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JUNE MEDICAL AND THE MARKS RULE

Owen P. Toepfer*

*Why then Ile fit you. Hieronimo's mad againe.*¹

INTRODUCTION

In Thomas Kyd's early Elizabethan play, *The Spanish Tragedy*, Don Hieronimo—a member of the King of Spain's court—seeks to exact revenge on the men who murdered his son, Horatio.² When courtiers ask Hieronimo to stage a play for them, he uses the opportunity to avenge his son in his madness.³ Because the murderers do not know that Hieronimo has found them out, he is able to convince them to be actors in the play.⁴ Hieronimo suggests that each actor in the play speak a different language, and he replaces the prop daggers with real daggers with which he murders the murderers during the performance.⁵ After the play, Hieronimo cuts his own tongue out so that he cannot speak under torture.⁶ A similar drama unfolds with respect to the *Marks* rule and a recent Supreme Court case, *June Medical Services L.L.C. v. Russo*.⁷

Over forty years ago in *Marks v. United States*, the Supreme Court held 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 position taken by those Members who concurred

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1 T.S. ELIOT, *THE WASTE LAND* at l.431 (1922).

2 See THOMAS KYD, *THE SPANISH TRAGEDY* 95–99, 112 (Michael Neill ed., W.W. Norton & Co. 2014) (c. 1582).

3 See *id.* at 95.

4 See *id.* at 96.

5 See *id.* at 99–100, 106.

6 See *id.* at 112; see also PETER B. MURRAY, *THOMAS KYD* 139–40 (Sylvia E. Bowman ed., 1969) (positing that Hieronimo's suggestion to have each character speak a different language allows him to speak freely about his revenge plot without the other courtiers understanding him and makes the court into a neo-Babel, marked by mutual incomprehension and confusion).

7 140 S. Ct. 2103 (2020).

in the judgments on the narrowest grounds.’”⁸ For example, in a 4–1–4 decision (i.e., *plurality-concurrence-dissent*), the single-Justice concurrence will become binding precedent if it is the “narrowest” of the two opinions supporting the judgment—even though the four-Justice plurality commanded more votes.

Academics have decried the *Marks* rule as uneconomical, not administrable, and likely to create confusion among lower courts.⁹ Among judges, *Marks* analysis has come to be known as a “vexing task.”¹⁰ Indeed, no agreement exists among the federal circuit courts of appeals on the definition of “narrowest,”¹¹ nor has the Supreme Court offered guidance by defining the term—likely due in part to the fact that the Justices themselves often cannot agree on how *Marks* applies.¹² The confusion has led to the proliferation of “*Marks* disputes”¹³ and a number of circuit splits.¹⁴ And as with any doctrine whose content is contested and underdetermined among lower courts, the single most outcome-determinative factor in a *Marks*-implicated case may simply be the circuit that is deciding it.

A contingent of academics has recently been asking the Court to abolish—or at least clarify or alter—the *Marks* rule in recent years.¹⁵ In the face of such supplication, the Court continues to cite the rule with approval and without instruction on how to apply it.¹⁶ In its 2018, 2019, and 2020 opinions, the Court cited the rule four times in total¹⁷—a relatively high rate of citational recurrence in the U.S. Reports.¹⁸ The Court, Hieronimo-like, has

8 430 U.S. 188, 193 (1977) (plurality opinion) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

9 See Section I.C for a review of the various critiques of the *Marks* rule.

10 *EMW Women’s Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 431 (6th Cir. 2020) (quoting *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 133 (6th Cir. 1994)).

11 See *infra* Section II.A.

12 See, e.g., *Ramos v. Louisiana*, 140 S. Ct. 1390, 1403 (2020) (Gorsuch, J.) (“The dissent contends that . . . we risk defying *Marks v. United States*. . . . The parties realize what the dissent does not: *Marks* has nothing to do with this case.”). In 2017 the Supreme Court granted review in a case in order to clear up what the *Marks* rule entails, but the Court ultimately resolved the case on other grounds and did not touch the *Marks* question. See *Hughes v. United States*, 138 S. Ct. 1765, 1771–72 (2018).

13 See *Ramos*, 140 S. Ct. at 1403 (defining a “*Marks* dispute” as a suit “where the litigants duel over which opinion represents the narrowest and controlling one”).

14 See, e.g., *Hughes*, 138 S. Ct. at 1771–72 (reviewing the circuit split created by various *Marks* analyses of the Court’s split decision in *Freeman v. United States*, 564 U.S. 522 (2011)).

15 See *infra* Section I.C.

16 But see *Hughes*, 138 S. Ct. at 1778–79 (Sotomayor, J., concurring) (abandoning her views expressed in concurrence in *Freeman*, 564 U.S. at 534–44, which certain courts found to be narrowest under *Marks*, because they had “contributed to ongoing discord among the lower courts, [and] sown confusion among litigants.”).

17 See *id.* at 1771; *Bucklew v. Precythe*, 139 S. Ct. 1112, 1121 (2019); *Ramos*, 140 S. Ct. at 1403; *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2135 n.1 (2020) (Roberts, C.J., concurring in the judgment).

18 In comparison, the Supreme Court cited *Miranda v. Arizona*, 384 U.S. 436 (1966), a well-known and oft-cited case, only three times in the same span of time. See *Ramos*, 140 S.

left lower courts in *Babel* and bitten out its tongue, refusing (for now) to clarify the meaning of “narrowest.”

If one thing is clear, it is that the *Marks* rule is not going anywhere anytime soon.¹⁹ Lower courts must continue to contend with that one consequential word: *narrowest*. Courts are already doing so with respect to one recent Supreme Court case from the 2019 term, *June Medical Services L.L.C. v. Russo*, a 4–1–4 decision in which a majority of the Justices invalidated a Louisiana admitting privileges law called Act 620.²⁰ Act 620 required every Louisiana abortion provider to obtain admitting privileges at a hospital within a thirty-mile radius of the clinic at which he or she performed or induced abortions.²¹ Abortion providers brought a facial challenge questioning the constitutionality of Act 620, which was nearly identical to a Texas statute that the Supreme Court invalidated in *Whole Woman’s Health v. Hellerstedt* in 2016.²²

In his plurality opinion joined by three other Justices, Justice Breyer voted to invalidate Act 620 by applying the benefits-burdens balancing test, which he believes *Whole Woman’s Health v. Hellerstedt* requires.²³ Chief Justice Roberts, in a concurring opinion written for himself alone, supplied the fifth judgment-supportive vote necessary for the law’s invalidation, but he instead invoked *stare decisis* and applied the undue burden standard of *Planned Parenthood of Southeastern Pennsylvania v. Casey*²⁴ as applied by *Whole Woman’s*

Ct. at 1412; *Collins v. Virginia*, 138 S. Ct. 1663, 1678 n.5 (2018); *Wilson v. Sellers*, 138 S. Ct. 1188, 1194 (2018).

19 A corollary derived from the inverse of the legal maxim *cessante ratione legis, cessat lex ipsa* would be *vivente ratione legis, vivit lex ipsa*: as long as the law’s rationale endures, so does the law. The animating rationale for the *Marks* rule—that a case ought to generate a “single legal standard for the lower courts to apply in similar cases”—will obviously never go away. *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 693 (3d Cir. 1991), *aff’d in part and rev’d in part*, 505 U.S. 833 (1992). The question is whether there is a better standard by which to divine a split decision’s “single legal standard.” *Id.*

20 *June Med.*, 140 S. Ct. at 2113, 2134.

21 LA. STAT. ANN. § 1061:10 (2016), *invalidated by June Med.*, 140 S. Ct. at 2113, 2134.

22 136 S. Ct. 2292, 2318 (2016). *Compare* LA. STAT. ANN. § 1061:10(A)(2) (“On the date the abortion is performed or induced, a physician performing or inducing an abortion shall [h]ave active admitting privileges at a hospital that is located not further than thirty miles from the location at which the abortion is performed or induced and that provides obstetrical or gynecological health care services.”), *with* TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a) (West 2013), *invalidated by Whole Woman’s Health*, 136 S. Ct. at 2318 (“A physician performing or inducing an abortion must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that is located not further than 30 miles from the location at which the abortion is performed or induced and provides obstetrical or gynecological health care services.”).

23 *June Med.*, 140 S. Ct. at 2112–13 (“In *Whole Woman’s Health v. Hellerstedt* . . . [the Court] explained that [*Casey*’s undue-burden] standard requires courts independently to review the legislative findings upon which an abortion-related statute rests and to weigh the law’s ‘asserted benefits against the burdens’ it imposes on abortion access.” (quoting *Whole Woman’s Health*, 136 S. Ct. at 2310)).

24 505 U.S. at 874.

Health.²⁵ Crucially, the Chief Justice disagrees with the plurality's contention that *Whole Woman's Health* augmented *Casey*'s undue burden standard.²⁶

This Note, proceeding in three parts, describes the history of the Court's abortion jurisprudence, evaluates the current state of the *Marks* rule, and demonstrates that Chief Justice Roberts's concurrence in *June Medical* is the controlling opinion for *Marks* purposes under each definition of "narrowest" that several federal circuit courts of appeals employ. Part I first traces the historical arc of abortion jurisprudence from *Roe v. Wade* to *June Medical* and thereafter provides background on the history of and academic reactions to the *Marks* rule. Part II considers the various approaches to the *Marks* rule taken by the several federal circuits and how each approach would treat the *Marks* dispute that *June Medical* presents. Part III then considers further the potential implications, immediate and remote, of the application of the *Marks* rule to *June Medical* and of the conclusion that the Chief Justice's concurrence has the strongest claim to precedential effect.

I. BACKGROUND

A. *A Ballad of Battling Standards: Abortion Jurisprudence Before June Medical*

Unlike many of the landmark abortion cases in the United States, *June Medical* did not really announce any new standard of review for evaluating abortion restrictions—it was simply about application of precedent to a set of facts. Yet the decision to apply or not to apply the benefits-burdens standard of *Whole Woman's Health*²⁷ to Louisiana's admitting privileges law was necessarily going to be a consequential one, seeing that Justice Breyer's view of the *Whole Woman's Health* standard is broader than some of the standards that came before it, like the undue burden standard of *Casey*.²⁸ Given that the central disagreement between the plurality and concurrence in *June Medical* is what *exactly* the proper standard of review for challenged abortion restrictions is, a brief overview of the relevant caselaw is in order.

