usually*; and (2) a "command," *but not* an inexorable command. By way of contrast, vertical stare decisis is *always* the wise policy, and it is an *inexorable* command. In fact, the cases citing these three quoted portions from Justice Brandeis's dissent *ad infinitum* were cases dealing with horizontal stare decisis, not vertical.[88]

The rudimentary general theory contained in the opening section of Justice Brandeis's dissent applies to horizontal stare decisis in general, regardless of the subject matter involved, because the carving out of constitutional questions comes in *after* his three considerations on precedent. This is compatible with the recognition that the relaxation of precedent, *always* present in the horizontal dimension as opposed to the *inexorable* vertical dimension, is even more present when constitutional matters are involved.

In conclusion: (1) horizontal stare decisis is always softer than vertical stare decisis and (2) when constitutional questions are at stake, horizontal stare decisis is even softer. A logical consequence of this conclusion is that when it comes to constitutional questions, overruling happens "often," but when it comes to other questions, overruling happens "occasionally." In Justice Brandeis's own words, "in cases involving the Federal Constitution . . . this court has *often* overruled its earlier decisions;"[89] but "[t]his Court has, in [other] matters deemed important, *occasionally*

88. For references to Justice Brandeis's dicta in majority opinions of the Supreme Court that deal with horizontal stare decisis, see, for example, Smith v. Allwright, 321 U.S. 649, 665–66 (1944); Glidden Co. v. Zdanok, 370 U.S. 530, 543 (1962); Edelman v. Jordan, 415 U.S. 651, 671 (1974); Ill. Brick Co. v. Illinois, 431 U.S. 720, 736 (1977); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 695 (1978); Thomas v. Wash. Gas Light Co., 448 U.S. 261, 273 n.18 (1980); Payne v. Tennessee, 501 U.S. 808, 827–28 (1991); Hubbard v. United States, 513 U.S. 695, 712 n.11 (1995); Seminole Tribe of Fla. v. Florida, 571 U.S. 44, 63 (1996); Agostini v. Felton, 521 U.S. 203, 235–36 (1997); Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455 (2015); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

89. *Burnet*, 128 U.S. at 406–07 (emphasis added). While not alluding exactly to constitutional questions, but to "cases concerning [criminal] procedur[e] rules that implicate fundamental constitutional protections," Justice Sotomayor put it nicely in *Ramos*, "the force of *stare decisis* is at its nadir." *Ramos*, 140 S. Ct. at 1409 (Sotomayor, J., concurring).

overruled its earlier decisions although correction might have been secured by legislation."[90]

By way of further reference to the shades of normativity identified in the Introduction of this Article, the general rule summarized in the preceding paragraph can be sketched out by establishing four levels or degrees of normativity. From three to zero: (3) vertical stare decisis—hard binding force: overruling is out of the question; (2) horizontal stare decisis—soft binding force: overruling may happen occasionally; (1) horizontal stare decisis in constitutional matters—softer binding force: overruling may happen often; and (0) the pure civil law system concept of "precedent": near zero binding force but merely persuasive authority.[91]

Although the above is a fair description of the status quo today and in 1932 when *Burnet* was decided, this is not to say that things are or were crystal clear. The difference between (2) "soft" and (1) "softer" is sometimes blurry, and it is not possible to describe precisely the reality in general terms to accurately predict overruling. Even the clear-cut distinction between maximum, hard binding force at the vertical level and the soft binding force of horizontal stare decisis in general is sometimes blurry in reality. In order to uphold vertical stare decisis, the Court may sometimes treat horizontal stare decisis as if it were an "inexorable command." In *June Medical*, for example, when Chief Justice Roberts decided to honor the precedential value of the judgment in *WWH*, he was not only *respecting* a recent prior decision in which he had dissented but also reasserting the strength of *WWH* at the vertical level.[92] In line with the stay to which the Chief Justice had concurred,[93] the decision to treat *WWH* as precedent was also a message for lower courts that might have been perceived as subtly challenging the authority of *WWH*—in the vertical dimension, where that should never happen—and therefore challenging

---

90. *Burnet*, 128 U.S. at 406 n.1. The text to this note makes it clear that the reference is to matters *other* than constitutional. These other matters are those in which "correction can be had by legislation." *Id*. at 406. Justice Brandeis then immediately contrasted those matters with constitutional ones "where correction through legislative action is practically impossible." *Id*. at 407.

91. On shades of normativity analysis, see Legarre and Handy, *supra* note 6; Santiago Legarre, *From Comparative Constitutional Law to Comparative Constitutionalism*, 12 FAULKNER L. REV. (forthcoming 2021).

92. *See supra* Introduction (citing *Ramos*, 140 S. Ct. at 1416 n.5 (Kavanaugh, J., concurring in part)).

93. *See supra* Section I.B note 57–58 (referring to a stay that the Supreme Court had issued on the Fifth Circuit Court of Appeals' stay of the Middle District's ruling. The Chief Justice had concurred despite having dissented in the prior case).

the authority of the Supreme Court itself. Once *WWH* was decided the way it was decided, the Chief Justice very likely concluded that the fact that he had dissented in *WWH* was less important than the opportunity found in *June Medical* to defend the Court's authority.

To be clear, the above by no means suggests that the avenue chosen by the Chief Justice in *June Medical* was the only way to respect the Court's authority or that the dissenters in *June Medical* disrespected the Court's authority. Unlike the Fifth Circuit, for whom abiding by *WWH* was an inexorable command,[94] the possibility of overruling was in the menu of options for the Supreme Court. In particular, Chief Justice Roberts, who "continue[d] to believe that [*WWH*] was wrongly decided,"[95] had the option to join Justices Alito and company and transform their view into a majority opinion. Instead, the Chief Justice opted to forego that possibility and to respect *WWH*'s result. Nevertheless, if he would have voted for *WWH*'s overruling, no one could have legitimately suggested that in overruling itself the Court had compromised its own authority.[96] As Justice Kavanaugh reminded us in his little treatise on stare decisis in *Ramos*, overruling is common in the Supreme Court; in the words of Justice Brandeis, it happens "often" in constitutional cases, and *June Medical* was certainly a constitutional case.

B. Horizontal Stare Decisis in Ramos *and* June Medical

The way we read *Burnet*—by circumscribing the references to stare decisis to its horizontal dimension and partially disentangling such references from the subject matter at stake—should illuminate the interpretations of the relevant passages in both *Ramos* and *June Medical*.

The majority in *Ramos*, for example, essentially reiterated Justice Brandeis's idea, writing first that "*stare decisis* isn't supposed to be the art of methodically ignoring what everyone knows to be true"[97] and later that "*stare decisis* has never been interpreted to be an inexorable command."[98] In the light of our suggested interpretation of *Burnet*, the *Ramos* majority's words apply only to horizontal stare decisis. Furthermore, given the

94. Regardless of the hypothesis in the text—where a lower court might show lack of respect for Supreme Court precedent by means of attempting to overrule it from below—it should be noted that this is not what the Fifth Circuit saw itself doing in *June*. *See* June Med. Servs. L.L.C. v. Gee, 905 F.3d 787, 791 (5th Cir. 2018), *rev'd sub nom.*, June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020).

