THE FEDERAL COURTS LAW REVIEW‡

Volume 14 2022

PLURALITY DECISIONS AND PRIOR PRECEDENT

*Ryan C. Williams**

‡ The *Federal Courts Law Review* is a publication of the Federal Magistrate Judges Association. Editing support is provided by the members of the *Mississippi Law Journal*.
* Associate Professor, Boston College Law School. I would like to thank Richard Re, Asher Steinberg, and Nina Varsava for their thoughtful comments on earlier drafts of this Article.

INTRODUCTION

Stare decisis may not be an "inexorable command,"[1] but it certainly commands a substantial amount of the Supreme Court's time and attention. Nowhere is this truer than in the fraught context of the Court's abortion jurisprudence. In its landmark 1992 decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[2] a narrowly divided Court connected the continued constitutional protection for abortion rights to the perceived necessity of adhering to its earlier decision in *Roe v. Wade*.[3] Since then, the Court's abortion decisions have often featured sharp divisions over the proper understanding and application of *stare decisis*.[4]

The Court's recent engagement with the subject in *June Medical Services L.L.C. v. Russo*[5] is no exception. *June Medical* involved a constitutional challenge to abortion regulations adopted by the State of Louisiana that were nearly identical to Texas regulations the Court had declared unconstitutional four years earlier in *Whole Woman's Health v. Hellerstedt*.[6] In the course of declaring the Texas regulations unconstitutional, the *Hellerstedt* majority (joined by five of the eight Justices participating in the case) interpreted the "undue burden" standard announced in *Casey* to require an assessment of both "the burdens a law imposes on abortion access" as well as "the benefits those laws confer."[7]

In *June Medical*, four Justices joined a plurality opinion authored by Justice Breyer (the author of *Hellerstedt*), which reaffirmed the earlier decision's understanding of the undue burden

---

[1] Payne v. Tennessee, 501 U.S. 808, 828 (1991).

[2] 505 U.S. 833 (1992).

[3] 410 U.S. 113 (1973). *See also Casey*, 505 U.S. at 865 ("[O]verruling *Roe*'s central holding would not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law.").

[4] *See, e.g.*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2326 (2016) (Thomas, J., dissenting) (contending that the "majority's undue-burden test looks far less like our post-*Casey* precedents and far more like the strict-scrutiny standard that *Casey* rejected"); Gonzales v. Carhart, 550 U.S. 124, 191 (2007) (Ginsburg, J., dissenting) (contending that the majority's opinion was "hardly faithful" to *stare decisis*).

[5] 140 S. Ct. 2103 (2020).

[6] 136 S. Ct. 2292, 2310-14 (2016). *See also June Med. Servs.*, 140 S. Ct. at 2112.

[7] *Hellerstedt*, 136 S. Ct. at 2309.

standard.[8] Four dissenting Justices—Justices Alito, Gorsuch, Thomas, and Kavanaugh—would have overruled the recently decided *Hellerstedt* decision, rejecting the balancing framework that decision had established for assessing whether an "undue burden" exists and upholding the challenged Louisiana regulations.[9]

Chief Justice John Roberts authored a separate opinion, concurring in the judgment alone. Roberts, who had joined the dissenters in *Hellerstedt*, continued to view that decision as "wrongly decided."[10] Unlike the dissenters, however, Roberts believed that *stare decisis* demanded the Court to "treat like cases alike," requiring consistent treatment of the Louisiana and Texas regulations.[11] But while Roberts was willing to accord *stare decisis* effect to the *result* of *Hellerstedt*, he refused to accord similar effect to the *reasoning* the Court had relied upon to reach that result, insisting that "remaining true" to the "intrinsically sounder" doctrine of *Casey*, properly understood, would better effectuate the policies of *stare decisis*.[12]

In the short time since *June Medical* was handed down, the decision has already produced a nascent circuit split, with the Fifth, Sixth, and Eighth Circuits concluding that Chief Justice Roberts's concurrence effectively overruled *Hellerstedt*[13] while the Seventh Circuit concluded that *June Medical* leaves *Hellerstedt*'s precedential effect undisturbed.[14]

The confusion surrounding *June Medical* is reflective of a deeper confusion in the law surrounding plurality precedent more generally. This same confusion was on vivid display in another decision the Court handed down a few weeks before *June Medical*—

---

[8] *See June Med. Servs.*, 140 S. Ct. at 2120.

[9] *Id.* at 2154 (Alito, J., dissenting).

[10] *Id.* at 2133 (Roberts, C.J., concurring in the judgment).

[11] *Id.* at 2134.

[12] *Id.* at 2134-35 (alteration omitted) (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 231 (1995)).

[13] *See* Whole Woman's Health v. Paxton, 10 F.4th 430, 441-42 (5th Cir. 2021); Whole Woman's Health v. Paxton, 978 F.3d 896, 903-04 (5th Cir. 2020); EMW Women's Surgical Ctr., P.S.C. v. Friedlander, 978 F.3d 418, 432-33 (6th Cir. 2020); Hopkins v. Jegley, 968 F.3d 912, 915 (8th Cir. 2020).

[14] Planned Parenthood of Ind. & Ky., Inc. v. Box, 991 F.3d 740, 741-42 (7th Cir. 2021). *See also infra* notes 147-150 and accompanying text.

Ramos v. Louisiana[15]—in which the Justices clashed over the precedential significance of one of the Court's earlier plurality decisions. And because the *Ramos* decision itself resulted in a fractured majority, the decision did nothing to clarify the confused, and confusing, doctrine surrounding plurality precedent.

In a prior Article, I suggested a framework for extracting precedential guidance from plurality decisions that focused on identifying the universe of future cases that fall within the domain of overlapping agreement shared between the various judgment-supportive opinions in a case.[16] The Court's decisions in *Ramos* and *June Medical* provide an occasion to revisit and extend that framework by illustrating how courts applying this "shared agreement" approach should think about plurality decisions in relation to prior majority-supported precedent.

The shared agreement approach provides a way of thinking about plurality precedent that helps to identify plurality decisions that overturn or alter prior precedent and to distinguish them from decisions that leave preexisting precedent untouched. In particular, the shared agreement approach recognizes the ability of plurality decisions to alter precedent *only* in those circumstances where a majority of Justices whose votes were collectively necessary to the judgment in the original case agree that the earlier precedent should be overruled. Where, by contrast, the members of the judgment-necessary majority disagree about prior precedent, the willingness of a subset of the majority to overrule an earlier decision leaves the precedential status of the earlier decision undisturbed.

I. THE SHARED AGREEMENT APPROACH: AN OVERVIEW

The most significant guidance the Supreme Court has offered on the subject of plurality precedent came in the form of a cryptic sentence in a 1977 decision, *Marks v. United States*,[17] where the Court instructed that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that

---

[15] 140 S. Ct. 1390 (2020).

[16] *See* Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 822-38 (2017).

[17] 430 U.S. 188 (1977).

position taken by those Members who concurred in the judgments on the narrowest grounds.'"[18] But while the Court apparently assumed its instruction was sufficiently straightforward to require no further elaboration, lower courts have struggled to apply the "narrowest-grounds" rule the case prescribes.[19] The Supreme Court itself has recognized on multiple occasions that the rule "is more easily stated than applied" and that efforts to apply the rule to particular plurality decisions had "baffled and divided the lower courts."[20] But despite this recognition, the Court has persistently refused to provide further clarifying guidance regarding the proper meaning and application of the *Marks* rule.[21]

In the absence of more specific guidance from the Supreme Court, the lower courts have struggled to apply *Marks*, developing a number of conflicting and contradictory approaches for extracting precedential guidance from plurality decisions.[22] Unsurprisingly, this diversity of approaches routinely leads to clashes over the precedential significance of particular plurality decisions of the type presently on display in the emerging lower court split over the significance of *June Medical*.[23]

The shared agreement approach reflects an interpretation of the "narrowest-grounds" rule of *Marks* that seeks to bring theoretical coherence to the confused, and confusing, doctrine that presently surrounds plurality precedent. The shared agreement approach starts from premises similar to those that undergird the traditional, common-law understanding of precedent—namely,

---

[18] *Id.* at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.)).