1. *Roe v. Wade* and Strict Scrutiny

Before the landmark Supreme Court case of *Roe v. Wade*²⁹ in 1973, state legislatures were generally free to regulate abortion in whatever ways they saw fit: abortion was either outlawed or significantly restricted in forty-six U.S.

25 *June Med.*, 140 S. Ct. at 2134–35 (Roberts, C.J., concurring in the judgment).

26 *Id.* ("In *Whole Woman's Health v. Hellerstedt*, the Court concluded that Texas's admitting privileges requirement 'places a *substantial obstacle* in the path of women seeking a previability abortion' and therefore violated the Due Process Clause of the Fourteenth Amendment." (quoting *Whole Woman's Health*, 136 S. Ct. at 2300) (emphasis added) (citation omitted)).

27 136 S. Ct. 2292 (2016).

28 See *infra* subsection I.A.2.

29 410 U.S. 113 (1973).

states.³⁰ In a single move, the Supreme Court would “[sweep] aside all of these laws and replace[] them with a new rule and regulatory framework of its own making,”³¹ thus hatching the jurisprudential beast—often morphing, never fully fledged—that was to grow into U.S. abortion law.

The Supreme Court in *Roe v. Wade* declared for the first time that abortion restrictions implicate an unenumerated, fundamental right to privacy grounded in the Due Process Clause of the Fourteenth Amendment.³² Such reasoning would have seemed fantastic and shocking had not the path been cleared for such jurisprudential innovation by a few prior decisions. It was against a backdrop of Supreme Court cases that gradually situated certain family matters within the protective reach of the right to privacy that the Court decided that abortion ought to receive similar protection.³³

The case most demonstrative of the sort of creative reasoning that cleared the way for *Roe* is *Griswold v. Connecticut*, in which the Court found a right to privacy in the “penumbras” created by the “emanations” of no fewer than five Amendments in the Bill of Rights: the First, Third, Fourth, Fifth, and Ninth.³⁴ The *Griswold* Court found that a law restricting the use of contraceptives was unconstitutional, as it violated this right to privacy.³⁵ Eight years later, the *Roe* Court held that the right to privacy also protected the right to abortion—but the right was no longer penumbral (at least in the context of abortion).³⁶ Rather, the Court (unconfidently) found the right to privacy buried in the Fourteenth Amendment’s procedural guarantees.³⁷

30 O. CARTER SNEAD, WHAT IT MEANS TO BE HUMAN: THE CASE FOR THE BODY IN PUBLIC BIOETHICS 110–11 (2020).

31 *Id.* at 111.

32 *Roe*, 410 U.S. at 153 (“This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”).

33 This right to privacy resists encroachment by the State. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (education and rearing of children); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541–42 (1942) (procreation); *Prince v. Massachusetts*, 321 U.S. 158, 165–66 (1944) (family relationships); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (contraception) (noting that “[v]arious guarantees [explicit or implicit in the Bill of Rights] create zones of privacy”); *Loving v. Virginia*, 388 U.S. 1, 2, 12 (1967) (interracial marriage).

34 *Griswold*, 381 U.S. at 484. But see Robert J. Pushaw, Jr., *Partial-Birth Abortion and the Perils of Constitutional Common Law*, 31 HARV. J.L. & PUB. POL’Y 519, 531 (2008) (calling penumbral reasoning a “transparently fictional” process).

35 *Griswold*, 381 U.S. at 485–86.

36 See *supra* note 32 and accompanying text.

37 “No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .” U.S. CONST. amend. XIV, § 1. Finding such a right required invocation of the doctrine of “substantive due process” which holds that the enumerated procedural rights of the Fourteenth Amendment implicate unenumerated substantive rights. For a summary of the development of substantive due process in the twentieth century, see generally Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63 (2006). For the Court’s unconfident language, see *supra* note 32 and accompanying text.

By placing a woman's decision to terminate her pregnancy within the "fundamental right[]" of privacy, the Court ensured that the proper standard of judicial review for abortion restrictions would be "strict scrutiny"—the highest and most stringent standard of review.³⁸ Under a strict scrutiny regime, a Court may only find justification for legislative regulation of a fundamental right if there is a "compelling state interest" in regulating that right.³⁹ Such regulation, moreover, must be "narrowly drawn to express only the legitimate state interests at stake."⁴⁰ Most challenged laws do not survive strict scrutiny.⁴¹

In the context of abortion, the Court in *Roe* contemplated that "[a]t some point in pregnancy" the state attains interests (which become increasingly compelling throughout gestation) in "[maternal] health, in maintaining medical standards, and in protecting potential [human] life."⁴² According to *Roe's* (now inoperative) trimester framework, a state could not regulate abortion before the end of the first trimester.⁴³ After "approximately the end of the first trimester," a state's interest in maternal health would be sufficiently "compelling" to justify regulating abortion in ways related to maternal health.⁴⁴ And after fetal viability, a state's interest in potential life would be sufficiently "compelling" to justify regulation and prescription of most abortions.⁴⁵ This last directive has become known as *Roe's* "central holding"—i.e., that a state cannot ban "nontherapeutic" abortions before fetal viability.⁴⁶

The thread of *Roe's* central holding weaved its way through the abortion cases that percolated up to the Supreme Court in the 1970s and '80s,⁴⁷ but there eventually came a point where the Court seemed to "retreat" from *Roe's* jurisprudentially extreme recognition of abortion as a fundamental right

38 *Roe v. Wade*, 410 U.S. 113, 153, 155 (1973); SNEAD, *supra* note 30, at 115.

39 *Roe*, 410 U.S. at 155 (quoting *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627 (1969)).

40 *Id.*

41 SNEAD, *supra* note 30, at 115. Indeed, it is so difficult for a law to survive strict scrutiny that Professor Gerald Gunther famously called the standard "'strict' in theory and fatal in fact." Gerald Gunther, Foreword, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). *But see* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 796 (2006) (finding that about thirty percent of challenged laws survive strict scrutiny).

42 *Roe*, 410 U.S. at 154, 163.

43 *Id.* at 163.

44 *Id.* at 162–63.

45 *See id.* at 163–64.

46 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 860 (1992).

47 *See, e.g., Webster v. Reprod. Health Servs.*, 492 U.S. 490, 516 (1989); *Simopoulos v. Virginia*, 462 U.S. 506, 510–11 (1983); *Bellotti v. Baird*, 443 U.S. 622, 639 (1979); *Beal v. Doe*, 432 U.S. 438, 445–46 (1977); *Poelker v. Doe*, 432 U.S. 519, 520 (1977) (*per curiam*); *Planned Parenthood v. Danforth*, 428 U.S. 52, 55–56 (1976).

without actually overruling the case.⁴⁸ The Court's apparent and increasing discomfort with its practice of "impos[ing] . . . its own, extraconstitutional value preferences"⁴⁹ in abortion cases under *Roe's* strict scrutiny regime became so acute that *Roe* was destined for an overhaul.

2. *Casey* and the Undue Burden Standard

Almost twenty years after *Roe v. Wade*, the Supreme Court in *Casey*⁵⁰ reaffirmed *Roe's* "central holding"⁵¹ but shifted away from the "privacy" rationale and downgraded the right to abortion from a fundamental right to a "protected liberty."⁵² Thus, the Court had to fashion a lower standard of review for challenged abortion regulations: the "undue burden" standard.⁵³ The Court held that an "undue burden" exists where a law places a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."⁵⁴ Any such law, the Court held, is unconstitutional. Conversely, a law serving a "valid purpose" that does not impose a substantial obstacle is constitutional even if it "has the incidental effect of making it more difficult or more expensive to procure an abortion."⁵⁵

At issue in *Casey* were five provisions of the Pennsylvania Abortion Control Act of 1982.⁵⁶ The majority found that only one of these—the spousal notification requirement—imposed an undue burden and was therefore invalid.⁵⁷ Justice Blackmun (who authored the majority opinion in *Roe*) dissented.⁵⁸ He would have applied strict scrutiny and invalidated all five provi-

48 Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from Roe v. Wade*, 138 U. PA. L. REV. 83, 83–84 (1989) (arguing that *Webster* "eviscerate[d] *Roe* without explicitly overruling the case" by suggesting that "the abortion right [was] no longer fundamental").

49 *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 794 (1986) (White, J., dissenting).

50 505 U.S. 833 (1992).

51 The *Casey* Court announced that *Roe's* central holding was "that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." *Id.* at 860 (plurality opinion).

52 *Id.* at 876.

53 *Id.*

54 *Id.* at 876, 878 ("In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.").

55 *Id.* at 874.

56 *Id.* at 844. 18 PA. CONS. STAT. § 3205 (1989) required informed consent of the woman seeking an abortion; *id.* § 3206 (amended 1992) required informed consent of a parent of a minor seeking an abortion (with the possibility of a judicial bypass); *id.* § 3209, *invalidated by Casey*, 505 U.S. at 895, required a woman to notify her husband that she was seeking an abortion; *id.* § 3203 excused compliance with the foregoing requirements in the case of a "medical emergency"; and *id.* §§ 3207(b) (1988), 3214(a), and 3214(f) imposed reporting requirements on abortion clinics.

57 *Casey*, 505 U.S. at 887–95.

58 *Roe v. Wade*, 410 U.S. 113, 116 (1973).

sions.⁵⁹ Justice Blackmun’s alternative conclusion demonstrates just how vast the difference between strict scrutiny and the undue burden standard is.

3. *Whole Woman’s Health* and the Benefits-Burdens Test

Fast forward twenty-four years more, and a new standard emerges—or, rather, an old standard evolves. At least it may seem so. In *Whole Woman’s Health*, Justice Breyer—joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan—purported to apply *Casey*’s undue burden standard to invalidate two Texas abortion laws, one requiring abortion providers to have admitting privileges and one requiring abortion clinics to meet certain safety standards.⁶⁰ But the majority’s decision came by way of a novel interpretation of the undue burden standard: “The rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.”⁶¹

Yet any reasonable reading of *Casey* would not lead one to conclude the undue burden standard necessarily requires this “grand ‘balancing test in which unweighted factors mysteriously are weighed.’”⁶² And even if judges could faithfully and fairly conduct such a balancing test, it flies in the face of the very standard—i.e., the undue burden standard—that it purports to be an elaboration of. For example, a law that poses no substantial obstacle on abortion access, which would be otherwise valid under *Casey*, may violate the benefits-burdens test if a court is unsatisfied with the benefits that flow from the law as compared to the law’s burdens. The Court, then, seemed to apply a standard somewhere in between the undue burden standard and strict scrutiny.

