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Cover Page Footnote

Author would like to thank Jonathan Entin for his advice and guidance throughout the research and drafting process.

A *WHOLE WOMAN'S* MESS: HOW THE *MARKS* RULE, ANTICIPATORY OVERRULINGS, AND ONE CONCURRING OPINION HAVE CONFUSED LOWER COURTS RULING ON ABORTION RESTRICTIONS

Christine Scherer[*]

I. INTRODUCTION

Following *Planned Parenthood of Southeastern Pennsylvania v. Casey*, there was notable commentary about what the "undue burden" test outlined in the opinion would mean for states seeking to restrict access to abortion services.[1] When the case was decided, it effectively invited more conservative states to pass increasingly restrictive abortion legislation under the guise that the laws furthered a compelling state interest and did not create an undue burden for a woman seeking a legal abortion.[2] But, in 2016,

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[1] 505 U.S. 833, 876–79 (1992).

[2] Janet Benshoof, *Planned Parenthood v. Casey: The Impact of the New Undue Burden Standard on Reproductive Health Care*, 269 J. AM. MED. ASS'N 2249, 2253 (1993) ("Although the Court's opinion indicates that there should be a fact-finding process . . . many states may try to avoid this procedure by passing or trying to revive restrictions that are similar to those upheld in *Casey* and arguing that, accordingly, they should be upheld."); *see* Chris Whitman, *Looking Back on Planned Parenthood v. Casey*,

abortion rights were given more strength than ever before when the Supreme Court decided *Whole Woman's Health v. Hellerstedt*.[3] The case involved review of a Texas statute that required physicians who performed abortions to have admitting privileges within a thirty-mile radius of their outpatient office.[4] The Court gave more substance to the meaning of the undue burden test by applying a cost-benefit analysis.[5] The Court thus struck down the law as unconstitutional because the admitting privileges requirement offered no health benefits to women and imposed an undue burden on a woman seeking a pre-viability abortion.[6] At the time, legal scholars hailed *Whole Woman's Health* as a case that offered women seeking abortions significant protection from state regulations.[7]

In the past four years, a major shift among the judiciary has, in the eyes of pro-life activists at least, created the perfect environment to have *Casey* overturned or significantly limited.[8] But the issue is far more complicated because the doctrine of *stare decisis* protects the *Casey* holding and its progeny, and failure to respect the doctrine could lead to questions of legitimacy of the Court.[9] Even so, given the change in its composition, abortion providers and other pro-choice plaintiffs who bring lawsuits in federal court challenging these restrictions are increasingly wary of the risk they take when they appeal an unfavorable lower court decision to the

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100 MICH. L. REV. 1980, 1986–91 (2002) ("Despite its willingness to reaffirm *Roe*, the *Casey* opinion suffers from the Court's failure to develop a coherent and confident theory of what abortion rights have meant for women over the years since *Roe* was decided."); Sara L. Doyle, Casenote, *Planned Parenthood of Se. Pa. v. Casey: Adopting the Unduly Burdensome Standard*, 44 MERCER L. REV. 717, 728 (1993) (observing that under *Casey,* "the courts are forced to employ the subjective 'unduly burdensome' analysis and hope not to impart their own biases.").

[3] *See* 136 S. Ct. 2292 (2016).

[4] *Id.* at 2310.

[5] *Id.* at 2318.

[6] *Id.*

[7] *See* John A. Robertson, Whole Woman's Health v. Hellerstedt *and the Future of Abortion Regulation*, 7 U.C. Irvine L. Rev. 623, 643 (2017) (noting that "*Whole Woman's Health* is a major setback for the antichoice movement."); Kate Greasley, *Taking Abortion Rights Seriously:* Whole Woman's Health v. Hellerstedt, 80 Mod. L. Rev. 325, 338 (2017) (arguing that the change in scrutiny would make it more difficult for politicians to pass restrictions that would be upheld when challenged). *But see* Leah M. Litman, *Unduly Burdening Women's Health: How Lower Courts are Undermining* Whole Woman's Health v. Hellerstedt, 116 MICH. L. REV. ONLINE 50, 51 (2017) ("For whatever reason, states and the federal courts of appeals do not seem to have gotten the message, or they are just refusing to hear it. States and courts of appeals are seeking to cabin *Hellerstedt* in a variety of unpersuasive ways and recycling—occasionally with success—many of the arguments that *Hellerstedt* rejected."). *Id.*

[8] *See, e.g.*, Jeremy W. Peters, *As Passions Flare in Abortion Debate, Many Americans Say 'It's Complicated,'* N.Y. TIMES (June 15, 2019), https://www.nytimes.com/2019/06/15/us/politics/abortion-debate-pennsylvania.html; Amelia Thompson-DeVeaux, *Here's Why the Anti-Abortion Movement is Escalating*, FIVETHIRTYEIGHT (May 21, 2019), https://fivethirtyeight.com/features/we-categorized-hundreds-of-abortion-restrictions-heres-why-the-anti-abortion-movement-is-escalating/; *What's Going On In The Fight Over U.S. Abortion Rights?*, BBC NEWS (June 14, 2019), https://www.bbc.com/news/world-us-canada-47940659.

[9] *See, e.g.*, Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 6 (2012) (arguing that when cases get overturned too frequently, it gives the impression the Court is not functioning in accordance with the rule of law).

Supreme Court.[10] An example of this risk arose when the Fifth Circuit refused to follow the *Whole Woman's Health* holding in *June Medical Services v. Gee*, reasoning that a nearly identical law to the one in *Whole Woman's Health* did not create an undue burden because of slight factual differences.[11] The Supreme Court narrowly reversed.[12] Chief Justice Roberts, who dissented in *Whole Woman's Health*, was the deciding vote, concurring in the judgment based only on *stare decisis*.[13] His concurrence rejected the *Whole Woman's Health* cost-benefit analysis and instead offered support for the less stringent undue burden test.[14]

Though *June Medical* was initially seen as a win for pro-choice advocates, in the months following the opinion, it became clear that *June Medical* laid the groundwork for the Court to revisit the standard of review for abortion restrictions.[15] A major question left unanswered was whether *June Medical* overruled *Whole Woman's Health* under the *Marks* rule, which states that when the Supreme Court does not have a majority opinion in a given case, "the holding of the Court may be viewed as that position taken by [the majority of the Court] who concurred in the judgments on the narrowest grounds."[16] To this point, in *Hopkins v. Jegley,* the Eighth Circuit held that Chief Justice Roberts's concurring opinion was controlling because his opinion provided the narrowest grounds to reach a majority.[17] Because Justice Roberts rejected the reasoning in *Whole Woman's Health*, the Eighth Circuit concluded that *Whole Woman's Health* and its cost-benefit analysis was no longer controlling.[18] The Sixth and Fifth Circuits have agreed with the Eighth Circuit, but the Seventh Circuit has rejected this approach.[19]

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[10] *See, e.g.*, Mary Ziegler, *Identity Contests: Litigation and the Meaning of Social-Movement Causes*, 86 U. COLO. L. REV. 1273, 1277 (2015) (noting that in the history of abortion litigation, "[l]ay actors and lawyers alike stayed away from arguments thought likely to jeopardize litigation strategies, and in the process narrowed their demands, pushed important arguments below the surface, and silenced voices . . . .").

[11] 905 F.3d 787, 805–15 (5th Cir. 2018).

[12] June Medical Services v. Russo, 140 S.Ct. 2103, 2109 (2020).

[13] *Id.*

[14] *Id.* at 2134–35 (Roberts, C.J., concurring).

[15] *See* Amy Howe, *Opinion Analysis: With Roberts providing the fifth vote, court strikes down Louisiana abortion law* (June 29, 2020, 12:49 PM), https://www.scotusblog.com/2020/06/opinion-analysis-with-roberts-providing-the-fifth-vote-court-strikes-down-louisiana-abortion-law/ (writing that the decision was clearly a victory for the challengers even if the holding was narrow); Cynthia Yee-Wallace, *Symposium: Chief Justice Roberts reins in the cavalry of abortion providers charging toward the elimination of abortion regulation*, (Jun. 29, 2020, 7:46 PM), https://www.scotusblog.com/2020/06/symposium-chief-justice-roberts-reins-in-the-cavalry-of-abortion-providers-charging-toward-the-elimination-of-abortion-regulation/ (noting that the case was a victory for states who wish to pass laws that will meet constitutional requirements of the *Casey* two-part test).

[16] Marks v. United States, 430 U.S. 188, 193 (1977).

[17] 968 F.3d 912, 915–16 (8th Cir. 2020).

[18] *Id.*

[19] *See* EMW Women's Surgical Ctr., P.S.C. v. Friedlander, 978 F.3d 418, 433, nn.8–9 (6th Cir. 2020) (noting the court's agreement with the Eighth Circuit and that, at the time, a three-judge panel from the Fifth Circuit rejected the rationale that the Chief Justice's opinion is controlling); Whole Woman's Health v. Paxton, 10 F.4th 430, 440 (5th Cir 2021) (en banc) (adopting Chief Justice Robert's concurrence as the controlling opinion from *June Medical*). *But see* Planned Parenthood of Ind. & Ky. v. Box, 991 F.3d 740,

These cases illustrate tension among two long-standing Supreme Court doctrines. Applying *Marks* to *June Medical* might lead to the conclusion that *Whole Woman's Health* is no longer good law. However, this conclusion goes against the principle that only the Supreme Court can overrule one of its precedents. Absent explicit language from the Court overturning *Whole Woman's Health*, the *June Medical* opinion has left many lower courts confused as to its proper application to currently pending abortion restriction cases. Accordingly, *June Medical* illustrated a rare scenario in which an arguably proper *Marks* application leads to an impermissible anticipatory overruling of precedent by a lower court.

In light of this tension, this Article will analyze the benefits and disadvantages of the Supreme Court's potential resolution to either amend or jettison the *Marks* rule and the strict prohibition on anticipatory overrulings. Part I will examine the background of the anticipatory overrulings doctrine and the *Marks* rule. Part II will briefly discuss the current landscape of Supreme Court abortion jurisprudence. Part III will examine the recent controversial Eighth Circuit opinion and compare this to the other circuits that have addressed whether Chief Justice Roberts's opinion in *June Medical* is controlling. Part IV will then explore possible resolutions the Supreme Court can apply, framing it through the context of *June Medical* and *Whole Woman's Health*. As Part IV will illustrate, resolution of this tension is difficult, and each option will have consequences that go beyond the *June Medical* application. Finally, Part V will provide a brief conclusion of the assertions made throughout; in considering which option may be best, the Court must weigh the importance of respect for precedent with the need for uniformity among the lower courts.

II. ANTICIPATORY OVERRULINGS AND THE *MARKS* RULE

The Eighth Circuit in *Hopkins v. Jegley* declined to apply *Whole Woman's Health*, reasoning that the Court in *June Medical* effectively overruled it.[20] The Eighth Circuit relied on *Marks* in its explanation of its interpretation of the *June Medical* holding.[21] However, because the Supreme Court did not explicitly overrule *Whole Woman's Health*, the Eighth Circuit's interpretation and application of *June Medical* directly contradicts the general rule that only the Supreme Court can overrule precedent. Therefore, this section discusses the Court's historical treatment of lower courts that engage

746 (7th Cir. 2021) ("We simply do not survey non-majority opinions to count likely votes and boldly anticipate overruling of Supreme Court precedents).

[20] 968 F.3d 912, 916 (8th Cir. 2020).

[21] *Id.* at 914–16.

in anticipatory overrulings and the difficulty such lower courts have had in applying the *Marks* rule.[22]

A. Admonishing Lower Courts for Ignoring Precedent

In recent decades, the Supreme Court has admonished lower courts for failing to follow precedent.[23] This is likely because the doctrine of *stare decisis* provides many benefits. The Supreme Court has noted that *stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[24] A benefit of courts' consistent and predictable application of the law is that it gives the public adequate notice of their rights while promoting judicial efficiency because already established rights can be disposed of in earlier stages of litigation.[25] Additionally, the doctrine of *stare decisis* prevents the constant reevaluation of core holdings when new Justices are appointed to the court, a lack of which could create a flood of litigation every few years.[26] Of course, there is some criticism of the doctrine. First, some argue that the doctrine prevents the legal field from adapting quickly to changes in society.[27] Second, it perpetuates possibly erroneous decisions, especially if the rationale for the controlling case is dubious.[28]

Nonetheless, the doctrine of *stare decisis* is sometimes unpersuasive, and the Court will overrule its previous decisions.[29] For example, in

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[22] As an initial note, some legal scholars refer to anticipatory overrulings as "under-rulings." *See* Christopher Bryant & Kimberly Breedon, *How the Prohibition on "Under-Ruling" Distorts the Judicial Function (and What to do About It)*, 45 PEPP. L. REV. 505, 507 (2018).