[19] *See* Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. 1942, 1959 (2019) (observing that the *Marks* analysis often "generates lasting disagreement" among intermediate appellate courts regarding the precedential effect of particular plurality decisions).

[20] Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (quoting Nichols v. United States, 511 U.S 738, 745-46 (1994)).

[21] The Court most recently passed on an opportunity to clarify the precedential status of plurality decisions in a 2018 decision. *See* Hughes v. United States, 138 S. Ct. 1765, 1768 (2018). Although the Court granted certiorari in *Hughes* on multiple questions regarding the proper interpretation and application of the *Marks* narrowest-grounds rule, it determined it would be "unnecessary" to address those questions because it was able to resolve the case on other grounds. *Id.* at 1771-72.

[22] *See* Williams, *supra* note 16, at 806-22 (discussing various approaches to *Marks* in the lower courts).

[23] Re, *supra* note 19, at 1959-60; Williams, *supra* note 16, at 807 & n.50.

that the precedential significance of a prior case is determined by the judgment in the precedent-setting case and the court's reasons for that judgment (i.e., the *ratio decidendi*).[24] This *ratio decidendi* approach is sometimes thought to be unworkable in the plurality context because no single opinion articulates the collective set of reasons that explain why the court awarded the particular judgment it did.[25] But the key insight of the shared agreement approach is that while no one single opinion fully explains the reasons for a court's decision in a plurality case, the reasons for the court's judgment can nonetheless be discerned by looking to the set of opinions that were collectively necessary to that judgment.[26] In particular, the reason a court will have decided the case in the particular way it did is because *each* of the opinions that were collectively necessary to its judgment pointed to that result.[27] And because the rationales reflected in those opinions will typically point to consistent results in at least *some* other cases as well, later interpreters will typically be able to identify a universe of future cases in which *each* of the judgment-supportive opinions point to identical results.[28]

This domain of shared agreement on outcomes may be relatively narrow or quite broad depending on the manner in which the judgment-supportive opinions happen to align with one another.[29] But in nearly all cases, the deciding majority's shared agreement about the proper result in the specific case before the Court will provide at least *some* guidance to later courts about which other cases are sufficiently "like" the adjudicated case to demand consistent treatment—namely, those cases in which each of the judgment-supportive opinions would point to the same result.[30] Of course, in at least some cases, the judgment-supportive

---

[24] Williams, *supra* note 16, at 835-38.

[25] *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1404 (2020) (plurality opinion) (suggesting that plurality decisions, like "'unexplicated' decisions," lack a controlling *ratio* that can bind later courts); NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 73 (2008) ("Where a majority of judges agree as to the decision but disagree as to the correct grounds for the decision, extracting a *ratio decidendi* from the case may be an arbitrary exercise.").

[26] Williams, *supra* note 16, at 836.

[27] *See id.*

[28] *Id.* at 836-37.

[29] *Id.* at 830-35.

[30] *Id.* at 836-37.

opinions from the precedent case will point to different results. In this circumstance, the shared agreement approach would typically recognize a limited degree of discretion on the part of the later court to choose *between* the competing rationales that contributed to the majority's judgment.[31] The principal constraint on lower courts' ability to choose between such opinions is the binding effect of other controlling precedential decisions.[32] The following Part focuses on sorting out this relationship between plurality decisions and prior majority-supported precedents in greater detail.

II. PLURALITY DECISIONS AND THEIR RELATIONSHIP TO PRIOR PRECEDENT

The existing confusion surrounding the relationship between plurality decisions and prior majority-supported precedents is well-illustrated by the Supreme Court's decision in *Ramos v. Louisiana*.[33] *Ramos* involved a challenge to a Louisiana statute permitting felony convictions on the basis of non-unanimous jury verdicts[34]—a practice long assumed to have been validated by the Court's 1972 plurality decision in *Apodaca v. Oregon*.[35] The *Ramos* Court fractured sharply over the precedential status of *Apodaca*, with three Justices insisting that the decision had not created a binding precedential rule at all, while the remaining six Justices rejected that view but split evenly on the question of whether *Apodaca* should be overruled.[36]

Justice Gorsuch's plurality opinion, joined in relevant part by two other Justices, insisted that the absence of a majority-supported *ratio* in *Apodaca* left that decision a rule for the parties in that case alone, without establishing any binding rule to govern future cases.[37] Justice Gorsuch viewed this limitation as necessary

---

[31] *Id.* at 837-38.

[32] *Id.* at 862-63. *See also* Re, *supra* note 19, at 1987 ("[T]he shared agreement approach calls for reconciling fragmented decisions with earlier precedent.").

[33] 140 S. Ct. 1390 (2020).

[34] *Id.* at 1394-95.

[35] 406 U.S. 404 (1972).

[36] *See Ramos*, 140 S. Ct. at 1417 n.6 (Kavanaugh, J., concurring in part) ("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 concludes that *Apodaca* should be and is overruled.").

[37] *See id.* at 1403-04 (plurality opinion).

to avoid what he viewed as an absurd consequence—namely, allowing "a single Justice," writing only for himself, to "overrule precedent" and "bind future majorities."[38] Both the dissenting opinion, authored by Justice Alito (on behalf of himself and two others), and Justice Kavanaugh in a sole concurrence criticized this position as incompatible with the Court's instruction in *Marks*.[39] According to Justice Alito, "[t]he logic of *Marks* applies equally no matter what the division of the Justices in the majority," and he declared himself unaware of any "case holding that the *Marks* rule is inapplicable when the narrowest ground is supported by only one Justice."[40]

The shared agreement approach provides a sensible path through which to resolve the clash of conflicting intuitions reflected in the *Ramos* opinions. The shared agreement approach embraces Justice Gorsuch's intuition that the opinion of a single Justice—or, indeed, any opinion supported by less than a majority of the Court—cannot overturn prior precedent. At the same time, the shared agreement approach demonstrates that majority-supported *judgments* in plurality decisions are sometimes properly read to overturn prior rulings and establish new, binding precedent.

A. Judgment Majorities Inconsistent with Prior Precedent: The Example of Memoirs

The fact that plurality decisions can sometimes overturn majority-supported precedent is apparent from the Court's decision in *Marks* itself. *Marks* involved an appeal from a prosecution for criminal obscenity.[41] The defendants challenged the jury instruction provided by the trial court, which was consistent with the First Amendment obscenity standard articulated by the Supreme Court in its 1973 decision, *Miller v. California*.[42] The petitioners claimed this instruction amounted to a retrospective

---

[38] *Id.* at 1403.

[39] *See id.* at 1430 (Alito, J., dissenting) (insisting that Gorsuch's argument reflected "an attack on the rule that the Court adopted in *Marks*"); *id.* at 1416 n.6 (Kavanaugh, J., concurring in part) (agreeing that *Apodaca* established a binding precedent that must be either followed or overruled).

[40] *Id.* at 1431 (Alito, J., dissenting).

[41] Marks v. United States, 430 U.S. 188, 189-91 (1977).

[42] *Id.* at 190-91 (citing Miller v. California, 413 U.S. 15 (1973)).

criminal punishment because a plurality decision handed down seven years earlier—*A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General* ("*Memoirs*")[43]—established a different, more speech-protective standard.[44] Because the defendants' prosecution would likely also have been permissible under the standard articulated by the Supreme Court in its last majority-supported decision, *Roth v. United States*,[45] the defendants' retrospectivity challenge hinged on whether the plurality decision in *Memoirs* had altered the applicable constitutional rule.[46]

The *Marks* Court had little difficulty concluding that it had. Invoking the "narrowest grounds" rule, the Court identified the three-Justice plurality opinion in *Memoirs* as the "controlling opinion" in that case and concluded that the Court's decision had, in fact, established new law that was more speech-protective than the standard articulated in *Roth*.[47] *Marks* thus established that plurality decisions can, at least sometimes, overturn prior majority-supported precedents.