A plausible explanation for the innovation is that the majority was intending to augment the undue burden standard with a stricter test that would be more difficult for abortion regulations to pass. Professor Jonathan Siegel has described the mechanism of judicially crafted standard-shifting:

In some areas, as the law shifts from one legal rule to another, the new rule does not immediately oust the old rule in a single, cataclysmic case. Rather, the new rule first emerges as a supplement to the old rule. Only later does it become clear that the new rule has supplanted the old rule.⁶³

Also of note is Justice Breyer’s misstatement of the *Casey* standard. He wrote that “viability”⁶⁴ is the “relevant point at which a State may begin limiting

59 *Casey*, 505 U.S. at 926 (Blackmun, J., dissenting in part).

60 *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309, 2313, 2318 (2016); TEX. HEALTH & SAFETY CODE ANN. §§ 171.0031(a) (West 2015); 245.010(a) (West 2013), *invalidated by Whole Woman’s Health*, 136 S. Ct. at 2318.

61 *Whole Woman’s Health*, 136 S. Ct. at 2309.

62 *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2135 (2020) (Roberts, C.J., concurring in the judgment) (quoting *Marrs v. Motorola, Inc.*, 577 F.3d 783, 788 (7th Cir. 2009)).

63 Jonathan R. Siegel, *Injury in Fact and the Structure of Legal Revolutions*, 68 VAND. L. REV. EN BANC 207, 208 (2015).

64 *Whole Woman’s Health*, 136 S. Ct. at 2320 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992)).

women's access to abortion for reasons unrelated to maternal health."⁶⁵ But the passage in *Casey* that he cited to support his reading stipulated that the State may regulate abortion before viability in the name of certain state interests as long as those regulations do not impose an undue burden.⁶⁶

Whether or not the *Whole Woman's Health* majority was intending such a jurisprudential sleight of hand, the plurality in *June Medical*, discussed below, makes clear that the Justices who had signed onto Breyer's opinion in *Casey* thought they had indeed augmented the standard. From the standard-shifting perspective, Chief Justice Roberts's concurrence in *June Medical* takes on a new light.

4. *June Medical* and . . . Which Standard?

In *June Medical*, Justice Breyer—joined in plurality by Justices Ginsburg, Kagan, and Sotomayor—along with Chief Justice Roberts (concurring) invalidated Louisiana's admitting privileges law, Act 620.⁶⁷ The plurality of the Court sought to do so by applying the benefits-burdens standard of *Whole Woman's Health*. Recall that in *Whole Woman's Health* the Court seemed to scrutinize a challenged abortion law by weighing the law's "asserted benefits against the burdens" it imposed on access to abortion.⁶⁸

Justice Breyer concluded in *June Medical* that the record supported the district court's finding that "the statute did not further the State's asserted interest in protecting women's health" on the one hand and that the statute placed an undue burden on access to abortion because of its anticipated effect of forcing abortion clinics to close.⁶⁹ According to Justice Breyer, there was no real benefit, and the burden was clear.⁷⁰ The scales tipped in favor of invalidation. But Justice Breyer's opinion was only a plurality opinion and by itself would not have been enough to invalidate Louisiana's law.

In his concurring opinion, Chief Justice Roberts offered the necessary fifth vote for invalidation—but he rejected Justice Breyer's application of the benefits-burdens standard. Chief Justice Roberts restated his view that *Whole*

⁶⁵ *Id.*

⁶⁶ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (speaking of "the State's profound interest in potential life" and "the health *or safety* of a woman seeking an abortion" (emphasis added)). Put another way, *Casey* held:

Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose.

Id. at 877; see also SNEAD, *supra* note 30, at 161.

⁶⁷ *June Med.*, 140 S. Ct. at 2112, 2133. Note that by this time Justice Kavanaugh had replaced Justice Kennedy, who signed onto the majority opinion in *Casey*. See *supra* note 57 and accompanying text.

⁶⁸ *Whole Woman's Health*, 136 S. Ct. at 2310.

⁶⁹ *June Med.*, 140 S. Ct. at 2112.

⁷⁰ *Id.*

Woman's Health was wrongly decided,⁷¹ but, invoking stare decisis, he opted to apply it to the similar facts of *June Medical*.⁷² The catch was that the Chief Justice argued that the Court in *Whole Woman's Health* clearly only intended to apply the undue burden standard of *Casey*—not create a balancing test meant to replace *Casey's* standard.⁷³ Since Louisiana's admitting privileges law "burden[ed] women seeking previability abortions to the same extent as the Texas law [invalidated in *Whole Woman's Health*]," stare decisis compelled Chief Justice Roberts to concur in the judgment that the law is unconstitutional.⁷⁴

Crucially, the Chief Justice distinguished *Whole Woman's Health's* judgment from its rationale. He was able to concur with the plurality because the facts of *June Medical*, on his view, were so similar to those in *Whole Woman's Health* that stare decisis recommended the same judgment here. With respect to *Whole Woman's Health's* rationale, however, he differed from the plurality:

In this case, *Casey's* requirement of finding a substantial obstacle before invalidating an abortion regulation is therefore a sufficient basis for the decision, as it was in *Whole Woman's Health*. In neither case, nor in *Casey* itself, was there call for consideration of a regulation's benefits, and nothing in *Casey* commands such consideration. Under principles of stare decisis, I agree with the plurality that the determination in *Whole Woman's Health* that Texas's law imposed a substantial obstacle requires the same determination about Louisiana's law. Under those same principles, I would adhere to the holding of *Casey*, requiring a substantial obstacle before striking down an abortion regulation.⁷⁵

The critical distinction between judgment and rationale resurfaces throughout the discussion of how *Marks* applies to *June Medical* below.

So how does *Marks* apply to *June Medical*? Where does *June Medical* leave the state of abortion law? Does *Whole Woman's Health's* benefits-burdens standard, as applied by *June Medical's* plurality, govern? Or has the Chief Justice dialed the law back to *Casey's* substantial obstacle/undue burden standard? Indeed, did *Whole Woman's Health* even modify *Casey's* standard in the first place? To pick back up the analogy to *The Spanish Tragedy*, the Court, like Hieronimo, has perpetuated the semantic confusion regarding "narrowest"

71 *Id.* at 2133 (Roberts, C.J., concurring in the judgment). Chief Justice Roberts joined Justice Alito's dissenting opinion in *Whole Woman's Health*, 136 S. Ct. at 2330.

72 *June Med.*, 140 S. Ct. at 2134 (Roberts, C.J., concurring in the judgment) ("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.").

73 *Id.* at 2138–39 ("We should respect the statement in *Whole Woman's Health* that it was applying the undue burden standard of *Casey*. . . . The Court explicitly stated that it was applying 'the standard, as described in *Casey*,' and reversed the Court of Appeals for applying an approach that did 'not match the standard that this Court laid out in *Casey*.'" (quoting *Whole Woman's Health*, 136 S. Ct. at 2309–10)).

74 *Id.* at 2141–42.

75 *Id.* at 2139.

among lower courts, the players, in the face of supplications for clarity.⁷⁶ The Court has initiated the drama, knowing that the lower courts are likely to disagree with respect to which opinion is narrowest. Fortunately, the *Marks* rule answers most of the stare decisis questions that *June Medical* leaves in its wake. To see how, an overview of the history and application of the *Marks* rule is necessary.

B. *The Marks Rule and Narrowest Grounds*

One of the foundational principles of the doctrine of stare decisis is that a Supreme Court opinion generally does not assume precedential effect unless a majority of the Justices endorses a single rule of decision.⁷⁷ The doctrine has few exceptions, and perhaps no exception seems more contrary to the established modes of precedent generation than the *Marks* rule. The *Marks* rule dictates that, in a split Supreme Court decision, the opinion representing the narrowest grounds for concurring in the judgment binds lower courts on future questions of law.⁷⁸ The unique nature of the *Marks* mechanism of precedent generation as well as the increasing frequency with which courts apply the rule warrants an explanation of the rule's history.⁷⁹

Stanley Marks and his codefendants were charged with violating federal obscenity laws. Between the time they committed the crimes and the commencement of their trial, the Supreme Court decided *Miller v. California*, which announced “guidelines to isolate ‘hard core’ pornography from expression protected by the First Amendment.”⁸⁰ *Miller's* guidelines were far less favorable to Marks and company than the older standard of *Memoirs v. Massachusetts*, which exempted material that possessed “redeeming social

76 This is not to say that there are no good reasons for leaving questions like this one unresolved for a time. One of the obvious benefits of the jurisdictional separation of the several federal circuits is that each circuit is a sort of jurisprudential “laboratory.” The several circuits, all laboring to solve the same problem with diverse approaches, may in this way efficiently find workable answers to certain questions.

77 See 18 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 134.03[2] (Daniel R. Coquillette, Gregory P. Joseph, Sol Schreiber, Georgene M. Vairo & Chilton Davis Varner eds., 3d ed.), LEXIS (database updated 2020). On lower courts, the precedent set by Supreme Court on questions of law is binding. See *id.* § 134.01[1]. The Supreme Court itself, however, adheres to precedent only as a matter of policy and has the power to overrule previous decisions. See, e.g., *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (“[S]tare decisis is not an inexorable command.” (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991))). For a thorough overview of the doctrine of stare decisis, see generally Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411 (2010).

78 *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976) (plurality opinion)).

79 See Richard M. Re, *Beyond the Marks Rule*, 132 HARV. L. REV. 1943, 1951–65 (2019) (demonstrating increasing citations to *Marks* in opinions of the Supreme Court, federal courts of appeals, and even state courts of appeals). One of the more curious features of the *Marks* rule is that it has “jumped the federalism barrier.” *Id.* at 1944.

80 413 U.S. 15, 29 (1973).

value” from the obscenity laws.⁸¹ The question for the Supreme Court was whether retroactive application of the *Miller* guidelines in *Marks*’s trial constituted a violation of any right protected by the Due Process Clause of the Fifth Amendment.⁸² The Court determined that the *Memoirs* standard was appropriate, but there was a problem: the majority in *Memoirs* split 3–2–1 on the reasoning.

