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THE MARKS RULE MISSES THE MARK: HOW THE SEVENTH CIRCUIT CORRECTLY DETERMINED THE PRECEDENTIAL EFFECT OF THE SUPREME COURT'S *JUNE MEDICAL PLURALITY*

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INTRODUCTION

Abortion has been the flag in the middle of a tug of war that has lasted for over fifty years: an issue neither side of the aisle has been able to pull across the center or willing to put down. However, even though the “constitutional standards for state regulations affecting a woman’s right to choose to terminate a pregnancy are not stable, they have not been changed, at least not yet.”¹ Abortion is undoubtedly a politically polarizing topic in the United States, and recently abortion foes have made significant political gains.² Numerous states, including Indiana, are purposefully passing blatantly unconstitutional

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¹ *Planned Parenthood of Ind. & Ky., Inc. v. Box 991* F.3d 740, 741 (7th Cir. 2021).

² *See Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021); *see also Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 277 (5th Cir. 2019).

legislation.³ These legislative bodies continue to challenge the abortion standard set forth by the Supreme Court, which has led to a wave of abortion litigation. Unfortunately, the courts are not discouraging this trend.

On the contrary, the Supreme Court encourages this behavior from legislators by continuing to grant certiorari on abortion cases, sending the message that the standard is not static and legislatures can mess with it.⁴ As a result, legislatures, just like the State of Indiana, continue to knowingly pass unconstitutional abortion restrictions, knowing abortion clinics will race to court to obtain an injunction, which would force the federal judiciary to step in and safeguard abortion rights. Then, politicians have the opportunity to rally against the court's ruling for their political gain. Finally, at the next legislative session, legislatures would start all over again, unrelenting in their unbroken cycle of anti-abortion attacks that have yet to result in the prohibition of abortion.

This same cycle occurred with *Planned Parenthood of Indiana & Kentucky, Inc. v. Box*.⁵ Planned Parenthood raced to the court to obtain an injunction to stop Indiana's legislatures' Act 404, which places an additional requirement on a minor seeking abortion restricting the right to access abortion, from going into effect. Each time the Supreme Court adds to its abortion jurisprudence and tinkers with the standard of the right to abortion, states take it as a sign to attempt to get more restrictive abortion legislation through the court system and into law. Therefore, the cycle keeps going.

³ *Jackson*, 141 S. Ct. at 2495. (Challenge to Texas SB8 banning abortions after six weeks in direct conflict with the Supreme Court abortion standard); *see also Dobbs*, 945 F.3d at 277 (Mississippi law banning abortions after fifteen weeks in direct conflict with the Supreme Court abortion standard).

⁴ *See Dobbs*, 945 F.3d 265, 277 (5th Cir. 2019), cert. granted in part, 141 S. Ct. 2619, 209 L. Ed. 2d 748 (2021) (The district court and circuit court determined that the abortion restriction enacted by Mississippi legislatures was facially unconstitutional because it directly conflicted with Casey, yet the Supreme Court granted certiorari).

⁵ 991 F.3d at 741.

Not only does the Supreme Court stimulate controversy when continuing to take on abortion cases, but each new decision added to the Supreme Court abortion jurisprudence only confuses the standard of the right to abortion. Even if the Supreme Court has consistently reaffirmed the fundamental right to abortion, continually altering the right to allow for new limits and restrictions makes the standard harder for the lower courts and circuits to apply and be consistent. Constitutional rights are supposed to be uniform throughout the nation.⁶ However, the Supreme Court's latest decision in *June Medical Services L.L.C. v. Russo*⁷ makes finding consistency and clarity in the constitutional right to access abortion nearly impossible. The Supreme Court granted certiorari in *June Medical*, a near-identical case to *Whole Woman's Health v. Hellersted*, decided just three years earlier.⁸ In *Whole Woman's Health*, the Supreme Court balanced the benefits and burdens of the abortion restriction at issue, which determined that the restriction was unconstitutional. However, a more conservative Supreme Court published a plurality decision on the *June Medical* abortion restriction that tracked nearly word for word the *Whole Woman's Health* restriction the Supreme Court struck down three years earlier.

When the Supreme Court comes down in a plurality opinion, that opinion still has precedential effects. In *Marks v. United States*,⁹ the Supreme Court created the *Marks* Rule instructing lower courts to ascertain precedential effect in the narrowest common denominator of a plurality holding. Therefore, when the Supreme Court decided *June Medical* as a plurality, it handed down the opinion knowing lower courts would need to navigate the *Marks* Rule to determine the

⁶ See Evan Bernick, *The Circuit Splits Are Out There—and the Court Should Resolve Them*, 16 ENGAGE 2 (2015); see also Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decision making*, 73 TEX. L. REV. 1, 38 (1994) (“Both the Constitution’s framers and the Supreme Court have stressed that the articulation of nationally uniform interpretations of federal law is an important objective of the federal adjudicatory process.”)

⁷ 140 S. Ct. 2103, 2141 (2020).

⁸ 136 S. Ct. 2292, 2318 (2016).

⁹ 430 U.S. 188 (U.S. 1977).

binding effect of the plurality and the appropriate abortion standard to use when laws challenging the right to abortion would inevitably come forward.

However, using the *Marks* Rule to determine a controlling opinion¹⁰ has been deemed a “vexing task” by many lower circuits, including the Seventh Circuit, and using the *Marks* Rule to determine the controlling opinion in *June Medical’s* plurality is already plaguing lower court judges across the nation, creating variation and unreliability in access to reproductive rights by jurisdiction. For example, circuits differ from holding that *June Medical* left the right to abortion unchanged,¹¹ requiring a standard balancing the benefits and burdens of laws restricting abortion, to determining the plurality opinion overruled *Whole Woman Health*,¹² restricting the standard to only looking at the burdens.

Shortly after the Supreme Court decided *June Medical*, it then remanded *Planned Parenthood of Indiana & Kentucky, Inc. v. Box*, back to the Seventh Circuit for review in light of the plurality opinion. There, the Seventh Circuit was required to take on the task of interpreting the *Marks* Rule as it applies to *June Medical*. This case highlights the tremendous amount of variation in the interpretation of the *Marks* Rule and how this variation is the difference between Indiana’s Act 404 and other pieces of legislation like it, passing constitutional muster and going into effect to restrict abortion access the Act failing to do so. This inconsistency in the application of the *Marks* Rule leads to instability in constitutional rights themselves.¹³ The variation in determining the precedential weight of *June Medical* has severe practical implications on the right to abortion as a whole

¹⁰ *EMW Women’s Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 431 (6th Cir. 2020).

¹¹ *Box*, 991 F.3d at 741; *EMW*, 978 F.3d at 431.

¹² *Hopkins v. Jegley*, 968 F.3d 912, 915 (8th Cir. 2020).

¹³ *See Hughes v. United States*, 138 S. Ct. 1765, 1771–72 (2018).

and especially for those most impacted by restrictive abortion laws, the young and the poor.¹⁴

The Seventh Circuit majority's interpretation of the *Marks* Rule is correct. After applying the *Marks* Rule, the Seventh Circuit determined that *June Medical* did not overrule *Whole Woman's Health* or change the right to abortion. Therefore, the Seventh Circuit reaffirmed its prior ruling using the *Whole Woman's Health* balancing standard to grant a preliminary injunction against the Indiana State Statute Act 404,¹⁵ which placed significant obstacles in the way of unemancipated minors seeking abortions.¹⁶

This first part of the article will discuss the background of *Planned Parenthood v. Box*, the history of the Supreme Court's abortion jurisprudence, and how the *Marks* Rule interprets plurality opinions. The second part will discuss why the Seventh Circuit's interpretation is correct. Finally, the third part will discuss what to expect in the coming term and the more significant issue at play.

SETTING THE SCENE FOR INCONSISTENCY IN THE RIGHT TO ABORTION

A. *The Facts of Planned Parenthood of Indiana and Kentucky v. Box.*

Unintended pregnancy is always a delicate situation, especially when it involves teenagers. The Supreme Court recognized the delicacy of these situations in the 1978 case of *Bellotti v. Baird*,¹⁷ where the Supreme Court specifically extended the constitutional right of privacy and liberty established in *Roe v. Wade* to minors.¹⁸ More specifically, in *Bellotti*, the Supreme Court held “if a state requires a

¹⁴ Michele McKeegan., *The Politics of Abortion: A Historical Perspective*. 3 *Women's Health Issues*. 127, 131 (1993).

¹⁵ Ind. Code § 16-34-2-4(e) (2021).

¹⁶ *Box*, 991 F.3d at 740.

¹⁷ 443 U.S. 622, 643–44 (1979) (The Supreme Court has announced clear bypass requirements for parental consent requirements); *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 141 S. Ct. 187, 207 (2020).

¹⁸ 410 U.S. 113 (1973).

pregnant minor to obtain the consent of one or both parents, another alternative option must be available for the minor to receive the abortion.¹⁹ The alternative process has four requirements: (1) the minor is permitted to demonstrate her maturity and informed decision making on having the abortion without parental consent, (2) if the minor does not prove maturity, she can convince the judge that the abortion would be the best decision for her (3) the minor must remain anonymous, and (4) the process must be expedited to ensure the abortion will be possible to obtain.²⁰

“Consistent with *Bellotti*, Indiana statutes have long provided a fast and confidential judicial bypass procedure that is supposed to allow a small fraction of pregnant, unemancipated minors seeking abortions to obtain them without the consent of or notice to their parents, guardians, or custodians.”²¹ Initially, the judicial bypass process in Indiana required a minor seeking an abortion without parental consent first to find her way to a state trial court. Then secondly, the trial court must find that the abortion would be in the minor’s best interests or that the minor is sufficiently mature to make their own decision.²² After those two steps, the minor was allowed a confidential abortion.