[23] *See* Bosse v. Oklahoma, 137 S.Ct. 1, 2 (2016) (per curiam) ("[T]he court was wrong to go further and conclude that *Payne* [*v. Tennessee*, 501 U.S. 808 (1991),] implicitly overruled *Booth* [*v. Maryland*, 482 U.S. 496 (1987),] in its entirety."); Tenet v. Doe, 544 U.S. 1, 10–11 (2005) ("There is, in short, no basis for respondents' and the Court of Appeals' view that the *Totten* [*v. United States*, 92 U.S. 105 (1876),] bar has been reduced to an example of the state secrets privilege. In a far closer case than this, we observed that if the 'precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'") (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989)); Agostini v. Felton, 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent.").

[24] Kimble v. Marvel Enter., 576 U.S. 446, 455 (2015) (quoting Payne v. Tennessee, 501 U.S. 808, 827–28 (1991)).

[25] Waldron, *supra* note 9, at 4, 10.

[26] *Id.* at 4.

[27] *See* Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L. J. 1573, 1590 (2014) (arguing that allowing lower courts to not follow Supreme Court precedent in narrow circumstances would allow courts to react to changes more quickly); C. Steven Bradford, *Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling*, 59 FORDHAM L. REV. 39, 42 (1990) (arguing that anticipatory overrulings make the law more responsive to societal changes and promotes judicial efficiency).

[28] Criddle & Staszewski, *supra* note 27, at 1576–77; *see also* Bradford, *supra* note 27, at 42 (noting that allowing anticipatory overruling would promote equal treatment of the parties).

[29] *See, e.g.*, Payne, 501 U.S. at 828 ("*Stare decisis* is not an inexorable command."); Katz v. United States, 389 U.S. 347, 353 (1967) (overruling Olmstead v. United States, 277 U.S. 438 (1928)); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79–80 (1938) (overruling Swift v. Tyson, 41 U.S. (16 Pet.) 1

Payne v. Tennessee, the Court declined to adhere to stare decisis, calling it a "principle of policy and not a mechanical formula . . . ."[30] Particularly, the Court noted that constitutional cases may be an area where the Court is less likely to adhere to *stare decisis* because of the impossibility of legislative correction; a distinction when compared to other contract and property cases "where reliance interests are involved."[31]

One of the best explanations of when the Court chooses not to follow precedent came from Justices O'Connor, Kennedy, and Souter, in their plurality opinion in *Casey*.[32] Therein, the Justices explained four factors the Court considers when asked to overrule precedent: (1) the quality of the past decision's reasoning; (2) its consistency with related decisions; (3) legal developments since the past decision; and (4) reliance on the decision throughout the legal system and society.[33] In *Casey*, for example, the Justices noted that the rule from *Roe v. Wade* contributed to immeasurable numbers of women placing such a reliance on the right to abortion that overruling that decision would create a substantial hardship.[34] Thus, the Court reaffirmed the basic holding of *Roe v. Wade*.[35]

In practice, sometimes, the controlling decision is not as clear as a subsequent opinion that directly overrules a previous decision. There are many instances where cases have made their way to the Supreme Court, and the Court treats the old precedent as if it has been effectively overruled for quite some time.[36] But in some cases, clearly erroneous law has yet to be formally overturned by the Supreme Court. For example, *Buck v. Bell* is regarded as one of the worst Supreme Court decisions in history, a decision that effectively permitted the sterilization of mentally ill and genetically abnormal individuals.[37] While *Buck v. Bell* has never been explicitly overturned, a series of lower court rulings implicitly overturned it.[38]

(1842)); W. Coast Hotel v. Parish, 300 U.S. 379, 398 (1937) (overruling Adkins v. Children's Hospital, 261 U.S. 525 (1923)).

[30] 501 U.S. at 827–30 (1991) (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)).

[31] *Id.* at 828.

[32] *See* Planned Parenthood v. Casey, 505 U.S. 833, 854–69 (1992) (devoting a large portion of the opinion to explaining why *stare decisis* was important in the case).

[33] *See id.* at 854–55.

[34] *Id.* at 854–56.

[35] *Id.* at 856.

[36] *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (overruled by Trump v. Hawaii, 138 S.Ct. 2392 (2018) (stating "Korematsu was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'")); Lochner v. New York, 198 U.S. 45 (1905) (Superseded by statute); Plessy v. Ferguson, 163 U.S. 537 (1896) (overruled by Brown v. Board of Educ., 347 U.S. 483 (1954) (stating "[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.")). For an interesting discussion on overruling by implication, *see generally* Bradley Scott Shannon, *Overruled by Implication*, 33 SEATTLE U. L. REV. 151 (2009).

[37] *See* 274 U.S. 200, 205–08 (1927). Justice Holmes infamously wrote, "[t]hree generations of imbeciles are enough." *Id.* at 207.

[38] Edward J. Larson, *Putting Buck v. Bell in Scientific and Historical Context: A Response to Victoria Nourse*, 39 PEPP. L. REV. 119, 126 (2011). *See, e.g.*, Conservatorship of Valerie N., 707 P.2d 760, 762

Thus, this begs the question of whether, as a multitude of genetic-based abortion bans make their way through the lower court system, should we allow for *Buck* to control because the Supreme Court has not directly said it is overruled? Of course, it seems highly probable that if the issue in *Buck v. Bell* did reach the Supreme Court, the Court would formally overrule it. But should we expect lower courts to adhere to it in the meantime?

Often, the Court will still applaud the circuit or district court for applying the precedent, even if it is ultimately overturned.[39] For example, in *State Oil Co. v. Khan*, the Court wrote, "[t]he Court of Appeals was correct in applying that principle despite disagreement with [the precedent], for it is this Court's prerogative alone to overrule one of its precedents."[40] This deliberate acknowledgment by the Court that precedent was correctly followed indicates the Court's desire to have the final say on which cases get overruled.

Though the Supreme Court cases discussed thus far stem from the federal court system, state courts also follow the same principle. The state superior courts bind the lower-level state courts, and lower courts are not permitted to engage in anticipatory overrulings. For example, the Arizona Supreme Court admonished one of the lower state courts, writing, "we note that the superior court erred by anticipating that we would revisit and overrule [precedent case] after [related case]. The lower courts are bound by our decisions, and this Court alone is responsible for modifying that precedent."[41] The Illinois Supreme Court even referred to this obligation to adhere to precedent as a "duty."[42]

This strict rule requiring adherence to Supreme Court precedent was established in the 1989 case *Rodriguez de Quijas v. Shearson/American Express, Inc.*.[43] Prior to this case, there were two competing schools of thought among lower court judges: some judges adhered to the blind adherence policy while others were willing to disregard precedent if they believed the Supreme Court would not follow it.[44] However, even within the courts that allowed anticipatory overrulings, disagreements emerged about

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(Cal. 1985) (refusing to allow a guardian to have a mentally disabled female sterilized because there was a lack of evidence showing that other less intrusive means of birth control were not available); *In re* Guardianship of Hayes, 608 P.2d 635, 641–42 (Wash. 1980) (holding that guardian failed to meet burden of proof that sterilization would be in the disabled woman's best interest).

[39] *See, e.g.*, United States v. Hatter, 532 U.S. 557, 567 (2001) ("The Court of Appeals was correct in applying *Evans* [*v. Gore*, 253 U.S. 245 (1920),] to the instant case, given that 'it is this Court's prerogative alone to overrule one of its precedents.' State Oil Co. v. Khan, 522 U.S. 3, 20 (1997). Nonetheless, the court below, in effect, has invited us to reconsider *Evans*. We now overrule *Evans* insofar as it holds that the Compensation Clause forbids Congress to apply a generally applicable, nondiscriminatory tax to the salaries of federal judges, whether or not they were appointed before enactment of the tax.").

[40] 522 U.S. at 20.

[41] Sell v. Gama, 295 P.3d 421, 428 (Ariz. 2013) (citations omitted).

[42] Yakich v. Aulds, 155 N.E.3d 1093, 1095 (Ill. 2019).

[43] 490 U.S. 477, 484 (1989).

[44] Bradford, *supra* note 27, at 40, 45.

when its use was proper; some judges advocated for a "near certainty" standard while others advocated for a mere "preponderance standard."[45] Thus, when the issue of adhering to precedent reached the Supreme Court in 1989, the Court swiftly clarified and restricted overruling precedent solely to the highest court.[46] Justice Kennedy wrote:

> We do not suggest that the Court of Appeals on its own authority should have taken the step of renouncing *Wilko* [*v. Swan*, 346 U.S. 427]. If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.[47]

B. Rare Exceptions

Although the Justices often write about precedent as if they consistently apply it, that is far from true. On rare occasions, the lower court has clearly issued an anticipatory overruling, and when it reaches the Supreme Court, the Court agrees without admonishing the lower court. One of the premier examples of this arose in *West Virginia State Board of Education v. Barnette*.[48] In the precedent 1940 case, *Minersville School District v. Gobitis*, the Supreme Court upheld a Pennsylvania law requiring students enrolled in public school to salute the flag, even if they had religious objections to doing so.[49] But, less than two years later, a West Virginia three-judge district court declined to uphold a similar state law, finding that *Gobitis* was wrongly decided and the freedom to choose what to believe in was a fundamental right in the United States.[50] The district court reasoned that if the issue were to go before the Supreme Court, the Court likely would not uphold *Gobitis*.[51] Writing for the Fourth Circuit, Judge Parker first analyzed the current composition of the Supreme Court and noted that at least four members thought the reasoning in *Gobitis* was unsound.[52] He then noted the Court's unwillingness to cite *Gobitis* in a subsequent case where it was clearly supporting authority.[53] This evidence and his personal belief that the flag salutation statute was a violation of religious freedoms led Judge Parker to conclude that the district court was not obligated to follow *Gobitis*.[54]

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[45] *Id.* at 45–46.
[46] *Rodriguez de Quijas*, 490 U.S. at 484.
[47] *Id.* For more discussion about the context with which the *Rodriguez* opinion was made, see Bradford, *supra* note 27, at 66–68.
[48] *See generally* 319 U.S. 624 (1943).
[49] 310 U.S. 586, 592–93, 599–600 (1940).
[50] Barnette v. W. Va. State Bd. of Educ., 47 F. Supp. 251, 253 (S.D. W. Va. 1942).
[51] *See id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*

The case was appealed to the Supreme Court.[55] In a decision penned by Justice Jackson, the Court affirmed the lower court decision and overruled *Gobitis*.[56] Neither the majority nor the dissent criticized the lower court for failing to follow precedent.[57] Of course, there is no requirement that the Court reprimand the lower courts for failing to follow precedent. But, given how temporally close together these cases were decided, it seems peculiar that the Court mentioned nothing about the district court ignoring precedent despite anticipating that the Supreme Court would overrule itself only three years later.

Another infamous example of a lower court's failure to follow precedent without admonishment is *Younger v. Harris*.[58] In that case, a man was charged under California's Criminal Syndicalism Act in federal court, and he argued that the statute was unconstitutional despite the Supreme Court ruling in *Whitney v. California* that it was consistent with the First Amendment.[59] The district court, in 1968, explained that statutes that chilled speech had since been held to strict scrutiny, and therefore *Whitney* was no longer controlling.[60] The Supreme Court formally overruled *Whitney* in a separate 1969 case; when *Younger* reached the Court, the Justices did not reprimand the lower court for declining to follow precedent that, at the time, was still good law. [61]

There are other examples of lower courts engaging in anticipatory overrulings that never made it as far as the Supreme Court. For example, *Brown v. Board of Education* applied only to educational facilities, and the Supreme Court did not actually overrule *Plessy v. Ferguson*.[62] However, many lower courts declined to follow *Plessy* in the wake of *Brown v. Board of Education* thus expanding the Court's reasoning to cover more than educational facilities.[63] This was also a prevalent issue with Lochner-era cases, as many cases were never formally overruled but were

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[55] *See generally* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[56] *Id.* at 642.