In *Memoirs*, Justice Brennan, joined by two other members, held that an obscene book must have “redeeming social importance” in order to fall within the protective reach of the First Amendment.⁸³ Justice Black and Justice Douglas concurred in the judgment, but they reasoned that the First Amendment protects *all* obscene materials from government interference.⁸⁴ Justice Stewart also concurred, reasoning that only “hard-core pornography”⁸⁵ may be suppressed.⁸⁶ In holding that Justice Brennan’s *Memoirs* plurality was binding, the Court in *Marks* relied on previous interpretive practice and announced its eponymous rule: “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’”⁸⁷

C. *The Critics and the Advocates*

While most scholars of the *Marks* rule criticize it to varying degrees,⁸⁸ there is a growing body of literature defending the rule.⁸⁹ The major criti-

81 *Memoirs v. Massachusetts*, 383 U.S. 413, 418–19 (1966) (plurality opinion).

82 *Marks*, 430 U.S. at 189–93.

83 *Memoirs*, 383 U.S. at 421.

84 *Id.* at 421 (noting that Justice Black concurred in *Memoirs* for the reasons stated in *Ginzburg v. United States*, 383 U.S. 463, 476 (1966) (Black, J., dissenting), and *Mishkin v. New York*, 383 U.S. 502, 515 (1966) (Black, J., dissenting)); *id.* at 426–27 (Douglas, J., concurring); *see also Ginzburg*, 383 U.S. at 481 (Black, J., dissenting).

85 *Mishkin*, 383 U.S. at 518 (Stewart, J., dissenting) (noting what could be suppressed).

86 *Memoirs*, 383 U.S. at 421 (Stewart, J., concurring) (noting that Justice Stewart concurred in *Memoirs* for the reasons stated in *Ginzburg*, 383 U.S. at 497 (Stewart, J., dissenting), and *Mishkin*, 383 U.S. at 518 (Stewart, J., dissenting)).

87 *Marks*, 430 U.S. at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)). For a more thorough description of *Marks*’s background, see Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 804–06 (2017).

88 *See, e.g., Re, supra* note 78, at 1945 (“[T]he *Marks* rule is wrong, root and stem, and should be abandoned.”); Douglas J. Whaley, Comment, *A Suggestion for the Prevention of Non-Clear-Majority Judicial Decisions*, 46 TEX. L. REV. 370, 376 (1968) (arguing that the opinion which enjoys the support of the most nondissenting judges should become the court’s official opinion); Williams, *supra* note 86, at 838–59 (arguing for a “shared agreement” approach to plurality precedent).

89 *See, e.g.,* Brief of Law Professors as Amici Curiae in Support of Neither Party at 2, *Hughes v. United States*, 138 S. Ct. 1765 (2018) (No. 17-155), 2018 WL 637338, at *2 (arguing that abandoning *Marks* would “create considerable guidance problems for lower courts” and would “undermine norms within [the Supreme Court] that motivate the suc-

ques of the rule generally fall into three categories. First, it would seem that the *Marks* rule—in its generation of precedent in the absence of a clear majority—is likely to create “precedents that are unlikely to be either legally correct or practically desirable.”⁹⁰ It is easy to see why. It would seem that a rule endorsed by, say, four Justices is more likely to be legally correct than a single-Justice concurrence (to say nothing of the obvious inconsistency between allowing a single Justice to determine policy and the “majority-rules” democratic mentality woven into America’s constitution).⁹¹

Second, some have noted that the *Marks* rule promotes inefficiencies in judicial deliberation and results in institutional instability.⁹² If, as an alternative to the *Marks* rule, only rules of decision which enjoyed the endorsement of five or more Justices assumed precedential effect, Justices would have the incentive to negotiate and settle on a position that appeals to all members in the majority. The *Marks* rule, however, allows for as few as one Justice to set precedent so long as he can cast his reasoning as the narrowest among the judgment-supportive opinions in a decision. Thus, Justices supporting the judgment in a decision may have little incentive to find an optimal point along the spectrum of potential reasons for a decision where all members in the majority can agree.⁹³ On this view, *Marks* is a bane of judicial economy.

The third critique is that the *Marks* rule creates confusion among lower courts.⁹⁴ How is a judge supposed to figure out which opinion in an on-point case is narrowest? While the Supreme Court could resolve the interpretive issues by endorsing one of the various “versions”⁹⁵ of the *Marks* rule or providing other guidance, it has not done so.⁹⁶ Often, courts—including the Supreme Court—end up designating one opinion as narrowest without explaining how they came to that conclusion.⁹⁷ The temptation for judges

cessful formation of majority opinions”); Maxwell L. Stearns, *The Case for Including Marks v. United States in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321, 329 (2000).

90 Re, *supra* note 78, at 1946.

91 See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1431 (2020) (Alito, J., dissenting) (“I am aware of no case holding that the *Marks* rule is inapplicable when the narrowest ground is supported by only one Justice. Certainly the lower courts have understood *Marks* to [sic] apply in that situation.”); *Blum v. Witco Chem. Corp.*, 888 F.2d 975, 981 (3d Cir. 1989) (“Although there is some awkwardness in attributing precedential value to an opinion of one Supreme Court justice to which no other justice adhered, it is the usual practice when that is the determinative opinion . . .”).

92 See, e.g., Re, *supra* note 78, at 1969.

93 See Maxwell L. Stearns, *Constitutional Law’s Conflicting Premises*, 96 NOTRE DAME L. REV. 447, 486, 493 (2020) (discussing the assumption implicit in *Marks* that Justices often settle on views that can be arranged on a spectrum).

94 See, e.g., Re, *supra* note 78, at 1944–45.

95 See *infra* Section II.A (explaining the various approaches to *Marks* application).

96 See *Williams*, *supra* note 86, at 819–22 (noting the Supreme Court’s apparent “indifference” to the practical problems of *Marks*); *supra* note 12 and accompanying text.

97 See, e.g., *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007) (according precedential effect to Justice Powell’s concurrence in an on-point case because, under *Marks*, it was simply “more limited” than the plurality’s opinion in that case); *Hopkins v. Jegley*, 968 F.3d 912, 915 (8th Cir. 2020) (invoking *Marks* and simply noting that “Chief Justice Robert’s

deciding *Marks*-implicated cases to designate as narrowest that opinion which they would prefer to apply as precedent is clear. But even in the absence of agreement on how *exactly* the *Marks* rule ought to work, most circuits have developed their own methods of determining which opinion is narrowest. While the *Marks* rule in its current form potentially allows for overmuch judicial discretion in precedent application, it is not a blank check.

II. THE *MARKS* RULE(S) AND *JUNE MEDICAL*

A. *Six Paths to Narrowest*

A noteworthy feature of abortion jurisprudence is that *June Medical* is not the first *Marks*-implicated abortion case. Parts of *Casey*'s joint opinion commanded the votes of only a plurality of the Court, but the joint opinion, representing the narrowest position supporting the judgment, is the holding under *Marks*. The Supreme Court has acknowledged as much.

A *Marks* dispute erupted after the Supreme Court remanded *Casey* for proceedings consistent with the Court's opinion.⁹⁸ On remand, the *Marks* dispute prompted a number of complex procedural moves by the parties. Attempting to put to rest the continued disagreement between the parties on the implications of *Casey*, Justice Souter invoked *Marks* in an in-chambers opinion, with an interesting caveat, to instruct the parties and courts below on how to read *Casey*: "For the purposes of this opinion, I join the applicants and the courts below in treating the joint opinion in [*Casey*] as controlling, as the statement of the Members of the Court who concurred in the judgment on the narrowest grounds."⁹⁹

The Supreme Court's swift clarification that the joint opinion was controlling under *Marks* prevented future *Marks* disputes over *Casey* and spared lower courts the burden of applying *Marks* under their various approaches. It would seem, however, that *Casey* presented a fairly easy *Marks* issue anyway: the joint opinion was obviously narrowest under any reasonable reading of *Marks*, and there was really no question about a single Justice's concurrence potentially competing for precedential effect. *June Medical* is a harder case. For one, the Court has not explicitly indicated which opinion it views as controlling. Additionally, the question of precedential effect is between a single-Justice concurrence, which would arguably overrule prior precedent (although it does not claim to do so), and a four-Justice plurality, which purports to adhere to prior precedent.

In the absence of guidance from on high, most of the federal circuit courts of appeals have developed their own working definition of "narrowest"

[sic] vote [in *June Medical*] was necessary in holding unconstitutional Louisiana's admitting-privileges law, so his separate opinion is controlling").

98 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 901 (1992); *Planned Parenthood of Se. Pa. v. Casey*, 510 U.S. 1309, 1309–10 (1994) (Souter, J., in chambers).

99 *Casey*, 510 U.S. at 1310 n.2 (citation omitted). Chief Justice Rehnquist—who dissented in *Casey*—also later wrote that he viewed the *Casey* plurality as binding under *Marks*. *Stenberg v. Carhart*, 530 U.S. 914, 952 (2000) (Rehnquist, C.J., dissenting).

for *Marks* purposes.¹⁰⁰ Thus, the approach a court takes to *Marks* application varies by circuit. Indeed, the approach may even vary *within* a circuit. Sometimes the difference between one approach to *Marks* and another is more semantic than substantive, and some circuits have applied different approaches to *Marks* at different times.¹⁰¹ Because all approaches to *Marks* have core similarities, all approaches would produce the same result in many cases. *June Medical* is most likely one of these cases. Because each *Marks* approach analyzes in different ways how each opinion fits with the others, Table 1 lays out each opinion in *June Medical* as well as its respective author and signing Justices for convenience.

TABLE 1

Majority		Dissent			
Breyer, J. joined by: Ginsburg, J. Kagan, J. Sotomayor, J	Roberts, C.J.	Thomas, J.	Alito, J. joined by: Gorsuch, J. Thomas, J. (in part) Kavanaugh, J. (in part)	Gorsuch, J.	Kavanaugh, J.