However, Indiana Senate enrolled Act 404, which changed the judicial bypass process. Act 404 would make Indiana an outlier; the only state requiring a parental notification after a judicial bypass procedure has already deemed the minor mature enough to make the decision themselves, as required under *Bellotti*.²³ Act 404 changed the judicial bypass process by adding a new “notification requirement” triggered after the judge approves the abortion for the minor.²⁴ The Act, if deemed constitutional, would require the minor’s parents to be

¹⁹ *Bellotti*, 443 U.S. at 644.

²⁰ *Id.* at 797 (“A child, merely on account of [their] minority, is not beyond the protection of the Constitution.”)

²¹ *Box*, 141 S. Ct. at 207.

²² Ind. Code § 16-34-2-4(e) (2021).

²³ 443 U.S. at 797.

²⁴ *Box*, 991 F.3d at 740.

notified that she is seeking an abortion through the bypass procedure unless the court finds the notification contrary to the best interest of the minor. (After a judge determines a minor can make the abortion decision, the law would still require the parents of the minor to be notified before the abortion takes place.) It is important to highlight that Act 404 only provides the best interest exception to this notification requirement, purposely leaving out the ability for the judge to decide based on maturity that the parents do not need to be notified.²⁵ This additional notification requirement, which does not consider the minor's maturity, effectively limits minors' privacy and access to confidential abortions.

The first time *Planned Parenthood v. Box*²⁶ came to the Seventh Circuit from the Southern District of Indiana, the Seventh Circuit applied the undue burden standard as used in *Whole Woman's Health*, comparing the benefits of the legislation to its burdens against persons seeking abortions.²⁷ As a result, the Seventh Circuit granted a preliminary injunction stopping Act 404's manipulation of the judicial procedure from going into effect. After that decision, the United States District Court for the Southern District of Indiana, the defendants-appellants, petitioned the Seventh Circuit for rehearing and rehearing *en banc*, which the Seventh Circuit denied. Then the United States District Court for the Southern District of Indiana petitioned for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit. The Supreme Court granted the petition for writ of certiorari, vacated the Seventh Circuit's decision, and remanded for further consideration in light of *June Medical*.²⁸

On remand, an important question for the Seventh Circuit panel was how to apply the "narrowest ground" rule announced in *Marks v.*

²⁵ Ind. Code § 16-34-2-4(d) (2021).

²⁶ *Planned Parenthood*, 141 S. Ct. at 207.

²⁷ *Whole Woman's Health*, 136 S. Ct. at 2318; *Compare* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 860 (1992).

²⁸ *June Medical*, 140 S. Ct. at 2113; *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 591 U.S. —, 141 S. Ct. 187, 188 (2020).

*United States*²⁹ for discerning the precedential force of Supreme Court decisions issued without a majority opinion (referred to throughout this Note as the *Marks* Rule). The Seventh Circuit correctly concluded that the plurality holding in *June Medical* did not overrule the precedential effect of *Whole Woman's Health*, as it applies to the instant case. Therefore, the Seventh Circuit correctly affirmed the preliminary injunction against Act 404 because Act 404 was substantially likely to be unconstitutional and violate the requirements outlined in *Bellotti*.³⁰ To understand what and why the Seventh Circuit came out the way it did and the *Marks* Rule's impact on access to abortion rights, it is essential to look at both the history of abortion in the United States and the history of the *Marks* Rule.

B. History of Abortion

The Supreme Court established the constitutional right to abortion in 1973 with the landmark decision of *Roe v. Wade*.³¹ However, the history of abortion began well before that. Abortion has been a widespread practice as solidly rooted in our past as in the present.³² Since the 1600s, people around the world have used abortion to control their reproduction in every known society — regardless of its legality. For a long time, abortion was a “common and legalized”³³ practice in the United States.

It was not until the 19th century that the war on reproductive rights truly began, with the first known abortion restriction law passed in England in 1803.³⁴ After that, more anti-abortion laws started to follow, and by the end of the 19th-century, most states in the U.S.

²⁹ 430 U.S. 188 (1977).

³⁰ *Box*, 991 F.3d at 752.

³¹ 410 U.S. at 113.

³² Zoila Acevedo, *Abortion in early America*. 4 *Women & Health*, 159–167, (1979).

³³ *Roe*, 410 U.S. at 132. ([i]t is undisputed that at common law, abortion performed before “quickening”-the first recognizable movement of the fetus in utero.)

³⁴ Lord Ellenborough's Act, 43 Geo. 3, c. 58 (1803).

adopted laws banning abortion except to save the life or health of a pregnant person.³⁵ Then, in 1873 Congress passed the Comstock Laws, which banned the publication and dissemination of information about birth control.³⁶

1. The Right to Abortion Rooted in the Right to Privacy

In response to those abusive legislative blockades threatening reproductive health, the Supreme Court in *Griswold v. Connecticut*³⁷ in 1965 recognized the Bill of Rights having a “penumbra” of guarantees including the right to privacy for individuals in deciding matters “so intimate and personal as childbearing.”³⁸ This case applied to the right of promotion and use of contraceptive birth control for married women. However, the case most notably established the constitutional right of privacy in the realm of reproductive rights. The penumbra of rights first recognized in *Griswold*, namely the right of personal privacy, would also serve as the basis for a woman’s right to their body and their reproductive decisions, including the right to abortion.³⁹

Eight years after *Griswold*, in 1973, the Supreme Court decided *Roe v. Wade*, which solidified the right to privacy as it applied to a

³⁵ See Cyril C. Means, *The Law of New York Concerning Abortion and the Status of the Fetus, A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 1664, 1968, (1968). (By the turn of the 20th century, almost every state classified abortion as a felony, with some states including limited exceptions for medical emergencies and cases of rape and incest.); see also Connecticut § 19a-600, *et seq.* (Connecticut’s first abortion restriction passed in 1821); see also Missouri Stands for the Unborn Act § § 188.056, 188.057, and 188.058 (Missouri’s first abortion restrictions enacted in 1825); see also Illinois in 1827; and New York in 1829.

³⁶ See 42 Cong. Ch. 258, 17 Stat. 598 (1873); see also Peter Smith, *The History and Future of the Legal Battle Over Birth Control*, 49 Cornell L.Q. 275, 275-76 (1964).

³⁷ 381 U.S. 479 (1965)

³⁸ *Griswold*, 381 U.S. 479 (1965)

³⁹ See Professor Cheryl E. Amana Burris, J.D., LL.M., *Reproductive Rights Under Attack: Can the Fundamentals of Roe Survive?* 8 Biotechnology & Pharmaceutical L. Rev. 1, 3 (2015).

woman’s decision to birth a child.⁴⁰ The essential principles of *Roe* established for the first time that abortion restrictions implicated an unenumerated, fundamental right to personal privacy grounded in the Due Process Clause of the Fourteenth Amendment.⁴¹ In addition, the Court developed a trimester system.⁴² The system prohibited state interference with a woman’s right to terminate her pregnancy during the first trimester, which left abortion decisions to be made only between a patient and their attending physician.⁴³ After the first trimester, states could enact abortion regulations reasonably related to maternal health. Then, only in the third trimester after a fetus reached the point of “viability” did a state’s interest in potential life become so compelling to allow states to go as far as prohibiting abortion except for saving the mother’s life.⁴⁴

Importantly, since the Supreme Court found the right to abortion through the fundamental right of privacy, courts evaluated legislative challenges to the right under strict scrutiny.⁴⁵ Thus, *Roe* provided the most protection to date for the right to abortion.⁴⁶ While many scholars think the Supreme Court in 1973 took the abortion issue away from voters and should have allowed the democratic process to handle this issue itself,⁴⁷ the Court stepped in and created constitutional

⁴⁰ *Roe*, 410 U.S. at 129. (“Personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights.”)

⁴¹ *Id.* at 129 (The right to abortion was encompassed in the penumbra of rights first recognized in *Griswold v. Connecticut*); see *Griswold*, 381 U.S. 479 (1965)

⁴² *Roe*, 410 U.S. at 163.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 155; *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir.2004) (Under the strict scrutiny standard, a law “must serve a compelling government interest and must be narrowly tailored to serve that interest.”)

⁴⁶ *Roe*, 410 U.S. at 153,155.

⁴⁷ *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 277 (5th Cir. 2019) (James C. Ho, Concurring) (Nothing in the text or original understanding of the Constitution establishes a right to an abortion. Rather, what distinguishes abortion from other matters of health care policy in America—and uniquely removes abortion

protection for abortion. Nevertheless, the creation of this right was not the Court's fatal flaw rather, the wishy-washy decisions going back and forth on the standard of the right to abortion that followed *Roe* are. These subsequent decisions continued to reshape the right to abortion and have never allowed the dust to settle, making the issue as contentious today as when the Supreme Court decided *Roe* fifty years ago.

2. Chipping Away at *Roe*: *Casey* and the Undue Burden Standard

In 1992, nearly 20 years later, the Supreme Court created the “undue burden standard” in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁴⁸ *Casey* reaffirmed the principles of *Roe* giving deference to stare decisis respecting settled precedent⁴⁹ and upholding the “promise of the Constitution that there is a realm of personal liberty which the government may not enter.”⁵⁰ Implicit in that promise is the “right of an individual ... to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”⁵¹

However, *Casey*'s allegiance to *Roe* was selective — the joint opinion deferred to certain aspects of *Roe* while abandoning others.⁵² The Supreme Court took a major step back by identifying the right to abortion as a protected liberty rather than a fundamental right to

policy from the democratic process established by our Founders—is Supreme Court precedent.); Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of Roe v. Wade: Why Abortion Should Be Returned to the States*, 10 TEX. REV. L. & POL 85, 162–63 (2005) (The Supreme Court made the abortion debate more divisive because it prevented resolution through the normal give and take of political and legislative discourse and decision.); Jean Bethke Elshtain, *Roe v. Wade: Speaking the Unspeakable*, in Robert P. George, *Great Cases in Constitutional Law* 182 (2000).