[57] *See id.* Justice Frankfurter, who wrote the majority opinion in *Gobitis*, wrote a vigorous dissent, personally attacking the majority opinion. *Id.* at 647 (Frankfurter, J., dissenting). "As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard." *Id.* (Frankfurter, J., dissenting).

[58] *See generally* 401 U.S. 37 (1971).

[59] *Id.* at 38–40.

[60] Harris v. Younger, 281 F. Supp. 507, 511–16 (C.D. Cal. 1968), *rev'd,* 401 U.S. 37 (1971).

[61] *See generally* Younger v. Harris, 401 U.S. 37; *see also* Peyton v. Rowe, 391 U.S. 54, 57–58 (1968) (agreeing with the circuit court that did not follow precedent by reasoning that the precedent was no longer good law).

[62] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954); Plessy v. Ferguson, 16 S. Ct. 1138 (1896). As legal scholar C. Stephen Bradford observed, many legal search tools incorrectly label *Plessy* as overturned by *Brown v. Board of Education*. Bradford, *supra* note 29 at 71 nn. 179. "Actually, *Plessy* has never been overturned." *Id.*

[63] Browder v. Gayle, 142 F. Supp. 707, 717 (M.D. Ala. 1956) (explicitly declining to follow *Plessy v. Ferguson*, 16 S. Ct. 1138 (1896), because it had been implicitly overruled); Flemming v. S.C. Elec. & Gas Co., 224 F.2d 752, 752–53 (4th Cir. 1955) (reasoning there is no doubt *Plessy v. Ferguson*, 16 S. Ct. 1138 (1896), had been repudiated).

nonetheless no longer applied by lower courts because they were viewed as bad law.[64]

Courts in Canada have recently tackled a similar issue. In 2018, a New Brunswick provincial court declined to follow a 1921 Supreme Court of Canada precedent that upheld statutory restrictions on bringing alcoholic beverages into the province.[65] The Supreme Court of Canada reversed the judgment, choosing to uphold precedent.[66] However, the Court there noted that while lower courts are generally required to follow precedents from higher courts, a narrow exception allows lower courts to engage in anticipatory overrulings.[67]

The Supreme Court of Canada better explained this exception in the 2013 case *Canada (Attorney General) v. Bedford*.[68] Therein, the Court explained the narrow exception is acceptable where: (1) a new legal issue is raised; and (2) there is a change in the circumstance or evidence that "fundamentally shifts the parameters of the debate."[69] Of course, this could be a difficult standard for lower courts in the United States to apply because the standard seems to be amorphous and discretionary. But this explanation still suggests that if a lower court can articulate these factors, a disregard for precedent may be acceptable in narrow cases. The United States has seemingly never explicitly created a similarly narrow exception.

C. The Closely Intertwined Marks *Rule*

One of the more confusing judicial doctrines underpinning the application of precedent comes from a 1977 Supreme Court case, *Marks v. United States*.[70] In *Marks*, the petitioners were charged with transporting obscene materials across state lines.[71] The petitioners argued that they were entitled to a "more favorable formulation" of jury instruction under a recent plurality decision in *Memoirs v. Massachusetts*.[72] The Court disagreed; writing for the majority, Justice Powell concluded that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ."[73] What this means is that a mere concurrence may, in the right situations, become the controlling

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[64] *See* Gold v. DiCarlo, 235 F. Supp. 817, 818–19 (S.D.N.Y. 1964), *aff'd.*, 380 U.S. 520 (1965) (disregarding *Tyson & Brother v. Banton*, 273 U.S. 418 (1927), as no longer controlling law). For a more in-depth discussion on both the post-*Brown* and *Lochner*-era cases, see Bradford, *supra* note 27, at 71–74.

[65] R. v. Comeau (2016), 448 N.B.R.2d 1 (Can. N.B. Prov. Ct.), *rev'd*, [2018] 1 S.C.R. 342 (Can.).

[66] R. v. Comeau, [2018] 1 S.C.R. 342, 343–44 (Can.).

[67] *Id.*

[68] *See generally* Canada (Attorney General) v. Bedford, [2013] 3 S.C.R. 1101 (Can.).

[69] *Id.* at 42.

[70] *See generally* 430 U.S. 188 (1977).

[71] *Id.* at 189.

[72] *Id.* at 190.

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

opinion.[74] Or, in some cases, a single Justice's opinion may be controlling where the rest of the Court splits four-to-one-to-four.[75]

Though the *Marks* rule seems simple, its application has greatly confused lower courts and led to inconsistent applications. Lower courts are often split on how to measure which holding is, in fact, the narrowest. First, some courts apply the "'reasoning' approach."[76] Under this test, an opinion is controlling only if the narrowest opinion represents a "common denominator."[77] In other words, "it must embody a position implicitly approved by at least five Justices who support the judgment."[78] But, because the Supreme Court "reviews judgments, not opinions," in cases where the Court is presented with multiple issues, there may be times when a majority does not agree on all the issues.[79] Therefore, there are, in effect, multiple "majority opinions" where there is no logical connection between the opinions to clearly identify the narrowest opinion under *Marks*.[80] Accordingly, some plurality opinions never yield a controlling opinion under this test.

The second test looks to the results of a Justice's opinion rather than their reasoning.[81] Under the "results" test, the narrowest opinion is the one that states the rule that "would necessarily produce results with which a majority of the Justices from the controlling case would agree."[82] Thus, under this theory, every plurality decision yields a controlling opinion.[83]

The Supreme Court has not provided much guidance on the application of *Marks*. In 2011, Justice Sotomayor's solo concurrence in *Freeman v. United States* was treated as the controlling opinion by many

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[74] *See e.g.*, Freeman v. United States, 564 U.S. 522 (2011). Here, Justice Sotomayor's solo concurrence is the controlling precedent because her reasoning was the narrowest despite all eight of the other justices disagreeing with her reasoning. *See id.* at 534–45; *see, e.g.*, *United* States v. Smith, 658 F.3d 608, 611 (6th Cir. 2011) ("Justice Sotomayor's opinion is the narrowest ground for the Court's decision and thus represents the Court's holding in *Freeman*.").

[75] *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Or. v. Mitchell, 400 U.S. 112 (1970). *But see* Peter Lehmuller & Dennis Gregory, *Affirmative Action: From Before* Bakke *to After* Grutter, 42 NASPA J. 430, 434–47 (2004) (noting that *Bakke* did not result in a consistent interpretation by lower courts).

[76] *See* United States v. Davis, 825 F.3d 1014, 1021 (9th Cir. 2016).

[77] King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991).

[78] *Id.*

[79] Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984) (footnote omitted); *see* Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 816 (2017).

[80] Williams, s*upra* note 79, at 816–17.

[81] United States v. Davis, 825 F.3d 1014, 1021 (9th Cir. 2016).

[82] Davis, 825 F.3d at 1021; *see also* 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. That middle-ground opinion will produce results that represent a subset of the results generated by the other opinions."); Williams, *supra* note 79, at 814–15 (explaining the results test).

[83] Williams, *supra* note 79, at 814–15, 815 n.93 (writing that courts should look to all opinions, including dissents, to identify the controlling fifth vote).

lower courts, despite the fact that no other Justice agreed with her reasoning.[84] In 2018, the Court heard oral arguments on the *Marks* rule in *Hughes v. United States*.[85] Though *Hughes* gave the Court an opportunity to clarify which opinion was the controlling opinion in *Freeman* under the *Marks* rule, the Court ultimately avoided the *Marks* issue and decided *Hughes* on other grounds.[86]

Another notable application of the *Marks* rule is exemplified in *Apodaca v. Oregon*.[87] In that case, a four Justice plurality determined that there was no constitutional right to a unanimous jury verdict for a conviction.[88] However, in his concurrence, Justice Powell argued that there was, in fact, a constitutional right to a unanimous jury verdict in federal criminal trials, but that the Fourteenth Amendment did not incorporate this against the states.[89] Then, in *Ramos v. Louisiana*, the Supreme Court concluded that there was actually "no controlling opinion at all" in *Apodaca*.[90]

In *Ramos*, the parties did not attempt to argue that Justice Powell's opinion was controlling because the reasoning he relied on had been rejected under recent precedent. The plurality in *Ramos* seemed to dismiss the possibility that the *Marks* rule could be used to overturn a precedent, arguing that "a rule like that would do more to harm than advance *stare decisis*."[91] However, Justice Alito pushed back on this argument in his dissent, addressing what should happen when a *Marks* applied concurrence would overrule precedent.[92] He wrote, "the logic of *Marks* dictates an affirmative answer, and I am aware of no case holding that the *Marks* rule applies any differently in this situation."[93] He further wrote, "[t]he logic of *Marks* applies equally no matter what the division of the Justices in the majority, and I am aware of no case holding that the *Marks* rule is inapplicable when

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[84] 564 U.S. 522, 534–45 (2011); *see, e.g.*, United States v. Rivera-Martinez, 665 F.3d 344, 348 (1st Cir. 2011) ("In the uncertain wake of *Freeman*, two other courts of appeals, have published opinions addressing this question. Both agree with our conclusion" that Justice Sotomayor's opinion controls.) (citing Sixth Circuit and Fourth Circuit); United States v. Keith, No. 04-354, 2012 WL 253103, at *6 (E.D. Pa. Jan. 26, 2012) (stating that "the circuits that have addressed the issue all agree that Justices Sotomayor's concurring opinion is the controlling opinion in *Freeman*. . . . [and that] . . . other judges in this district who have considered the issue agree that Justice Sotomayor's [ ] concurring opinion is the controlling opinion.") (citing First, Second, Fourth, and Sixth Circuits).

[85] *See* 138 S. Ct. 1765 (2018).

[86] *See generally* 564 U.S. 522 (2011); Justin Marceau, *Argument preview: Narrowing the "narrowest grounds" test, or simply interpreting a federal statute?*, SCOTUSBLOG (Mar. 20, 2018, 10:42 AM), https://www.scotusblog.com/2018/03/argument-preview-narrowing-narrowest-grounds-test-simply-interpreting-federal-statute/; 138 S. Ct. 1765, 1772 (2018).

[87] *See generally* Apodaca v. Oregon, 406 U.S. 404 (1972), *overruled by* Ramos v. Louisiana, 140 S. Ct. 1390 (2020).

[88] *Id.* at 411.

[89] Johnson v. La., 406 U.S. 366, 371–73 (1972) (addressing *Apodaca*, 406 U.S. 404 (1972), and *Johnson* in the same concurring opinion).

[90] *See* Ramos, 140 S. Ct. at 1403–04.

[91] *Id.*

[92] *Id.* at 1440 (Alito, J. dissenting).

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

the narrowest ground is supported by only one Justice."[94] Given the disagreement among the Justices regarding proper *Marks* application, it is easy to understand how lower courts have struggled to apply plurality opinions properly and decide which opinion is controlling.[95]

III. HOW DID WE GET HERE? A BRIEF OVERVIEW OF SUPREME COURT ABORTION JURISPRUDENCE

In 1992, the Supreme Court issued its plurality decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[96] This case reshaped how the judiciary was to evaluate abortion restrictions. Under *Roe v. Wade*, the Court concluded that women had a right to an abortion until a certain point in gestation.[97] But under *Casey*, the plurality concluded that the state could impose abortion regulations so long as it did not place an undue burden on a woman seeking a pre-viability abortion.[98] Some legal scholars refer to the Court's decision in *Casey* as a "split-the-difference approach."[99] On one hand, the Court rejected the absolutism that right-to-life advocates argued for and reaffirmed the core holding of *Roe v. Wade*.[100] But the Court also refused to apply the strict scrutiny review the Pennsylvania abortion restrictions that *Roe v. Wade* seemed to require and refrained from declaring this issue a woman's "right-to-choose" that pro-choice advocates were seeking.[101] Instead, the Court adopted the "undue burden" standard, which is comprised of a two-part test: (1) is there a substantial state interest, and (2) does the restriction pose an undue burden?[102]

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[94] *Id.* (Alito, J. dissenting). For a more in-depth discussion of the *Marks* issue in *Ramos*, see Maxwell Stearns, *Modeling Narrowest Grounds*, 89 GEO. WASH. L. REV. 101, 117–129 (2021).