95. *June Med.*, 140 S. Ct. at 2133 (Roberts, C.J., concurring).

96. *See infra* Part IV.

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

98. *Id*.

rhetoric of these segments of the *Ramos* majority opinion and their resemblance to the relevant ones in Justice Brandeis's dissent in *Burnet*, it seems fair to predicate these *Ramos* dicta to horizontal stare decisis in general, not just to cases where constitutional matters are involved.

The logical consequence of the *Ramos* majority's view endorsing *Burnet* begs the question: when should the Court overrule itself? Because there is no inexorable command at the horizontal level of stare decisis, overruling may happen "occasionally," such as when statutory interpretation is involved, or "often," such as in constitutional matters.[99] How infrequent is "occasionally" and how frequent is "often"? These are normative questions without a predetermined answer. The justices in *Ramos* reiterated previous Supreme Court dicta regarding when it is legitimate to overrule,[100] but one cannot draw from those considerations any general, useful, valid rule; therefore, we repeat, it is hard to predict when overruling will happen.[101] Nevertheless, it is worth noting that the jurisprudential, interpretative theory embraced by each justice will make overruling essentially available as a legitimate option, depending on the theory in question. For example, Justice Thomas's clear view, shared less clearly by some of his colleagues at the Court,[102] that the Constitution is one thing and its interpretation by the Court is a different one[103] leaves ample room for the identification of "erroneous"[104] precedents. This view of overruling, insofar as it holds that the Court should only consider whether the Court's precedents are within the realm of permissible

99. *See supra* Section II.A.

100. *See supra* Section I.A.

101. *See supra* Section II.A.

102. Justice Kavanaugh, for example, distinguishes the question "whether the Constitution prohibits non-unanimous juries" from the question "whether to overrule an erroneous constitutional precedent that allowed non-unanimous juries." *Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring in part).

103. The rejection, that is, of the "realist" dictum that "the constitution is what the judges say it is." M. PUSEY, CHARLES EVANS HUGHES 204 (1963) ("We are under a Constitution but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the Constitution.").

104. *Ramos*, 140 S. Ct. at 1421 (Thomas, J., concurring in judgment). Professor Re interpreted Justice Thomas in *Ramos* along lines perhaps similar to ours: "For Justice Thomas, this conclusion springs primarily from an originalist inquiry into history and theoretical points about legal interpretation." Re, *Precedent as Permission*, *supra* note 14, at 3; *see also Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring) (suggesting that a precedent be egregiously wrong before overruling it).

interpretation,[105] prevents the enshrinement of "demonstrably erroneous decisions . . . over the text of the Constitution."[106] In contrast, if "the Constitution is what the judges say it is,"[107] then overruling is still possible; however, it is more likely that the entrenchment of precedents will be such that the odds of overruling will become significantly lower, other factors being equal.

Similarly, when in *June Medical* Chief Justice Roberts wrote that "[t]he legal doctrine of stare decisis requires us, absent special circumstances, to treat like cases alike,"[108] he surely meant, "treat present Supreme Court cases like you treated similar past Supreme Court cases." No vertical consideration is to be found there. The same is true when, quoting the Black's Law Dictionary, he added, "Stare decisis ('to stand by things decided') is the legal term for fidelity to precedent."[109] He must here mean "fidelity to horizontal precedent." For from the context, we know by now that what he has in mind in those two references is whether or not to overrule *WWH*.[110] What is at stake therefore is the horizontal dimension of precedent. Still, the Chief Justice alluded to "stare decisis," and rightly so, insofar as one keeps in mind which facet of stare decisis he meant.

Black's Law Dictionary (in the very same page cited to by the Chief Justice) offers a definition of *horizontal* stare decisis: "The doctrine that a court, esp. an appellate court, must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself."[111] It also offers a definition of *vertical* stare decisis: "The doctrine that a court must strictly follow the decisions handed down by higher courts within the same jurisdiction."[112] According to the Dictionary, these terms were used for the first time in 1977,[113] which provides us with an authoritative confirmation of the idea that the term "horizontal stare decisis," favored in this Article, has been in use for a while.

---

105. *Ramos*, 140 S. Ct. at 1421 (Thomas, J., concurring in judgment) (quoting Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring)).

106. *Id.*; *see also* Nina Varsava, *Precedent on Precedent*, 169 PENN L. REV. 118, 131 (2020) (noting that "Justice Thomas has no patience for wrongly decided cases").

107. *See* PUSEY, *supra* note 103, at 204.

108. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring).

109. *Id.* (citing *Stare Decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019)).

110. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2319 (2016).

111. *Stare Decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

112. *Id*.

113. *Id.*

C. Precedents as to the Reasoning and Precedents as to the Result: The Special Case of Marks *Precedents*

What constitutes precedent? This is a question that has disturbed theorists of the common law forever.[114] Whatever the answer to this question, what indeed constitutes precedent will apply by and large both to the vertical and the horizontal dimensions of precedent.

Most binding past decisions are issued by collegiate tribunals. Therefore, the question has much to do with the problem of majorities in courts. In the decision of a collegiate court, one ought to distinguish the reasoning, or rationale, from the conclusion, or result. In the American system, the former is contained in an opinion; the latter is contained in a judgment. The Supreme Court may, for example, conclude to confirm the lower court's decision. It may be that there is only one majority reasoning leading to that conclusion: this is known as a "majority opinion," where five or more Justices sign the same document containing one, single reasoning. The precedential value of majority opinions is obvious. But it may be, in another hypothetical, that some Supreme Court justices offer reason A to confirm the lower court's decision while others offer reason B to the same end. Each of the opinions containing A and B are called concurring opinions in the American system, and the one among those concurring opinions that carries the most votes is called a plurality opinion.[115] Regardless of whether the Court's opinion is a majority opinion or merely a plurality opinion accompanied by other concurrences, there will always be a majority judgment of the Court that declares the result of the case. Furthermore, as Justice Kavanaugh neatly wrote, "In the American system of stare decisis, the result and the reasoning each independently have precedential force, and courts are therefore bound to follow both the result and the reasoning of a prior decision."[116] There may

---

114. It is noteworthy that in *Ramos* the Supreme Court majority cited the most authoritative, classic book on precedent. Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020) (citing R. CROSS & J. HARRIS, PRECEDENT IN ENGLISH LAW 1 (4th ed. 1991)). The dissent in *Ramos* also cites other doctrinal works on precedent. *Id*. at 1429 (Alito, J., dissenting) (citing J. SALMOND, JURISPRUDENCE 191 (10th ed. 1947); M. GERHARDT, THE POWER OF PRECEDENT 3 (2008); Landes & Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J. LAW & ECON. 249, 250 (1976)).

115. As Nina Varsava puts it, "[A] plurality opinion is the concurring opinion . . . that received the most votes of all the concurrences." Varsava, *supra* note 106, at 119 n.4.

116. *Ramos*, 140 S. Ct. at 1416 n.6 (Kavanaugh, J., concurring in part). It might seem that the way the plurality in *Ramos* treated *Apodaca* would entail

also be dissents, but these are largely irrelevant for precedential purposes.[117] In sum, a majority opinion yields a precedent as to the reasoning, leading to "reasoned stare decisis," and a majority judgment yields a precedent as to the result, leading to "results stare decisis."