⁴⁸ 505 U.S. 833, 874 (1992).

⁴⁹ Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 789 (2012) (Put roughly, stare decisis refers to the practice of a court deferring to some set of precedent).

⁵⁰ *Casey*, 505 U.S. at 872 (plurality opinion).

⁵¹ *Id.* at 851–52, (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453.)

⁵² *Id.*

privacy. As a result, the strict scrutiny standard of review no longer applied.⁵³ In doing so, the Court significantly changed the abortion landscape and created an entirely new framework.⁵⁴ The Court held that the “undue burden” standard prohibits any state laws that have the purpose or effect of placing a substantial obstacle in the way of a woman seeking a pre-viability abortion.”⁵⁵ The undue burden standard instructed lower courts to look at the burdens abortion restriction placed on the right to access abortion, and any such law imposing an undue burden on the right was therefore unconstitutional.⁵⁶ This new standard allowed states broader authority, and legislators across the country took advantage of it by enacting a steady stream of abortion restrictions and regulations that would slowly strangle access to abortion.⁵⁷

For example, there were five provisions of the Pennsylvania Abortion Control Act of 1982 under review in *Casey*. However, the Supreme Court found that only the spousal notification requirement imposed an undue burden on a woman accessing abortion and was unconditionally invalid.⁵⁸ Three justices crafted and authored the *Casey* opinion: O’Connor, Kennedy, and Souter; because Justice Blackmun dissented, stating he would have applied *Roe*’s strict scrutiny and invalidated all five provisions.

It would seem *Casey* created a plurality opinion, similar to the current issue with *June Medical*’s plurality. But the court, not wanting

⁵³ *Id.* at 876

⁵⁴ Murray, *The Symbiosis of Abortion and Precedent*, 134 HARVARD L. REV. 308 (2020) Available: <https://harvardlawreview.org/2020/11/the-symbiosis-of-abortion-and-precedent/>.

⁵⁵ *Id.*, at 878, 112 S.Ct. 2791

⁵⁶ *Id.* at 876.

⁵⁷ See Serena Mayeri, Opinion, *How Abortion Rights Will Die a Death by 1,000 Cuts*, N.Y. TIMES (2018) (“As abortion-rights leaders feared, *Casey*’s undue burden standard allowed more restrictions than *Roe*. Many states have enacted laws that drastically limit access to reproductive health care, particularly for poor, rural and immigrant women who cannot afford to miss work and make repeated trips to clinics hundreds of miles away.”)

⁵⁸ *Id.* at 887-95.

confusion in the application of its holding, invoked the *Marks* Rule itself, explicitly instructing the parties and the lower courts on how to read *Casey* properly. Thus, Justice Souter stated, “[f]or 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.”⁵⁹ However, this distinction between Blackmun’s dissent and the majority serves a purpose; it highlighted the *Roe* and *Casey* standards differences. Significantly more restrictive abortion laws passed muster under the new *Casey* standard than *Roe*’s standard. Nevertheless, the Supreme Court would not stop there, and the *Casey* “undue burden standard” would not be the last time the Supreme Court would modify the standard of the right to abortion.

3. Adding Protection: Whole Woman’s Health and Weighing the Benefits and Burdens

In 2016, *Whole Woman’s Health v. Hellerstedt* reaffirmed the “undue burden” standard.⁶⁰ However, the majority, consisting of Justices Breyer, Kennedy, Ginsburg, Sotomayor, and Kagan, applied the *Casey* undue burden standard a little more broadly by considering the burdens a law imposed on abortion access together with the benefits those laws conferred.⁶¹ This balancing of the burdens compared to the benefits helped the Court decipher if states enacted the legislation to promote safety and address a public health concern for individuals dealing with an unintended pregnancy or if the law was just a sham to hinder access to abortion procedures.

In this case, the majority approved a pre-enforcement injunction against two Texas state laws. The first injunction was on the clause that required admitting privileges for abortion providers. The second

⁵⁹ *Stenberg v. Carhart*, 530 U.S. 914, 952 (2000) (Rehnquist, C.J., dissenting)(Chief Justice Rehnquist—who dissented in *Casey*—also later wrote that he viewed the *Casey* plurality as binding under *Marks*).

⁶⁰ 579 US, 136 S. Ct. 2292 (2016)

⁶¹ *Id.*

focused on the clause that required abortion clinics to meet unnecessary hospital-level “safety” standards. The proposed laws would have effectively shut down most clinics in the State while providing minimal benefit or improvements in abortion delivery because the abortion procedures were already incredibly safe.⁶² To date, no majority opinion of the Supreme Court has overruled this standard.

4. Partisanship and Inconsistency in the Courtroom: June Medical and the Plurality Decision

Three years later, in 2019, the Supreme Court heard its most recent abortion case *June Medical*. It is important to note that within these three years, Justice Kennedy retired, and the Supreme Court saw two new additions, Justice Gorsuch⁶³ and Justice Kavanaugh.⁶⁴ So, even though the facts of *June Medical* were identical to *Whole Woman’s Health*, the Supreme Court now had more conservative-leaning justices than it did in the time of *Whole Woman’s Health*.

The Louisiana admitting privileges law in *June Medical* was nearly word-for-word the Texas admitting privileges law struck down in *Whole Woman’s Health* and had the same effect of shutting down almost all abortion providers in the state.⁶⁵ The only difference was that the case had much less progressive support, and the Court decided

⁶² *Id.* at 970-80.

⁶³ Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 115th Cong. 74, 76, 135 (2017) (statement of Judge Neil M. Gorsuch). Judge Gorsuch vowed to analyze cases with respect to the “law of precedent.”

⁶⁴ Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 115th Cong. (Sept. 5, 2018) (statement of Judge Brett M. Kavanaugh). Judge Kavanaugh assured the Senate Judiciary Committee of his commitment to precedent, noting that the concept of *stare decisis* “comes from Article III itself.”

⁶⁵ *June Medical*, 140 S. Ct. at 2113, 2134

the opinion as a 4-1-4 plurality (i.e., plurality-concurrence-dissent).⁶⁶ Justices Ginsburg, Breyer, Sotomayor, Kagan considered the burdens the law imposed on abortion access together with the benefits those laws conferred, following the standard used in *Whole Woman's Health*.⁶⁷ On the other end, Justices Thomas, Alito, Gorsuch, and Kavanaugh dissented, believing the *Whole Woman's Health* standard was not appropriate and should be overturned.⁶⁸ Chief Justice Roberts concurred with the majority in his own opinion, striking down the law purely on the principle of stare decisis,⁶⁹ calling for the Court to adhere to *Whole Woman's Health's* earlier result on the essentially identical facts.⁷⁰ Both the plurality and the Chief Justice agreed that enforcement of the Louisiana law was properly enjoined before it took effect.

While this was arguably a win for pro-choice supporters, the plurality decision left many open questions: Namely, what was the binding authority, and which abortion standard applied? With no instruction from the Supreme Court,⁷¹ it was now up to the lower courts to answer these questions. To do this, the lower courts utilized the incongruent *Marks* Rule. Together, the uncertain abortion standard and application of the *Marks* Rule paired with rising legislative attacks on abortions laws in various states created a recipe for inconsistency. This recipe created several disagreements among circuits about which opinion in *June Medical* was the “narrowest grounds.”

The Seventh Circuit entered this split when it applied its interpretation of the *Marks* Rule on remand in *Planned Parenthood of Indiana & Kentucky, Inc. v. Box*.⁷²

⁶⁶ *Id.* at 2122–32 (Breyer, J., plurality opinion).

⁶⁷ *Id.*

⁶⁸ *June Medical*, 140 S. Ct. at 2148 (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*).

⁶⁹ *See*, Mead, *supra* note 44, at 790.

⁷⁰ *June Medical*, 140 S. Ct. at 2134, 2139 (Roberts, C.J., concurring).

⁷¹ *See Casey*, 510 U.S. at 1309–10 (Souter, J., in chambers). Unlike in *Casey* plurality specifically told the lower courts the holding to use.

⁷² 991 F.3d 740, 741 (7th Cir. 2021).

C. The Marks Rule Leading to Inconsistency in Reproductive Rights

The Supreme Court required the Seventh Circuit to rely on the *Marks* “narrowest grounds” Rule to understand *June Medical’s* holding and precedential force.⁷³ The issue with this instruction is that the *Marks* Rule is notoriously vague and incongruent in its application.⁷⁴ As a result, circuits across the nation used different approaches or even the same approach and came to different outcomes to determine the precedential effect. This variation has resulted in applying different abortion standards and has made the right to abortion differ by jurisdiction.⁷⁵

The Supreme Court held that the *Marks* Rule is the controlling Rule for evaluating the precedential effect of its plurality opinions.⁷⁶ According to the *Marks* 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.’”⁷⁷

Marks determined that lower courts were required to accord at least some precedential effect to plurality decisions. Still, the Court provided little guidance regarding precisely how lower courts should identify which aspects of those decisions were binding. Thus, the *Marks* Rule is far from a perfect solution when dealing with plurality decisions for various reasons. First, the Rule creates precedent when there is no clear majority, which can be problematic. As a result, lower

⁷³ *Marks*, 430 U.S. at 193.

⁷⁴ Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 448 (1992). Even commentators who have proposed reforms to the *Marks* doctrine have sometimes characterized their efforts as “damage control,” viewing the task for lower courts as making the best of a bad situation the Supreme Court thrust upon them with its abdication of its institutional responsibility.

⁷⁵ See, e.g., Evan Bernick *supra* note 6 at 36.

⁷⁶ *Marks*, 430 U.S. at 193

⁷⁷ *Id.* quoting *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.).

courts across the country now can interpret the plurality in ways inconsistent with the Supreme Court's desired intent of the ruling. Second, the *Marks* Rule can be highly inefficient and create judicial instability because of the inconsistent rulings.⁷⁸ Finally, the *Marks* Rule creates confusion among lower courts because it provides no guiding framework. Due to the lack of instruction on how lower courts should implement the *Marks* Rule, circuits across the country have created various methods for concluding which is the narrowest opinion. Each *Marks* approach analyzes how each justice's opinion in a case fits with the others in different ways. The Seventh Circuit considered three approaches: the logic-subset, the swing-vote, and the issue-by-issue.