[95] *See generally* Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. 1942 (2019) (arguing the *Marks* rule should be discarded and we should require a majority to reach binding precedent); Williams, *supra* note 79, at 814–15 (arguing for a shared agreement approach, which is a clarification of the *Marks* rule to make it less confusing).

[96] *See generally* 505 U.S. 833 (1992). Of course, *Roe v. Wade*, 410 U.S. 113 (1973), came first, which established a general constitutional right to abortion.

[97] *See* 410 U.S. at 164–165.

[98] *See Casey*, 505 U.S. at 876–78. An in-depth discussion of the abortion landscape in America is regrettably beyond the purview of this Article. For a more thorough analysis, see MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: *ROE V. WADE* TO THE PRESENT (Cambridge University Press, 2020).

[99] Neal Devins, *How* Planned Parenthood v. Casey *(Pretty Much) Settled the Abortion Wars*, 118 YALE L.J. 1318, 1351 (2009); *see also* Danielle Lang, *Truthful But Misleading? The Precarious Balance of Autonomy and State Interests in* Casey *and Second-Generation Doctor Patient-Regulation*, 16 U. PA. J. CONST. L. 1353, 1363 (2014) ("The Court's opinion reflected an understanding of the rights in conflict at issue in the case before them, unlike the *Roe* decision, which no longer reflected the values embedded in the debate over a woman's right to choose."); Natalie Wright, *State Abortion Law After* Casey*: Finding "Adequate and Independent" Grounds for Choice in Ohio*, 54 OHIO ST. L. J. 891, 900 (1993) ("The *Casey* decision was not a clear victory or defeat for either side of the abortion debate but a compromise—like the *Roe* decision—only granting more power to the state in favor of coercion.").

[100] Devins, *supra* note 98, at 1328.

[101] *See id.* at 1328.

[102] *Casey*, 505 U.S. at 876.

Following *Casey*, lower courts applied the undue burden standard, and the Supreme Court heard a handful of cases on the issue.[103] A brief survey of lower court decisions illustrates the significant confusion judges have had in determining what constitutes an undue burden. For example, in *Cincinnati Women's Services v. Taft*, the Sixth Circuit held that a law that applied to practically all women in a population was considered an undue burden, but a restriction that applied to only 12% would not create such a burden.[104] In another case, *Jane L. v. Bangerter*, the Tenth Circuit held that when the state's clear intention was to pass a law to challenge *Roe*, the legislation has the purpose of creating an undue burden.[105]

Many circuits are also wary of First Amendment challenges to informed consent provisions in abortion laws. The Fifth Circuit rejected a First Amendment claim in *Texas Medical Providers Performing Abortion Services v. Lakey*, writing "[i]f the disclosures are truthful and non-misleading, and if they would not violate the woman's privacy right under the *Casey* plurality opinion, then [plaintiffs] would, by means of their First Amendment claim, essentially trump the balance *Casey* struck between women's rights and the states' prerogatives."[106] The Supreme Court provided very little guidance to lower courts about how to evaluate these restrictions in light of *Casey*.

The Supreme Court again reviewed the undue burden standard in 2016 with *Whole Woman's Health v. Hellerstedt*.[107] At issue in the case was a Texas law that required abortion physicians to have admitting privileges at a hospital within thirty miles of the abortion clinic.[108] The law would have had the effect of shutting down almost thirty-five out of forty-two abortion clinics in the state.[109] In a five-to-three decision, the Court struck down the

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[103] *See* Gonzales v. Carhart, 550 U.S. 124 (2007) (upholding a state law prohibiting partial-birth abortions as not vague or overbroad and therefore not placing an undue burden in the way of a woman seeking a legal abortion); *see also* Hill v. Colorado, 530 U.S. 703, 734–35 (2000) (upholding a statute that prohibited counselors from walking up to women on a public sidewalk within 100 feet of a health care facility); Stenberg v. Carhart, 530 U.S. 914, 934 (2000) (holding invalid a law banning partial-birth abortions because the law did not include a health exception for the mother and was therefore vague).

[104] Cincinnati Women's Servs. v. Taft, 468 F.3d 361, 373–74 (6th Cir. 2006); *see also* Women's Med. Pro. Corp. v. Baird, 438 F.3d 595, 605 (6th Cir. 2006) (holding an abortion clinic closure acceptable because plaintiffs could not prove that the vast majority of patients would be unable to seek care at another clinic).

[105] Jane L. v. Bangerter, 102 F.3d 1112, 1117–18 (10th Cir. 1996).

[106] Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 577 (5th Cir. 2012); *see also* Planned Parenthood Minn. v. Rounds, 696 F.3d 889, 905–06 (8th Cir. 2012) (holding a law requiring physicians to tell women that abortions lead to increased rates of suicide as part of the informed consent process as constitutional under the First Amendment, despite no empirical evidence of the truth of that statement); *see also* Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175, 193–202 (2018) (explaining that there is more sophistication in constitutional litigation through interpretation of judicial signaling, finding the "right plaintiff," and arguing the right set of facts likely to prompt the Justices to adopt change).

[107] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).

[108] *Id.*

[109] *Id.* at 2301.

law as creating an undue burden on a woman seeking a legal abortion.[110] Justice Breyer, in his majority opinion, noted that there was no medical benefit to the provisions that could justify the obstacle the law created.[111]

Some legal scholars agree that the ruling added more meaning behind the undue burden test.[112] First, the holding requires to consider both "whether a law eliminates access but also whether [it] benefits anyone."[113] Second, although legislative findings matter, courts "retain the power to balance the benefits and burdens of a law."[114] In essence, the undue burden test became more of a cost-benefit analysis. Finally, the Court seemed to indicate increasing deference to the trial court findings, which is important in understanding how evidence is weighed as future cases percolate through the lower courts.[115]

Making sense of exactly how to apply this more concrete yet still amorphous undue burden test has created much discussion among legal scholars. Most agree that the outcome of *Whole Woman's Health* is that the undue burden test begins to resemble more of a cost-benefit analysis.[116] This promoted optimism among legal scholars because the cost-benefit analysis is a framework that the judiciary is much more familiar with, so ideally, more consistent applications of the test could be applied by lower courts.[117] But, while the *Whole Woman's Health* opinion seemed to clarify health-justified abortion restrictions, it remained unclear how this test will be applied to other abortion restrictions.[118] Reproductive rights legal scholar, Mary Ziegler, noted that *Whole Woman's Health* set future litigation about abortion restrictions to be all about the factual findings of the district court.[119]

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[110] *Id.* at 2299. Justice Scalia had recently passed, hence the Court had only eight voting members. CONGRESSIONAL RESEARCH SERVICE, *The Death of Justice Scalia: Procedural Issues Arising on an Eight-Member Supreme Court*, 1, 9, https://crsreports.congress.gov/product/pdf/R/R44400 (Feb. 25, 2016).

[111] *Id.* at 2311–12.

[112] *See* David Gans, *No more rubber-stamping state regulation of abortion* (Jun. 27, 2016, 5:15 PM), https://www.scotusblog.com/2016/06/symposium-no-more-rubber-stamping-state-regulation-of-abortion/; *see also* Mary Ziegler, *The Court once again makes the "undue-burden" test a referendum on the facts*, SCOTUSBLOG (Jun. 27, 2016, 2:34 PM), https://www.scotusblog.com/2016/06/symposium-the-court-once-again-makes-the-undue-burden-test-a-referendum-on-the-facts/.

[113] Ziegler, *supra* note 111 (discussing the outcomes of the Supreme Court decision).

[114] *Id.*

[115] Mary Ziegler, *Substantial Uncertainty:* Whole Woman's Health v. Hellerstedt *and the Future of Abortion Law*, 2016 SUP. CT. REV. 77, 114 (2017).

[116] *See* Robertson, *supra* note 7, at 630 (quoting Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016)); *see also* Ziegler, *supra* note 115 at 78; *Fourteenth Amendment--Due Process Clause--Undue Burden*--Whole Woman's Health v. Hellerstedt, 130 HARV. L. REV. 397, 405–06 (2016).

[117] *Fourteenth Amendment--Due Process Clause--Undue Burden*--Whole Woman's Health v. Hellerstedt, *supra* note 115, at 404.

[118] *Id.* at 405.

[119] Ziegler, *supra* note 115, at 114.

She also speculated that scientific uncertainty could become an even greater component of abortion litigation than before.[120]

Notably, Chief Justice Roberts joined Justice Alito's dissent in *Whole Woman's Health*.[121] Justice Alito's primary argument in his dissent was that the case should have been barred by *res judicata* because the plaintiffs had already litigated the case at the Fifth Circuit, lost on the merits, and did not petition the Court for review at that time.[122] The dissent lamented the changing circumstances that the Supreme Court majority now allowed for the case to move forward on the grounds that the petitioners had gained better evidence to show how many clinics would close.[123] Further, the dissent applied the *Casey* undue burden test and found that the restrictions did not impose an undue burden and should have been upheld.[124]

In 2020, the Court heard *June Medical Services v. Russo*, which challenged a Louisiana law that required abortion providers to have admitting privileges at hospitals—a nearly identical restriction to the Texas law the Court had struck down in *Whole Woman's Health*.[125] However, the makeup of the Court had changed: Justice Antonin Scalia, who passed away in 2016, was replaced by Justice Neil Gorsuch, and Justice Anthony Kennedy retired and was replaced by Justice Brett Kavanaugh.[126]

The Court issued a plurality opinion striking down the law, in a judgment which saw Chief Justice Roberts flip from his vote in *Whole Woman's Health*.[127] But, he concurred only in the judgment, not in the reasoning. [128] In his concurrence, Chief Justice Roberts reiterated his belief that *Whole Woman's Health* was wrongly decided, but supported striking down the Louisiana law on the basis of precedent.[129] He provided a detailed discussion explaining that based on his reading of *Casey*, there was nothing in the undue burden test that required a cost-benefit analysis.[130] Though on its face, the case was a "win" for abortion rights activists, the opinion has not stopped speculation about how Chief Justice Roberts may rule should the facts of the case be different.[131] His concurrence embraced *Casey* and its

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[120] *Id.* at 93–98, 109–16 ("*Whole Woman's Health* does not foreclose the use of scientific uncertainty as a justification for restricting abortion, the strategy relied on so successfully by abortion opponents for decades.").

[121] *Whole Woman's Health*, 136 S. Ct. at 2330 (Alito, J., dissenting).

[122] *See id.* at 2230–51 (Alito, J., dissenting).

[123] *See id.* at 2230–31 (Alito, J., dissenting).

[124] *See id.* at 2346–50 (Alito, J., dissenting).

[125] June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2112 (2020).

[126] *Supreme Court Nominations (1789–Present)*, U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm (last visited Jan. 4, 2022).

[127] *June Med. Servs.*,140 S. Ct. at 2133–34 (2020) (Roberts, J., concurring in the judgment).

[128] *Id.*

[129] *Id.*

[130] *Id.* at 2139.

[131] This Article will not speculate about Chief Justice Roberts's signaling in this case. For discussions about the implications of his opinion on future abortion cases, *see* Marc Spindelman, *Embracing* Casey*:* June Medical Services L.L.C. v. Russo *and the Constitutionality of Reason-Based Abortion Bans*,

undue burden test, which should secure the right to abortion for women; but, the remaining question is: what standard of review will state restrictions be subject to moving forward?[132]

So then, what are lower courts to do with this decision? As discussed previously, under the *Marks* rule, the narrowest view of the Court is the controlling opinion. In *June Medical*, only four Justices would have voted to uphold the stricter *Whole Woman's Health* cost-benefit test. However, Chief Justice Roberts did not indicate any desire to stray from *Casey*, meaning there are at least five Justices willing to uphold the undue burden analysis outlined in that case. Therefore, there stems a logical argument that Chief Justice Roberts's concurrence in *June Medical Services* is now the controlling opinion under the *Marks* rule because it represents the position that the majority of the Court would take. Under this application, *Whole Woman's Health* would be deemed overruled.