Despite this basic framework of precedent, there are actually three meanings of precedent in the United States federal system: (1) precedent as to the reasoning; (2) precedent as to the result; and sometimes (3) precedent as to the result accompanied by a reasoning consisting in the narrowest grounds between two or more competing rationales that concur in the result. The latter is known as *Marks* precedent.[118] *Marks* precedents constitute a legal fiction: what is indeed not a majority opinion, but rather one particular plurality opinion, is taken to be a majority opinion for stare decisis purposes.

III. *MARKS* PRECEDENTS IN LIGHT OF *RAMOS* AND *JUNE MEDICAL*

Whenever a court faces a past decision in which there is a judgment without one majority opinion but instead two or more opinions concurring in the judgment, a question presents itself: is this past decision a *Marks* precedent?[119] This implies that *Marks* precedents are a species of a more general type of decision in which the majority is split. Therefore, while every *Marks* precedent is a decision in which the majority is split, the reverse is not true: not every decision where the majority is split counts as a *Marks* precedent. In other words, not every case without a majority

---

denying the binding force of a precedent as to the result. But the way Justice Gorsuch does it allows for consideration of *Apodaca* as a one-off exception that does not comport with objecting to the general theory that there is stare decisis as to the result. Justice Gorsuch appears to assert that the result of *Apodaca* is necessarily entangled in its reasoning, discussed *infra* Section III.B.

117. Williams put it thus: "Because dissents, by definition, are not necessary to the judgment in the precedent case, they stand in a position similar to dicta and are thus, arguably, not entitled to precedential effect." Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraints*, 69 STAN. L. REV. 795, 819 (2017).

118. *See* Marks v. United States, 430 U.S. 188, 193 (1977).

119. It has been argued, however, that the *Marks* inquiry is not quite the same at the vertical and horizontal level, because at the latter "the Court has sometimes concluded that the analysis is sufficiently complicated to render *Marks* unhelpful as an analytic tool" and thus the Court "narrow[s]" its own prior precedents without overtly overruling them. Williams, *supra* note 117, at 821 n.20; *see generally* Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1865 (2014) [hereinafter Re, *Narrowing Precedent in the Supreme Court*].

opinion is a *Marks* precedent, but for there to be a *Marks* precedent there ought *not* be a majority opinion. For this reason, *Ramos v. Louisiana* is not a *Marks* precedent and is not even susceptible of a *Marks* test. Slim as it is, there is a majority opinion in *Ramos* consisting in those few segments of Justice Gorsuch's opinion—Parts I, II.A, III, and IV.B.1—that were joined not only by the stalwart Justices Ginsburg and Breyer, who endorsed Justice Gorsuch's opinion in full, but also by Justices Sotomayor and Kavanaugh, concurring in part. This majority opinion rejects *Apodaca* generally and requires unanimous juries in state court criminal proceedings.

Put simply, a decision in which the majority is split will count as a *Marks* precedent if and only if it is possible to compare the votes that concur in the majority judgment and conclude that one of them reaches that judgment on narrower grounds than the other one(s). For this reason, in "a *Marks* dispute . . . the litigants duel over which opinion represents the narrowest and controlling one."[120] As Justice Alito stated in his dissent in *Ramos*, the *Marks* rule "ascribes precedential status to decisions made without majority agreement on the underlying rationale."[121] Or in the words of Justice Kavanaugh in the same case, "When the Court's decision is splintered, courts follow the result, and they also follow the reasoning or standards set forth in the opinion constituting the 'narrowest grounds' of the Justices in the majority."[122]

The preceding propositions implicitly follow from the Supreme Court's holding in the 1977 case that gave birth to the *Marks* doctrine: "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.'"[123] Justice Kavanaugh held in 2013 when he was on the Court of Appeals, and reiterated in 2020 in his separate vote in *Ramos*, that "the *Marks* rule is ordinarily commonsensical to apply."[124] This may be true in some cases, such as *June Medical*, where it is relatively easy to discern that the grounds

120. *Ramos*, 140 S. Ct. at 1403 (plurality opinion).

121. *Id.* at 1430 (Alito, J., dissenting).

122. *Id*. at 1416 n.6 (Kavanaugh, J., concurring in part).

123. *Marks*, 430 U.S. at 193 (internal quotations and citations omitted).

124. *Ramos*, 140 S. Ct. at 1416 n.6 (Kavanaugh, J., concurring in part); *see* United States v. Duvall, 740 F.3d 604, 610–11 (D.C. Cir. 2013) (Kavanaugh, J., concurring in denial of rehearing en banc). According to Justice Kavanaugh, the *Marks* rule "usually means that courts in essence heed the opinion that occupies the middle-ground position between (i) the broadest opinion among the Justices in the majority and (ii) the dissenting opinion." *Ramos*, 140 S. Ct. at 1416–17 n.6.

used by the four-member plurality to strike down the Louisiana law would generally strike down more laws than the grounds used by the Chief Justice, which are, in this sense, closer to the dissent than the four-member plurality's grounds.

Although Justice Kavanaugh recognized that in most cases "it is ordinarily commonsensical to apply,"[125] the *Marks* doctrine does suffer from severe complications in some cases that fall outside the scope of this Article.[126] Justice Alito, dissenting in *Ramos*, called the *Marks* doctrine "controversial" and indicated that the Supreme Court had recently considered a case that implicated its meaning but ultimately decided the case on another ground.[127]

With respect to precedent, what is the outcome after one unsuccessfully conducts a *Marks* analysis? There is still the judgment in that case in which one failed to reconstruct the narrowest grounds. That judgment itself carries some precedential force. Justice Kavanaugh put it neatly in his concurrence in *Ramos*:

> On [the] very rare occasions [in which] . . . it can be difficult to discern which opinion's reasoning has precedential effect under *Marks* . . . the *result* of the decision still constitutes a binding precedent for the federal and state courts, and for this Court.[128]

Whether these occasions are "very rare" is debatable and a topic for another day. In any event, Justice Kavanaugh is describing "result stare decisis."[129]

When a certain precedent is both lacking a majority opinion and insusceptible of a successful analysis under *Marks*, a lower court will occasionally take advantage of those circumstances to ignore even the

---

125. *Ramos*, 140 S. Ct. at 1416 n.6 (Kavanaugh, J., concurring in part).

126. *See* Williams, *supra* note 117, at 804 (discussing the shortcomings of the *Marks* "narrowest grounds" rule); Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. 1942, 1966–76 (2019) [hereinafter Re, *Beyond the* Marks *Rule*] (discussing the normative shortcomings of *Marks* before suggesting the *Marks* rule may be better abandoned).

127. *Ramos*, 140 S. Ct. at 1430 (Alito, J., dissenting) (citing Hughes v. United States, 138 S. Ct. 1765 (2018)).

128. *Id*. at 1416 n.6 (Kavanaugh, J., concurring in part) (internal citations omitted).