1. The Logical-Subset/Reasoning-Based Approach

The “logical-subset” approach is likely the most prevalent, consistently applied by the Third, Sixth, Ninth, Tenth, and D.C. Circuits, among others.¹⁰² Under this approach, a Supreme Court decision only becomes binding on lower courts if a *single line of reasoning* enjoys the assent of a majority of the Justices.¹⁰³ A single line of reasoning exists if there is an opinion which is a “logical subset” of other, broader opinions. Put another way, if there is a lowest common denominator in terms of rationale among a majority of Justices, that rationale is narrowest and becomes binding on lower courts. If no single line of reasoning is endorsed by a majority of the Court, only the specific result—the judgment—becomes binding on lower courts.

Sitting en banc, the Ninth Circuit recently adopted this approach with forceful language:

To foster clarity, we explicitly adopt the reasoning-based approach This approach . . . makes the most sense. A fractured Supreme Court decision should only bind the federal courts of appeal when a majority of the Justices agree upon a single underlying rationale and one opinion can reasonably be described as a logical subset of the other. When no single ratio-

100 For thorough overviews and critiques of each approach, see Re, *supra* note 78, at 1976–93, and Williams, *supra* note 86, at 806–19.

101 See *infra* subsections II.A.1–6.

102 See 18 MOORE, *supra* note 76, at ¶ 134.03[2]; EMW Women’s Surgical Ctr. v. Friedlander, 978 F.3d 418, 431 (6th Cir. 2020).

103 See Re, *supra* note 78, at 1980–81.

nale commands a majority of the Court, only the specific result is binding on lower federal courts.¹⁰⁴

For example, if a three-Justice plurality endorses the judgment based on rationales *A* and *B*, and a two-Justice concurrence endorses the judgment based on rationales *C* and *D*, neither opinion could be said to represent a “logical subset” of the other. There is no common denominator. If, on the other hand, the same two-Justice concurrence endorsed the judgment based on rationale *A*, the reasoning of the concurrence would obviously be a logical subset of the reasoning in the plurality (which applied rationales *A* and *B*). Thus, the concurring opinion—and therefore the *A* prong of the reasoning—is narrowest for *Marks* purposes and becomes binding on lower courts. This approach is often schematized as two concentric circles. The smaller circle, representing the “narrower” opinion, is nested within the larger circle, representing the broader opinion.¹⁰⁵

Applied to *June Medical*, the logical-subset approach almost certainly demands that the Chief Justice’s concurrence bind. Justice Breyer clearly views the relevant standard as undue burden-*plus*. In his view, *Casey*’s substantial-obstacle test as applied in *Whole Woman’s Health* requires also a consideration of the law’s benefits.¹⁰⁶ Chief Justice Roberts, on the other hand, views the standard simply as the undue burden standard as articulated in *Casey* and reaffirmed in *Whole Woman’s Health*.¹⁰⁷ Thus, the Chief Justice’s view of the standard of review necessary to reach the judgment (undue burden alone) is logically nested within the plurality’s broader conceptualization of the standard (undue burden plus consideration of the law’s benefits). While the plurality looked to both the burdens and benefits of Act 620, the concurrence looked only to the burdens.

Indeed, the Sixth Circuit recently applied the logical-subset approach to *June Medical* in *EMW Women’s Surgical Center, PSC v. Friedlander* and found Chief Justice Roberts’s concurrence to be binding.¹⁰⁸ Applying a hybrid of

104 *United States v. Davis*, 825 F.3d 1014, 1021–22 (9th Cir. 2016) (en banc). Consider also the D.C. Circuit’s enunciation of the approach: “In essence, the narrowest opinion must represent a common denominator of the Court’s reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment.” *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991).

105 For a visualization, see *Re*, *supra* note 78, at 1981 fig.4, and *Williams*, *supra* note 86, at 809 fig.1.

106 See *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2122–32 (2020) (plurality) (assessing Act 620’s burdens and, subsequently, its benefits).

107 *Id.* at 2139.

108 978 F.3d 418, 431–33 (6th Cir. 2020); see *Bristol Reg’l Women’s Ctr., P.C. v. Slatery*, No. 20-6267, 2021 WL 650893, at *14 (6th Cir. Feb. 19, 2021) (Thapar, J., dissenting) (“[A]s our court recently held, the Chief Justice’s separate opinion in *June Medical*—not the plurality opinion—provides the controlling legal rule in the case.” (citing *EMW Women’s Surgical Ctr.*, 978 F.3d at 433)). *But see id.* at *5–6 (majority opinion) (expressing doubt as to the precedential effect of *EMW* and labeling Judge Larsen’s analysis as potentially dicta).

the logical-subset and results-based approaches,¹⁰⁹ a divided panel found that Chief Justice Roberts's concurrence was binding under *Marks* and vacated an injunction against enforcement of a Kentucky law that did not conclusively place an undue burden on women seeking abortions.¹¹⁰

Writing for the majority, Judge Larsen articulated her *Marks* analysis in the following fashion:

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. This is so because in that subset of cases, a majority of the Court which issued the fractured decision would necessarily agree with the result. In a fractured decision upholding the constitutionality of a law, that means the narrowest opinion is the one whose rationale would uphold the fewest laws going forward. . . .

Conversely, when a fractured decision strikes down a law as unconstitutional, the narrowest opinion is the one whose rationale would invalidate the fewest laws going forward.¹¹¹

Both the plurality and the concurrence in *June Medical* would invalidate any law that places a substantial obstacle in the path of a woman seeking a previability abortion.¹¹² But the plurality would also invalidate laws where “the balance” between the law’s burdens and benefits “tipped against the statute’s constitutionality.”¹¹³ Judge Larsen concluded: “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*.”¹¹⁴

2. The Median Approach

Also known as the “fifth-vote” approach, the median approach views as binding that opinion which represents the rationale of the “median” Justice.¹¹⁵ To locate the narrowest grounds, a lower court looks to the “swing” vote—or the Justice (or bloc of Justices) who was necessary to provide the fifth judgment-supportive vote. A swing vote is identified as narrowest if its

109 See *infra* subsection II.A.4 for more about the results-based approach.

110 *EMW Women’s Surgical Ctr.*, 978 F.3d at 422–23, 431–34.

111 *Id.* at 431–32 (citations omitted) (quoting *United States v. Kratt*, 579 F.3d 558, 562 (6th Cir. 2009)).

112 *June Med.*, 140 S. Ct. at 2120, 2122 (plurality opinion); *id.* at 2138 (Roberts, C.J., concurring in the judgment).

113 *Id.* at 2120 (plurality opinion).

114 *EMW Women’s Surgical Ctr.*, 978 F.3d at 433. But see *Whole Woman’s Health All. v. Hill*, No. 1:18-CV-01904, 2020 WL 5994460, at *28 (S.D. Ind. Oct. 9, 2020) (“Because the plurality and concurring opinions applied differing undue burden tests and neither can be considered a logical subset of the other (indeed, the opinions are in direct controversy with one another on this point), we reject the State’s argument that the plurality and the concurrence in *June Medical* encompassed a common holding regarding the proper application by the lower courts of the undue burden standard.”).

115 See *Re*, *supra* note 78, at 1977; *Williams*, *supra* note 86, at 813.

judgment-supportive conditions will have narrower application than those of the other opinion(s) in future cases. That is, the conditions upon which the swing vote premised its judgment are less often satisfied than those of the other majority opinion(s).¹¹⁶ A lower court's rationale for this approach is largely "predictive" in nature: in future, factually similar cases, the Court will likely be able to muster five votes only for the rationale taken by the "fifth Justice" in the earlier case.¹¹⁷ That is, the necessary fifth Justice likely would not join the majority in a later case unless it followed his or her rationale.

Alternatively, the approach's rationale is premised on the view that if the majority *had* to settle on one view, they would likely settle on the median Justice's view.¹¹⁸ The Third, Seventh, and D.C. Circuits have applied, or at least flirted with, this approach.¹¹⁹ For example, if a four-Justice plurality would endorse propositions *A* and *B*, but the concurring Justice would endorse only proposition *A*, the four-Justice bloc would be more likely to cede its adherence to proposition *B* than the single Justice would be to adopt proposition *B*. In order to retain the single Justice's vote and thus the majority, it is assumed that the four Justices would accept the single Justice's narrower view.

The paradigmatic case to which the median approach applies is the 4-1-4 case—like *June Medical*. In such a case, there is a spectrum of views in which the four Justices in the plurality and the four dissenting Justices represent two extremes, where the single concurring Justice has staked out a middle ground. It seems clear that the Chief Justice had done just that. Where the plurality would apply the higher benefits-burdens standard of *Whole Woman's Health* and the dissenters—though expressing a range of views—generally agreed that *Casey's* undue burden standard should not result in Act 620's invalidation,¹²⁰ the Chief Justice's concurrence, invoking *stare decisis*, applied the undue burden standard of *Casey* but upheld the

116 See Re, *supra* note 78, at 1977. For a visualization of the median approach as a Venn diagram, see *id.* at 1977 fig.3.

117 Williams, *supra* note 86, at 814.

118 *Id.*

119 Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682, 693 (3d Cir. 1991), *aff'd in part and rev'd in part*, 505 U.S. 833 (1992) ("[W]henver possible, there [must] be a single legal standard for the lower courts to apply in similar cases and that this standard, when properly applied, [must] produce results with which a majority of the Justices in the case articulating the standard would agree."); United States v. Duvall, 740 F.3d 604, 610 (D.C. Cir. 2013) (Kavanaugh, J., concurring in the denial of rehearing en banc) ("In most cases, the commonsense way to apply *Marks* is to identify and follow the opinion that occupies the middle ground between (i) the broader opinion supporting the judgment and (ii) the dissenting opinion."); Annex Books, Inc. v. City of Indianapolis, 581 F.3d 460, 465 (7th Cir. 2009) ("Because the other Justices [in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002),] divided 4 to 4, and Justice Kennedy was in the middle, his views establish the holding.").