IV. HOW LOWER COURTS HAVE APPLIED CHIEF JUSTICE ROBERTS'S CONCURRENCE IN *JUNE MEDICAL*

As legal scholars predicted, anti-abortion states quickly began probing to find the most favorable jurisdictions to litigate this critical issue.[133] The issue was put to the test by the Eighth Circuit, in *Hopkins v. Jegley*, less than two months after the Supreme Court issued its opinion in *June Medical Services*.[134]

This case arose as an appeal from the district court's grant of a preliminary injunction that prohibited the enforcement of recently passed state laws regulating abortion.[135] In 2017, Arkansas enacted four laws:

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109 GEO. L.J. ONLINE 115 (2020) (noting that in light of previous case precedent and Chief Justice Roberts's concurrence in *June* that reason-based abortion bans undermine *Casey*'s vitality and should be held unconstitutional); Gretchen Borchelt, *Symposium: June Medical Services v. Russo: when a "win" is not a win*, SCOTUSBLOG (Jun. 30, 2020, 12:31 PM), https://www.scotusblog.com/2020/06/symposium-june-medical-services-v-russo-when-a-win-is-not-a-win/ (referencing Chief Justice Roberts's concurrence appears to favor a previous, weaker standard that would allow myriad of abortion bans to remain in place); Erika Bachiochi, *Symposium: The chief justice restores the* Casey *standard even while undermining women's interests in Louisiana*, SCOTUSBLOG (Jun. 30, 2020, 11:44 AM), https://www.scotusblog.com/2020/06/symposium-the-chief-justice-restores-the-casey-standard-even-while-undermining-womens-interests-in-louisiana/ (noting that Chief Justice Robert's argues, in his concurrence, for justices to weigh the state's interests in the issue would require them to act as legislators).

[132] Spindelman, *supra* note 130, at 129.

[133] *See, e.g.*, Dov Fox, I. Glenn Cohen, & Eli Y. Adashi, June Medical Services v. Russo—*The Future of Abortion Access in the US*, JAMA HEALTH F. (Sept. 14, 2020), https://jamanetwork.com/channels/health-forum/fullarticle/2770774; Mary Ziegler, *Abortion After June Medical*, HARV. L. & POL'Y REV. BLOG (Aug. 19, 2020), https://harvardlpr.com/2020/08/19/abortion-after-june-medical/; John Knepper, *Symposium: How to count to one* (Jul. 1, 2020, 12:13 PM), https://www.scotusblog.com/2020/07/symposium-how-to-count-to-one/; *see also* Laurie Sobel *et al.*, *Abortion at SCOTUS: A Review of Potential Cases this Term and Possible Rulings* (Oct. 30, 2020), https://www.kff.org/womens-health-policy/issue-brief/abortion-at-scotus-a-review-of-potential-cases-this-term-and-possible-rulings/.

[134] 968 F.3d 912 (8th Cir. 2020). *June Medical Services v. Russo* was decided on June 29, 2020, and *Hopkins v. Jegley* was decided on August 7, 2020. *Compare* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020), *with* Hopkins v. Jegley, 968 F.3d 912 (8th Cir. 2020).

[135] *Hopkins*, 968 F.3d at 913–14.

(1) prohibiting dismemberment of aborted fetuses; (2) prohibiting sex selection of a child; (3) regulating the disposition of fetal remains; and (4) regulating the maintenance of forensic samples from abortions performed on a child.[136] Prior to *June Medical Services*, the district court had applied the *Whole Woman's Health* cost-benefit analysis.[137] The district court found a likelihood of success on the merits and thus granted a preliminary injunction.[138]

In a *per curiam* opinion, the Eighth Circuit vacated the preliminary injunction and remanded the case.[139] The court relied heavily on Chief Justice Roberts's concurring opinion in *June Medical Services,* noting that the Chief Justice rejected the reasoning behind *Whole Woman's Health*'s cost-benefit analysis.[140] The panel quoted Chief Justice Roberts, writing, '"[p]retending that we could pull that off,' Chief Justice Roberts observed, 'would require us to act as legislators, not judges.'"[141] The court also highlighted Chief Justice Roberts's displeasure with the element from *Whole Woman's Health* that gave power to the courts to conduct the cost-benefit analysis instead of the legislature.[142]

In this case, the Eighth Circuit found that the Chief Justice's concurring opinion in *June Medical* was the controlling opinion under the *Marks* rule.[143] Accordingly, because he expressed such disdain for the cost-benefit analysis in *Whole Woman's Health*, the court found this test was no longer controlling. Instead, according to the Eighth Circuit, the district court must evaluate the state laws and determine whether they pose a "substantial obstacle" or "substantial burden"—not whether the regulations have any benefit to women.[144] The Eighth Circuit denied a rehearing *en banc* and remanded the case back to the district court for further determinations consistent with their application of *June Medical Services*.[145] Since the case was remanded, there has been some back and forth between the trial court and appellate court. There is currently a second preliminary injunction in place

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[136] ARK. CODE ANN. § 20-16-1803 (2017); *id.* § 20-16-1904; *id.* § 20-17-801; *id.* § 12-18-108(a)(1).
[137] *Hopkins v. Jegley*, 267 F. Supp. 3d 1024, 1055 (E.D. Ark. 2017).
[138] *Id.* at 1051.
[139] Hopkins, 968 F.3d at 916.
[140] *See generally id.*
[141] *Id.* at 915 (quoting June Medical Servs. LLC v. Russo, 140 S. Ct. 2103, 2136 (2020)).
[142] *Id.*
[143] *Id.* ("Chief Justice Robert's [sic] vote was necessary in holding unconstitutional Louisiana's admitting-privileges law, so his separate opinion is controlling.").
[144] *Id.*
[145] Hopkins v. Jenkins, 968 F.3d 912 (8th Cir. 2020), *reh'g en banc denied* (Dec. 15, 2020). The Eighth Circuit also instructed the lower court to reconsider in light of *June Medical* and *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019) (per curiam). *Id.* at 916. *Box v. Planned Parenthood* presented two questions to the Court: first, the validity of the state's fetal-remains law, and second, the constitutionality of genetic-based abortion restrictions. Box, 139 S. Ct. at 1781. The Court granted certiorari and held that how fetal remains were disposed did not impact a woman's access to abortion. *Id.* at 1781. On the genetic-based abortion restrictions, the Court denied certiorari, leaving a preliminary injunction in place until another circuit had ruled on the issue. *Id.* at 1782.

preventing the law from going into effect, and as this article was nearing publication, the case has again been appealed to the Eighth Circuit.[146]

With the shift in the Supreme Court over the past few years, there has been much percolation of abortion regulations among the lower courts.[147] Many lower courts are hearing abortion restriction cases, and the first step in their analysis is whether or not Chief Justice Roberts's concurrence in *June Medical* is controlling.[148] Some legal scholars argue that the *Marks* rule as applied in *Hopkins* is correct because *June Medical* was decided within the same spectrum as it relates to abortion rights.[149] Justice Breyer's opinion in *June Medical* argued for the most protection of abortion rights, whereas Chief Justice Roberts's concurrence argued for narrower protection of abortion rights.[150] Thus, under this theory, Chief Justice Roberts's opinion is the controlling opinion; because he argues that the proper test is the *Casey* undue burden test, that is, the test that should be applied by lower courts instead of *Whole Woman's Health*'s cost-benefit analysis. The undue burden standard is much more lenient and allows states to pass restrictions more easily.

Other legal scholars, however, argue that *June Medical Services* created no new law because there were two parts to Chief Justice Roberts's reasoning: (1) an abortion restriction is acceptable if the state has a substantial interest and there is not a substantial burden created; and (2) under *stare decisis*, admitting privileges requirements are unconstitutional.[151] They reiterate that the *Marks* rule requires lower courts to determine the holding of the controlling opinion, which they argue in Roberts's opinion is merely that admitting privileges requirements are unconstitutional.[152] Some argue his commentary relating to the proper test is merely *dicta* and therefore not binding on lower courts.[153] Therefore, these legal scholars would argue that the Eighth Circuit improperly applied the *Marks* rule to *Hopkins*.

Although the Eighth Circuit was the first to interpret the meaning of *June Medical Services*, other circuits have now done so as well. The results

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[146] Hopkins v. Jegley, No. 17-CV-00404, 2021 WL 41927, *5 (E.D. Ark. 2021).

[147] *See, e.g.*, *Preterm-Cleveland v. Himes, 940 F.3d 318 (6th Cir. 2019), vacated, 944 F.3d 630 (6th Cir. 2019); Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Parson,* 408 F. Supp. 3d 1049 (W.D. Mo. 2019); Little Rock Family Planning Servs. v. Rutledge, 397 F. Supp. 3d 1213 (E.D. Ark. 2019); EMW Women's Surgical Ctr. v. Beshear, No. 19-cv-178, 2019 WL 1233575 (W.D. Ky. 2019).

[148] *See, e.g.*, *Preterm-Cleveland*, 994 F.3d at 520.

[149] *See, e.g.*, Melissa Murray, *The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 308, 322–27 (2020); David S. Cohen, *Why Whole Woman's Health's Balancing Test Still Applies After June Medical*, HARV. L. & POL'Y REV. BLOG (Aug. 24, 2020), https://harvardlpr.com/2020/08/24/why-whole-womans-healths-balancing-test-still-applies-after-june-medical/.

[150] Murray, *supra* note 149.

[151] Cohen, *supra* note 149.

[152] *Id.*

[153] *Id.*

are mixed, with the Sixth and Fifth Circuits agreeing with the Eighth Circuit that Chief Justice Roberts's concurrence is controlling, while the Seventh Circuit found that *June Medical* yielded no controlling opinion.[154]

In August of 2020, only fourteen days after the Eighth Circuit decided *Hopkins*, the Fifth Circuit held that the *June Medical* decision yielded no controlling opinion.[155] The court opted to use the reason test instead of the results-based test.[156] It held that because the plurality and the concurrence disagreed on what test to apply, Chief Justice Roberts's opinion could not be considered controlling because it was not a logical subset of the other opinion.[157] The court wrote, "the plurality's and concurrence's descriptions of the undue burden test are not logically compatible, and *June Medical* thus does not furnish a controlling rule of law on how a court is to perform that analysis."[158] Accordingly, the Fifth Circuit applied the plurality opinion. The Fifth Circuit quickly vacated this decision and granted rehearing *en banc*, and in August of 2021, the court reversed.[159] In its opinion, the Fifth Circuit adopted Chief Justice Roberts's concurrence from *June Medical* as the controlling opinion under *Marks*.[160] The court found that *Hellerstedt's* balancing test was no longer applicable, writing that "the district court erred by balancing SB8's benefits against its burdens."[161]

In the fall of 2020, a three-judge panel of the Sixth Circuit agreed with the Eighth Circuit and found that the Chief Justice's concurrence in *June Medical* was controlling.[162] The Sixth Circuit wrote that an opinion is 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.[163] But in cases where a plurality strikes down a law as unconstitutional, the Sixth Circuit held that the narrowest opinion is the one that would strike down the fewest laws moving forward.[164] Applying this test to a recent abortion rights case, the Sixth Circuit wrote:

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[154] *See generally* Whole Woman's Health v. Paxton, 978 F.3d 896 (5th Cir. 2020); Planned Parenthood of Ind. & Ky. v. Box, 991 F.3d 740 (7th Cir. 2021).

[155] *Whole Woman's Health*, 978 F.3d at 904.

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.*, *vacated*, 978 F.3d 974 (5th Cir. 2020). Whole Woman's Health v. Paxton, 10 F.4th 430, 440 (5th Cir 2021) (en banc).

[160] *Id.*

[161] *Id.* at 442.

[162] EMW Women's Surgical Ctr., P.S.C. v. Friedlander, 978 F.3d 418, 432, 436–37 (6th Cir 2020).

[163] *Id.* at 431 (discussing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), and observing that the Sixth Circuit had applied Justice Powell's holding that a strict scrutiny standard should apply over an intermediate scrutiny standard because that was the narrowest rule that emerged from a fractured Court).