129. *See* James Hardisty, *Reflections on Stare Decisis*, 55 IND. L.J. 41, 52–57 (1979) (discussing the relationship between "rule" stare decisis and "result" stare decisis).

judgment in that precedent.[130] But when this happens, the anomaly may offer another opportunity for interaction between the two dimensions of stare decisis, with the Supreme Court revisiting the same question in a new case in order to horizontally reaffirm the thin precedent and provide what was originally lacking—a majority opinion or at least a *Marks* precedent. An example of this interaction between the vertical and the horizontal dimensions of stare decisis is the situation with the 1991 case *Barnes v. Glen Theatre, Inc*.

A. Barnes v. Glen Theatre, Inc. *and the Situation of UnMarksable Cases: Perception, Reality, and Practicality*

In *Barnes v. Glen Theatre, Inc.*, the Supreme Court upheld Indiana's statutory restrictions on nude dancing.[131] The decision, however, was a fractured 3–1–1–4.[132] Chief Justice Rehnquist wrote the three-justice plurality opinion joined by Justices O'Connor and Kennedy.[133] The plurality found that nude dancing was "expressive conduct protected by the First Amendment."[134] The Chief Justice then decided that *United States v. O'Brien* applied to the dancing, thus requiring the government's regulation to be (1) within the constitutional police power of government; (2) in furtherance of a substantial government interest; (3) upon an interest unrelated to the suppression of speech; and (4) no greater than necessary to further the interest.[135] When applying the test, Chief Justice Rehnquist concluded that the regulation against nude dancing was within the constitutional police power of government to regulate morality—which he found to be a substantial government interest.[136] He also concluded that the interest was unrelated to the suppression of speech since the dancing was still permissible with scant clothing. Finally, the Chief Justice concluded that the regulation was narrowly tailored because the nudity ban was the permissible end goal of the statute, and the dancers could still dance.

Justice Souter in concurrence agreed with the plurality that nude dancing was expressive and protected by the First Amendment.[137] He also

130. *See* Pap's A.M. v. City of Erie, 719 A.2d 273, 278 (Pa. 1998), *rev'd*, 529 U.S. 277 (2000).
131. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 567 (1991).
132. *Id*. at 562.
133. *Id*.
134. *Id*. at 565.
135. *Id*. at 567 (citing O'Brien v. United States, 391 U.S. 367, 376–77 (1968)).
136. *Id*. at 569.
137. *Id*. at 582.

agreed that the *O'Brien* test was the appropriate test for the statute.[138] Justice Souter, however, was more concerned with the secondary effects of nude dancing than the majority's rationale of regulating morality.[139] Justice Souter applied the *O'Brien* test to the state's interest in discouraging prostitution, sexual assaults, and other criminal activity, which he believed were negative secondary effects of nude dancing.[140] The Justice concluded that this interest was permissible, substantial, and narrowly tailored, thus satisfying the *O'Brien* test.[141]

Although Justice Souter's concurrence largely tracks the three-justice plurality opinion, Justice Scalia's concurrence takes a much different approach. Justice Scalia found that the statute was not directed at expression at all and not subject to heightened First Amendment scrutiny.[142] Instead, the Justice surveyed the history of laws regulating immoral conduct and, after finding that nude dancing fit the mold of non-expression, concluded that the law should be analyzed under the rational-basis test.[143] Justice Scalia then concluded that moral opposition to nude dancing satisfied the rational-basis test.[144] Meanwhile, Justice White's dissenting opinion concluded that the statute targeted specific expressive conduct "because of its communicative attributes" rather than general conduct and should therefore be struck down.[145]

When a nearly identical nude dancing law reached the Pennsylvania Supreme Court seven years after *Barnes*, the Pennsylvania Supreme Court in *Pap's A.M. v. City of Erie* perceived *Barnes* as unMarksable.[146] The court stated, "[W]e can find no point on which a majority of the *Barnes* Court agreed. Thus, although we may find that the opinions expressed by the Justices prove instructive, no clear precedent arises out of *Barnes* on the issue of whether the Ordinance in the matter *sub judice* passes muster under the First Amendment."[147] The Pennsylvania court then engaged in

---

138. *Id*.

139. *Id*. For an in-depth discussion about whether there is true distinction between the public morality analysis and secondary effects analysis, see Santiago Legarre & Gregory J. Mitchell, *Secondary Effects and Public Morality*, 40 HARV. J.L. & PUB. POL'Y 321 (2017).

140. *Barnes*, 501 U.S. at 582.

141. *Id.* at 587.

142. *Id.* at 572.

143. *Id*. at 580.

144. *Id.*

145. *Id.* at 595–96.

146. Pap's A.M. v. City of Erie, 719 A.2d 273, 278 (Pa. 1998), *rev'd*, 529 U.S. 277 (2000).

147. *Id.*

an independent analysis of the law, selecting favorable excerpts from U.S. Supreme Court decisions in order to strike down the law, contrary to the result in *Barnes*.[148] Thus, the Pennsylvania Supreme Court used the possibility of an unMarksable case to attempt to escape vertical stare decisis.

Following the Pennsylvania Supreme Court's ruling, the case reached the U.S. Supreme Court.[149] The Court was split 4–2–1–2 on the issue of nude dancing, but this time, the Court was also faced with a lower court that failed to follow *Barnes*.[150] According to the plurality in *Pap's*:

> After canvassing [the separate opinions in *Barnes*], the Pennsylvania court concluded that, although it is permissible to find precedential effect in a fragmented decision, to do so a majority of the Court must have been in agreement on the concept that is deemed to be the holding. The Pennsylvania court noted that "aside from the agreement by a majority of the *Barnes* Court that nude dancing is entitled to some First Amendment protection, we can find no point on which a majority of the *Barnes* Court agreed." Accordingly, the court concluded that "no clear precedent arises out of *Barnes* on the issue of whether the [Erie] ordinance . . . passes muster under the First Amendment."[151]

The plurality then seemed to endorse the Pennsylvania court's view that *Barnes* was unMarksable: "[A]lthough no five Members of the Court agreed on a single rationale [for the conclusion in *Barnes*] . . . [w]e now clarify that government restrictions on public nudity such as the ordinance at issue here should be evaluated under the framework set forth in *O'Brien*."[152]

The plurality did not go so far as to say that *Barnes* was not precedent.[153] In fact, the plurality appeared to reinforce the vertical stare

148. *Id.* at 359–64.
149. City of Erie v. Pap's A.M., 529 U.S. 277, 280 (2000).
150. *Id*. at 283.
151. *Id.* at 285–86 (internal citations omitted).
152. *Id*. at 289.
153. In fact, *Barnes* could be construed as a *Marks* precedent by looking at the least common denominator of the logic of the *Barnes* opinions: "As a logical consequence of their approval of morality justifications for regulations of speech, Chief Justice Rehnquist, Justice O'Connor and Justice Kennedy implicitly agreed with Justice Souter that governmental efforts to control the harmful secondary effects associated with adult entertainment can serve as a basis for restricting activities that enjoy First Amendment protection." Triplett Grille, Inc. v. City of Akron, 40 F.3d 129, 134 (6th Cir. 1994).