Each approach has a distinct method for ascertaining the narrowest ground of a plurality, and each has distinct pros and cons. Lower courts across the country have not been consistent in sticking to an approach. Rather different circuit panels often adopt different approaches depending on the particular plurality decision that the circuit is considering.⁷⁹ "This doctrinal confusion among lower courts regarding the proper approach and application of *Marks* has produced a series of longstanding circuit splits that have resulted from lower courts' disagreements regarding how the narrowest grounds rule should apply to particular Supreme Court plurality decisions."⁸⁰

⁷⁸ Owen P. Toepfer, *June Medical and the Marks Rule*, 96 NOTRE DAME L. REV. 1725 (2021)

⁷⁹ *Compare, e.g., Green v. Haskell Cty. Bd. of Comm'rs*, 568 F.3d 784, 807 n.17 (10th Cir. 2009) ("Given that [Van Orden v. Perry, 545 U.S. 677 (2005),] was decided by a plurality, the separate opinion of Justice Breyer, who supplied the 'decisive fifth vote,' is controlling under the rule of Marks."); *with, e.g., United States v. Carrizales Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) ("In practice, . . . the Marks rule produces a determinate holding 'only when one opinion is a logical subset of other, broader opinions.'" (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc))). Some circuit courts have even commented on this internal inconsistency. *See, e.g., Lisk v. Lumber One Wood Preserving, LLC*, 792 F.3d 1331, 1337 (11th Cir. 2015).

⁸⁰ *see* Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 804–06 (2017); *see, e.g., Garland v. Roy*, 615 F.3d 391, 402-03 (5th Cir. 2010) Identifying a four-way circuit split

1. The Logic-Subset Approach

The logic-subset, “implicit consensus,” or “common denominator” approach is frequently utilized in circuit courts. According to the logic-subset approach, the *Mark’s* narrowest ground rule applies only “where it is clear that one opinion would apply in a subset of cases encompassed by a broader opinion such that ‘the rationales for the majority outcome are nested, fitting within each other like Russian dolls.’”⁸¹ When the reasoning underlying the decisive concurring opinion fails to fit within a broader logical circle drawn by the other opinions or is not within the nesting doll, *Marks* does not apply.⁸² Therefore, under this approach, a Supreme Court decision is only binding when a single line of reasoning enjoys the assent of a majority of the justices. Only the reasoning enjoined by a majority is the lowest common denominator of a majority of the justices’ rationales.⁸³ In the simplest scenario, four justices agree on ground *A* and *B* for the judgment, and the one justice concurs only on ground *A* but not ground *B*. In such a case, the concurring opinion on ground *A* is the rationale that provides the narrowest ground and is thereby controlling.⁸⁴

regarding application of *Marks* to *United States v. Santos*, 553 U.S. 507 (2008), and rejecting all four in favor of a fifth distinct approach; *see also* *Rapanos v. United States*, 547 U.S. 715 (2006).

⁸¹ *King*, 950 F.2d at 781 (“*Marks* is workable . . . only when one opinion is a logical subset of other, broader opinions.”).

⁸² *Id.* at 782; accord, *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) (explaining that where no single standard “constitutes the narrowest ground for a decision on that issue, there is then no law of the land”).

⁸³ *See Alcan Aluminum Corp.*, 315 F.3d at 189.

⁸⁴ *Box*, 978 F.3d at 476.

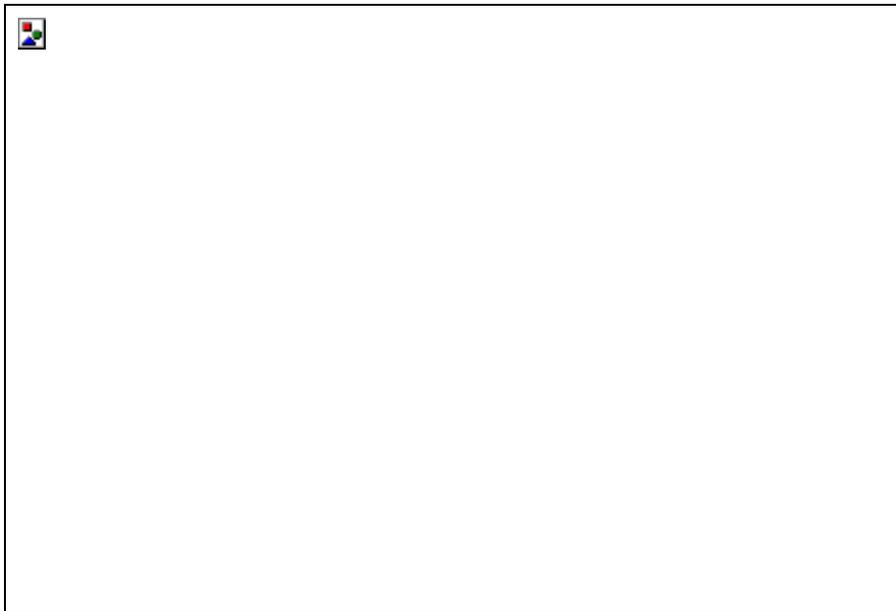


Figure 1 *Gregg v. Georgia* Plurality

For example, in *Gregg v. Georgia*,⁸⁵ the Court, considering the unconstitutionality of the death penalty, published another fragmented opinion. The Court treated the concurring opinion of Justices Stewart and White as controlling.⁸⁶ The opinions fell in a single line of reasoning with Justices Marshall and Brennan as the inner smallest nesting doll, having the most restrictive opinion, believing the death penalty is unconstitutional in all circumstances. Then, Justice Stewart and White's opinion was the middle nesting doll, believing the death penalty is unconstitutional when administered arbitrarily and capriciously. Last, Justice Douglas's opinion was the outer nesting doll, who insisted that any discretion is for the judge or jury to decide when to impose capital punishment. Therefore, Justice Stewart and White's opinion was the binding precedent because the most

⁸⁵ 428 U.S. 153, 169 (1976).

⁸⁶ *See id.*

restrictive opinion (Justice Marshall and Brennan) would fit within it, and the broadest opinion would also agree with it to some extent.⁸⁷ Overall, *Gregg* is an example of when it is relatively unproblematic to apply the *Marks* Rule.

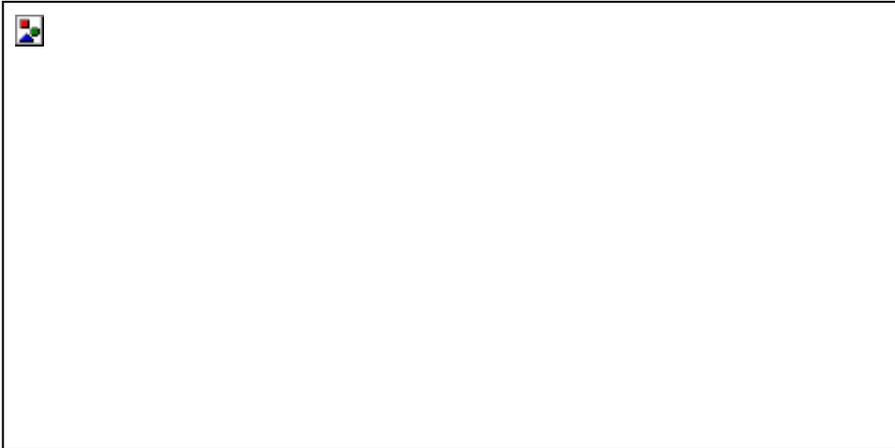


Figure 2 McDonald v. City of Chicago Plurality

In contrast, the *Marks* Rule would not apply under the logic-subset approach when choosing one opinion as the narrowest ground would produce a holding that a majority of justices would not have endorsed. For example, in *McDonald v. City of Chicago*,⁸⁸ the Court determined whether the Second Amendment was incorporated through the Fourteenth Amendment's Privileges and Immunities or Due Process clauses. Justice Alito's plurality advocated that the right was incorporated through the Due Process Clause but not incorporated through the Privileges or Immunities Clause. In contrast, Justice Thomas concurred in the judgment but held the right was incorporated through the Privileges or Immunities Clause, not through the Due Process Clause. Then, the two dissenting positions determined that the right was not incorporated through either the Due Process or Privileges

⁸⁷ See *Furman v. Georgia*, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring).

⁸⁸ 561 U.S. 742, 745 (2010).

and Immunities Clauses. The opinions overlap in some sense but also diverge in others, making it impossible for the opinions to order in a nested manner.⁸⁹ Thus, in an instance like *McDonald*, the *Marks* logic-subset approach could not apply. The *Marks* Rule does not require the court to find common ground—it only requires that when it does, the *Marks* Rule can apply.⁹⁰ Therefore, if there is no common denominator, the *Marks* Rule is inappropriate, and no binding precedent can be applied.