Looking to the alignment of the opinions in *Memoirs* makes it easy to understand the intuition driving the *Marks* Court's conclusion that the *Memoirs* decision had, in fact, established a new precedential rule. In *Memoirs*, six Justices concurred in the judgment. The plurality opinion, authored by Justice Brennan, purported to apply the *Roth* standard but articulated a much more stringent standard for prosecutions, demanding, among other things, that the allegedly obscene material be proven to be "utterly without redeeming social value"—a requirement not articulated in the *Roth* decision.[48] Justices Douglas and Black "reiterated their well-known position that the First Amendment provides an

---

[43] 383 U.S. 413 (1966).

[44] *Marks*, 430 U.S. at 190-91.

[45] 354 U.S. 476 (1957).

[46] *See Marks*, 430 U.S. at 193 ("If . . . *Roth*, not *Memoirs*, stated the applicable law prior to *Miller*, there would be much to commend the . . . view . . . that *Miller* did not significantly change the law.").

[47] *Id.* at 193-94 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).

[48] *Memoirs*, 383 U.S. at 418. *See also Roth*, 354 U.S. at 489 (defining obscenity according to "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest").

absolute shield against governmental action aimed at suppressing obscenity."[49] Finally, Justice Stewart concurred in the judgment "based on his view that only 'hardcore pornography' may be suppressed."[50]

The judgment in *Memoirs* thus depended on the shared agreement among a majority of the Justices to apply a more speech-protective standard than the standard articulated in *Roth*. In other words, *Memoirs* featured the existence of a shared agreement among a judgment-necessary majority to overrule (or at least substantially alter) the preexisting precedential standard.

The alignment of the opinions in *Memoirs* also helps to explain the Court's statement that the three-Justice plurality opinion provided the "narrowest grounds" of the Court's judgment and, therefore, the "controlling opinion" in the case.[51] The three judgment-supportive opinions in *Memoirs* lined up in a simple continuum in which the "narrowest" opinion pointed to a result that was wholly subsumed within the results produced by the two "broader" opinions.[52] That is, any obscenity prosecution deemed impermissible under the standard articulated by the plurality would also have been deemed impermissible under the rationales adopted by the two other concurring opinions.

By contrast, the plurality would have allowed at least *some* obscenity prosecutions that the three concurring Justices would not. The six Justices who joined in the Court's judgment thus all necessarily agreed that the *Roth* standard should be revised to the extent it would have allowed prosecutions that would be prohibited by the new test announced by the plurality. But here, their agreement ended. There was no consensus to overrule or alter *Roth* to the broader extent advocated by Justices Douglas, Black, or Stewart. The *Memoirs* decision thus left the prior precedential rule established by *Roth* intact except to the extent the deciding majority necessarily agreed it should be overruled.

---

[49] *Marks*, 430 U.S. at 193.

[50] *Id.*

[51] *Id.*

[52] *Id.*

B. Judgment Majorities Reflecting Both Precedent-Consistent and Precedent-Inconsistent Rationales: The Example of Hein

The Court's decision in *Marks* stands in tension with at least one possible reading of Justice Gorsuch's opinion in *Ramos*—namely, that plurality decisions can *never* overrule prior precedent.[53] At the same time, and contrary to the dissenters' position in *Ramos*, nothing in the "logic" of *Marks* compels the conclusion that a single Justice will *always* have the authority to overrule prior precedent by authoring a putatively "narrowest" opinion in a plurality case.[54]

Consider, for example, the Court's 2007 plurality decision in *Hein v. Freedom from Religion Foundation, Inc.*[55] *Hein* involved a question regarding the availability of taxpayer standing to challenge Executive Branch expenditures that benefited religious organizations in a manner that the plaintiffs alleged violated the First Amendment's Establishment Clause.[56] In its 1968 decision in *Flast v. Cohen*,[57] the Court had recognized an exception to its general bar on allowing taxpayers to challenge federal expenditures, authorizing such challenges in the limited context of cases alleging a violation of the Establishment Clause.[58]

Six of the Justices who participated in the *Hein* case agreed that the logic of *Flast* compelled recognition of the taxpayer plaintiffs' standing in that case. But the Court nonetheless held, by a vote of five-to-four, that the plaintiffs lacked standing. Two of the Justices who agreed *Flast* would otherwise govern the case (Justices Scalia and Thomas) believed that *Flast* should be overruled.[59] Three other Justices joined in a plurality opinion authored by Justice Alito, which concluded that *Flast* was distinguishable because the challenged expenditures were made out of general Executive Branch appropriations rather than funds specifically appropriated by Congress to be spent on religious

---

[53] *See* Nina Varsava, *Precedent on Precedent*, 169 U. PA. L. REV. ONLINE 118, 120-23 (2020) (discussing this interpretation of Gorsuch's opinion and its seeming tension with the Court's holding in *Marks*).

[54] *Contra* Ramos v. Louisiana, 140 S. Ct. 1390, 1431 (2020) (Alito, J., dissenting).

[55] 551 U.S. 587 (2007).

[56] *See id.* at 587.

[57] 392 U.S. 83 (1968).

[58] *Id.* at 102-04.

[59] *Hein*, 551 U.S. at 636-37 (Scalia, J., concurring in the judgment).

purposes.[60] This left only four Justices (in dissent) who believed both that *Flast* required recognition of the plaintiffs' standing and that that decision should not be overruled.[61]

Lower courts that have considered *Hein*'s precedential significance have generally viewed Justice Alito's plurality opinion as controlling, even though that opinion reflected the views of only three of the Court's nine members.[62] Some of these judges have viewed the plurality as controlling because it occupied a supposed "middle ground" between the other two opinions in the case.[63] The shared agreement approach points to the same conclusion, though for slightly different reasons. Unlike approaches that attach determinative significance to the opinion occupying the "median" position on the Court,[64] the shared agreement approach would focus on the plurality opinion in *Hein* because of its relationship to prior precedent.

Applying the shared agreement approach, a later interpreter would conclude that the reason the judgment-necessary majority in *Hein* resolved the case the way it did (i.e., its *ratio decidendi*) was *either* because *Flast* involved distinguishable facts (the plurality's reasoning) *or* because *Flast* was wrongly decided and should be overruled (the rationale of the concurrence). But unlike a more typical plurality decision in which a later court should regard itself as free to follow either of the judgment-consistent rationales,[65] the scope of the later court's discretion is constrained by the continuing precedential effect of *Flast*. The view that *Flast* should be overruled garnered only two votes in *Hein*—well short of a majority. And because lower courts lack the freedom to disregard prior majority-

---

[60] *Id.* at 609-10 (plurality opinion).

[61] *Id.* at 637 (Souter, J., dissenting).

[62] *See, e.g.*, Freedom from Religion Found., Inc. v. Nicholson, 536 F.3d 730, 738 n.11 (7th Cir. 2008) (noting Justice Alito's plurality opinion "is controlling"); *In re* Navy Chaplaincy, 534 F.3d 756, 759 n.2 (D.C. Cir. 2008) (identifying Justice Alito's plurality opinion as the "binding opinion of the Court").

[63] *See, e.g.*, Hinrichs v. Speaker of the House of Representatives of the Ind. Gen. Assembly, 506 F.3d 584, 607 (7th Cir. 2007) (Wood, J., dissenting) (focusing on Justice Alito's plurality opinion "because it was he who expressed the middle ground on the Court").