decisis effect, at least as to the result in *Barnes*: "[T]he Pennsylvania court adopted the dissent's view in *Barnes* [which upheld the statute]. . . . A majority of the Court rejected that view in *Barnes*, and we do so again here."[154] The concurrence from Justices Scalia and Thomas also hinted at some precedential weight of *Barnes*. The concurring opinion mentioned, almost in passing, "The city of Erie self-consciously modeled its ordinance on the public nudity statute we upheld against constitutional challenge in [*Barnes*], calculating (one would have supposed reasonably) that the courts of Pennsylvania would consider themselves bound by our judgment on a question of federal constitutional law."[155]

Overall, the *Pap's* Court appeared to mostly ignore the *Marks* question presented by *Barnes* in favor of clarifying a holding for nude dancing cases. In this attempt to clarify, the Court fractured once again but was likely successful in forming a rule through the *Marks* doctrine. The *Pap's* Court secured five Justices who agreed that (1) nude dancing was expressive speech and (2) regulations on nude dancing should be analyzed with the *O'Brien* test in the context of the state's interest in combatting secondary effects of nude dancing. Justices O'Connor, Rehnquist, Kennedy, and Breyer joined in a plurality opinion that endorsed Justice Souter's opinion in *Barnes*—that nude dancing is expressive speech and regulations on nude dancing target secondary effects for purposes of the *O'Brien* test. Although Justice Souter did not join this aspect of the *Pap's* opinion to create a majority opinion, he did reason in concurrence:

> [I] agree with the analytical approach that the plurality employs in deciding this case. Erie's stated interest in combating the secondary effects associated with nude dancing establishments is an interest unrelated to the suppression of expression under *United States v. O'Brien*, . . . and the city's regulation is thus properly considered under the *O'Brien* standards.[156]

Thus, under a straightforward *Marks* analysis, five justices agreed with the above proposition. The *Pap's* Court reinforced both vertical stare decisis and horizontal stare decisis by reversing the Pennsylvania Court and supplying a clearer holding consistent with *Barnes*.

154. *Pap's*, 529 U.S. at 292.
155. *Id*. at 307.
156. *Id.* at 310.

B. Apodaca v. Oregon*: A One-of-a-Kind unMarksable Case*

Although the *Pap's* Court declined to fully engage in a *Marks* analysis for *Barnes*, *Apodaca* appears to truly fall outside of the *Marks* doctrine. Whether a case is subject to the *Marks* doctrine results in an inquiry regarding precedential weight. This *Marks* and precedential-weight inquiry sheds light on which opinions in *Ramos* are correct and, more importantly, on the weight and extent of *June Medical* as a precedent.

As previously discussed, the *Apodaca* majority was achieved through the vote of Justice Powell.[157] *Marks* instructs that the precedent of a split majority is the concurring opinion that solves the legal issues on the narrowest grounds.[158] The *Apodaca* majority found that the Sixth Amendment did not require unanimous juries in criminal trials.[159] As a threshold issue, however, Justice Powell found that the Sixth Amendment does indeed require unanimous juries in criminal trials.[160] Therefore, Justice Powell's opinion does not contain nested logic or a partially overlapping rationale of the plurality that is typically required for an implicit-consensus *Marks* analysis.[161] For example, if Justice Powell's opinion had said that the Sixth Amendment does not require unanimous juries, like the plurality, but then outlined specific exceptions to that rule, then his rationale would partially overlap with the rationale of the plurality.

Another common *Marks* approach is the fifth-vote rule, which allows a lower court to simply use the deciding Justice's concurring opinion and assume it is the narrowest ground.[162] This approach also does not work well with *Apodaca*. Justice Powell endorsed a dual-track theory of incorporation that the Court had already decided as a majority was

---

157. Johnson v. Louisiana, 406 U.S. 366, 366 (1972).

158. Marks v. United States, 430 U.S. 188, 193 (1977).

159. Apodaca v. Oregon, 406 U.S. 404, 412 (1972), *abrogated by* Ramos v. Louisiana, 140 S. Ct. 1390 (2020).

160. *Johnson*, 406 U.S. at 371.

161. *See* Williams, *supra* note 117, at 809; *see also* Re, *Beyond the* Marks *Rule*, *supra* note 126, at 1980–84 (describing the "logical subset" approach).

162. *See* Williams, *supra* note 117, at 813–15; *see also* Re, *Beyond the* Marks *Rule*, *supra* note 126, at 1977–80 (describing the "median opinion" approach). In *Apodaca*, it might seem possible, at least on the surface, to justify Justice Powell's concurrence as the narrowest grounds since his "view is narrower in the sense that he would find that a nonunanimous verdict is constitutionally permissible—the result of *Apodaca*—in fewer cases than the other Justices concurring in the judgment." Varsava, *supra* note 106, at 123. But for the reasons offered in the text we ultimately think that not even this tack is plausible when it comes to *Apodaca*.

inapplicable to Sixth Amendment jury trials.[163] As a result, the fifth-vote approach would allow Justice Powell, writing for himself, to overturn a prior decision of the Court.[164] The fifth-vote approach is already controversial for its concentration of power in one justice.[165] This approach is even more unworkable when that one justice uses a rationale already rejected by the Court, as in *Apodaca*. In other words, when a justice relies on a foregone doctrine, the fifth-vote approach is especially untenable. Justice Gorsuch appears to critique the fifth-vote approach in *Ramos*, which suggests that he believed the fifth-vote approach to be the only *Marks* approach to discern a holding in *Apodaca*.[166]

The final *Marks* approach is the issue-by-issue approach.[167] This approach requires one to parse all opinions for a majority agreement but is controversial because it gives weight to dissenting opinions.[168] Nevertheless, this approach is also unworkable for *Apodaca*. When counting the votes based on the issues, three results arise along with serious contradictions:

> (1) the Sixth Amendment guarantees the same rights in federal and state trials—8 votes: 4 from the plurality and 4 from the dissents;

---

163. *Ramos*, 140 S. Ct. at 1402 (plurality opinion) ("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)."). The full incorporation of the right to trial by jury began in *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968).

164. This problem was identified in *Ramos*. *Ramos*, 140 S. Ct. at 1402.

165. "Perhaps most controversially, the fifth vote approach treats as binding *all* aspects of the opinion reflecting the median Justice's views, including propositions that no other participating Justice explicitly or implicitly assented to." Williams, *supra* note 117, at 815. "More fundamentally, the median opinion approach paradoxically ascribes precedential force to minority opinions that all other Justices have declined to join. In fact, the median opinion approach often supports rules that most Justices actively oppose." Re, *Beyond the* Marks *Rule*, *supra* note 126, at 1978.

166. "And to accept [Justice Powell's reasoning in *Apodaca*] as precedential, we would have to embrace a new and dubious proposition: that a single Justice writing only for himself has the authority to bind this Court to propositions it has already rejected. This is not the rule, and for good reason—it would do more to destabilize than honor precedent." *Ramos*, 140 S. Ct. at 1402.

167. Williams, *supra* note 117, at 817; *see also* Re, *Beyond the* Marks *Rule*, *supra* note 126, at 1988–93 (describing the "all opinions" approach).

168. *Id*.