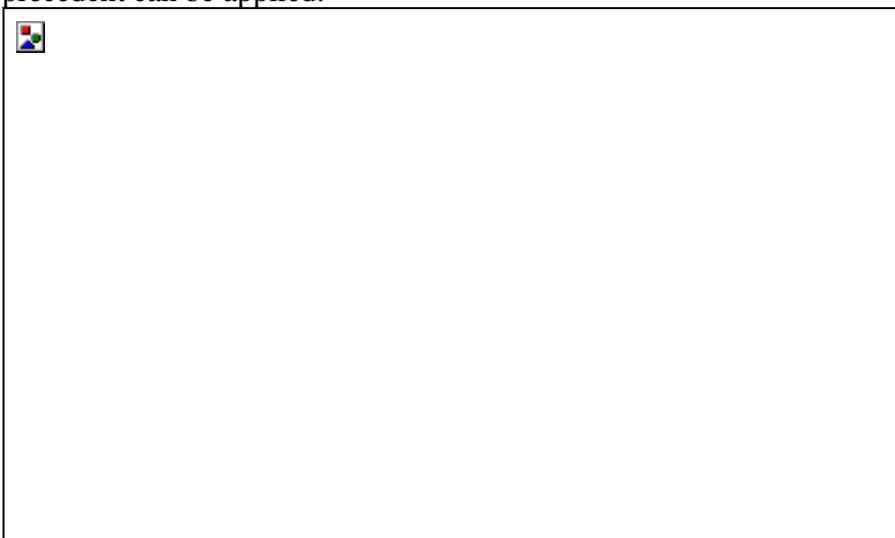


Figure 3: June Medical Plurality

Like *Gregg*, the opinions in *June Medical* are in a single line of reasoning that enjoys the assent of a majority of the justices. The Justices merely disagree over how restrictive the right to abortion is. All justices' opinions fell on that spectrum, nesting from the most restrictive, the inner nesting doll, to the least restrictive, the outer nesting doll. Specifically, Justice Breyer's plurality opinion is broadest because it protects the right to abortion the most by upholding the *Casey* undue burden standard with *Whole Woman's Health* burden-

⁸⁹ David S. Cohen, *The Paradox of McDonald v. City of Chicago*, 79 GEO. WASH. L. REV. ARGUENDO 1A (2011).

⁹⁰ *Box*, 978 F.3d at 43.

benefit balance. But the varying dissenting opinions are the most restrictive to the right with the least protection. Chief Justice Roberts' opinion is the middle ground, believing the law should be struck down on *stare decisis* grounds. Thus, Chief Justice Roberts's opinion is logically nested within the plurality's opinion of the standard.

The logic-subset approach to the *Marks* Rule applies to *June Medical*. However, there is a dispute as to the outcome of that approach. Circuits have come out with three different outcomes using the logic-subset approach: 1) there is no binding precedent in *June Medical*, 2) Chief Justice Roberts's entire opinion controls, and 3) that *Whole Woman's Health* was entitled to *stare decisis* effect was the only holding.⁹¹

For example, the Fifth Circuit in *Whole Woman's Health v. Paxton* concluded that no opinion represented a logic-subset of the other and that *Hellerstedt's* cost-benefit test still governed.⁹² The Fifth Circuit determined that the only common denominator between the plurality and the concurrence in *June Medical* was their shared conclusion that the challenged Louisiana law constituted an undue burden, further stating that the decision did not furnish a new controlling rule as to how to perform the undue burden test. Therefore, the *Whole Woman's Health* formulation of the test continues to govern all abortion cases, which means that the undue burden plus benefit and burden analysis would still be the appropriate standard.

However, the Fifth Circuit granted a rehearing *en banc*, vacated the initial opinion, and reversed. The Fifth Circuit *en banc* reasoned that Chief Justice Robert's entire opinion is the binding precedent in the case because "So the Chief Justice's test is a narrower version (only burdens) of the plurality's test (benefits and burdens).

⁹¹ See *EMW*, 960 F.3d at 796 ("Like other courts presented with this argument, we find it unpersuasive."); *W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310, 1326 (11th Cir. 2018) ("The State cites no support for the proposition that a different version of the undue burden test applies to a law regulating abortion facilities.")

⁹² See *Whole Woman's Health v. Paxton*, 972 F.3d 649, 652–53 (5th Cir. 2020).

Accordingly, the Chief Justice's concurrence controls, and we do not balance the benefits and burdens in assessing an abortion regulation.⁹³

Further, the Sixth Circuit is currently in disagreement with itself over the holding of *June Medical*. The Sixth Circuit used the logic-subset approach in *EMW Women's Surgical Ctr., PSC v. Friedlander*,⁹⁴ the court found that Chief Justice Roberts's entire concurrence was binding.⁹⁵ *EMW* involved a Kentucky law requiring that abortion providers obtain transfer and transport agreements with local hospitals and ambulance services. A divided panel found that Chief Justice Roberts's concurrence was binding under *Marks* and vacated an injunction against Kentucky law enforcement.⁹⁶ Reasoning that because all laws invalid under the Chief Justice's rationale (the middle nesting doll) are invalid under the plurality's (the outer nesting doll), 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 the *Marks* Rule. *EMW*'s holding was very contentious within the circuit panel.⁹⁷ The dissent argued that "the majority openly disregarded the circuit's standard of review and discarded binding precedent. In doing so, the majority in the sixth circuit condoned the evisceration of the constitutional right to abortion access in Kentucky."⁹⁸

⁹³ *Paxton*, No. 17-51060 WL 3661318 (5th Cir. Aug. 18, 2021).

⁹⁴ 978 F.3d at 431.

⁹⁵ *Id.*

⁹⁶ *EMW*, 978 F.3d at 433.

⁹⁷ *Id.* at 438 (Clay, J., dissenting) ("At the end of the day, no matter what standard this Court is bound to apply, the majority's decision today is terribly and tragically wrong. The majority directly contravenes both the plurality and concurring opinions in *June Medical Services*, as well as the majority opinion in *Whole Woman's Health*. Correctly analyzed, the record and the law definitively demonstrate that Kentucky's transfer and transport agreement requirements impose an undue burden under any possible analysis. And the consequences of today's decision could not be more dire. As a result of the majority's deeply flawed analysis, millions of individuals will be altogether deprived of abortion access.")

⁹⁸ *Id.*

Instead, the dissent which utilized the same logic-subset approach would have upheld *Whole Woman's Health*. Stating that even if the Chief Roberts' Justice's concurrence in *June Medical* was the controlling opinion from that case— his critique of the balancing approach was mere dicta because Chief Justice Roberts based his opinion on stare decisis. Thus, the dissent determined that the narrowest ground between the plurality and the concurrence was only that *Whole Woman's Health* was entitled to stare decisis effect on essentially identical facts.⁹⁹ The dissents holding resulted in the *Whole Woman's Health* standard, where the burdens and benefits of the law at issue are balances.¹⁰⁰

The dissenting opinion in *EMW* is not the only opinion taking issue with the majority analysis. Additionally, in *Bristol Regional Women's Center, P.C. v. Slatery*,¹⁰¹ a case involving a Tennessee statute that imposes a waiting period of 24-48 hours on women seeking an abortion in the State, the court expressed grave doubt as to the precedential effect of the *EMW* majority opinion. The court suggested the panel's choice between the two standards was entirely dicta¹⁰² because it was not necessary to determine the issue on appeal and is therefore not binding on the circuit.¹⁰³

⁹⁹ *June Medical*, 140 S. Ct. at 2120 (plurality); *id.* at 2139 (concurrence).

¹⁰⁰ *See Whole Woman's Health*, 136 S. Ct. at 2318; *See EMW*, 978 F.3d at 470.

¹⁰¹ No. 20-6267, 2021 WL 650893, at 14 (6th Cir. Feb. 19, 2021) (Thapar, J., dissenting).

¹⁰² *United States v. Hardin*, 539 F.3d 404, 410–11, 413 (6th Cir. 2008) (Holding an earlier opinion to be dicta insofar as it chose between a probable cause and a "lesser reasonable belief standard" for the quantum of proof needed for police officers to enter a residence and execute a search warrant where the facts of the earlier case were such that either standard would have been satisfied).

¹⁰³ *Slatery*, No. 20-6267, 2021 WL 650893, at 14 (6th Cir. Feb. 19, 2021) ("Given a choice between Casey and Whole Woman's Health standards would not have change the outcome of the EMW case due to the nature of the underlying facts").

2. The Swing-Vote Approach

Next, the swing-vote or “median” approach essentially views *Marks* as an instruction to search for the opinion reflecting the views of the Court’s median or “swing” justice—typically, the fifth vote and accord that decision full precedential effect.¹⁰⁴ Therefore, to locate the narrowest grounds, a lower court looks to justice’s opinion, which was necessary to secure a majority. Meaning the controlling opinion could reflect the view of only one justice.¹⁰⁵ Lower courts justify using this approach under two schools of thought: (1) assessing the predictive value of future similar cases, assuming the Court will likely be able to muster five votes only for the rationale taken by the “fifth justice” in the earlier case¹⁰⁶, and (2) considering the forced-to-choose rationale, which assumes that the swing vote justice’s opinion would be the preferred outcome of the Court if it were required to settle on one view.¹⁰⁷

Although this approach does not require the opinions to be “nested,” this approach requires opinions to be based on a single dimension of the opinions.¹⁰⁸ There needs to be a middle ground opinion to determine the plurality’s preferred precedential outcome. It would be impossible to identify a single opinion reflecting the justices’ median position if the opinions, like in *McDonald v. Chicago*, were in

¹⁰⁴ See Williams, *supra* note 79, at 806.

¹⁰⁵ *Casey*, 947 F.2d at 694.

¹⁰⁶ See, e.g., Frank B. Cross, *The Justices of Strategy*, 48 DUKE L.J. 511, 548 (1998) (book review) Contending that a “rational lower court” attempting to use a prior Supreme Court plurality decision to predict the Court’s future decisions “will simply find the position of the fifth Justice and treat this as the law.”

¹⁰⁷ See generally Maxwell L. Stearns, *Constitutional Process: A Social Choice Analysis of Supreme Court Decision Making* 45, 124-41 (2000) (arguing that a fifth vote approach to the Marks rule—that is, one that accords controlling significance to the views of the Court’s median Justice—will identify a Condorcet winner in most plurality decisions.)