[64] Williams, *supra* note 16, at 813-17 (discussing this "fifth vote" approach to interpreting plurality precedent).

[65] *See supra* notes 30-31 and accompanying text (describing the shared agreement approach).

supported Supreme Court precedent, they could not themselves disregard the precedential effect of *Flast* unless and until that decision is overruled by an actual Supreme Court majority decision.[66] The plurality opinion thus offers the only judgment-consistent rationale that explains the result in *Hein and* that can be reconciled with *Flast*.

The distinction between treating the *Hein* plurality as controlling because it occupies a "middle ground" and treating it as controlling because of the prior precedential effect of *Flast* can be illustrated using a simple hypothetical. Imagine a variation on *Hein* involving identical facts and a similar 3-2-(4) voting breakdown in which the plurality and the dissenting Justices adhere to the same position they expressed in the actual case. But imagine that instead of endorsing a total ban on taxpayer standing, the two-Justice concurring opinion instead supported overruling *Flast* in general, but would have allowed a narrow carve-out for suits in which a federal statute expressly authorizes a right of action to challenge federal expenditures alleged to violate the Establishment Clause.[67]

As so reformulated, the hypothetical concurring opinion would arguably occupy the "middle ground" position because it might allow some challenges to expenditures from Executive Branch appropriations whereas the dissent would allow all such challenges and the plurality opinion would allow none.[68] But treating that opinion as the "controlling" opinion would result in overruling the precedent established by *Flast* even though *no other* Justice who participated in *Hein* would have supported that result. This is precisely the type of "dubious proposition" that Justice Gorsuch

---

[66] *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

[67] *Cf.* Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 182-205 (2011) (considering circumstances in which express Congressional authorization of standing might allow plaintiffs to overcome otherwise applicable standing barriers).

[68] *Cf.* United States v. Duvall, 740 F.3d 604, 612 (D.C. Cir. 2013) (Kavanaugh, J., concurring in the denial of rehearing en banc) (observing that when an opinion would sometimes allow a practice that the other opinions in the case would either always allow or never allow, that opinion occupies the middle ground because "'sometimes' is a middle ground between 'always' and 'never'").

warned of in his *Ramos* opinion when he rejected the prospect of allowing "a single Justice" to "overrule precedent" based on a fortuitous alignment of voting positions.[69]

The shared agreement approach provides a method of parsing plurality precedent that avoids such strongly counterintuitive results while also avoiding the contrary extreme that would deny plurality decisions the capacity to overrule precedent entirely. Rather, as the discussion of *Marks* above suggests, the shared agreement approach would recognize the potential for plurality decisions to overrule precedent only if, and only to the extent that, an actual majority of the Justices whose votes were collectively necessary to the Court's judgment actually agreed that an earlier decision should be overruled.[70] By contrast, where a proposed overruling of prior precedent garners the support of less than a majority (as in *Hein*), the shared agreement approach would leave the earlier precedent undisturbed.

C. The Problem of Multiple Judgment Majorities: The Example of Casey

The two scenarios described above—i.e., plurality decisions in which each of the judgment-necessary opinions support overruling prior precedent and decisions involving a judgment premised on a mix of precedent-consistent and precedent-inconsistent rationales—likely account for the large majority of circumstances in which a question regarding the relationship between a plurality decision and prior precedent might plausibly arise. But neither fully accounts for the somewhat unusual alignment of opinions in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[71] in which a plurality opinion joined by only three of the Court's nine members purported to alter core features of the scrutiny standard specified by *Roe v. Wade*[72] and to explicitly overturn at least two of the Court's post-*Roe* abortion decisions.[73] Assessing the precedential significance of *Casey* requires consideration of how the

---

[69] Ramos v. Louisiana, 140 S. Ct. 1390, 1402-03 (2020) (plurality opinion).

[70] *See supra* Section II.A (discussing the application of the shared agreement approach to the Court's decision in *Marks*).

[71] 505 U.S. 833 (1992).

[72] 410 U.S. 113 (1973).

[73] *See infra* text accompanying notes 83-88 (discussing the *Casey* plurality opinion).

shared agreement approach should address the somewhat unusual circumstance of a single Supreme Court decision supported by two, differently constituted majority coalitions, each of which is independently necessary to a different aspect of the Court's judgment.

To see why the existence of multiple-judgment majorities matters to the precedential inquiry, it will be useful to start with an example from a non-plurality decision. In *United States v. Booker*,[74] the Supreme Court, by a vote of five-to-four, concluded that certain applications of the Federal Sentencing Guidelines violated the Sixth Amendment to the extent they made a defendant's criminal sentence depend on facts found by the trial judge rather than the jury.[75] In the same case, the Court also held by a vote of five-to-four that the conflict with the Sixth Amendment could be cured by severing the provision of "the federal sentencing statute that [made] the Guidelines mandatory," rendering the Guidelines "effectively advisory" for sentencing judges.[76] However, these two holdings were reflected in two different opinions—one written by Justice Stevens and one written by Justice Breyer—which were joined by different five-Justice majority coalitions; only Justice Ginsburg (who did not write separately in the case) joined both the Stevens opinion and the Breyer opinion.[77]

At first glance, attributing precedential significance to Justice Ginsburg's implicit rationale—i.e., that the Federal Sentencing Guidelines were unconstitutional as written but that the constitutional infirmity could be cured through severability—might seem to raise concerns similar to those articulated by Justice Gorsuch in his *Ramos* opinion. After all, if we are concerned about giving "a single Justice writing only for himself" the "authority to bind" the Court to a preferred rationale,[78] shouldn't we be equally concerned about allowing a single Justice to accomplish the same objective without having to write an opinion at all?

But in *Booker*, the Court's holding was supported by an *actual* majority of the Court on each of the relevant issues, and *both*

---

[74] 543 U.S. 220 (2005).

[75] *Id.* at 243-44 (Stevens, J., opinion in part).

[76] *Id.* at 245 (Breyer, J., opinion in part).

[77] *Id.* at 226, 244.

[78] Ramos v. Louisiana, 140 S. Ct. 1390, 1402 (2020) (plurality opinion).

opinions were necessary to explain the judgment the Court ultimately reached. Ascribing precedential significance to both majority opinions is thus no different from ascribing precedential significance to two majority-supported opinions written in different cases addressing similar issues where the Court's respective judgments are supported by differently constituted majority coalitions. In this circumstance, it is relatively common for a single "median" or "swing" Justice to find herself in the majority in both cases, even if none of her colleagues share her particular view of the law.[79]

Casey involved a similar alignment of multiple judgment-necessary majorities in a single case. In *Casey*, the Court considered a constitutional challenge to five specific provisions of a Pennsylvania law regulating abortion access, which the plaintiffs contended conflicted with the substantive due process abortion right that the Supreme Court had recognized nineteen years earlier in *Roe*.[80] The plaintiffs' challenge focused particularly on the following features of the Pennsylvania law: (1) a requirement that "a woman seeking an abortion give her informed consent prior to the abortion procedure," (2) a requirement that women seeking an abortion must "be provided with certain information at least 24 hours before the abortion is performed," (3) a requirement that minors seeking abortions must obtain parental consent, (4) a requirement that married woman seeking an abortion "sign a statement indicating that she has notified her husband of her intended abortion," and (5) the imposition of certain record-keeping requirements on abortion-providing facilities.[81] Because certain provisions stood in tension with the holding of *Roe* and later abortion decisions, the case also implicated a question of whether *Roe* itself should be overruled.[82]

---

[79] *Cf.* Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 39-44 (2008) (discussing the influence of "median" Justices).

[80] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844-45 (1992) (plurality opinion).

[81] *Id.* at 844. The informed consent requirement, mandatory waiting period, spousal notification requirement, and the parental consent requirement were all subject to a statutory "medical emergency" exception, and the parental consent requirement was further qualified by the availability of a judicial override procedure. *Id.*

[82] *Id.* at 844-45.