(2) the Sixth Amendment guarantees the right to unanimous verdicts in federal trials—5 votes: 1 from the concurrence and 4 from the dissents; and
(3) the Sixth Amendment does not guarantee the right to unanimous verdicts in state trials—5 votes: 4 from the plurality and 1 from the concurrence.[169]

These three propositions cannot all coexist without contradiction.[170] For example, the four dissenters in *Apodaca* agreed that the Sixth Amendment required unanimous juries.[171] Justice Powell also endorsed this idea at least in part. Thus, an essential proposition of the dissenters would win under the issue-by-issue approach even though the proposition was squarely at odds with the result of the case. Furthermore, the dissenters and the majority both reject Justice Powell's dual-track-incorporation rationale. Therefore, there is no issue consensus capable of forming a workable holding. Even where there was majority agreement, *Apodaca* does not work with the issue-by-issue approach since this approach would give too much weight to dissenters for propositions that the majority for the result rejected.

Apodaca's complete failure under *Marks* makes it one of the premier examples of an unMarksable case. Yet, a case's status as unMarksable does not completely erase its value as precedent. In *Ramos*, Justice Alito recognized as a legal matter that *Apodaca* cannot be a non-precedent.[172] Justice Alito's assertion is true, at least in precedent's most basic form: "[A] decided case that furnishes a basis for determining later cases involving similar facts or issues."[173] Indeed, cases that lack clear reasoning exist, and numerous jurists recognize that there is at least some precedential force in such decisions.[174] Therefore, *Apodaca*, at the very

169. Varsava, *supra* note 106, at 128.
170. *Id*.
171. *See* Apodaca v. Oregon, 406 U.S. 404, 414–15 (1972).
172. "It is remarkable that it is even necessary to address this question, but in Part IV–A of the principal opinion, three Justices take the position that *Apodaca* was never a precedent. The only truly fitting response to this argument is: 'Really?'" Ramos v. Louisiana, 140 S. Ct. 1390, 1427–28 (2020) (Alito, J., dissenting).
173. *Precedent*, BLACK'S LAW DICTIONARY (11th ed. 2019).
174. Cross and Harris's work on precedent in English law highly endorses *ratio decidendi* as inseparable from precedent; however, even they recognize precedential force when a rationale is not articulated: "It would be a mistake to assume that such decisions necessarily lack a *ratio decidendi* which enables them to be cited as a precedent, for a proposition of law on which they must have been

least, was precedent as to its result tied to material facts. Accordingly, a defendant's conviction was constitutional when convicted in state court by ten out of twelve jurors.[175]

Justice Gorsuch overlooked this principle of precedent when rejecting *Apodaca* as a precedent. Although Justice Gorsuch's approach to reject *Apodaca* as a precedent may be normatively desirable to eliminate unclear precedent, his approach rejecting results stare decisis is legally incorrect. Justice Gorsuch attempts to address the hurdles of results stare decisis, opining that *Apodaca*'s reasoning is entangled in the result particularly to extract the requirement that the conviction be in state court.[176] Yet Justice Gorsuch is necessarily tying a *ratio decidendi* to the written opinions of the *Apodaca* justices. As discussed previously, the written opinions of the *Apodaca* justices are unworkable—there is no *ratio decidendi*—but this does not erase all precedential force. The material facts of *Apodaca*, including the fact of a state court conviction, combined with the result are what yield the state court requirement. As such, the justices in *Ramos* that recognized *Apodaca* as precedent despite *Apodaca* being unMarksable were correct. Furthermore, *Apodaca* was arguably weak precedent from the start, as several justices in the *Ramos* plurality asserted. This weak precedential force combined with the flexibility of horizontal stare decisis made *Apodaca* ripe for overruling and the result of *Ramos* more foreseeable.

Apodaca's uniqueness both in its very nature and its treatment in *Ramos* may make it a one-off case. By its nature, *Apodaca* is unMarksable as a case that cannot be analyzed without absurd results under the traditional views of *Marks*, including implicit consensus, the fifth-vote rule, and the issue-by-issue approach. *Apodaca* (1) did not have nested

---

based may be inferred with more or less confidence from the facts coupled with the conclusion." CROSS & HARRIS, *supra* note 114. "In the American system of *stare decisis*, the result and the reasoning each independently have precedential force, and courts are therefore bound to follow both the result and the reasoning of a prior decision." *Ramos*, 140 S. Ct. at 1416 n.6 (Kavanaugh J., concurring).

175. *Apodaca*, 406 U.S. at 406, *abrogated by Ramos*, 140 S. Ct. 1390. *Apodaca*'s related case from Louisiana would adjust the juror requirement to nine out of ten. Johnson v. Louisiana, 406 U.S. 356 (1972), *abrogated by Ramos*, 140 S. Ct. 1390 (2020).

176. "Where does the convenient 'state court' qualification come from? Neither the *Apodaca* plurality nor the dissent included any limitation like that—their opinions turned on the meaning of the Sixth Amendment. What the dissent characterizes as *Apodaca*'s result turns out to be nothing more than Justice Powell's reasoning about dual-track incorporation dressed up to look like a logical proof." *Ramos*, 140 S. Ct. at 1404 (plurality opinion).

logic, so there was no implicit consensus; (2) would overrule a major legal premise by way of one justice through the fifth vote; and (3) would necessarily cause the dissent to win if individually counting the logic of all justices. These circumstances seem rare, although it is possible that another case either presently or in the future could include similar conditions to *Apodaca*. However, by its treatment in *Ramos* as a non-precedent, *Apodaca* is certainly a one-off case. If Justice Gorsuch's opinion provides authority for the existence of non-precedent from a fractured decision, it should be emphasized that the Justice's opinion narrowly confines its reasoning to *Apodaca*. Justice Gorsuch makes only one exception to binding precedent: *Apodaca*, wherein the deciding fifth vote relied on a foregone constitutional doctrine.

IV. THE LEGACY OF *RAMOS* AND *JUNE MEDICAL*

Ramos offers an in-depth look at the Supreme Court's view of precedent and stare decisis. With the *Ramos* framework in mind, the question remains of *June Medical*'s precedential weight. *June Medical*, as a 4–1–4 decision, constitutes a *Marks* precedent. Chief Justice Roberts's vote in *June Medical* can be nested within the logic of the plurality. Unlike in *Apodaca*, the Chief Justice's opinion does not split with the plurality on fundamental legal issues or embrace shaky legal theories. Accordingly, Chief Justice Roberts's concurrence in *June Medical* is an "implicit consensus," not a "fifth vote."

Justice Breyer's plurality opinion in *June Medical* reviewed both the district court and court of appeals' applications of *WWH*, in which there was a five-vote majority opinion.[177] Thus, the plurality in *June Medical* acknowledged the precedential effect of *WWH*, and in applying *WWH*, embraced it as controlling under horizontal stare decisis. Likewise, Chief Justice Roberts based his concurring opinion on the doctrine of stare decisis.[178] The Chief Justice's opinion accords with the plurality to the extent that both opinions agree that the precedential effect of *WWH* affects the outcome in *June Medical*.