120 *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2148 (2020) (Thomas, J., dissenting); *id.* at 2154-57 (Alito, J., dissenting); *id.* at 2181 (Gorsuch, J., dissenting); *id.* at 2182 (Kavanaugh, J., dissenting) (joining Justice Alito's dissent in its discussion of *Casey*).

law.¹²¹ Thus, the Chief Justice was caught in the middle. Like the plurality, he viewed the *Casey* standard as applied in *Whole Woman's Health* as resolving the case; like the dissenters, he believed that *Whole Woman's Health's* “balancing test” was inapplicable (though for different reasons).¹²²

The condition (substantial obstacle/undue burden) upon whose satisfaction the concurrence entered judgment in *June Medical* will apply more narrowly than the plurality's condition (undue burden and weighing of benefits) in future cases, so it represented the “median” view. In other words, since the concurrence's undue burden standard is more easily met than the plurality's standard, the Chief Justice can be safely categorized as the swing vote. The Chief Justice's condition, requiring a substantial obstacle amounting to an undue burden, will apply more narrowly because it will be satisfied less often than the plurality's condition—requiring a “balance” between benefits and burdens that tips in favor of unconstitutionality.¹²³

3. The Case-Specific Approach

The case-specific approach asks which judgment-supportive opinion employed the most case-specific reasoning to resolve the case. Essentially, the most fact-bound reasoning among the judgment-supportive opinions represents the narrowest grounds supporting the judgment.¹²⁴ Notably, this approach to *Marks*—since it only asks whether one opinion employed more case-specific reasoning—does not require there to be any overlap between opinions with respect to reason. Thus, where the logical-subset approach would decline to find a narrowest opinion in a split decision where there is no common denominator among the majority opinions, the case-specific approach will recognize the opinion of even a single Justice to be “narrowest” under *Marks* if it applied the most fact-bound reasoning. In fact, divergence between the logical-subset approach and the case-specific approach led to a recent circuit split over how *Marks* applies to *Freeman v. United States*,¹²⁵ a 4–1–4 sentencing case.¹²⁶ The Supreme Court granted certiorari in *Hughes*

121 *Id.* at 2134–35 (Roberts, C.J., concurring in the judgment).

122 Interestingly, Justice Alito framed the Chief Justice's concurrence not in *Marks* terms, but in terms of the Chief Justice's “vote[] to overrule *Whole Woman's Health* insofar as it changed the *Casey* test.” *June Med.*, 140 S. Ct. at 2153 (Alito, J., dissenting). If he was right, then there were five votes to “overrule” *Whole Woman's Health* (Chief Justice Roberts and Justices Alito, Thomas, Gorsuch, and Kavanaugh). But Chief Justice Roberts did not purport to “overrule” *Whole Woman's Health*; he seemed to think that *Whole Woman's Health* did not actually change *Casey's* standard. Rather, he thought that *Whole Woman's Health's* discussion of benefits must be read in the context of *Casey* and that *Whole Woman's Health* on its own terms did not change *Casey's* undue burden standard. *See id.* at 2135–39 (Roberts, C.J., concurring in the judgment).

123 *Id.* at 2120 (plurality opinion).

124 *United States v. Dixon*, 687 F.3d 356, 359 (7th Cir. 2012).

125 564 U.S. 522 (2011).

126 *Compare* *United States v. Davis*, 825 F.3d 1014, 1021–22 (9th Cir. 2016) (en banc) (finding that no opinion in *Freeman* controlled because Justice Sotomayor's lone concurrence was not a “logical subset” of the plurality opinion), *with* *Dixon*, 687 F.3d at 359 (hold-

v. United States to address the split but resolved the case on substantive grounds and ultimately left the *Marks* question untouched.¹²⁷

One of the cases that created the circuit split was *United States v. Dixon*, in which the Seventh Circuit found that Justice Sotomayor's lone concurrence—rather than the four-Justice plurality—in *Freeman* was binding under *Marks* because her reasoning provided the narrowest, most case-specific basis for deciding the case.¹²⁸ Strikingly, the court in *Dixon* acknowledged that “eight Justices disagreed with Justice Sotomayor's approach and believed it would produce arbitrary and unworkable results.”¹²⁹ Nevertheless, the court found that her reasoning was narrowest and thus controlling.¹³⁰

The case-specific approach likely has little to say about *June Medical* because the reasoning of both the plurality and the concurrence was similarly fact-bound, and the Chief Justice's concurrence clearly seems to instead invite a logical subset (or similar) analysis. If the approach were to apply at all, it would most likely recommend treating the Chief Justice's concurrence as binding. The real divergence between the plurality and concurrence seems to be a question of the qualities of *Casey*'s undue burden standard as applied by *Whole Woman's Health*. From the Chief Justice's perspective, the plurality's consideration of Act 620's benefits¹³¹ was extraneous to the proper undue burden analysis, which was sufficient, without consideration of benefits, to reach the judgment. On such a view, the plurality's consideration of benefits was unnecessary to resolve the case,¹³² and under the case-specific approach, such consideration would make the plurality opinion broader than the concurrence. If the Chief Justice is right, then his concurrence is narrowest in that it is most case-specific in its consideration only of Act 620's burdens in reaching the judgment.

ing that Justice Sotomayor's concurrence was narrowest and controlling because “her reasoning provided the narrowest, most case-specific basis for deciding *Freeman*”). Curiously, the Fourth Circuit applied the logical-subset approach to the same question, but, unlike the Ninth Circuit, determined that Justice Sotomayor's concurring opinion *did* “embod[y] [the narrowest] position implicitly approved by at least five Justices who support[ed] the judgment.” *United States v. Brown*, 653 F.3d 337, 340 n.1 (4th Cir. 2011) (quoting *A.T. Massey Coal Co. v. Massanari*, 305 F.3d 226, 236 (4th Cir. 2002)) (applying *Marks*).

127 *Hughes v. United States*, 138 S. Ct. 1765, 1771–72 (2018).

128 *Dixon*, 687 F.3d at 358–59.

129 *Id.* at 359.

130 *Id.* at 359–60; *see also* *Gaylor v. Mnuchin*, 919 F.3d 420, 433 (7th Cir. 2019) (finding that Justice Blackmun's concurrence in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), which invalidated a state tax exemption for religious publications, was narrowest because his Establishment Clause reasoning was limited to the sale of religious literature by religious organizations and did not employ the broader statements and reasoning present in the plurality).

131 *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2130–32 (2020) (plurality opinion).

132 *Id.* at 2139 (Roberts, C.J., concurring in the judgment) (“In this case, *Casey*'s requirement of finding a substantial obstacle before invalidating an abortion regulation is therefore a sufficient basis for the decision, as it was in *Whole Woman's Health*.”).

4. The Results-Based Approach

Under the results-based approach—which has been used by the Third, Sixth, Tenth, and Eleventh Circuits—the narrowest grounds are “those that, in other cases, would consistently produce results that would be reached by the majority of the Justices supporting the fragmented decision.”¹³³ This language suggests that the results-based approach may simply be the logical subset or median approach doing business under a different name. Just as the logical-subset approach effectively asks whether a lowest common denominator exists between the opinions comprising the majority, the results-based approach seeks out the “least ‘far-reaching’” common ground among the opinions.¹³⁴

Consider again the *Freeman* circuit split. In determining whether the plurality or Justice Sotomayor’s lone concurrence was narrowest under *Marks*, the Eleventh Circuit reasoned that Justice Sotomayor’s concurrence embodied the holding under *Marks* since whenever the standard she applied would permit a sentence reduction, the plurality’s standard would as well (but the converse is not true).¹³⁵ In a word, Justice Sotomayor’s approach would produce consistent *results*, whereas the plurality’s approach would not.

As applied to *June Medical*, the results-based approach would likely marshal the same rationale that Judge Larsen of the Sixth Circuit employed in her logical-subset analysis: “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*.”¹³⁶ The Chief Justice’s concurrence, then, would bind under this approach as well.

5. The Smallest-Change Approach

The smallest-change approach asks which opinion in a fractured majority would change settled law the least. A straightforward example is the Fifth Circuit’s interpretation of *J. McIntyre Machinery, Ltd. v. Nicaastro*,¹³⁷ a personal jurisdiction case which produced a four-Justice plurality and a two-Justice concurrence written by Justice Breyer. The Fifth Circuit reasoned that Justice Breyer’s approach in his concurrence was “narrowest” under *Marks* because he looked only to precedent in deciding the case, whereas the plurality would have altered the stream-of-commerce test for assessing personal jurisdiction.¹³⁸

133 See 18 MOORE, *supra* note 76, at ¶ 134.03[2].

134 *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007) (quoting *Johnson v. Bd. of Regents*, 263 F.3d 1234, 1247 (11th Cir. 2001)).

135 *United States v. Hughes*, 849 F.3d 1008, 1011–15 (11th Cir. 2017).

136 *EMW Women’s Surgical Ctr., PSC v. Friedlander*, 978 F.3d 418, 433 (6th Cir. 2020).

137 564 U.S. 873 (2011).

138 *Ainsworth v. Moffet Eng’g, Ltd.*, 716 F.3d 174, 178 (5th Cir. 2013); see also *AFTG-TG, LLC v. Nuvoton Tech. Corp.*, 689 F.3d 1358, 1363 (Fed. Cir. 2012) (“[T]he crux of Justice Breyer’s concurrence was that the Supreme Court’s framework applying the stream-

The *June Medical* majority opinions defy such a straightforward application of the smallest-change approach because both the plurality and the concurrence purport to simply apply precedent; neither Justice Breyer nor Chief Justice Roberts views his opinion as changing the law.¹³⁹ Their disagreement is about what the law *is*. As noted above, Justice Breyer views *Whole Woman's Health* as requiring a balancing of benefits and burdens of a restriction, whereas the Chief Justice argues that *Whole Woman's Health*, on its own terms, requires no such balancing. Any consideration of benefits under *Casey* and *Whole Woman's Health*, the Chief Justice argues, must be confined to the “threshold requirement that the State have a ‘legitimate purpose’ and that the law be ‘reasonably related to that goal.’”¹⁴⁰

True, *Whole Woman's Health's* requirement of a benefits-burdens balancing test was the “law” insofar as lower courts after *Whole Woman's Health* generally assumed that such a test was the law and, as such, applied it to challenged abortion regulations.¹⁴¹ Justice Alito's remark in his *June Medical* dissent that the Chief Justice was “vot[ing] to overrule *Whole Woman's Health* insofar as it changed the *Casey* test” further suggests that—at least in effect—the Chief Justice's concurrence would in fact “change” the law if found to be binding, at least to the extent that it would require lower courts to abandon the benefits-burdens balancing test that they have heretofore been applying.¹⁴²

The relevant distinction here would be that what the law *is* is not necessarily how the law has been *interpreted*; incorrect application of law does not change the law's nature. On such a view, if the Chief Justice accurately described the state of the law after *Whole Woman's Health*, then his concurrence would be binding under the smallest-change approach because he applied *Whole Woman's Health* on its own terms, whereas the plurality's approach, if found to be binding, would perpetuate incorrect application of *Whole Woman's Health* (thus also perpetuating the “change” from *Casey* that results from incorrect application of *Whole Woman's Health*).