A coalition of three Justices—Justices O'Connor, Kennedy, and Souter—famously joined in a collectively authored plurality opinion that reaffirmed what the plurality described as the "essential holding" of *Roe*.[83] At the same time, the plurality rejected certain features of the *Roe* decision—particularly that decision's "trimester framework," which prohibited nearly all regulation of abortion during the first trimester of a pregnancy, permitted regulation solely in the interest of the pregnant woman's health in the second trimester, and permitted states to regulate and even ban most abortions in the third trimester.[84] Instead, the plurality endorsed a more flexible standard under which the state may regulate the abortion decision throughout the pregnancy so long as its regulations do not impose an "undue burden" on a pregnant woman's decision regarding whether or not to terminate the pregnancy.[85]

In the course of describing this revised framework, the plurality purported to "overrule" two post-*Roe* decisions—*City of Akron v. Akron Center for Reproductive Health, Inc.*[86] and *Thornburgh v. American College of Obstetricians and Gynecologists*[87]—that were inconsistent with the plurality's preferred approach.[88] Applying this standard, the plurality concluded that each of the challenged provisions of the Pennsylvania law should be upheld, with the exception of the spousal notification requirement, which the plurality concluded posed an "undue burden" on a married woman's ability to obtain an abortion.[89]

Two Justices, Stevens and Blackmun, wrote separately, concurring in part and dissenting in part.[90] Both would have upheld the *Roe* trimester framework in full and would have preserved the precedential status of the *Akron* and *Thornburgh* decisions.[91]

---

[83] *Id.* at 845-46.

[84] *Id.* at 872-73.

[85] *Id.* at 873-77.

[86] 462 U.S. 416 (1983), *overruled by Casey*, 505 U.S. 833 (1992).

[87] 476 U.S. 747 (1986), *overruled by Casey*, 505 U.S. 833 (1992).

[88] *Casey*, 505 U.S. at 870 (plurality opinion).

[89] *Id.* at 879-901.

[90] *Id.* at 911 (Stevens, J., concurring in part and dissenting in part), 922 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[91] *Id.* at 914-17, 929-34.

Stevens and Blackmun disagreed with the plurality regarding the constitutionality of certain challenged regulations, including the 24-hour waiting period.[92] But both concurred with the plurality regarding the unconstitutionality of the spousal notification requirement.[93]

The remaining four Justices joined an opinion authored by Chief Justice Rehnquist concurring in the judgment in part and dissenting in part.[94] Unlike the plurality, these four Justices would have overruled *Roe* in full, applying a rational basis standard of scrutiny to laws regulating abortion.[95] Chief Justice Rehnquist's opinion rejected the plurality's conclusion that the spousal notification requirement violated the Constitution, but he agreed with its conclusion regarding the constitutional permissibility of the remaining provisions of the Pennsylvania law.[96]

Although no other Justice concurred fully in the rationale endorsed by the plurality, focusing on the *results* produced by the decision reveals that the three Justices who co-authored that opinion occupied a position very similar to the position occupied by Justice Ginsburg in *Booker*. That is, only those three Justices concurred in both aspects of the Court's judgment—namely, that the spousal notification provision was unconstitutional *and* that the remaining provisions were constitutionally permissible. And though no single opinion from *Casey* commanded a majority in full, the set of results to which the differently constituted majorities necessarily agreed as a result of their rationales demonstrates that only the plurality's opinion is capable of rationalizing both aspects of the Court's judgment.

The two Justices who joined the plurality in holding the spousal notification requirement unconstitutional necessarily agreed that *Roe*'s "essential holding" should be preserved, requiring at least some level of heightened scrutiny for abortion regulations.[97] And although those two Justices would have preferred to preserve the full precedential status of *Roe*, *Akron*, and *Thornburgh*, they

---

[92] *Id.* at 918-22, 937-40.

[93] *Id.* at 922, 925 n.1.

[94] *See id.* at 944 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

[95] *See id.* at 944, 966.

[96] *Id.* at 966-79.

[97] *Id.* at 871 (plurality opinion).

recognized that approach was inconsistent with the judgment the Court reached on other provisions of the Pennsylvania law.[98]

By contrast, the four Justices who joined in Chief Justice Rehnquist's separate opinion necessarily agreed with the plurality that *Roe*, *Akron*, and *Thornburgh* must be altered or overruled to the extent necessary to preserve the constitutionality of the informed consent, waiting period, and parental consent provisions.[99] But they would have gone much further by overruling *Roe* in its entirety—a step for which they lacked majority support and that would be impossible to reconcile with the Court's contemporaneous holding on the spousal consent provision.[100]

The shared agreement approach thus supports the near-universal sentiment that the three-Justice plurality opinion in *Casey* reflected the "controlling" opinion in that case and that the decision did, in fact, effect a partial overruling of prior precedent.

III. *RAMOS* AND *JUNE MEDICAL* UNDER THE SHARED AGREEMENT APPROACH

With the framework sketched in the two foregoing Parts more clearly in view, we can now turn to the two recent Supreme Court decisions that point to the tension between plurality decisions and prior precedent—*Ramos v. Louisiana*[101] and *June Medical Services L.L.C. v. Russo*[102]—to see how the shared agreement approach would address the precedential implications of each.

A. Revisiting Ramos

As noted above, the jurisprudential question that fractured the Court in *Ramos* focused on the precedential significance of a decades-old Supreme Court plurality decision, *Apodaca v. Oregon*.[103] In *Apodaca*, the Court considered a constitutional challenge to an Oregon law that authorized non-unanimous jury

---

[98] *See id.* at 870.

[99] *See id.* at 954-55, 969 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

[100] *See id.* at 944.

[101] 140 S. Ct. 1390 (2020).

[102] 140 S. Ct. 2103 (2020).

[103] 406 U.S. 404 (1972).

verdicts in criminal cases.[104] The Supreme Court had long held that the Sixth Amendment required unanimous jury verdicts in federal criminal cases.[105] And a separate, more recently developed line of precedent suggested that the provisions of the Bill of Rights held to be "incorporated" against the states through the Fourteenth Amendment's Due Process Clause should be interpreted to apply against the states in the same way that they restricted the federal government.[106]

Notwithstanding this combined line of precedent, the Supreme Court held in *Apodaca* and in a companion case, *Johnson v. Louisiana*,[107] that the defendants' criminal convictions by non-unanimous state jury verdicts did not violate the Constitution.[108] Four Justices joined in an opinion authored by Justice White, which expressed skepticism about the constitutional requirement of jury unanimity for both federal and state convictions.[109] Justice Powell, writing only for himself, disagreed with what he took to be Justice White's rejection of the Court's longstanding precedent interpreting the Sixth Amendment to require unanimity, but he concluded that at least some rights, including the criminal jury right, could apply differently against the states than they do against the federal government.[110] Based on this "dual-track" theory of incorporation, Justice Powell would have held the non-unanimous criminal jury verdicts permissible in state courts, but not in federal courts.[111] The four dissenting Justices would have required unanimous jury verdicts for state and federal convictions.[112]

In *Ramos*, Justice Gorsuch asserted that *Marks* was unworkable as applied to *Apodaca* because no single opinion in the

---

[104] *Id.* at 406 (plurality opinion).

[105] *See, e.g.*, Andres v. United States, 333 U.S. 740, 748-49 (1948); Patton v. United States, 281 U.S. 276, 288-90 (1930), *abrogated by* Williams v. Florida, 399 U.S. 78 (1970); Maxwell v. Dow, 176 U.S. 581, 586 (1900), *abrogated by* Williams v. Florida, 399 U.S. 78 (1970).

[106] *See, e.g.*, Malloy v. Hogan, 378 U.S. 1, 10-11 (1964).