¹⁰⁸ *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 619 (7th Cir. 2014) (quoting *United States v. Heron*, 564 F.3d 879, 884 (7th Cir. 2009) (collecting cases)); *Whole Woman’s Health All. v. Hill*, 493 F. Supp. 3d 694, 732 (S.D. Ind. 2020), order clarified sub nom.

effect multiple distinct “majorities” composed of different justices who do not share a common ranking for the available options.¹⁰⁹

This approach is relatively broader than the logic-subset approach but is not without its critiques—and for a good reason. There are two main criticisms of the swing vote approach. First, this approach treats as binding every aspect of the opinion reflecting the median justice’s views, even if no other participating justice would have agreed. Second, the approach allows the dissenting opinions to have potential precedential effect by considering their point of view when searching for the middle opinion, even though *Marks* explicitly wrote in terms of “those Members who concurred in the judgments.”¹¹⁰ Despite these criticisms, the Third, Seventh, and D.C. Circuits have all toyed with this approach to some extent.¹¹¹

The paradigmatic case the swing vote approach would apply is the 4–1–4 case. The swing-vote approach could apply to *June Medical* because it is a 4-1-4 case, and all the opinions fall on a spectrum of views as required, with Chief Justice Robert’s concurrence in the middle of the plurality and dissent.¹¹² Under this approach, it would be likely that the Chief Justice’s entire concurring opinion would be binding. Thus, the Casey undue burden standard would apply effectively, overruling the Whole Woman’s Health standard weighing the benefits and burdens of the law in question. This holding aligns with the swing votes approach’s understanding that if forced to choose among the remaining opinions, both the plurality and dissent would

¹⁰⁹ See Williams, *supra* note 79, at 804–06. If forced to choose among each of the remaining opinions, those writing or joining the opinions at the outer edge” of this continuum “would most prefer the one closest to them and least prefer the one farthest from them.”

¹¹⁰ *Marks*, 430 U.S. at 193 (quoting *Gregg*, 428 U.S. at 169.) This is also in contention with precedent case law and scholarly view that *Marks* does not count in any sense the dissenting opinions.

¹¹¹ See *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.”)

¹¹² *June Medical*, 140 S. Ct. at 2120 (Breyer, J., plurality)

choose Chief Justice Roberts’s opinion. However, applying this version of the *Marks* Rule highlights the main criticisms of the swing-vote approach. First, using this approach would create a binding precedent entirely on the view of a single justice, which is worrisome. It should not be possible that lower courts can determine that one justice’s opinion can overrule a true majority opinion by a mere interpretation.¹¹³

3. Issue-by-Issue Approach

In this approach, the key is not what opinion is “narrowest,” but which legal issues get at least five affirmative votes. This approach considers every opinion, including those dissenting from the majority. Then within each opinion, anything that receives the endorsement of at least five justices is binding.¹¹⁴ This approach only applies to a limited type of plurality decision, mainly cases with “dual majority.”¹¹⁵ Where “there are in effect two majorities: the plurality and concurrence agreeing on the result, and the concurrence and dissent agreeing on the fundamental legal principles involved.”¹¹⁶ There must be points where the opinions agree for any part of the opinion to have five votes.

A positive effect of this approach is that it avoids the uneasy conclusion that a single justice’s view can establish a binding precedent for the Court, unlike the swing vote approach. Instead, this approach looks for specific parts of the opinions that at least five justices have assented. However, there are also negative repercussions that stem from this approach. As the swing vote approach, this method is in contention with *the Mark’s* Rule’s notion that the dissenting opinions should not be counted or be able to potentially bind future

¹¹³ See *Ramos*, 140 S. Ct. at 1402–03.

¹¹⁴ See *Williams*, supra note 79, at 817–19.

¹¹⁵ *Id.* at 819

¹¹⁶ *Id.*

cases,¹¹⁷ which has led to some circuits expressly disavowing the approach entirely.¹¹⁸

Courts use this approach mostly when they cannot find the narrowest opinion under either logic-subset or the swing vote approaches.¹¹⁹ For example, the Eighth Circuit in *Hopkins v. Jegley*¹²⁰ held that Chief Justice Roberts's entire concurrence in *June Medical* was binding. The court did not specify which approach they were using to define the narrowest holding in *June Medical* nor explained how it reached its conclusion. However, the language of the case suggested the court was using an issue-by-issue interpretation. The court reasoned that because a total of five justices (Robert concurring and the four dissenting opinions) all rejected the *Whole Woman's Health* cost-benefit standard *Whole Woman's Health* was no longer binding precedent, and the court applied a straight *Casey* undue burden standard analysis.

However, it is also possible that a lower court using this approach with *June Medical* could find upholding *Whole Woman's Health* on the grounds of stare decisis to be the holding. The four Justice plurality and Justice Robert's concurrence give that issue a majority five votes

¹¹⁷ See, e.g., Jonathan H. Adler, *Reckoning with Rapanos: Revisiting "Waters of the United States" and the Limits of Federal Wetland Regulation*, 14 MO. ENVTL. L. & POL'Y. REV. 1, 14 (2006) (contending that "[n]othing in the dissent" in a plurality decision "constitutes a portion of the judgment of the Court, so nothing in the dissent" can be "part of the actual holding of the case" under *Marks*).

¹¹⁸ See, e.g., *Paxton*, 972 F.3d at 653 ("[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))).

¹¹⁹ *United States v. Donovan*, 661 F.3d 174, 182 (3d Cir. 2011) (only after concluding that a strict application of marks was unworkable for the *Rapanos* decision, did the Third Circuit look to the votes of dissenting Justices if they, combined with votes from plurality or concurring opinions, to established a majority view on the relevant issue.)

¹²⁰ 968 F.3d 912, 915 (8th Cir. 2020).

without considering the dissenting opinions. The applicable standard to be used would be weighing the benefits and the burdens. Either way, it is relatively unnecessary since the issue-by-issue approach is merely a “necessary logical corollary”¹²¹ of *Marks* when a *Marks*’ analysis does not find a “narrowest” opinion. Therefore, lower courts should not use this approach with *June Medical* given the other approaches’ applicability.¹²²

As the above cases indicate, the *Marks* Rule interpretation is entirely left up to the lower courts to interpret on their terms, which results in differing standards across the jurisdictions, even when utilizing the same approach. The lack of standardization in the *Marks* Rule allows for a distortion of the right to abortion and comes with practical consequences, including stimulating even more controversy around the issue. Like the Fifth and Sixth Circuits, the Seventh Circuit correctly opted to use the logic-subset approach as it is the best approach for a plurality opinion such as *June Medical*, however using the same approach, the seventh circuit would come to an alternative outcome.

SEVENTH CIRCUIT ENTERS THE SPLIT

The Seventh Circuit majority came to the proper conclusion despite the Supreme Court leaving the lower courts “with [their] previous decision in one hand and a half-dozen *June Medical* opinions in the other, figur[ing] out how the latter affects the former.”¹²³ Undoubtedly, each circuit is trying its level best to apply the same guidance from the *Marks* Rule to the same set of opinions in *June Medical*, yet the varying circuit precedents have made it clear that this is not so simple a task.¹²⁴

Unsurprisingly, due to the mass inconsistency in applying the *Marks* Rule and the polarized nature of the abortion issue itself, the

¹²¹ *Duwall*, 740 F.3d at 611.

¹²² *See id.* at 611.

¹²³ *Box*, 991 F.3d at 752

¹²⁴ *See id.* at 757.

Seventh Circuit panel was divided two-to-one in the proper application of the *Marks* Rule.¹²⁵ Although the Seventh Circuit was unanimous in the initial inquiry determining which approach to adopt (the logic-subset approach), the panel disagreed on the second inquiry of what within that logic-subset is binding. The Seventh Circuit majority determined that *June Medical* did not change the standard of abortion and applied the *Whole Woman's Health* balance of burdens and benefits standard. Despite the majority's interpretation being a minority viewpoint among sister circuits,¹²⁶ the Seventh Circuit majority's interpretation is most consistent with the principles of the *Marks* Rule and the doctrine of stare decisis, the grounds on which Chief Justice Roberts concurred.

A. *The Logic-Subset Approach is the Best Approach*

First, the panel looked at each of the three approaches discussed above. The Seventh Circuit's majority and dissent were unanimous in choosing the logic-subset approach as the best to determine the precedential effect of *June Medical*. The logic-subset approach was a clear choice for the Seventh Circuit because the *June Medical* plurality fits the nesting doll type of plurality that is best suited for this analysis consistent with the "substantial weight of authority."¹²⁷ Even further, using the logic-subset approach as the majority applied avoided unwelcome outcomes of the *Marks* Rule that the alternative approaches, namely the swing-vote approach, would produce.

Therefore, the Seventh Circuit dismissed the swing-vote approach as a non-predominant approach in courts across the country.¹²⁸ Moreover, the swing-vote approach here is inconsistent with Supreme Court precedent, treating as binding every aspect of the opinion

¹²⁵ *Id.* at 752.

¹²⁶ *Id.* at 751. The Seventh Circuit "recognize that the scope of *June Medical* and the effect of the concurrence has been controversial" and other circuits have come to an different conclusion, but that is not binding on them. Other circuits are wrong.

¹²⁷ *Id.* at 748.

¹²⁸ *Id.* at 749.

reflecting the median justice's view, even if no other participating justice would have agreed and allowing dissenting opinions to have potential precedential effect, which goes against Seventh Circuit and Supreme Court precedent.¹²⁹ Moreover, the Supreme Court instruction specifically wrote in terms of only "those Members who concurred in the judgment."¹³⁰ Therefore, the Seventh Circuit was left to ascertain the narrowest grounds between the plurality opinion and Chief Justice's Roberts concurring opinion.