[164] *Id.* at 431–32; *see* Grutter v. Bollinger, 288 F.3d 732, 739 (6th Cir. 2002). The Court noted that in *Marks* itself, the Supreme Court held that Justice Powell's opinion announcing the judgment of the Court in *Bakke* controlled because it provided the most limited protection. *Id.* (citing Marks v. United States, 430 U.S. 188, 193 (1977)).

> 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*. His concurrence therefore "constitutes [*June Medical Services*'] holding and provides the governing standard here.[165]

The Sixth Circuit decided to apply the entire concurrence, including the undue burden test, not the cost-benefit analysis applied in *Whole Woman's Health*.[166] The panel therefore, applied the *Casey* undue burden test and upheld a Kentucky abortion restriction requiring strict licensing requirements for abortion facilities.[167] In a recent *en banc* decision deciding the constitutionality of genetic-based abortion bans, the Sixth Circuit reiterated in a nine-to seven decision that Chief Justice Roberts's concurrence in *June Medical* is the controlling opinion.[168]

The Sixth Circuit recently reaffirmed their earlier decision in *EMW in Bristol Regional Women's Center, P.C. v. Slatery*.[169] In the case, the Sixth Circuit upheld Tennessee's forty-eight-hour waiting period for abortions.[170] The *en banc* panel again addressed the *Marks* issue. As an initial matter, the court wrote:

> The panel majority in *EMW* ably analyzed the Supreme Court's decision in *June Medical* and reasoned that the Chief Justice's concurrence is the 'holding of the Court' under *Marks v. United States* . . . . To the extent we were unclear in *Preterm*, we adopt *EMW's* thorough analysis here.[171]

The case invoked a similar break in the votes: nine judges in the majority, one concurrence, and seven dissenters.[172] Judge Moore again took issue with the lack of analysis the majority took towards the *Marks* application.[173] She again pointed out that three-judge panels do not create binding law on an *en banc* circuit court, despite the majority calling it "the controlling law of

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[165] *EMW Women's Surgical Ctr.*, 978 F.3d at 433 (quoting *Grutter*, 288 F.3d at 741) (alterations in original).

[166] *Id.* at 430.

[167] *Id.* at 433–34.

[168] Preterm-Cleveland v. McCloud, 994 F.3d 512, 525 (6th Cir. 2021) (*en banc*). This pronouncement generated some debate among the judges; Judge Batchelder, writing for the majority, held that the three-judge panel's adoption of Chief Justice Roberts's concurrence as the controlling opinion in *EMW* meant the concurrence was controlling within the circuit. *Id.* But as Judge Moore points out in her dissent, although a panel of the Sixth Circuit cannot overrule another panel of the Sixth Circuit, there is nothing that would prevent the circuit *en banc* from overruling a divided panel. *Id.* at 552 (Moore, J., dissenting).

[169] Bristol Reg'l Women's Ctr., P.C. v. Slatery, 7 F.4th 478, 482–83 (6th Cir. 2021) (*en banc*).

[170] *Id.* at 481, 489.

[171] *Id.* at 481 n.1.

[172] *Id.* at 481.

[173] *Id.* at 491 (Moore, J dissenting).

our circuit."[174] The dissenting judges seem to believe that the majority's application of *Marks* was *dicta* and not based on precedent or reasoned analysis.[175]

Somewhat ironically, in the spring of 2021, the Seventh Circuit also applied the "logical subset" test to Indiana's statutory restrictions on minors' access to abortions and came to a different conclusion.[176] Here, the three-judge panel reasoned that the only common ground between the plurality and concurrence was that *Whole Woman's Health* was entitled to *stare decisis* because the facts were so similar.[177] The Seventh Circuit further reiterated that only that part of the concurrence was entitled to *Marks* application by lower courts.[178] Therefore, the Seventh Circuit applied the *Whole Woman's Health* cost-benefit analysis, assuming it was still controlling. This case is currently awaiting a grant or denial of certiorari by the Supreme Court.[179]

In May of 2021, the Supreme Court agreed to hear *Dobbs v. Jackson Women's Health Organization*.[180] The case is a challenge to a Mississippi law that banned elective abortions after fifteen weeks and before the point of viability.[181] The case presents two relevant questions: (1) whether states can restrict elective abortion access before viability; and (2) whether the undue burden standard or a cost-benefit analysis should be applied.[182] However, certiorari was only granted for Question 1; therefore, this case may be another missed opportunity for the Court to address the tension between the *Mark* rule and the prohibition of anticipatory overrulings.[183] Indeed, at oral argument, the issue whether Chief Justice Roberts's concurrence was controlling went largely unaddressed.[184]

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[174] *Id.* at 506 (Moore, J. dissenting).

[175] *Id.* (Moore, J. dissenting).

[176] Planned Parenthood of Ind. & Ky. v. Box, 991 F.3d 740, 748 (7th Cir. 2021).

[177] *Id.*

[178] *Id.* The Seventh Circuit acknowledged in its opinion the different approaches other circuits have taken to the *June Medical* concurrence but disposed of the issue by reasoning that the Sixth Circuit's approach is inconsistent with the Seventh Circuit's treatment of *Marks*. *Id.* at 751–52. Although Judge Kanne, the dissenter from the panel's decision, agreed that the Seventh Circuit has treated *Marks* differently than the Sixth and Eighth Circuits, ultimately, they argued that the common denominator between the plurality and Roberts's concurrence is the application of the *Casey* undue burden test before striking down an abortion restriction. *Id.* at 755–57.

[179] SCOTUSBLOG, Box v. Planned Parenthood of Indiana and Kentucky Inc., https://www.scotusblog.com/case-files/cases/box-v-planned-parenthood-of-indiana-and-kentucky-inc-4/ (last visited Jan. 4, 2022).

[180] Order List, 593 U.S., 2 (May 17, 2021).

[181] Amy Howe, *Court to Weigh in on Mississippi Abortion Ban Intended to Challenge Roe v. Wade*, SCOTUSBLOG (May. 17, 2021, 11:55 AM), https://www.scotusblog.com/2021/05/court-to-weigh-in-on-mississippi-abortion-ban-intended-to-challenge-roe-v-wade/.

[182] John Elwood, *One new case, two issues of appellate procedure*, SCOTUSBLOG (Apr. 29, 2021, 4:19 PM), https://www.scotusblog.com/2021/04/one-new-case-two-issues-of-appellate-procedure/.

[183] Order List, 593 U.S., 2 (May 17, 2021).

[184] Dobbs v. Jackson Women's Health, No. 19-1392, Oral Argument (Dec. 1, 2021), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/19-1392_4425.pdf. Justice

V. HOW SHOULD THE COURT RESOLVE THIS CONFLICT?

Chief Justice Roberts's concurring opinion in *June Medical* illustrates a rare situation where the controlling opinion—or at least what some circuits may consider to be the controlling opinion—in effect overrules current Supreme Court precedent. Thus, an arguably proper application of the *Marks* rule is inconsistent with the general rule that only the Supreme Court can overturn its own precedent. Currently, this issue is percolating among the lower courts in the abortion context, but it is conceivable that it will arise in other areas of law as well. The lower courts have very little guidance from the Supreme Court on how to handle this conflict. It is, therefore, understandable that Roberts's concurrence in *June Medical* has been applied differently in each circuit that has dealt with the issue so far. But the non-uniform application of the law is undesirable because it undermines the principle of equal treatment under the law, and thus the Supreme Court has an interest in addressing the issue directly.[185]

Because the Supreme Court is not bound by its own doctrines the same way lower courts are, the Justices have the flexibility to issue clear guidance to the lower courts on how to properly apply *Marks* and whether there may be narrow circumstances where an anticipatory overruling is permitted. The stronger the guidance, the more uniformly the lower courts can apply the law. But, as this analysis will illustrate, there is not a clear path for the Court to resolve this conflict. This analysis discusses the benefits and disadvantages of each possible resolution.

A. *Abandoning the Strict Rule that Only the Supreme Court Can Overrule Precedent*

The strict rule whereby only the Supreme Court can overrule its precedent has proven onerous at times, and it could be time for the Court to revisit it. A case that was recently denied certiorari, *National Coalition of Men v. Selective Service System*, illustrates this problem well.[186] The plaintiffs in that case claimed that the male-only draft registration was discrimination based on sex.[187] But forty years earlier in *Rostker v. Goldberg*, the Supreme Court rejected a very similar claim.[188] The Court concluded, "[t]his is not a case of Congress arbitrarily choosing to burden one of two

Gorsuch acknowledged that there was a question as to whether *Hellerstedt* was still good law, but did not comment specifically on the *Marks* application issue. *Id.* at 59:9-60:8.

[185] Deborah Beim & Kelly Rader, *Legal Uniformity in American Courts*, 16 J. EMPIRICAL LEGAL STUD. 448, 451 (2019). The desirability of uniformity among federal courts has been around since the creation of our nation. *Id.* "Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed." *Id.* at 451 n.3 (quoting THE FEDERALIST NO. 80 (Alexander Hamilton)).

[186] Nat'l Coal. for Men v. Selective Serv. Sys., 969 F.3d 546 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1815 (2021).

[187] *Id.* at 547.

[188] Rostker v. Goldberg, 453 U.S. 57, 78–79 (1981).

similarly situated groups . . . . Men and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft."[189] In the recent case, the plaintiffs argued that because women could now hold all the same positions in the military as men, *Rostker* no longer controlled.[190] The district court agreed, reasoning that because the dispositive fact in *Rostker* was that women were not fit for combat, the case was no longer controlling.[191] However, the Fifth Circuit, although acknowledging the shift in facts, refused to abandon *Rostker* and said: "[p]laintiffs . . . point to no case in which a court of appeals has done what they ask of us, that is, to disregard a Supreme Court decision as to the constitutionality of the exact statute at issue here because some key facts implicated in the Supreme Court's decision have changed."[192] Clearly, the plaintiffs here were right in that so much in gender equality jurisprudence has changed since *Rostker* was decided. There is a strong argument that it seems unreasonable to force lengthy and costly litigation on the plaintiffs to appeal their case all the way to the Supreme Court to achieve a relatively foreseeable result.

Often, the arguments in favor of strict adherence to *stare decisis* are (1) predictability, certainty, and reliance; (2) fairness and uniformity; (3) judicial economy; and (4) the public image of the court system.[193] However, when the controlling precedent is so clearly eroded and dubious, these four factors actually weigh in favor of, in narrow circumstances, allowing lower courts to issue an anticipatory overruling.

First, if the precedent is already dubious, then its predictability, certainty, and reliance interests are not nearly as strong. As discussed, *stare decisis* is not an absolute rule that binds the Court. Parties can always advocate for a reversal in precedent. Take, for example, *Rostker*; it can hardly be said that it was predictable or certain that the Court would adhere to that precedent given the changes in the way the military and society view the role of women. Given these changes, it is hard to argue that many women rely on the precedent. An anticipatory overruling would only occur in very narrow circumstances where the law has clearly been eroded, so by its very nature, the reliance factor would not be as strong.[194]

Second, anticipatory overrulings allow lower courts to treat all litigants fairly, instead of changing the law only when plaintiffs can afford to

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[189] *Id.* at 78.
[190] *See Nat'l Coal. for Men*, 969 F.3d at 548.
[191] Nat'l Coal. for Men v. Selective Serv. Sys., 355 F. Supp. 3d 568, 576 (S.D. Tex. 2019).
[192] Nat'l Coal. for Men, 969 F.3d at 550.
[193] Bradford, *supra* note 27, at 75 (arguing for narrow instances where lower courts can disregard dubious Supreme Court precedent); *see* Michael Gentithes, *In Defense of Stare Decisis*, 45 WILLAMETTE L. REV. 799 (2009) (arguing that *stare decisis* is a crucial part to any strong democracy).
[194] Bradford, *supra* note 27, at 77–78.

take their case all the way to the Supreme Court.[195] In the *stare decisis* argument, fairness instructs courts to treat similar cases alike.[196] But, in instances where the factors strongly suggest that the Court would not apply the precedent, it seems to go against the premise of fairness to force litigants to spend so much time and money to reach a result foreseen by lower courts.[197] The median time for federal civil cases to get to a final ruling is 26.3 months, and 14.7% of those cases last more than three years.[198] Litigation is incredibly burdensome on parties, so, in cases where the lower courts can clearly articulate why the Supreme Court would overrule precedent, there is an argument they should be allowed to do so.