[107] 406 U.S. 356 (1972), *abrogated by* Ramos v. Louisiana, 140 S. Ct. 1390 (2020).

[108] *Apodaca*, 406 U.S. at 406 (plurality opinion); *Johnson*, 406 U.S. at 363.

[109] *Apodaca*, 406 U.S. at 410-12.

[110] The basis for Powell's concurrence is set forth in his separate opinion in *Apodaca*'s companion case, *Johnson v. Louisiana*, which was decided the same day. *See id.* at 414; *Johnson*, 406 U.S. at 366, 368-77 (Powell, J., concurring in the judgment).

[111] *Johnson*, 406 U.S. at 376-77.

[112] *Apodaca*, 406 U.S. at 414-15 (Stewart, J., dissenting).

case could be regarded as narrower than any other.[113] If *Marks* is construed as requiring a single opinion from the original plurality decision to be singled out as unambiguously "narrower" than all others, Gorsuch's point is well taken.[114] Justice Powell's opinion in *Apodaca* was certainly "narrower" than Justice White's in certain respects insofar as Powell's rationale would limit the permissibility of non-unanimous jury verdicts to state prosecutions whereas White's rationale would presumably allow such verdicts in both state and federal court. But along a different dimension, White's opinion could be seen as potentially narrower than Powell's to the extent Powell's approach, unlike White's, might license a "dual-track" approach for incorporating protections other than the Sixth Amendment's requirement of jury unanimity.[115]

Both the dissenting opinion in *Ramos* and Justice Kavanaugh in his sole concurrence essentially agreed with Gorsuch's conclusion that *Apodaca* yielded no single "narrowest" opinion for *Marks* purposes, with Kavanaugh characterizing the case as one of the "very rare occasions" when "it can be difficult to discern which opinion's reasoning has precedential effect under *Marks*"[116] and the dissent expressly denying that Justice Powell's opinion constituted "a binding precedent."[117] But the Justices disagreed sharply about the precedential consequences of this conclusion.

Justice Gorsuch insisted that *Apodaca* only "resolved [the] case for the parties in that case" but had no broader precedential significance.[118] Both Justice Kavanaugh and the dissenters, however, viewed the binding "result" in *Apodaca* as having established a more general rule authorizing all non-unanimous jury verdicts in *all* state-court criminal proceedings.[119] Justice Gorsuch

---

[113] Ramos v. Louisiana, 140 S. Ct. 1390, 1403-04 (2020) (plurality opinion).

[114] *Cf.* Triplett Grille, Inc. v. City of Akron, 40 F.3d 129, 133 (6th Cir. 1994) (asserting that the "objective" of *Marks* "requires that, whenever possible, there be a single legal standard for the lower courts to apply in similar cases").

[115] *Cf.* McDonald v. City of Chicago, 561 U.S. 742, 867-70 (2010) (Stevens, J., dissenting) (citing *Apodaca* as precedential support for the permissibility of a "two-track" approach to incorporating Second Amendment rights).

[116] *Ramos*, 140 S. Ct. at 1417 n.6 (Kavanaugh, J., concurring in part).

[117] *Id.* at 1431 (Alito, J., dissenting).

[118] *Id.* at 1404 (plurality opinion).

[119] *See id.* at 1416 n.6 (Kavanaugh, J., concurring in part) ("The result of *Apodaca* was that state criminal juries need not be unanimous."); *id.* at 1429 (Alito, J., dissenting) (characterizing the "result" in *Apodaca* as meaning "that when (1) a defendant is

rejected this characterization of the *Apodaca* result as "nothing more than Justice Powell's reasoning about dual-track incorporation dressed up to look like a logical proof."[120]

The shared agreement approach provides a theoretical grounding for the dissent's intuition that *Apodaca*'s "result" is properly characterized at a higher level of generality than the resolution of the specific criminal prosecutions then before the Court while also illustrating the flaws in Justice Gorsuch's contrary position. Gorsuch's assertion that *Apodaca* supplied a precedential rule that bound the parties alone was premised on his assertion that it is "a judicial decision's reasoning—its *ratio decidendi*—that allows it to have life and effect in the disposition of future cases" as well as his unstated (and undefended) assumption that this *ratio decidendi* must be traceable to a single opinion in the precedent-setting case.[121] But this latter assumption is erroneous for reasons already discussed above.[122] Although a court's *ratio decidendi*—literally, its reason for decision—is usually reflected in a single majority-supported opinion, a plurality decision will typically require looking to multiple opinions to discern why the Court awarded the particular judgment it did.[123]

In *Apodaca*, the reason the Supreme Court found in favor of the state, rather than the criminal defendant, was because *both* Justice White's plurality opinion *and* Justice Powell's sole concurrence pointed to that result. And this shared agreement on the outcome was not narrowly circumscribed by all of the particular facts and circumstances presented by the specific dispute then before the Court. Rather, the plurality Justices and Justice Powell *necessarily* agreed on a consistent set of resolutions across *every* future case that would fall within the scope of their respective rationales—that is, as the dissenting opinion in *Ramos* put it, *every* future case in which "(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

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").

[120] *Id.* at 1404 (plurality opinion).

[121] *Id.*

[122] *See supra* text accompanying notes 25-28.

[123] *See* Williams, *supra* note 16, at 835-38.

vote was not unanimous."[124] Contrary to Justice Gorsuch's assertion, this interpretation of *Apodaca*'s "result" was not simply an obfuscated reiteration of Justice Powell's rationale.[125] To the contrary, the dissent correctly noted that virtually every other application of Powell's preferred "dual-track" theory of incorporation was barred by prior precedent, including cases involving different aspects of the Sixth Amendment jury right.[126]

B. Did June Medical *Overrule* Hellerstedt*?*

Hellerstedt involved a constitutional challenge to regulations of abortion facilities adopted by the State of Texas, which, among other things, required physicians working in such facilities to have admitting privileges at a nearby hospital and required the facilities to comply with detailed regulations the state applied to "ambulatory surgical centers."[127] The plaintiff abortion-services providers challenged both the admitting-privileges requirement and the application of the surgical-center regulations, contending that both sets of measures imposed an "undue burden" on a patient's access to abortion.[128]

Five Justices joined an opinion authored by Justice Breyer that accepted the challengers' contentions and concluded that the Texas regulations could not withstand constitutional scrutiny.[129] In the course of doing so, the *Hellerstedt* majority held that the determination of whether a particular regulation posed an "undue burden" requires courts to assess not only "the burdens a law imposes on abortion access" but also "the benefits those laws confer."[130] Because the district court found that the challenged Texas regulations would not, in fact, deliver significant medical benefits, Justice Breyer determined that the regulations were inconsistent with the proper understanding of the "undue burden" framework and should thus be invalidated.[131]

---

[124] *Ramos*, 140 S. Ct. at 1429 (Alito, J., dissenting).
[125] *Id.* at 1404 (plurality opinion) (emphasis omitted).
[126] *Id.* at 1431 (Alito, J., dissenting).
[127] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).
[128] *Id.*
[129] *Id.*
[130] *Id.* at 2309.
[131] *Id.* at 2310-18.