B. Where the Panel Disagrees

Although the panel agreed on the logic-subset approach and agreed not to consider dissenting opinions, the panel disagreed on the arguable more difficult question: what part of Chief Justice Roberts's concurrence in *June Medical* constituted the "logic-subset" of the plurality opinion.¹³¹

Both the majority and dissent agree that Chief Justice Roberts's concurrence on the grounds of stare decisis is the controlling opinion but disagree on what in the concurrence is entitled to stare decisis effect and within the logic-subset and therefore binding precedent on the Seventh Circuit. The majority found Chief Justice Roberts's concurrence on the grounds of stare decisis logically applied to the entire holding of *Whole Woman's Health*. The majority refused to hold that one justice's opinion effectively overruled Supreme Court precedent, especially when that opinion is based on the grounds of

¹²⁹ *Gibson*, 760 F.3d at 620. F.3d 1043, 1057 (3d Cir. 1994); *United States v. Johnson*, 467 F.3d 56, 65 (1st Cir. 2006) ("[W]e do not share the reservations of the D.C. Circuit about combining a dissent with a concurrence to find the ground of decision embraced by a majority of the Justices.").

¹³⁰ *Marks*, 430 U.S. at 193; Maxwell L. Stearns, *The Case for Including Marks v. United States in the Canon of Constitutional Law*, 17 *Const. Comment.* 321, 328 (2000) (It is generally agreed upon, and commonly held in the 7th circuit that the dissenting opinions do not count when applying the marks rule, and therefore the 7th circuit would not consider them).

¹³¹ *Box*, 991 F.3d at 754.

stare decisis.¹³² In contrast, the dissent opined that only *Whole Woman's Health's* finding of a substantial obstacle was to be given stare decisis effect and that the concurrence effectively overruled the benefit and burden analysis introduced in *Whole Woman's Health*. In consideration of the *Marks* Rule and the doctrine of stare decisis, the majority got it right.

C. The Majority's Interpretation is Correct

1. The Majority's Approach Limits Unwelcome Outcomes

While the *Marks* Rule lacks a strong framework, some underlying principles and critiques follow the *Marks* Rule and varying approaches. The majority's interpretation avoids the unwelcome outcomes that the swing-vote approach would produce, while the dissenting opinion rejecting the swing-vote approach essentially mirrors the swing-vote approach's outcome.¹³³ Both majority and dissent agree that dissenters are not considered in the determination of the common denominator. Therefore, 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."¹³⁴

The majority held there was one "sliver" of common ground between the plurality and Chief Justice Roberts's concurrence, that *Whole Woman's Health* was entitled to stare decisis effect on essentially identical facts. Further reasoning that the portions of Chief Justice Roberts's opinions discussing disapproval with the *Whole Woman's Health* standard were mere dicta, and that Chief Justice Roberts, himself, does not view the dicta in his concurrence as

¹³² *June Medical*, 140 S. Ct. at 2113, 2134.

¹³³ *Box*, 991 F.3d at 746–49. Applying the swing-vote test to treat everything in the concurrence as a binding holding would allow less than a majority to overrule a Court precedent that had been established by majority vote.

¹³⁴ See Toepfer, *supra* note 76, at 1738.

binding.¹³⁵ The majority specifically noted that the *Marks* Rule does not “turn everything the concurrence said—including its stated reasons for disagreeing with portions of the plurality opinion—into binding precedent that effectively overruled *Whole Woman’s Health*,” which is in line with Supreme Court precedent.

For example, in *United States v. Santos*,¹³⁶ “the Supreme Court split 4-1-4 on the decisive issue.¹³⁷ Justice Scalia wrote a plurality opinion for four justices to affirm; Justice Stevens wrote a separate, narrower opinion concurring in that judgment. But Justice Stevens’s concurring opinion expressed views on future cases not before the Court. The Supreme Court plurality addressed how *Marks* should apply. Justice Stevens’s reasoning was the narrowest in support of the judgment. Still, the plurality flatly rejected the idea that everything in Justice Stevens’s opinion was binding or directly applicable: “Justice Stevens’s speculations on that point address a case that is not before him, are the purest of dicta, and form no part of today’s holding.”¹³⁸ Just like Stevens in *Santos*, Roberts’s language in his concurrence in *June Medical* discussing *Whole Woman’s Health* went to a case not before him at that moment and is the “purest of dicta.”¹³⁹ The dissent in *Box* would have Chief Justice Roberts’s entire concurrence, dicta and all, overrule Supreme Court precedent.

While there is no significant instruction or precedent on whether a single justice may overrule prior precedent, the Seventh Circuit majority seems to agree with Justices Ginsburg, Breyer, and Gorsuch and their opinion in *Ramos v Louisiana*.¹⁴⁰ In *Ramos*, the justices cast doubt on the idea that “a single justice writing only for himself has the

¹³⁵ *June Medical*, 140 S. Ct. at 2133 (“The question today however is not whether *Whole Woman’s Health* was right or wrong, but whether to adhere to it in deciding the present case.”)

¹³⁶ 553 U.S. 507 (2008).

¹³⁷ *See Box*, 991 F.3d at 749

¹³⁸ *Id.* at 523.

¹³⁹ *See id.*

¹⁴⁰ 140 S. Ct. 1390, 1403 (2020) (Gorsuch, J.)

authority to bind this Court to propositions it has already rejected.¹⁴¹ The majority considered that holding a single justice's opinion as binding would not only depart from the Seventh Circuit's "predominant understanding of *Marks*," but the majority also showed reservations to the possibility of adopting one justice's non-majority opinion as possibly becoming national law.¹⁴² Therefore, even if one justice's view can be binding in *Marks*, it becomes even more taboo when that once justice's opinion would effectively overrule Supreme Court precedent.

It is well known that only the Supreme Court can overrule itself, and they do so sparingly.¹⁴³ The Supreme Court has overruled itself a mere 145 times out of the over 25,544 cases it has heard to date, which means it overrules itself not even one percent of the time.¹⁴⁴ Allowing a single justice's opinion to overrule *Whole Woman's Health* goes against well-known legal principal as well as the fabric of American democracy. No one justice dictates. Therefore, a single justice should not determine policy and rule for the American people. The majority appropriately concluded that overruling Supreme Court precedent via the *Marks* Rule was "not [its] job."¹⁴⁵

Since a majority of justices of the Supreme Court have not held otherwise, the Seventh Circuit's majority concluded that *Whole Woman's Health* remains precedent and is binding on lower courts. Therefore, the balancing test also remains a binding precedent. That is

¹⁴¹ *Id.* (“[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”).

¹⁴² *See King*, 950 F.2d at 782; *see also Gaylor v. Mnuchin*, 919 F.3d 420, 433 n.9 (7th Cir. 2019) (stating that where one Justice's concurring opinion reached the same result as the plurality opinion, but did so under a different constitutional clause, that concurring opinion was not a “logical subset” of the plurality opinion).

¹⁴³ *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

¹⁴⁴ David Schultz, *The Supreme Court Has Overturned Precedent Dozens of Times in the Past 60 Years, Including When It Struck Down Legal Segregation*. The Conversation. (2021).

¹⁴⁵ *See Box*, 991 F.3d at 749.

the standard the Seventh Circuit followed in the original decision¹⁴⁶ and continued to follow in the instant case. Further, the concurring opinion offered no direct guidance for applying the undue burden standard more generally, which signaled to the majority that *June Medical* did not overrule *Whole Woman's Health*, the dissent disagreed.

However, the dissenting opinion determining the narrowest ground as the Chief Justice's Roberts entire concurrence is in contention with the well-known legal principle and the principle of stare decisis itself. To accept the dissents determination of precedential effect in *June Medical* suggests that Chief Justice Roberts both reaffirmed *Whole Woman's Health* and, in the same opinion, implicitly overruled it.

2. Reliance on Stare Decisis

The doctrine of stare decisis is the doctrine of precedent. Stare decisis “promotes the evenhanded, predictable, and consistent development of legal principles fostering reliance on judicial decisions and contributes to the actual and perceived integrity of the judicial process.”¹⁴⁷ There are four main factors the Supreme Court considers when considering overruling Supreme Court precedent: the workability of a precedent, whether the precedent was well-reasoned, the age of the precedent, and the reliance interests at stake.¹⁴⁸ Since *Casey*, the Supreme Court abortion jurisprudence and stare decisis have gone hand in hand. Therefore, it is no surprise the Chief Justice invoked the doctrine in *June Medical*,¹⁴⁹ explaining, “[t]he legal doctrine of stare decisis requires [the Supreme Court], absent special circumstances, to treat like cases alike.”

The majority's application of the *Marks* Rule aligns most with the principle of stare decisis. While the Chief Justice wrote that he still

¹⁴⁶ See *Planned Parenthood, Inc.*, U.S. 141 S. Ct. at 188.

¹⁴⁷ See *Casey*, 505 U.S. at 860.

¹⁴⁸ *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009).

¹⁴⁹ See *Murray supra*, note 53 at 308.

disagreed with *Whole Woman's Health*, he explained that principles of stare decisis called for the Supreme Court to adhere to that earlier result on the essentially identical facts, decided just three years earlier.¹⁵⁰ Both the plurality and the Chief Justice agreed that enforcement of the Louisiana law was properly enjoined before it took effect. All the more, the concurring opinion offered no direct guidance for applying the undue burden standard more generally. The majority in *Box* held that the precedential effect only pertained to reaffirming *Whole Woman's Health* because stating the case is upheld pursuant to stare decisis and then effectively overruling is nonsensical.

The dissenting view is a form of tortured logic. Holding that stare decisis dictates the outcome in *June Medical*, but that the precedential effect of the opinion was only those aspects of *Whole Woman's Health* that aligned with the *Casey* undue burden standard, rather than the entire *Whole Woman's Health* opinion. The dissent supported this position by highlighting the Chief Justice's disdain for the holding of *Whole Woman's Health*. However, the doctrine of stare decisis does not allow for cherry-picking.¹⁵¹

Stare decisis means literally to “stand by things decided.” A doctrine intended on preserving precedent and limiting judicial review to “avoid an arbitrary discretion in the courts”¹⁵² should not be so selective to allow even the Chief Justice to state he is adhering to *Whole Woman's Health* and in the same opinion effectively overrule it.¹⁵³ Even though Chief Justice Roberts stated that stare decisis has its

¹⁵⁰ *June Medical*, 140 S. Ct. at 2134, 2139 (Roberts, C.J., concurring).