Third, allowing for anticipatory overrulings would allow courts to react more quickly to changing factual situations.[199] As legal scholar C. Stephen Bradford wrote:

> Without anticipatory overruling, legal progress is segmented. The law lurches forward first in one limited area and then in another, as the Supreme Court slowly changes its rules on a narrow, case-by-case basis. Policies that the Supreme Court no longer approves remain frozen in time. Obsolete, disapproved rulings continue to control people's behavior until a case presenting that precise issue again works its way to the Supreme Court. Anticipatory overruling, on the other hand, allows the law to adjust to changes in Supreme Court policy more rapidly. The transition is smoother and the benefits of new federal policies become available to the public more quickly.[200]

And fourth, when precedent is shaky, anticipatory overrulings allow lower courts to acknowledge the precedent's erroneous reasoning and explain why they are declining to follow it, which can enhance public perception of the court system. Blind adherence to precedent or attempts to distinguish similar cases can sometimes harm the public perception of a lower court because it is not as legally sound.[201] When the Supreme Court overrules precedent, the public does not always view that as a bad thing. The public

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[195] *Id.* at 78.
[196] *Id.*
[197] *Id.*
[198] Arthur R. Miller, *Widening the Lens: Refocusing the Litigation Cost-and-delay Narrative*, 40 CARDOZO L. REV. 57, 60 (2018). A recent example of just how prolonged some court cases can be is exemplified in *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020). One of the plaintiffs, Aimee Stephens, was fired from her job in 2013, but the Supreme Court did not issue its final decision until June of 2020. Aimee Ortiz, *Aimee Stephens, Plaintiff in Transgender Case, Dies at 59*, N.Y. TIMES, https://www.nytimes.com/2020/05/12/us/aimee-stephens-supreme-court-dead.html (Jun. 16, 2020). During that time, Stephens developed kidney failure and passed away. *Id.*
[199] *See* Bradford, *supra* note 27, at 79–81.
[200] *Id.* at 72.
[201] *Id.* at 82–83.

cares much more about substantive results—not procedural applications.[202] Accordingly, the Supreme Court's strict rule that only it can overrule precedent seems outdated. It does not allow lower courts to properly explain why a case should come out a certain way in situations where the court goes against precedent.

However, before the Supreme Court clarified its strict stance on anticipatory overrulings, lower court judges applied very different standards regarding when to disregard controlling precedent. For example, some judges would disregard precedent if there was a preponderance of the evidence that the controlling case would no longer be applied, whereas other judges required a reasonable certainty that the controlling case would no longer be applied.[203] The risk of these differing standards would again re-emerge if the Supreme Court revisited its rule on anticipatory overrulings. Even if the Court were to articulate a narrow test for when lower courts could disregard precedent, there would still be potential policy considerations about allowing lower court judges to speculate on a Supreme Court Justice's stance on a particular issue.[204]

Speculation as to how the Supreme Court might rule is one of the stronger arguments against allowing for anticipatory overrulings. All judges develop their own methodologies for reviewing cases, and these methodologies should be applied consistently and in good faith across all cases.[205] This means that even if a judge's methodology causes them to arrive at a disfavored result, that should nonetheless be the result.[206] But, in the context of the Supreme Court, the process by which the Justices reach a majority opinion is full of negotiations and compromises as the draft opinion circulates.[207] These discussions among Justices can ultimately lead to a narrower holding or changes to the language of the opinion. The lower court judges are not privy to these negotiations. To allow lower courts to attempt to predict the outcome of a particular case at the Supreme Court is thus unlikely to reflect the full reasoning of the Court. Supreme Court Justices are also very careful to avoid publicly stating their view on certain matters because, when a case comes to the Court, they want to approach it—or at least

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[202] *Id.* at 82.
[203] *Id.* at 45–46.
[204] *See id.* at 85–88.
[205] RICHARD H. FALLON, LAW AND LEGITIMACY IN THE SUPREME COURT 129–32 (Belknap Press, 2018).
[206] *Id.*
[207] *See* James F. Spriggs II, *et al.*, *Bargaining on the U.S. Supreme Court: Justices' Responses to Majority Opinion Drafts*, 61 J. POL. 485, 485–486 (1999) (discussing the bargaining and compromising that occurs during the circulation of drafts opinions among the justices); *see also* Stearns, *supra* note 94 at 182–87 (analyzing *Marks* as a bargaining tool).

give the impression that they are approaching it—with an unbiased mind and ready to rule on the specific set of facts before them.[208]

Applying this rationale to *June Medical*, the Court could adopt a narrow exception to the anticipatory overrulings doctrine and conclude that in rare circumstances, a single Justice's opinion can, under *Marks*, overturn precedent. This would essentially mean that the Court would formally adopt the reasoning from the Eighth, Fifth, and Sixth Circuits. As discussed above, there are inherent benefits to allowing lower courts to disregard binding precedent when the reasoning, in that case, is no longer sound. This would allow both the rule regarding anticipatory overrulings and the *Marks* rule to stay relatively intact and impact precedent the least.

However, this option for the Court is still problematic. First, lower courts are already struggling to apply *Marks* properly. Allowing lower courts to also disregard binding precedent under *Marks* would likely only further complicate matters. As the lower court applications of *June Medical* have illustrated, the *Marks* rule can be interpreted in many different ways. Unfortunately, absent clearer guidance from the Supreme Court, no one can say with certainty that one application is correct and another is incorrect. Second, this could potentially give one Justice far too much power. The Court has always made decisions via majority rule, but this type of application would permit one Justice to write a carefully worded opinion if they truly wanted precedent overturned. This could lead to a legitimacy problem for the Court. As two legal scholars pointed out, "[f]or an institution like the U.S. Supreme Court to render rulings that carry authoritative force, it must maintain a sufficient reservoir of institutional legitimacy . . . ."[209] Such legitimacy stems from the public's perception that the Court is distinct from the other branches of government and is less impacted by politics and rather each Justice applies their own rationale to each case to determine the result.[210]

In recent decades, the all-important "swing vote" has allowed for some "conservative" decisions in big cases, while other opinions were more "progressive" decisions. It has kept one political party from consistently winning, which enhances the appearance of a neutral Court.[211] The ways Justice O'Connor and Justice Kennedy would vote were seemingly difficult

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[208] *See, e.g.*, Tyler Cooper & Dylan Hosmer-Quint, *When Justices Go to School: Lessons from Supreme Court Visits to Public Colleges and Universities*, 15 (2020), https://fixthecourt.com/wp-content/uploads/2020/03/FTC-public-universities-report-3.24.20.pdf (noting that justices will often limit the number of guests allowed in a given talk, prohibit recordings, or let a school know ahead of time that currently pending cases are off-limits for questions).

[209] Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 184 (2013).

[210] *Id.*

[211] Jonathan S. Gould, *Rethinking Swing Voters*, 74 VAND. L. REV. 85, 128 (2021).

to predict.[212] In a speech in 2018, Justice Kagan questioned how the Court would continue to be seen by the public absent these swing votes.[213] She said:

> Part of the Court's legitimacy depends on people not seeing the court in the way that people see the rest of the governing structures of this country now. In other words, people thinking of the Court as not politically divided in the same way, as not an extension of politics, but instead somehow above the fray. . . .[214]

But the importance of the swing vote and what they can do for the Court's perception is minimized when there is no incentive to compromise to reach a majority opinion. If one Justice really wants to carefully articulate their opinion to achieve a desired result, then the Court stands to lose a lot of credibility with the public. Of course, one would hope that the Justices would apply the law and reason through their opinions in good faith. But, the public perception of the Supreme Court, particularly in times of political tension, is incredibly important.[215] How this type of application could delegitimize not only the Supreme Court but also lower courts as they would struggle to apply this should not be understated.

B. *The Court Could Abandon Marks*

On the other side of the spectrum, the Supreme Court could decide to abandon the *Marks* rule. Lower courts have struggled with the application of *Marks*, and instead of attempting to fix the doctrine, some legal scholars argue for its abandonment.[216] The strongest argument for its abandonment is that *Marks* applies only when there is no majority opinion, and therefore creates precedents that are not desirable.[217] In place of *Marks*, no binding precedent would be created in plurality opinions.[218]

However, abandoning *Marks* would create issues reaching far beyond just the *June Medical* context. The Supreme Court has relied on *Marks* in a variety of different types of cases.[219] To abandon the *Marks* rule would require the Court to sacrifice some of its precedent that has created reliance

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[212] *See id.* at 89.

[213] Sophie Tatum, *Justice Kagan worries about the 'legitimacy' of a politically divided Supreme Court*, CNN (Oct. 5, 2018, 10:06 PM), https://www.cnn.com/2018/10/05/politics/supreme-court-elena-kagan-legitimacy/index.html (quoting Justice Kagan from a speech she gave at Princeton University in 2018).

[214] *Id.*

[215] *See* Robert Barnes, *The political wars damage public perception of Supreme Court, Chief Justice Roberts says*, WASH. POST (Feb. 4, 2016), https://www.washingtonpost.com/politics/courts_law/the-political-wars-damage-public-perception-of-supreme-court-chief-justice-roberts-says/2016/02/04/80e718b6-cb0c-11e5-a7b2-5a2f824b02c9_story.html.

[216] *See* Re, *supra* note 95, at 2007–08 (arguing that the *Marks* rule should be discarded and we should require a majority to reach binding precedent).

[217] *Id.* at 1943–44.

[218] *Id.* at 1946.

[219] *Id.* at 1952 (noting that the Supreme Court majority opinions have cited the *Marks* rule nine times and non-majority opinions have cited it fifteen times).

interests over time. To mitigate this problem, the Court could decide to abandon *Marks* prospectively.[220] Thus, only foreclose new plurality decisions. This would preserve precedent but still help correct some of the issues with *Marks*. It would also likely be more straightforward for lower courts to apply because they can look to pre-existing case law to help apply older case law that would have required a *Marks* application. But confusion would persist in areas of law where *Marks* applications were already creating confusion for lower courts. Thus, merely abandoning *Marks* prospectively does not resolve current issues with *Marks* applications by lower courts. For example, it would not serve any benefit in the abortion context because *June Medical* has already been decided.

Some argue for the abandonment of *Marks* to apply retroactively, even though it would be costlier in terms of precedent because it would eliminate all of the confusion that *Marks* has created.[221] However, the floodgates of litigation that would open cannot be overlooked. Not only would this question the holdings of Supreme Court cases that relied on *Marks*, but also circuit court cases that relied on *Marks* when creating their precedents.[222] Moreover, many lower court decisions implicitly applied *Marks* but did not engage in any meaningful discussion of its application; thus, the true scope of the impact a retroactive application could have is unknown.[223] This could significantly change reliance interests or cause parties who lost their case because of *Marks* to feel slighted or lose their trust in the judicial process.

If the Court abandoned *Marks*, then only majority opinions could create binding precedent. This sometimes will put the Justices in tough situations. Either they can vote against their own preferred judgment to get a majority or relinquish their power to create a binding precedent on lower courts. But the Court has been doing this in cases for decades. One of the first examples of this occurred in *Screws v. United States*.[224] In that case, Justice Rutledge concurred in the judgment but wrote a separate concurrence to voice his own reasoning in how he got to the judgment, which was different from the plurality.[225] Another example arose in *United States v. Vuitch*.[226] The case was an interlocutory appeal of a district court ruling that an abortion law was unconstitutionally vague.[227] Although five Justices believed the Court had jurisdiction, only four thought that the district court judge had

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[220] *Id.* at 2007.
[221] *Id.*
[222] *Id.*
[223] *Id.*
[224] *See* 325 U.S. 91 (1945). For an in-depth discussion on the *Screws* opinion, see Re, *supra* note 95, at 1998–2000.
[225] *See id.* at 113–34.
[226] *See* 402 U.S. 62 (1971).
[227] *Id.* at 63.

committed reversible error.[228] Justice Blackman, who did not believe the Court had jurisdiction, joined the other four Justices to reverse the error; he wrote, "[b]ecause of the inability of the jurisdictional-issue majority to agree upon the disposition of the case, I feel obligated not to remain silent as to the merits."[229]

Justices have also, in select cases, recognized the practical effect of fractured opinions and have adjusted their opinions to reach a disposition. One of the more well-documented accounts of this was in *Hamdi v. Rumsfeld*.[230] The case involved the detention of alleged enemy combatants and their rights to due process.[231] Both Justice Souter and Justice Ginsburg believed that the prisoners should win outright but decided instead to join the plurality in order to achieve a majority on the judgment.[232] Justice Souter wrote:

> Since this disposition does not command a majority of the Court, however, the need to give practical effect to the conclusions of eight members of the Court rejecting the Government's position calls for me to join with the plurality in ordering remand on terms closest to those I would impose.[233]

This approach has advantages and disadvantages. This would obviously fly in the face of the general rule that Justices should adopt a personal judicial philosophy and apply it to all cases.[234] It would instead force Justices to bargain with each other and possibly sacrifice their own values in order to reach a majority. This could confuse the public if Justices were seemingly changing their judicial philosophies from one case to the next. It could appear as though they were making arbitrary decisions when instead the Court should aim to write clearly reasoned opinions to gain the support and trust of the public.