In *June Medical*, the Court confronted a challenge to a "nearly identical" set of abortion regulations adopted by the State of Louisiana.[132] In the intervening period separating the cases, two important changes to the Court's membership occurred—Justice Neil Gorsuch was appointed to a seat that had been vacant at the time of the *Hellerstedt* decision, and Justice Brett Kavanaugh was appointed to a seat vacated by the retirement of Justice Anthony Kennedy, a member of the *Hellerstedt* majority.[133] This change in membership created circumstances that some observers predicted might lead the Court to overrule *Hellerstedt*.[134]

But five Justices could not agree on either a straightforward reaffirmation or repudiation of *Hellerstedt*, producing a fractured majority that left the precedential status of *Hellerstedt* open to question. Justice Breyer, the author of the *Hellerstedt* majority opinion, authored a plurality opinion joined by the three other members of that majority still on the Court—Justices Ginsburg, Sotomayor, and Kagan.[135] Justice Breyer's opinion "appl[ied] the constitutional standards set forth in [the Court's] earlier abortion-related cases, and in particular in *Casey* and [*Hellerstedt*]."[136] Given the substantial similarity between the regulations at issue in the two cases and the findings of the district court, Justice Breyer concluded the Louisiana regulations were unconstitutional.[137]

Four Justices—including the two new appointees—joined an opinion authored by Justice Alito, contending that *Hellerstedt* "misinterpreted *Casey*, and . . . [it] should be overruled insofar as it changed the *Casey* test."[138] The dissenters thus urged that the case

---

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

[133] Amy Howe, *Argument Preview: Abortion Debate Returns to the Roberts Court*, SCOTUSBLOG (Feb. 26, 2020, 2:55 PM), https://www.scotusblog.com/2020/02/argument-preview-abortion-debate-returns-to-the-roberts-court/ [https://perma.cc/CA49-N83S].

[134] *See, e.g.*, Ed Kilgore, *Is the Constitutional Right to Choose Abortion Doomed?*, N.Y. MAG.: INTELLIGENCER (June 23, 2020), https://nymag.com/intelligencer/2020/06/are-we-in-the-last-days-of-a-clear-right-to-choose-abortion.html [Perma.cc link unavailable]; Garrett Epps, *America May Be Nearing the End of the* Roe *Era*, ATLANTIC (Feb. 13, 2020), https://www.theatlantic.com/ideas/archive/2020/02/supreme-court-abortion/606475/ [https://perma.cc/939N-J99B].

[135] *June Med. Servs.*, 140 S. Ct. at 2112.

[136] *Id.* at 2120.

[137] *Id.* at 2133.

[138] *Id.* at 2154 (Alito, J., dissenting).

should be remanded to the district court for "a new trial [to] determine, based on proper evidence" and the proper constitutional standard, whether the challenged regulations would pose an "undue burden" under *Casey*.[139]

The final vote was cast by Chief Justice Roberts, one of the dissenters in *Hellerstedt*, who authored a sole opinion, concurring in the judgment alone.[140] Although Chief Justice Roberts reaffirmed his belief that *Hellerstedt* was "wrongly decided," he nonetheless concluded that the Louisiana law should be struck down because "[t]he legal doctrine of *stare decisis* requires us, absent special circumstances, to treat like cases alike," and the Louisiana regulations "impose[d] a burden on access to abortion just as severe as that imposed by the Texas law."[141]

But the Chief Justice's willingness to extend *stare decisis* treatment to *Hellerstedt* extended only to the *result* of that case, not its reasoning. Because he believed the *Hellerstedt* majority had misconstrued the *Casey* standard by requiring "a weighing of costs and benefits,"[142] the Chief Justice concluded that "[r]emaining true to an 'intrinsically sounder' doctrine established in" *Casey* would "'better serve[] the values of *stare decisis* than would following' the recent departure" in *Hellerstedt*.[143] He thus chose to construe the *Hellerstedt* majority as simply applying the *Casey* "undue burden" standard without regard to the majority's discussion of the comparative benefits and burdens the regulations imposed.[144]

Although Chief Justice Roberts strained to defend his interpretation by claiming that "the discussion of benefits in [*Hellerstedt*] was not necessary to its holding,"[145]—and thus, presumably, dismissible as *dicta*—no other member of the Court embraced this interpretation. Justice Gorsuch, in a separate dissenting opinion, expressly took issue with the Chief Justice's interpretation, contending that "whatever else respect for *stare decisis* might suggest, it cannot demand allegiance to a nonexistent

---

[139] *Id.* at 2153-54.

[140] *Id.* at 2133 (Roberts, C.J., concurring in the judgment).

[141] *Id.* at 2133-34.

[142] *Id.* at 2136.

[143] *Id.* at 2134 (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 231 (1995) (plurality opinion)).

[144] *Id.* at 2138-39.

[145] *Id.* at 2139 n.3.

ruling inconsistent with the approach actually taken by the Court."[146]

The fractured majority decision in *June Medical* thus provided unclear and contestable guidance regarding the continuing precedential force of *Hellerstedt*. Four Justices voted to uphold that decision in its entirety while another four voted to overrule it, and the Chief Justice alone voted to accord precedential effect to its result while effectively excising a key portion of the majority's reasoning.

Three circuit courts of appeals—the United States Court of Appeals for the Fifth Circuit, the United States Court of Appeals for the Sixth Circuit, and the United States Court of Appeals for the Eighth Circuit—have concluded that Chief Justice Roberts's separate opinion provided the "narrowest grounds" of the Court's judgment for *Marks* purposes and therefore displaced the precedential rule announced in *Hellerstedt* to the extent that decision was inconsistent with the Chief Justice's reasoning.[147]

By contrast, the Seventh Circuit concluded that the Court's decision in *June Medical* did not disturb the undue-burden test articulated in *Hellerstedt*.[148] The Seventh Circuit concluded that the only "common ground between the plurality and the concurrence" in *June Medical* was that *Hellerstedt* "was entitled to stare decisis effect on essentially identical facts."[149] And because "[t]here was no majority to overrule" any portion of the *Hellerstedt* decision, the Seventh Circuit concluded that "that precedent stands as binding on lower courts unless and until a [Supreme] Court majority overrules it."[150]

The Seventh Circuit was correct to conclude that *June Medical* did not overrule or alter the precedential effect of *Hellerstedt*. The Eighth Circuit's contrary conclusion seems to have been driven by its assessment of Chief Justice Roberts's position as the median vote between the more extreme positions staked out by the plurality

---

[146] *Id.* at 2181 (Gorsuch, J., dissenting).

[147] Whole Woman's Health v. Paxton, 10 F.4th 430, 441-42 (5th Cir. 2021); EMW Women's Surgical Ctr., P.S.C. v. Friedlander, 978 F.3d 418, 437 (6th Cir. 2020); Hopkins v. Jegley, 968 F.3d 912, 915 (8th Cir. 2020).

[148] Planned Parenthood of Ind. & Ky. v. Box, 991 F.3d 740, 743-50 (7th Cir. 2021).

[149] *Id.* at 748.

[150] *Id.* at 749-50.

opinion and the dissent.[151] But while some courts and commentators have embraced this "fifth-vote" approach to the *Marks* rule,[152] it can lead to the kind of counterintuitive and undesirable results that Justice Gorsuch warned about in his *Ramos* opinion—empowering a single Justice to impose his or her own idiosyncratic view of the law and overturn prior precedent even if *no* other member of the Court agrees with that position.[153]

The Sixth Circuit offered a slightly different explanation for viewing the Chief Justice's opinion as the "narrowest," claiming that the results produced by Chief Justice Roberts's opinion reflected "a logical subset" of the results produced by the plurality's opinion.[154] The Sixth Circuit defended this "logical subset" test by claiming that "in that subset of cases, a majority of the Court . . . would necessarily agree with the result" produced by the "narrowest" opinion.[155] The Fifth Circuit adopted a similar rationale, concluding that because the Chief Justice agreed with the plurality's "substantial obstacle" analysis but "disagreed with . . . the plurality's . . . benefits analysis," the Chief Justice's opinion reflected a "common denominator" on which a majority of the Court implicitly agreed.[156]

The Sixth Circuit was correct to observe that all five Justices whose votes were necessary to the *June Medical* judgment would likely agree with the Chief Justice in any future case where his rationale would deem a regulation unconstitutional. But there was no such majority agreement with respect to other applications. To the contrary, the four Justices who joined in the plurality opinion would necessarily *disagree* with the Chief Justice in any future case where his preferred rationale would deem a restriction constitutional and the balancing methodology prescribed by

---

[151] *See Hopkins*, 968 F.3d at 915 (characterizing the Chief Justice's opinion as reflecting the "narrowest grounds" of the Court's judgment because his "vote was necessary in holding unconstitutional Louisiana's admitting-privileges law").