¹⁵¹ *Box*, 991 F.3d at 749 (Kane, J., dissenting) (“Among other things, Chief Justice Roberts stressed that “[s]tare decisis principles ... determine how we handle a decision that itself departed from the cases that came before it. In those instances, ‘[r]emaining true to an “intrinsically sounder” doctrine established in prior cases better serves the values of stare decisis than would following’ the recent departure.”)

¹⁵² *June Medical*, 140 S. Ct. at 2134 (Roberts, C.J., concurring in the judgment).

¹⁵³ See Murray supra, note 53 at 326 (“Taken together, the dissents by Justices Alito and Gorsuch took a dim view of Chief Justice Roberts’s approach to stare decisis. Both dissents argued that Chief Justice Roberts’s characterization of *Whole Woman's Health* was a legal fiction — a remade ruling utterly inconsistent with the actual holding in *Whole Woman's Health*.”)

limits and recognized that the principles of stare decisis are also used to determine how the Court handles a decision that itself departed from the cases that came before it, for the dissenting opinion to be true, it would mean “Chief Justice Roberts’s respect for precedent depended entirely on identifying only the parts of past decisions that he wished to follow.”¹⁵⁴ Justice Gorsuch expressly called out the Chief Justice for this incongruity in his *June Medical* dissent, stating, “whatever else respect for stare decisis might suggest, it cannot demand allegiance to a nonexistent ruling inconsistent with the approach actually taken by the Court.”¹⁵⁵

Using the *Marks* Rule, the majority opinion correctly rejected the possibility of such a discordant outcome by dismissing portions of the concurrence going beyond stare decisis as dicta having nothing to do with supporting the judgment.¹⁵⁶ The majority, in this instance, refused to do the Supreme Court’s dirty work for them.¹⁵⁷ If the Supreme Court wants to overrule any abortion jurisprudence, it must do so minimally with a five-to-four vote.

However, it appears the doctrine of stare decisis has become a stand-in for a more fraught conversation about the future of abortion rights.¹⁵⁸ To date, legislative and political efforts to take away abortion rights, like Indiana’s with Act 404, have proved not to be entirely successful. Moreover, the Supreme Court has consistently reaffirmed the fundamental right to abortion on the grounds of stare decisis. Still, it continues to minimally tinker with the standard, handing down a confusing precedent for the lower courts to apply. To date, the core

¹⁵⁴ See *id.* at 308.

¹⁵⁵ *June Medical*, 140 S. Ct. 2154–57 (Alito, J., dissenting). (Justice Alito noted that, even as the Chief Justice “stresses the importance of stare decisis . . . he votes to overrule *Whole Woman’s Health* insofar as it changed the *Casey* test.”)

¹⁵⁶ See *Box*, 991 F.3d at 749 (“[The *Marks* Rule] does not allow dicta in a non-majority opinion to overrule an otherwise binding precedent.”)

¹⁵⁷ See *id.* at 746. (We simply do not survey non-majority opinions to count likely votes and boldly anticipate overruling of Supreme Court precedents. That is not our job.)

¹⁵⁸ See *Murray supra*, note 53 at 309.

holding of *Roe* stubbornly survived all of these proposed challenges¹⁵⁹ because none of the stare decisis factors are present; if anything, evidence shows that abortion rights and the healthcare interests that go along with those rights are still very prevalent. Nevertheless, that does not stop the Supreme Court from taking on abortion cases and dragging the nation through another parade of hysterics.

THE *JUNE MEDICAL* PLURALITY HIGHLIGHTS A LARGER
ISSUE WITH THE SUPREME COURT'S ABORTION
JURISPRUDENCE

The constitutional right to abortion is still timely and heavily relied upon by those who need abortion rights the most.¹⁶⁰ Unfortunately, the Supreme Court's continued involvement in the right to abortion is causing more harm than good. The uncertainty stemming from the latest decision with *June Medical* creating a circuit split and a lack of uniformity in the right to abortion is a prime example. However, the Supreme Courts' involvement in the abortion debate is far from over. The Supreme Court again will add to its abortion jurisprudence on December 1, 2021, when it hears *Dobbs v.*

¹⁵⁹*See id.*

¹⁶⁰ *See, e.g.,* Jill E. Adams & Melissa Mikesell, *And Damned If They Don't: Prototype Theories to End Punitive Policies Against Pregnant People Living in Poverty*, 18 GEO. J. GENDER & L. 283, 312 (2017) ("By urging us to consider the discriminatory effects of government practices on particular groups, [Obergefell's] articulation of 'equal dignity' provides a new way to challenge Medicaid abortion coverage bans"); *see also* Gerdtz C, et al. *Side Effects, Physical Health Consequences, and Mortality Associated with Abortion and Birth After an Unwanted Pregnancy*. *Women's Health Issues* 26:55-9 (2016). Limiting young women's access to abortion does not ensure that abortions will not continue. It only ensures that abortions will be less safe; Nour N.M. *An Introduction to Maternal Mortality*. *REV. OBSTET. GYNECOL.* 1, 77–81 (2008). (States with stricter abortion ban laws have the highest rates of neonatal mortality. Facts show in the absence of abortion rights, more women and babies are going to get sick, be poor, and die. Additionally, these stricter abortion laws show no improvements in preventing sexual activity or unintended pregnancies.) Yet, the Supreme Court opinions do not consider these realities and may soon not even consider the benefits of an abortion restriction as compared to the burdens a restriction places on abortion.

Jackson.¹⁶¹ Making it clear that the Supreme Court will continue to do this seemingly “endless dance of determining whether a law unduly burdens a woman’s ability to obtain an abortion”¹⁶² and force lower courts to do the same.¹⁶³ While *Dobbs* might resolve this circuit split as to discrepancy of the abortion standard in *June Medical*,¹⁶⁴ the *June Medical* plurality highlights an ongoing issue that will not resolve itself come December 1, 2021. The issue of the Supreme Court continuing to grant certiorari for facially unconstitutional cases where it is clear the stare decisis principles they so heavily rely on during abortion challenges are not present, stimulating controversy and unreliability around abortion rights.¹⁶⁵

The evidence shows that the abortion decisions handed down by the Supreme Court have lasting effects on American citizens. Unfortunately, however, the Supreme Court keeps taking on abortion cases and handing down unsatisfying and confusing compromises, just as the Court did in *June Medical*, frustrating the American people on both sides of the abortion debate. Placing a woman’s right to abortion in the hands of nine justices has gotten this country exactly where we started in 1973: politically, even if not socially, divided. Rather than continue the same cycle, legislatures, policymakers, and the courts

¹⁶¹See *Dobbs*, S. Ct. 2619.

¹⁶²*Box*, 141 S. Ct. at 188.

¹⁶³See *id.*

¹⁶⁴Patrick Murray, *National: Public Pans Texas Abortion Law Most say leave Roe v. Wade as is*, Monmouth University Polling Institute (2021) (According to Monmouth University’s poll 62 per cent of Americans said that the decision in *Roe v. Wade*, which protected abortion as a right, should remain in place)

¹⁶⁵See, e.g., Melissa Murray, *Symposium: Party of Five? Setting the Table for Roe v. Wade*, SCOTUSBLOG (July 24, 2019, 3:18 PM) (That the Court granted review in *June Medical Services* was perhaps surprising, given that it had considered the constitutionality of an almost identical statute only a few years earlier. For some, the fact that four votes could be mustered to grant certiorari under these unusual circumstances suggested that one wing of the Court was especially eager to revisit the question of abortion rights.); David G. Savage, *A Supreme Court Retreat from Roe vs. Wade Could Begin This Week with Louisiana Abortion Case*, L.A. TIMES (2020) (“For the first time, the court appears to have a majority of conservative justices inclined to sharply limit abortion rights or overturn *Roe vs. Wade* entirely.”)

must stop looking at abortion as a right of choice, uncoupled from access to healthcare and public health. Unfortunately, the current make up of the abortion debate leaves out three critical parties healthcare, evidence-based research, and the American people's wishes.

Perhaps the Supreme Court is no longer the best equipped institution to weigh the right to abortion and should leave the standard as is. Unlike the legislatures and the courts, public health and health care systems across the country have experience, expertise, and data surrounding reproductive health and healthcare. Yet, these public health organizations and health systems in various states will be blocked from reproductive health if the right to abortion continues to change or go away.

Abortion politics does not even consider the participation or views of the American people anymore. Most American people take a middle-of-the-road approach to abortion, believing there should be a right to abortion even if that right is not unlimited¹⁶⁶, and feel the standard should be left alone. But the majority of American people—the moderate voices on this issue—are being forgotten in this pointless partisan war. Even if most Americans take the “pro-choice” position over the “pro-life,” the Democrat and Republican parties are polarized, and U.S. institutions, like the Supreme Court, keep the pot boiling, ensuring the battles will continue.¹⁶⁷

The abortion debate has yet to hit its breaking point in state politics and judicial appointments. As the Supreme Court takes on yet another abortion case this term, all entities need to realize that legislative attacks on the right to abortion attack the right to healthcare. They are not separate.¹⁶⁸ Therefore, maybe it is the Supreme Court's time to send the message that the abortion standard is static and effectively remove itself from the abortion debate to stop the controversy. If the Court is ill-positioned to handle this issue, they

¹⁶⁶ *Murray* supra note 158 at 3.

¹⁶⁷ See Andy Schmookler: *The GOP: false 'friend' of anti-abortion Americans*, N. VA. DAILY (2021).

¹⁶⁸ *Roe*, 410 at 165-66.

should stop trying and leave it to rest.¹⁶⁹ However, that seems unlikely. Sadly, for the American people, the end to the abortion debate, fifty-plus years later, is still not in sight.

¹⁶⁹ Lindgren, *supra* note 160 at 405.