6. The Issue-by-Issue (or All-Opinions) Approach

Also known as the all-opinions approach,¹⁴³ the issue-by-issue approach is more of an independent approach to finding what binds in a Supreme Court opinion than a species of *Marks* application, but it is certainly *Marks*-

of-commerce theory . . . had not changed The narrowest holding is that which can be distilled from Justice Breyer's concurrence—that the law remains the same after *McIntyre*.”).

139 *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2120 (2020) (plurality opinion); *id.* at 2133–34 (Roberts, C.J., concurring in the judgment).

140 *Id.* at 2138 (first quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992) (joint opinion); then quoting *id.* at 878 (plurality opinion)).

141 *See, e.g., Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973, 983 (7th Cir. 2019) (applying the benefits-burdens balancing test).

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

143 *See Re, supra* note 78, at 1988–93; Williams, *supra* note 86, at 817.

adjacent. What matters is not what opinion is “narrowest,” but which propositions get at least five affirmative votes. This approach involves consideration of each opinion in a case—including the dissent(s)—in order to determine each proposition that enjoys the endorsement of five or more Justices.¹⁴⁴ It may seem anomalous that a proposition, some of whose necessary votes come from dissenters, should bind in future cases, but the approach has been taken before.¹⁴⁵ Some circuits, however, seem to have expressly disavowed the approach.¹⁴⁶ The argument for using this approach is strongest when a court is unable to find a narrowest opinion under a *Marks* analysis.¹⁴⁷

In *June Medical*, there are two operative issues. The first is whether, under *stare decisis* considerations, the *facts* of the case compel a *judgment* that is identical to that in the factually similar case of *Whole Woman’s Health*. The second is whether the *standard* for abortion regulations is the undue burden standard of *Casey* rather than the benefits-burdens standard of *Whole Woman’s Health*. Both issues have five affirmative votes, but the only affirmative vote in common between the two issues is that of the Chief Justice. Chief Justice Roberts agreed with the plurality that *stare decisis* compelled the judgment in this case and supplied the necessary fifth vote here.¹⁴⁸

The second issue is more complex. As Justice Alito suggests, there are five votes in favor of applying the undue burden standard of *Casey* rather than the benefits-burdens standard of *Whole Woman’s Health*.¹⁴⁹ The waters are muddied by the fact that the Chief Justice does not purport to overrule *Whole Woman’s Health*, but rather to clarify that it did not change the *Casey*

144 See, e.g., *United States v. Donovan*, 661 F.3d 174, 182 (3d Cir. 2011) (“[W]e have looked to the votes of dissenting Justices if they, combined with votes from plurality or concurring opinions, establish a majority view on the relevant issue.”); see also Williams, *supra* note 86, at 817–19. For a visualization of this approach, see Re, *supra* note 78, at 1989.

145 See, e.g., *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 658–59 (3d Cir. 1999) (holding that lower courts are bound to follow a 5–4 vote on a takings issue in a Supreme Court case, even though four of those votes were cast by dissenters).

146 See, e.g., *Whole Woman’s Health v. Paxton*, 972 F.3d 649, 653 (5th Cir. 2020) (“[A]ny intimation that the views of dissenting Justices can be cobbled together with those of a concurring Justice to create a binding holding must be rejected. That is not the law in this or virtually any court following common-law principles of judgments.”); *United States v. Hughes*, 849 F.3d 1008, 1012 (11th Cir. 2017) (“When determining which opinion controls, we do not ‘consider the positions of those who dissented.’” (quoting *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007))).

147 When Justice Kavanaugh was on the D.C. Circuit, he called this approach a “necessary logical corollary” of *Marks* when a *Marks* analysis does not find a “narrowest” opinion. *United States v. Duvall*, 740 F.3d 604, 611 (D.C. Cir. 2013) (Kavanaugh, J., concurring in the denial of rehearing en banc).

148 *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2133–34 (2020) (Roberts, C.J., concurring in the judgment).

149 *Id.* at 2153 (Alito, J., dissenting) (noting the Chief Justice “votes to overrule *Whole Woman’s Health* insofar as it changed the *Casey* test.”).

standard.¹⁵⁰ Thus distinguished, it seems there are four votes to apply the benefits-burdens standard (the plurality), one vote to apply the undue burden standard as applied in *Casey* and *Whole Woman's Health* (the concurrence), and four votes to overrule *Whole Woman's Health* “insofar as it changed the *Casey* test.”¹⁵¹ But despite the Chief Justice’s apparent solicitude in not using the word “overrule,” his concurrence and Justice Alito’s dissent are functionally in agreement that the undue burden standard of *Casey* is the proper standard and should be applied. Thus, as Justice Kavanaugh notes in his dissent, there are five votes—one from the Chief Justice and four from the dissenters—“reject[ing] the *Whole Woman's Health* cost-benefit standard.”¹⁵²

B. Discussion

Although most of the time courts will reach similar results, notwithstanding their slightly different and sometimes shifting iterations of the *Marks* rule, it is easy for one to see how a single fractured Supreme Court decision could command conflicting interpretations among the federal circuit courts of appeals. For example, a lone concurrence could represent the “smallest change” in the law—as Justice Breyer’s concurrence in *McIntyre* does—but a four-Justice plurality could be characterized by another court as a logical subset of that concurrence’s broader rationale. Thus, one circuit may find that the concurrence is binding; another, the plurality opinion. One would logically conclude that it may be more accurate to speak of the *Marks* rules.

As noted above, the diversity in application of the *Marks* rule has already produced a circuit split on the question of whether Justice Breyer’s plurality or Chief Justice Roberts’s concurrence in *June Medical* is narrowest. The Eighth Circuit in *Hopkins v. Jegley* found that Chief Justice Roberts’s concurrence was binding but curiously did not explain how it reached that conclusion,¹⁵³ and the Sixth Circuit found the same applying the logical-subset approach.¹⁵⁴

On the other hand, the Fifth Circuit, along with a few federal district courts, has also applied the logical-subset approach, but found that neither

150 *Id.* at 2134, 2135–38 (Roberts, C.J., concurring in the judgment).

151 *Id.* at 2153 (Alito, J., dissenting).

152 *Id.* at 2182 (Kavanaugh, J., dissenting).

153 *Hopkins v. Jegley*, 968 F.3d 912, 915 (8th Cir. 2020) (“Chief Justice Robert’s [sic] vote was necessary in holding unconstitutional Louisiana’s admitting-privileges law, so his separate opinion is controlling. . . . In light of Chief Justice Roberts’s separate opinion, ‘five Members of the Court reject[ed] the *Whole Woman's Health* cost-benefit standard.’” (quoting *June Med.*, 140 S. Ct. at 2182 (Kavanaugh, J., dissenting) (alteration in original))). The language suggests the court was applying the “fifth-vote” approach and corroborating its conclusion with the issue-by-issue approach.

154 *EMW Women’s Surgical Ctr., PSC v. Friedlander*, 978 F.3d 418, 431 (6th Cir. 2020).

opinion represented a logical subset of the other and that *Whole Woman's Health v. Hellerstedt's* cost-benefit test still governed.¹⁵⁵

It has been established, at least provisionally, that Chief Justice Roberts's concurrence should become binding on lower courts under any application of *Marks*, and two circuits have endorsed this view. There are, however, two potential hurdles that may seem to block such a result, but these are easily cleared. The first is that Chief Justice Roberts wrote only for himself, and it seems unwise for courts to afford precedential effect to a single-Justice opinion rather than a four-Justice opinion. But it is settled that *Marks* applies to the opinion representing the narrowest reasoning supporting the judgment—no matter how the Court split.¹⁵⁶

The second hurdle is taller, but still surmountable. A single Justice's opinion may be controlling under *Marks*, but what if that opinion overrules prior precedent? Indeed, a three-Justice plurality of the Supreme Court in *Ramos v. Louisiana* expressed disapproval of an interpretation of the *Marks* rule that would allow a single Justice to overrule precedent: “[W]e 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. . . . [N]o case has before suggested that a single Justice may overrule precedent.”¹⁵⁷ Thus, Chief Justice Roberts's concurrence simply cannot control under *Marks*. Two responses to this argument.

First, Chief Justice Roberts arguably *was* simply applying precedent. At least, that is what he purports to be doing. Invoking the doctrine of stare decisis and marshaling the support of Blackstone, Burke, and Hamilton, Chief Justice Roberts argues that stare decisis counsels in favor of applying *Whole Woman's Health* and invalidating Act 620.¹⁵⁸ He argues, moreover, that *Whole Woman's Health* did not actually transform *Casey's* undue burden standard into the benefits-burdens standard:

We should respect the statement in *Whole Woman's Health* that it was applying the undue burden standard of *Casey*. The opinion in *Whole Woman's Health* began by saying, “We must here decide whether two provisions of [the Texas law] violate the Federal Constitution as interpreted in *Casey*.” Nothing more. The Court explicitly stated that it was applying “the standard, as described in *Casey*,” and reversed the Court of Appeals for applying an approach that did “not match the standard that this Court laid out in *Casey*.”¹⁵⁹

155 *Whole Woman's Health v. Paxton*, 972 F.3d 649, 652–53 (5th Cir. 2020) (“In *June Medical*, the only common denominator between the plurality and the concurrence is their shared conclusion that the challenged Louisiana law constituted an undue burden. . . . The decision does not furnish a new controlling rule as to how to perform the undue-burden test. Therefore, *Hellerstedt's* formulation of the test continues to govern this case.”).

156 See *supra* note 87 and accompanying text.

157 140 S. Ct. 1390, 1402–03 (2020) (plurality opinion).

158 *June Med.*, 140 S. Ct. at 2133–35 (Roberts, C.J., concurring in the judgment).

159 *Id.* at 2138–39 (internal citations omitted).