The wrinkle of Chief Justice Roberts's concurring opinion comes from his clarification of the *Casey* test and the *June Medical* plurality's cost-benefit analysis. Although the plurality construed *WWH*'s holding as introducing a cost-benefit analysis, the Chief Justice reaffirmed the undue-burden test from *Casey* and clarified that in *Casey*, "benefits" are considered only in the context of the state's burden to show whether a law

177. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2113 (2020).
178. *Id.* at 2133–35 (Roberts, C.J., concurring).

is reasonably related to a state's legitimate purpose for the law.[179] The Chief Justice's wrinkle, however, is not wholly inconsistent with the plurality opinion. Justice Breyer's plurality would still endorse the undue-burden *Casey* test and respect the result of *WWH*.

Indeed, the Chief Justice's concurring opinion is the narrowest grounds for deciding *June Medical*. Chief Justice Roberts first accepted stare decisis as governing the decision, which was consistent with the rationale of the plurality. He then clarified that in *WWH* the Court was not introducing any new tests on top of *Casey*. By reaffirming *Casey* without the introduction of new tests, the Chief Justice's concurrence provides the narrowest grounds because it does not make new law and is a logical subset of the plurality opinion. *June Medical* is a *Marks* precedent in which vertical stare decisis will inexorably bind lower courts. The circuit courts have already begun analyzing *June Medical* under *Marks* somewhat successfully.

In *Hopkins v. Jegley*, the Eighth Circuit reviewed a district court's decision to grant a preliminary injunction regarding four restrictions on abortion.[180] None of the restrictions included an admitting-privileges law.[181] The Eighth Circuit found that Chief Justice Roberts's concurrence in *June Medical* was controlling under *Marks*.[182] As a result, the Eighth Circuit vacated the district court's injunction and remanded the case back to the district court to engage in the undue-burden test from *Casey* rather than a cost-benefit analysis.[183] Thus, the *Hopkins* court, the first circuit court to analyze *June Medical*, found that *June Medical* was a *Marks* precedent and faithfully applied Chief Justice Roberts's concurring opinion.

Similarly, in *EMW Women's Surgical Center, P.S.C. v. Friedlander*, the Sixth Circuit reviewed a district court's decision to grant a permanent injunction regarding licensing requirements on abortion facilities, including hospital-admittance agreements and ambulance agreements.[184]

---

179. *Id.* at 2120, 2138.

180. Hopkins v. Jegley, 968 F.3d 912, 913–14 (8th Cir. 2020).

181. *Id*.

182. *Id.* at 915 ("Chief Justice Roberts's vote was necessary in holding unconstitutional Louisiana's admitting-privileges law, so his separate opinion is controlling); *see* Marks v. United States, 430 U.S. 188 (1977) (explaining that when "no single rationale explaining the result [of a case] 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'").

183. *Id*. at 915–16.

184. EMW Women's Surgical Center, P.S.C. v. Friedlander, 978 F.3d 418, 418 (6th Cir. 2020).

The Sixth Circuit determined that a *Marks* analysis was necessary to determine the holding of *June Medical*.[185] In order to tackle the "narrowest grounds" as required by *Marks*, the court used the nested-logic approach.[186] Furthermore, the court found that when a law is struck down as unconstitutional, the concurrence's nested logic must "invalidate the fewest laws going forward."[187] Applying this framework, the Sixth Circuit determined that Chief Justice Roberts's concurring opinion was nested logic because "[l]ike the Chief Justice, the plurality would invalidate any law with 'the effect of placing a substantial obstacle in the path of a woman's choice' to obtain a previability abortion."[188] Moreover, the court stated, "Because all laws invalid under the Chief Justice's rationale are invalid under the plurality's, but not all laws invalid under the plurality's rationale are invalid under the Chief Justice's, the Chief Justice's position is the narrowest under *Marks*."[189] Thus, the Sixth Circuit correctly concluded that *June Medical* was a *Marks* precedent and that the Chief Justice's concurring opinion controlled.

In contrast, a three-judge panel of the Fifth Circuit in *Whole Woman's Health v. Paxton* found that *June Medical* was not a *Marks* precedent and applied the *WWH* cost-benefit analysis.[190] The Fifth Circuit found no nested logic in Chief Justice Roberts's concurrence because "accounting only for a law's burdens [under the Chief Justice's test] renders it impossible to perform [the plurality's] balancing test, which necessarily entails weighing two sides against each other."[191] The court then found that *June Medical* was not "a controlling rule of law" and proceeded to apply the cost-benefit test of *WWH*.[192] The court, however, failed to fully analyze the nature of the nested-logic or logical-subset approach to *Marks*. This shortcoming was highlighted and correctly applied in Judge Willett's dissenting opinion. The dissenting opinion uses the following illustration and commentary to show nested logic:

---

185. *Id.* at 431.

186. *Id.* ("In a fractured decision where two opinions concur in the judgment, an opinion will be the narrowest under *Marks* if the instances in which it would reach the same result in future cases form 'a logical subset' of the instances in which the other opinion would reach the same result.") (internal citations omitted).

187. *Id.* at 432.

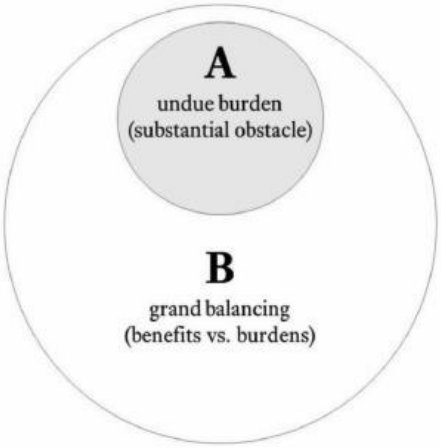
188. *Id.*

189. *Id.* at 433.

190. Whole Woman's Health v. Paxton, 978 F.3d 896, 904 (5th Cir. 2020).

191. *Id.*

192. *Id.*



> The larger circle (B) is the *June Medical* plurality's "grand 'balancing test'" to determine undue burden. The subset (A) is the Chief Justice's narrower test, which focuses only on half of the plurality's test: the burden part. Simply put, the tests have a common denominator—substantial obstacle—and the Chief Justice's agreement with the plurality's substantial-obstacle analysis is the "narrowest position supporting the judgment."[193]

Judge Willett's dissent demonstrates that Justice Breyer's plurality opinion does—at least impliedly—still endorse the *Casey* test and that the Chief Justice's concurring opinion is narrower by not adding additional tests to the default substantial-obstacle test. Therefore, the dissent correctly concluded that *June Medical* is a *Marks* precedent where Chief Justice Roberts's concurring opinion provides the controlling rationale. A plurality of the Fifth Circuit, sitting en banc, subsequently adopted Judge Willet's rationale as it pertains to the *Marks* analysis.[194]

In addition to its vertical stare decisis effects in the circuit courts, *June Medical* also offers insight into horizontal stare decisis. It would constitute a mistake to read Chief Justice Roberts's change from minority in *WWH* to majority in *June Medical* as simply a wholesale switch, because what was not a precedent in 2016 when he dissented in *WWH* was a precedent

193. *Id.* at 918 (internal citations omitted).