[152] *See* Williams, *supra* note 16, at 813-17. *See also* MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 124-41 (2000) (defending the fifth-vote approach).

[153] *See* Re, *supra* note 19, at 1977-80; Williams, *supra* note 16, at 815-17.

[154] EMW Women's Surgical Ctr., P.S.C. v. Friedlander, 978 F.3d 418, 430-31 (6th Cir. 2020).

[155] *Id.* at 431.

[156] Whole Woman's Health v. Paxton, 10 F.4th 430, 440-41 (5th Cir. 2021).

Hellerstedt would not.[157] The shared agreement approach limits the binding precedential force of such decisions to the subset of cases reflecting the majority's actual agreement, thus avoiding the prospect of according binding effect to a position supported by only a single Justice.

Of course, in *June Medical*, Roberts was not alone in rejecting the "balancing" test endorsed by the *Hellerstedt* majority, as all four of the dissenters supported the same view.[158] Some commentators have urged courts to take such dissenting views into account in determining the precedential effect of plurality decisions.[159] But according precedential weight to dissenting opinions conflicts with longstanding principles that limit the precedential authority of a decision to views that were actually necessary to (or at least, in some way contributed to) the Court's judgment.[160] The four dissenters in *June Medical* disagreed with the Court's judgment declaring the challenged Louisiana regulations unconstitutional.[161] Their views were thus wholly unnecessary to that judgment and did not contribute to it in any way. Focusing only on the opinions that actually help to explain why the Court rendered the particular judgment it did, Chief Justice Roberts stands alone in rejecting the balancing test prescribed by *Hellerstedt*.

If Chief Justice Roberts's opinion in *June Medical* is read as urging the overruling of *Hellerstedt*'s reasoning (while leaving its result intact), then his opinion occupies a position very much like that of the concurring opinion in *Hein*.[162] And for reasons discussed

---

[157] *Cf.* Re, *supra* note 19, at 1983 ("[E]ndorsement of a 'broader' proposition does not necessarily or logically entail an implicit endorsement of any 'narrower' proposition."); Adam Steinman, *Nonmajority Opinions and Biconditional Rules*, 128 YALE L.J.F. 1, 9-17 (2018) (explaining that a superset-subset relationship can never obtain where two opinions express different biconditional rules).

[158] *See* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2182 (2020) (Kavanaugh, J., dissenting) ("Today, five Members of the Court reject the [*Hellerstedt*] cost-benefit standard."). *See also* Whole Woman's Health v. Paxton, 972 F.3d 649, 654 (5th Cir. 2020) (Willett, J., dissenting) (pointing to this agreement as a basis for treating the Chief Justice's opinion as precedential).

[159] *See, e.g.*, Nina Varsava, *The Role of Dissents in the Formation of Precedent*, 14 DUKE J. CONST. L. & PUB. POL'Y 285, 288-89 (2019); Michael L. Eber, Comment, *When the Dissent Creates the Law: Cross-Cutting Majorities and the Prediction Model of Precedent*, 58 EMORY L.J. 207, 208 (2008).

[160] *See* Williams, *supra* note 16, at 818-19, 845-47.

[161] *June Med. Servs.*, 140 S. Ct. at 2153-54 (Alito, J., dissenting).

[162] *See supra* Section II.B.

above in connection with that case, an opinion joined by less than a majority of the Court's members should not be read to overrule or alter a prior majority-supported precedent.[163] On this reading, the "balancing" approach prescribed by the *Hellerstedt* majority and endorsed by the plurality in *June Medical* would remain the controlling legal standard.

The only potential wrinkle in this conclusion stems from Roberts's suggestion that the consideration of benefits may not have been "necessary" to the Court's decision in *Hellerstedt*.[164] Although the Supreme Court typically accords precedential effect to both the result as well as the reasoning on which its decisions are based, it has cautioned that only "those portions of the opinion necessary to [the] result" are entitled to binding effect.[165] If one were convinced by the Chief Justice's characterization of *Hellerstedt*, the rationale reflected in his concurrence would not necessarily be foreclosed by *Hellerstedt* because the binding *holding* of that decision (rather than its *dicta*) would leave open Roberts's preferred path.

But as Justice Gorsuch emphasized in his separate dissent, Roberts's manipulation of the holding/*dicta* distinction fails to provide a plausible account of the majority's actual reasoning in *Hellerstedt*.[166] The *Hellerstedt* majority was clear that it viewed the *Casey* undue burden framework as requiring an assessment of *both* the claimed benefits of a challenged regulation as well as the burdens it imposes.[167] This methodological framework thus seems inseparable from the majority's conclusion that each of the challenged regulations in that case "constitute[d] an undue burden on abortion access" under *Casey* and thus "violate[d] the Federal

---

[163] *See supra* text accompanying notes 65-70.

[164] *June Med. Servs.*, 140 S. Ct. at 2139 n.3 (Roberts, C.J., concurring in the judgment).

[165] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 67 (1996). *See also* Tyler v. Cain, 533 U.S. 656, 663 n.4 (2001) (describing statements unnecessary to the result as "dictum, which is not binding").

[166] *See June Med. Servs.*, 140 S. Ct. at 2180-81 (Gorsuch, J., dissenting).

[167] *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016) ("The rule announced in *Casey*, however, requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer."). *See also id.* at 2310 (concluding that the district court "applied the correct legal standard" when it "weighed the asserted benefits [of the challenged regulations] against the burdens").

Constitution."[168] Neither the Chief Justice's disagreement with the *Hellerstedt* majority's reading of *Casey* nor the possibility that the *Hellerstedt* majority might have reached the same result under a different legal standard deprives their chosen rationale of binding precedential effect.

In any event, even if one were convinced by the Chief Justice's narrow reading of *Hellerstedt*, this would not render his sole opinion binding on lower courts. Rather, under the shared agreement approach, later courts would be left with a *choice* between the reasoning reflected in Roberts's sole opinion and the reasoning endorsed by the plurality, which, as noted above, both endorsed and applied the *Hellerstedt* balancing framework. Later courts should only follow the Roberts approach if they are convinced, on the merits, that his preferred rationale offers a more coherent and persuasive reading of *Hellerstedt*, *Casey*, and the broader universe of background precedent and other legal materials relevant to the Court's decision.

In other words, under the shared agreement approach, a plurality decision leaves the precedential status of a prior majority-supported precedent untouched *unless* the deciding majority, whose votes are collectively necessary to the case outcome, agree that the earlier precedent should be overruled or altered. Because there was no such majority agreement on overruling in *June Medical* (at least among the particular Justices whose votes were necessary to the judgment), the precedential status of *Hellerstedt* was exactly the same the day after the Court handed down its decision in *June Medical* as it had been the day before.

CONCLUSION

The Supreme Court's recent decisions illustrate the confusion that continues to swirl around plurality precedent. *Ramos* demonstrates that the Justices cannot agree on the precedential significance of plurality decisions or their relationship to prior, majority-supported precedent. At the same time, both *Ramos* and

---

[168] *Id.* at 2300. *See also* County of Allegheny v. Am. C.L. Union, Greater Pittsburgh Chapter, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law.").

June Medical demonstrate that the Court is either unable or unwilling to refrain from issuing new plurality decisions, imposing upon lower courts the burden of sorting out how these decisions affect the preexisting framework of binding precedent. The shared agreement approach suggests a simple solution to this puzzle—namely, that a plurality decision alters the precedential framework applicable to later courts' decisions only if, and only to the extent that, such alteration was actually agreed upon by a majority of the Justices and such agreement was actually necessary to explain the Court's judgment.