Chief Justice Roberts further contends that, while *Casey* did discuss the benefits of the regulations, the Court did not place them “on a scale opposite the law’s burdens. Rather, *Casey* discussed benefits in considering the threshold requirement that the State have a ‘legitimate purpose’ and that the law be ‘reasonably related to that goal.’”¹⁶⁰ Chief Justice Roberts, on his own terms, was merely interpreting *Whole Woman’s Health*—not attempting to overrule it. As Judge Larsen argued in *Friedlander*, “if *Casey*’s joint opinion did not implicitly overrule *Roe*, neither did the Chief Justice’s opinion implicitly overrule *Whole Woman’s Health*.”¹⁶¹

The second response to the argument that Roberts’s opinion cannot control under *Marks* is that, even if Roberts’s opinion *would* overrule prior precedent (i.e., *Whole Woman’s Health*’s benefits-burdens standard), *Marks* still demands that his opinion bind. Although a three-Justice plurality in *Ramos* suggested in dicta that the notion that a single Justice can overrule prior precedent under special circumstances is a “dubious proposition,”¹⁶² three dissenting Justices explicitly argued that such a notion is consistent with, indeed required by, “the logic of *Marks*.”¹⁶³ The dissenters, moreover, noted that they were unaware of any case holding otherwise.¹⁶⁴ For now at least, the question of whether a single Justice may overrule prior precedent is an “academic” one,¹⁶⁵ neither explicitly endorsed nor rejected by the Supreme Court.

Unless and until the Supreme Court holds otherwise, lower courts have little choice but to take *Marks* on its own terms. *Marks* requires lower courts to find a “single legal standard” from a split decision,¹⁶⁶ and that standard must be that of the “narrowest” opinion.¹⁶⁷ Since the term “narrowest” is currently as capacious as it is underdetermined, lower courts have had no choice but to impose reasonable interpretations upon it, as seen above. But any notion that there are hidden principles in *Marks*—for example, that the narrowest opinion binds *unless* it overrules prior precedent—which are not direct outgrowths of the doctrine’s logic is more dubious than the presumption that there are no such hidden principles.

III. IMPLICATIONS: *JUNE MEDICAL* AND BEYOND

Because the *Marks* rule in each of its forms most plausibly recommends according precedential effect to the Chief Justice’s concurrence, his opinion

160 *Id.* at 2138 (first quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992) (joint opinion); then quoting *id.* at 878 (plurality opinion)).

161 *EMW Women’s Surgical Ctr., PSC v. Friedlander*, 978 F.3d 418, 437 (2020).

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

163 *Id.* at 1431 (Alito, J., dissenting).

164 *Id.*

165 *Id.*

166 *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 693 (3d Cir. 1991), *aff’d in part and rev’d in part*, 505 U.S. 833 (1992).

167 *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)).

functions much in the same way it would if he had written for a majority. As with any high-profile opinion, *June Medical* has commanded the attention of many with a keen interest in its implications, both immediate and remote. Four implications in particular have sufficient import to warrant discussion.

First, with the reinstatement of the undue burden standard as described in *Casey*, it is likely that more challenged abortion laws will survive challenges in court than if the benefits-burdens test were applied. The Chief Justice intimated as much in his *June Medical* concurrence when he expressed agreement with the four dissenters that the validity of admitting privileges depends on factors that vary by state.¹⁶⁸ Thus, *June Medical* does not doom admitting-privileges laws—though it does seem to deliver them a blow. After *June Medical*, states remain free to pass admitting-privileges laws. What's more, at least some courts will now assess their validity under the undue burden standard rather than the benefits-burdens balancing test. Because judicial consideration of the benefits of admitting-privileges laws has factored so heavily into their consistent invalidation,¹⁶⁹ courts may be less likely—in the absence of considerations of benefits—to invalidate admitting-privileges (and other) laws under the substantial obstacle/undue burden test.

Second, now that the *Marks* rule has been injected into one of the most contentious lines of Supreme Court cases, it cannot escape both public and judicial scrutiny. Because abortion laws are often challenged, and because courts now have the “vexing task”¹⁷⁰ of performing *Marks* analyses of the *June Medical* decision, the *Marks* rule will most likely be receiving much more air-time than it has previously enjoyed. And because future circuit court decisions can likely only exacerbate the current circuit split, the Supreme Court's awareness of the practical infelicities of the *Marks* rule will be heightened.

While a few Justices have expressed various qualms about various applications of *Marks*,¹⁷¹ the views of the others are not discernable, and it is unclear if the Court will even take on the task of reconsidering *Marks* in the near future. However, the injection of *Marks* into already fraught abortion jurisprudence, coupled with the increasing application of *Marks* among lower courts, does suggest that the rule may be approaching its breaking point. If, on the other hand, *Marks* endures, there may be an increase in what might be called “*Marks*-conscious judging,” in which judges (and Justices) engage in clever and intentional exploitation of the *Marks* mechanism to ensure that their opinions attain precedential effect.¹⁷² The implications

168 *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2141 n.6 (2020) (Roberts, C.J., concurring in the judgment).

169 *See, e.g., id.* at 2130–32 (plurality opinion); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2318 (2016).

170 *EMW Women's Surgical Ctr., PSC v. Friedlander*, 978 F.3d 418, 431 (6th Cir. 2020) (quoting *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 133 (6th Cir. 1994)).

171 *See, e.g., Ramos v. Louisiana*, 140 S. Ct. 1390, 1403–04 (2020) (plurality opinion); *Hughes v. United States*, 138 S. Ct. 1765, 1778–79 (2018) (Sotomayor, J., concurring).

172 Whether or not the Chief Justice was engaged in *Marks*-conscious judging in *June Medical* is indeterminable and does not matter with respect to the question of whether and how the *Marks* rule applies to his opinion. But note that in the first footnote to his *June*

of an increase in *Marks*-conscious judging would have considerable effects on judicial economy and ought to be explored elsewhere.

Third, the Chief Justice, along with the dissenters, seems to be participating in an effort to push abortion law back to the domain of the states.¹⁷³ What lurks under the surface of *June Medical* is the fact that the State of Louisiana did not ask the Court to reconsider the *Casey* standard. Both Justice Kavanaugh and the Chief Justice chose to highlight this fact, even though it was not directly necessary to do so in reaching their respective conclusions.¹⁷⁴ Because the Court is not a self-starting institution, its decisions for the most part stay within the boundaries sketched out by the parties in their briefs. Thus, it would seem that some Justices in *June Medical* recognized *Casey* as the governing standard only begrudgingly and because the parties' briefs constrained them in their ability to do otherwise. Although they inspire mere speculation, the apparent signals from certain Justices about *Casey* will not be lost on strategic litigants in future abortion cases.

Fourth, it appears that all five Justices in the majority—especially Chief Justice Roberts—regard the finding of a substantial obstacle largely as a factual question for the district court, which appellate courts review “only for clear error.”¹⁷⁵ Thus, future litigants in cases involving a challenged abortion restriction have all the more incentive to build a strong record at the district court level with which to prove or rebut a substantial-obstacle claim.

CONCLUSION

After *June Medical*, the Flying Dutchman that is U.S. abortion law—vagrant and heretofore unable to settle at any jurisprudential port—appears to sail in yet a new direction. Because Chief Justice Roberts's concurrence in *June Medical* most plausibly represents the “narrowest” judgment-supportive reasoning under each version of the *Marks* rule, his opinion has a much better claim to precedential effect than Justice Breyer's plurality. In effect, the judgment of *Whole Woman's Health* is now binding precedent on future cases that are sufficiently factually similar, and the reasoning of *Casey*—including its

Medical concurrence the Chief Justice points out how the *Marks* rule applies to *Casey*. *June Med.*, 140 S. Ct. at 2135 n.1. The *Marks* rule, then, was at least within his contemplation as he wrote his concurrence.

173 See SNEAD, *supra* note 30, at 167 (describing some of the factors behind this phenomenon).

174 *June Med.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring in the judgment); *id.* at 2182 n.1 (Kavanaugh, J., dissenting); see also *id.* at 2142 (Thomas, J., dissenting) (“Our abortion precedents are grievously wrong and should be overruled.”).

175 *Id.* at 2141 (Roberts, C.J., concurring in the judgment) (quoting U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, L.L.C., 138 S. Ct. 960, 966 (2018)); see also *id.* at 2132 (plurality opinion) (“We conclude, in light of the record, that the District Court's significant factual findings—both as to burdens and as to benefits—have ample evidentiary support. None is ‘clearly erroneous.’ Given the facts found, we must also uphold the District Court's related factual and legal determinations. These include its determination that Louisiana's law poses a ‘substantial obstacle’ to women seeking an abortion.”).

undue burden standard—is now binding on all future cases involving challenged abortion restrictions and regulations.

At least, so much is true for now. If anything is clear from the history of America's judicially crafted abortion law, it is its propensity to change. And it is impossible to predict from which angle change may come. In the context of abortion law after *June Medical*, the Court may reconsider the *Marks* rule—perhaps in an unrelated case—thus indirectly determining the precedential force of the two majority opinions. Alternatively, the Court may continue on what seems to be a path toward placing the regulation of abortion back in the domain of state law. What is certain is that the limits of *June Medical* will be explored in future cases.

If the Court did finally settle upon one version of the *Marks* rule, commonsense dictates that it would likely be a version already applied in some of the lower courts. And since each version of *Marks* recommends according precedential effect to the Chief Justice's concurrence in *June Medical*, the Chief Justice's return to the undue burden standard would remain intact no matter which version of the rule the Court may settle on. It seems highly unlikely that the Court would abolish the rule altogether, although it may elect to reinforce its limits.¹⁷⁶ It is also unclear, on the other hand, whether the Court will refashion abortion law in any major way that would amount to a total relinquishment of its stronghold over abortion law to the states.

The Chief Justice has attempted to fix the law at the undue burden standard of *Casey*; whether or not he succeeds in the long run depends on a number of unpredictable factors. But at least under the *Marks* rule, his concurrence binds. The apparent compromise that Chief Justice Roberts struck in *June Medical* is likely equally dissatisfying for policymakers, citizens, and litigants on both sides of the abortion debate, yet that compromise is now the law. The ship of Supreme Court abortion jurisprudence careens forward, again flying the flag of *Casey*'s undue burden standard, making its way toward some unknown port—or else, the bottom of the sea.

176 See *supra* note 19 and accompanying text.