194. Whole Woman's Health v. Paxton, 10 F.4th 430, 478 (5th Cir. 2021) (en banc).

in 2020.[195] That "switch" reading would work if the Chief Justice had joined Justice Breyer's opinion for the Court in *June Medical*. However, the Chief Justice's adherence to horizontal stare decisis may not have been as strong as it seems. Although it is true that the Chief Justice honored results stare decisis, his separate opinion in *June Medical* reveals serious doubts as to his adherence to the reasoning in the opinion of *WWH*—unsurprising doubts too, as he had dissented in the Texas case. In fact, we do not think anyone expects, at least as a general rule of stare decisis, that a justice of the Supreme Court who had voted in dissent in a previous case will switch his vote and join what was then the majority in a future case in order to fully honor horizontal stare decisis. If overruling is within bounds, why should a justice switch his or her vote in a case when the opportunity arises to overrule a recent precedent in which that justice had dissented?

Nevertheless, that justice will "begin with the presumption that we will follow precedent,"[196] but he or she may find that that presumption needs to be turned around, in which case the justice in question "has an obligation to provide an explanation for [his or her] decision."[197] So if Chief Justice Roberts, who "continue[d] to believe that the case [*WWH*] was wrongly decided,"[198] had decided to join the dissenters in *June Medical* and overrule *WWH*, that decision would have been in itself unobjectionable from the perspective of horizontal stare decisis. Similarly, if a new justice is appointed to the Supreme Court, no one could validly suggest that past precedent indefinitely and inexorably binds that justice. This is likely especially true when a new membership in the Court arises, as is now the case with the recent additions of Justices Gorsuch, Kavanaugh, and Barrett. Sooner or later these justices will certainly face controversial precedents such as *Planned Parenthood v. Casey*, which had not been challenged by the parties in *June Medical*.[199]

---

195. Noah Feldman made a similar mistake when he wrote that in *June Medical* the Chief Justice "provided the decisive vote to affirm the right to abortion as expressed in *Planned Parenthood v. Casey* (1992)." Noah Feldman, *The Battle Over Scalia's Legacy*, THE N.Y. REV., Dec. 17, 2020 (reviewing ANTONIN SCALIA, THE ESSENTIAL SCALIA: ON THE CONSTITUTION, THE COURTS, AND THE RULE OF LAW (2020). In fact, as we pointed out, *Casey* was out of the question in *June Medical*. *See supra* note 66. The true meaning of what the Chief Justice in effect did in this case can only be understood in the light of the *Marks* doctrine.

196. Ramos v. Louisiana, 140 S. Ct. 1390, 1432 (2020) (Alito, J., dissenting).

197. *Id.*

198. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2133 (2020) (Roberts, C.J., concurring in judgment).

199. *See supra* note 66.

If, for example, there is a hypothetical 4–4 split in the Court about whether to keep some past decision, the horizontal stare decisis doctrine would not force a new justice to join the camp that votes for the upholding of the precedent. He or she may and will cast the fifth vote as he or she sees fit: whether "to stand by things decided" or in favor of overruling—obviously offering reasons for his or her decision. This idea of course works both ways and is unrelated to an ideological preference as to the results. In the abortion context, the claimed freedom for the fifth vote to overrule may now favor the so-called "conservative" camp, given the recent additions to the Court, but if *Casey* were overruled, it could become the other way around in the future for incoming justices. In other contexts, the same approach to horizontal stare decisis and overruling may favor the "liberal" camp.

In *June Medical*, we know that Chief Justice Roberts, surely knowing that he could have overruled *WWH*, instead chose not to. By concurring in *June Medical*, he respected the result in *WWH*; by voting separately in *June Medical*, he not only made sure that Justice Breyer's proposed opinion in this case would not become a majority opinion, and therefore would not become controlling, but he was also able to introduce the mentioned wrinkle that likely weakened significantly the precedential value of *WWH*. Justice Alito observed this when, dissenting in *June Medical*, he indicated that the Chief Justice "votes to overrule *Whole Woman's Health* insofar as it changed the *Casey* test."[200] Never in his opinion in *June Medical* does the Chief Justice allude to such an overruling of *WWH*, or even less so does he admit it,[201] but that overruling effect is indeed the practical import of his concurring opinion in light of the *Marks* doctrine.[202] Thus, the Chief Justice and his pledge for stare decisis is true, up to a point. He struck down the Louisiana law in light of *WWH*, but he was the first one to disregard the full horizontal precedential value of *WWH* to the point that one of his dissenting colleagues called the Chief

200. *June Med.*, 140 S. Ct. at 2153 (Alito, J., dissenting).

201. Professor Re prefers to frame the problem in terms of "narrowing" the precedent instead of "overruling" it. This is closer to Chief Justice Roberts' own understanding of what he was doing with *WWH* in *June Medical*. *See* Re, *Narrowing Precedent in the Supreme Court*, *supra* note 119, at 1889 (contrasting the standard for "legitimate narrowing" with the stricter standard for overruling); *see also* Re, *Precedent as Permission*, *supra* note 14.

202. Note that what Justice Gorsuch said in *Ramos* of Justice Powell's opinion in *Apodaca* (that it would be wrong to afford "a single Justice writing only for himself . . . the authority to bind this Court to propositions it has already rejected") cannot be said of the Chief Justice's vote in *June Medical*. *Ramos*, 140 S. Ct. at 1430. As previously explained, the Chief Justice Roberts's opinion is nested logic.

Justice's opinion the "overruling" of *WWH*—a case in which there had been a majority opinion, unlike *June Medical*.[203] As a result, horizontal stare decisis was respected in a sense, but vertical stare decisis was changed by way of *Marks*.

CONCLUSION

The Supreme Court's 2020 term offered a unique glimpse into the Court's views on precedent. The High Court grappled with the vertical and horizontal dimensions of stare decisis and even offered extraordinarily rare commentary on the *Marks* doctrine. The Court's discussion of precedent includes support for our framework of precedent. Vertical stare decisis is, indeed, afforded binding weight. However, it is evident that horizontal stare decisis and an application of its weight can be a much more difficult question. Nevertheless, the Court clearly recognized some obligation to follow horizontal precedent in both *Ramos* and *June Medical*. Indeed, the Court began in both cases with addressing its prior case law. Yet, the Court diverged, mainly for policy reasons, on whether to follow prior precedent, and in the case of *Ramos*, whether certain prior cases at the horizontal level are precedent at all. Despite the *Ramos* plurality's problematic introduction of possible non-precedent, the idea of non-precedent is likely narrowly confined to the situation in *Apodaca*, if it exists at all. Although the *Marks* doctrine introduces difficulties of its own when analyzing a split opinion, it is clear from the Court's 2020 session that the doctrine is alive and well.

Furthermore, the interaction between horizontal stare decisis and *Marks* yielded the rather enigmatic decision in *June Medical*. While results stare decisis raises questions about the viability of admitting-privileges laws in the abortion context, Chief Justice Roberts's concurring opinion certainly qualifies *June Medical* as a *Marks* precedent, and as is already evident, the perceived precedential effect of *WWH* has been weakened. In light of the effect of the *Marks* doctrine, the question remains how much further the Court can take the idea of seemingly honoring horizontal precedent while at the same time exercising its freedom to deviate from prior decisions.

203. *June Med.*, 140 S. Ct. at 2153 (Alito, J., dissenting).