Even recently, Justice Kavanaugh and Justice Kagan sparred over the application of judicial philosophy. In *Edwards v. Vannoy*, Justice Kavanaugh was critical of Justice Kagan for inconsistent application of her judicial philosophy:

> Justice Kagan dissented in *Ramos* . . . it is of course fair for a dissent to vigorously critique the Court's analysis. But it is another thing altogether to dissent in *Ramos* and then to turn around and impugn today's majority for supposedly

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[228] *Id.* at 62–64.
[229] *Id.* at 98.
[230] *See* 542 U.S. 507 (2004).
[231] *Id.* at 511.
[232] *Id.* at 553.
[233] *Id.*
[234] FALLON, *supra* note 205, at 129–31.

> shortchanging criminal defendants. To properly assess the implications for criminal defendants, one should assess the implications of *Ramos* and today's ruling *together*.[235]

Justice Kagan explained that she "dissented in *Ramos* precisely because of its abandonment of *stare decisis*.[236] Now that *Ramos* is the law, *stare decisis* is on its side. I take the decision on its own terms, and give it all the consequence it deserves."[237] She then responded to Justice Kavanaugh's criticism, writing, "[i]t treats judging as scorekeeping—and more, as scorekeeping about how much our decisions, or the aggregate of them, benefit a particular kind of party."[238]

Even though this option may force justices to soften their own personal judicial philosophy and work with the other justices, it is beneficial because it creates a clear binding precedent. This doctrine thus forces the justices to do their jobs—work out their reasoning at the Supreme Court level or "forgo the power to create binding precedential rules" instead of leaving it up to lower courts to figure out the narrowest reasoning.[239] In close cases, "the fact that a swing voter's support is necessary for a majority to exist allows the swing voter to dictate the content of legislation or judicial doctrine."[240] Having the Supreme Court explicitly outline the binding precedent would help ensure uniform application of the law instead of inconsistent applications across different circuits.

In the case of *June Medical*, abandoning *Marks* would resolve the tension relatively quickly. Because *June Medical* did not produce a majority opinion, Chief Justice Roberts's concurrence would yield no controlling weight. Instead, *Whole Woman's Health* would be the clear precedent still intact, and its cost-benefit analysis would continue to be applied to abortion restrictions when challenged. There could be some issues if the Court decided only to abandon *Marks* prospectively since the *Marks* rule applications by lower courts have already begun. A prospective application thus would not be very helpful in the *June Medical* context. But both a retroactive and prospective abandonment would easily resolve the issue in future cases.

C. *The Court Could Modify the* Marks *Rule*

Another option would be for the Court to attempt to justify that these rules can coexist even though right now they seem to be in direct conflict with one another. This would effectively be done by the Court's formally adopting

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[235] 141 S. Ct. 1547, 1551 (2021) (holding that *Ramos v. Louisiana*, 140 S. Ct. 1390, does not apply retroactively).
[236] *Vannoy*, 141 S. Ct. at 71 (Kagan, J., dissenting).
[237] *Id.*
[238] *Vannoy*, 141 S. Ct. at 71 n.8 (Kagan, J., dissenting).
[239] Re, *supra* note 95, at 2000, 2006–07.
[240] Gould, *supra* note 207, at 88.

what the plurality argued in *Ramos* and thus modifying *Marks*. In *Ramos*, the plurality briefly sparred with the dissent over whether or not a single justice's opinion can overturn precedent.[241] The plurality dismissed this idea claiming that *Marks* "never sought to offer or defend such a rule" and that "a rule like that would do more to harm than advance *stare decisis*."[242]

It, therefore, seems possible that the Court could conjure up reasoning that would allow for *Marks* to remain the rule; but in cases where a single opinion would serve to overrule precedent, that opinion could not be considered controlling on the lower courts. This would allow both the *Marks* rule and strict prohibition on anticipatory overrulings to coexist without the Court having to abandon one or both of its doctrines. Both doctrines are important cornerstones of judicial reasoning, so this approach is appealing because it does not force significant change onto the lower courts by disrupting numerous cases of settled precedent.

But, as the dissent in *Ramos* highlights, there is no existing authority for the Court to justify such an interpretation. As Justice Alito noted, *Marks* applies equally to all opinions, no matter the division of Justices.[243] It is perfectly acceptable for the narrowest grounds to come from a single Justice's opinion, or at least lower courts have read *Marks* in this way, and the Supreme Court has never corrected them.[244] Justice Alito then turned to whether a single justice's opinion could overrule precedent. Because *Marks* is applied equally in all cases, Justice Alito concluded that it can.[245] However, he declined to go into an in-depth discussion because the "question is academic."[246]

Of course, the Court created the *Marks* rule, so the Court can amend the doctrine in *dicta* as it deems fit. But the *Marks* opinion does not attempt to distinguish between one-Justice opinions versus those joined by a greater number of Justices in a way that would justify explicitly amending the *Marks* rule to not overrule precedent.[247] The application of this clarified rule would likely confuse lower courts beyond the degree to which they already are confused. Should the Supreme Court prohibit its application in certain circumstances, this would likely lead to piecemeal applications across the circuits.

There are other ways that the Court could choose to modify *Marks* beyond adopting the *Ramos* reasoning. There has been some scholarly work

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[241] *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1403–04 (2020).
[242] *Id.*
[243] *Id.* at 1431 (Alito, J., dissenting).
[244] *Id.* (Alito, J., dissenting).
[245] *Id.* (Alito, J., dissenting).
[246] *Id.* (Alito, J., dissenting); *see also* Stearns, *supra* note 94, at 498–504 (2021) (discussing whether a singular opinion can be the narrowest).
[247] *See generally* Marks v. United States, 430 U.S. 188 (1977).

suggesting ways the Court could modify the *Marks* rule, though extensive discussion of the different suggestions is beyond the purview of this Article.[248] Most suggestions legal scholars have suggested focus on *how* lower courts should apply *Marks*, meaning setting forth a clearer rule for how to determine the narrowest opinion. While any of these applications could help alleviate the tension between *Marks* and anticipatory overruling, lower courts already have a challenging time just applying *Marks*. Thus, it would be reasonable to predict that changing the rule, even slightly, would lead to even more confusion, therefore perpetuating the problem of inconsistent applications until the next case reaches the Supreme Court.

In the case of *June Medical*, this application would resolve the conflicts in the abortion restriction setting very quickly. It would mean that Chief Justice Roberts's concurring opinion was not controlling. This change would, therefore, leave *Whole Woman's Health* intact and require the Sixth, Fifth, and Eighth Circuits to revisit their recent case decisions that say otherwise. Although this option seems attractive because it allows for the resolution of the issue as it appears in the abortion context, in the long-term, it does not resolve the inherent tension between the *Marks* rule and anticipatory overrulings. It seems difficult to justify why some opinions should be treated differently than others in a *Marks* application. When the reasoning is not sound, this issue will almost certainly arise again.

D. *Avoiding the Issue Altogether*

The Supreme Court, at least in the context of *June Medical*, could avoid the issue of precedent altogether. The Justices could achieve this by endorsing Chief Justice Roberts's concurring opinion as a full majority, or it could issue a majority clearly reaffirming *Whole Woman's Health*. Such a move was seen in *Grutter v. Bollinger* through its application of Justice Powell's single concurring opinion from *Board of Regents of the University of California v. Bakke*.[249] Similar to today's issues with *June Medical*, the circuit courts had a difficult time grappling with the various opinions of *Bakke*. The Fifth Circuit, persuaded by the fact that no other Justice endorsed Powell's opinion, found that his opinion was not controlling.[250] However, the Ninth Circuit, applying *Marks*, found that it *was* controlling because a majority of Justices wanted to allow some race-based considerations in higher education admissions.[251] When the issue re-emerged

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[248] *See* Williams, *supra* note 79, at 838–59 (arguing the Court should adopt the shared agreement approach); Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Plurality Decisions*, 42 DUKE L.J. 419, 447–57 (1992) (arguing that plurality opinions should bind only as to their result and the reasoning of the various opinions should be considered as persuasive only); Stearns, *supra* note 94, at 519–25 (discussing the problems with *Marks*).

[249] *See* Grutter v. Bollinger, 539 U.S. 306, 323–25 (2003).

[250] Hopwood v. Texas, 236 F.3d 256, 275 (5th Cir. 2000).

[251] Smith v. Univ. of Wash. L. Sch., 233 F.3d 1188, 1199–1200 (9th Cir. 2000). For a more in-depth discussion over the evolution of the case law since *Bakke* and leading to *Grutter*, see Lehmuller & Gregory,

at the Supreme Court in *Grutter*, the Court acknowledged that the *Marks* application of the fractured *Bakke* opinion was greatly confusing lower courts.[252] But, the Court completely sidestepped the issue of identifying the controlling opinion in *Bakke* instead writing, "[w]e do not find it necessary to decide whether Justice Powell's opinion is binding under *Marks* . . . today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."[253]

The Court could very well adopt the same technique here and not address the tension between *Marks* and anticipatory overrulings in the context of *June Medical*. It is true that this would allow the Court to dispose of the issue with abortion restrictions, and this would help to provide lower courts with clearer guidance on the test to apply to abortion restrictions in the future. But it would not prevent the *Marks* and anticipatory overrulings problem from arising again in a different area of law. As one legal scholar put it, "[e]ven 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."[254] It is clear that *Marks* has caused more confusion than its perceived benefits suggest.

Accordingly, it would be prudent for the Court to take this unique conflict among doctrines as an opportunity to clarify and refine *Marks* and anticipatory overrulings. This type of conflict occurs only rarely; but, when it does, it leads to fractured circuit case law, which is not desirable because it does not promote public trust in the judiciary. Especially because this conflict has arisen most recently in politically charged areas of law such as abortion and affirmative action—it is important for uniformity among federal courts. The Supreme Court should, therefore, use *Dobbs* as an opportunity to acknowledge that *Marks* has led to varying circuit court interpretations and address how lower courts should move forward. This will give lower courts much-needed guidance and allow for better application of case law across all circuits.

VI. CONCLUSION

As this Article has highlighted, there is no clear way for the Court to resolve the tension between *Marks* and anticipatory overrulings. Each potential solution has its advantages and disadvantages. Framing these issues in the context of *June Medical* helps illustrate some of the results that

supra note 75, at 434–47 (explaining the difficulty lower courts had in deciphering which opinion, if any, was controlling from *Bakke*).

[252] *Grutter*, 539 U.S. at 325

[253] *Id.* The Court here also wrote, "[i]t does not seem 'useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it.'" *Id.* (quoting Nichols v. United States, 511 U.S. 738, 745–46 (1994)).

[254] Williams, *supra* note 79, at 822 (citing Thurmon, *supra* note 248).

each option would yield. These doctrines have been incredibly difficult for lower courts to apply consistently. Accordingly, there is a need for the Supreme Court to offer proper guidance to the lower courts. Failure to do so will likely lead to inconsistent applications throughout the country, which is not in the interest of fairness and could harm the perception of the federal court system. The Court will have to consider which option will have the least disruptive effect on precedent while still providing clear guidance to help create a more standardized approach moving forward. Although challenging, the Supreme Court created these doctrines, and it needs to be responsible for clarifying the proper applications of said doctrines.