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I. INTRODUCTION

Planned Parenthood v. Casey is ostensibly just another in a long line of abortion cases winding its way up to the Supreme Court. However, the Third Circuit's analysis of the issues in Casey provides an important illustration of some difficult jurisprudential problems faced by lower federal courts when the Supreme Court has not clearly stated "what the law is." The Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The judicial system which Congress has created pursuant to Article III requires inferior or lower federal courts to abide by the decisions of the Supreme Court.

When a lower federal court is presented with a case raising a question of law that the Supreme Court has previously decided, its role is limited to applying the Court's precedent to the facts of that case. However, the dual function of a Supreme Court decision—resolving particular cases and providing

2. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Justice Marshall's statement, "[i]t is emphatically the province and duty of the judicial department to say what the law is," id., was used to justify judicial review of legislative acts. However, it seems reasonable to suggest that implicit within the duty to "say what the law is" is the duty to do so clearly. The difficulty faced by the Casey court is that the latest Supreme Court abortion decisions have created a great deal of uncertainty about "what the law is." See infra text accompanying notes 26-37.
4. "[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of [the Supreme] Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." Hutto v. Davis, 454 U.S. 370, 375 (1982) (per curiam). "As a lower court, we are bound both by the Supreme Court's choice of legal standard or test and by the result it reaches under that standard or test." Casey, 947 F.2d at 691-92.
guidance for future decisions—complicates the task of determining the precedential value of a particular decision when: (1) the majority does not agree on a single supporting rationale for its decision—a splintered decision; or (2) the majority's rationale for a particular result undermines the rationale supporting the result of a previous case without explicitly overturning it—an implicit reversal. These complications are especially significant in light of expectations that the Supreme Court's new ideological make-up will create a period of transition, as the Court reshapes many areas of the law in a more conservative image.

Casey is an example of how lower federal courts might untangle a limited number of these complications. In Casey, the Third Circuit upheld the constitutionality of various sections of Pennsylvania's abortion statute, reasoning that Webster v. Reproductive Health Services, a splintered decision, implicitly overturned parts of Roe v. Wade.

To lay the necessary groundwork for a discussion of Casey's implications, this note briefly reviews relevant portions of the Supreme Court's abortion jurisprudence and outlines the Third Circuit's reasoning in Casey. The note then analyzes the Third

5. Linda Novak, Note, The Precedential Value of Supreme Court Plurality Decisions, 80 COLUM. L. REV. 756, 757 (1980) (lower federal courts are bound by both the result and the rationale of a Supreme Court decision).
6. Compare Marshall Ingwerson, High Court's Slide to the Right, CHRISTIAN SCI. MONITOR, Apr. 4, 1991, ¶ U.S. at 6 ("The overall drift of the court, to most court-watchers, is at the least to consolidate the sharp rightward shift that began at the end of the Reagan presidency.") and Michael P. Ostrye, New Anthem, L.A. TIMES, July 29, 1991, at B4 ("With the Supreme Court on a new shift to the conservative right, maybe we should change the national anthem to 'Under My Thumb.'") with Robert P. Hey, US Supreme Court Opens Term, CHRISTIAN SCI. MONITOR, Oct. 1, 1990, ¶ U.S. at 1 ("Court-watchers are awaiting this year's judicial decisions to learn whether the court will continue its recent trend of making modest and generally more conservative changes in existing law.").

In Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), Justice Rehnquist dissented from the Court's broad interpretation of the Commerce Clause. He noted, "I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court." Id. at 580 (Rehnquist, J., dissenting). Justice O'Connor agreed: "I share Justice Rehnquist's belief that this Court will in time again assume its constitutional responsibility." Id. at 589 (O'Connor, J., dissenting). Depending on your ideological preferences, these statements are like either a defiant General MacArthur declaring "I shall return," or a nightmarish Freddie Krueger warning "I'll be baaaaack."

Circuit’s resolution of the difficult questions concerning precedent. Finally, the note concludes that the Third Circuit’s reasoning, though theoretically problematic, is jurisprudentially correct.

II. BRIEF SUMMARY OF THE SUPREME COURT’S ABORTION JURISPRUDENCE

In 1973, the Supreme Court’s decision in Roe v. Wade held that articles of the Texas Penal Code criminalizing abortions not performed to save the mother’s life, violated the Due Process Clause of the Fourteenth Amendment. From a jurisprudential standpoint, the Court’s opinion in Roe is important for three reasons. First, the Court held that a woman has a limited fundamental right to an abortion which is protected by the right to privacy. Second, the opinion established that governmental regulation of abortion must be subjected to strict scrutiny to determine if it interferes unconstitutionally with a woman’s abortion decision. Lastly, Roe developed a trimester framework to provide future guidance in determining the point at which a state’s legitimate interests in maternal health and fetal life become compelling.

9. The regulations at issue in Roe included articles 1191-94 and 1196 of the Texas Penal Code. Id. at 117. For the text of the relevant articles see id. at 117 n.1.
10. U.S. CONST. amend. XIV, § 1; Roe, 410 U.S. at 164.
11. Roe, 410 U.S. at 153. “The Constitution does not explicitly mention any right of privacy. In a line of decisions, however . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.” Id. at 152. This right to privacy extends only to those rights which are considered fundamental. Id. Although the Court determined that the right to an abortion is fundamental and thus protected by the right to privacy, it rejected the argument that it was absolute. Id. at 153.
12. Strict scrutiny is the Supreme Court’s highest standard of review. See, e.g., Hodgson v. Minnesota, 110 S. Ct. 2926, 2962 (1990) (Marshall, J., joined by Brennan & Blackmun, JJ., dissenting) (“[W]e have subjected state laws limiting [the abortion] right to the most exacting scrutiny . . . .”). Strict scrutiny requires that a regulation pass the following two-part test: (1) the regulation must be prompted by a compelling state interest; and (2) the regulation must be the least restrictive means of promoting the compelling state interest. See Roe, 410 U.S. at 155.
14. Id. at 162-65. The state’s interest in the health of the mother becomes compelling at the end of the first trimester, when the health risk of an abortion becomes equal to that of a normal childbirth. Id. at 163. The state’s interest in protecting potential life becomes compelling at the point of viability, approximately the end of the second trimester, when the fetus is capable of meaningful life
Since Roe, several Supreme Court cases have invoked strict scrutiny in reviewing state abortion regulations. Two decisions are relevant to the present discussion: Akron v. Akron Center for Reproductive Health (Akron I)\(^{15}\) and Thornburgh v. American College of Obstetricians & Gynecologists.\(^{16}\)

In Akron I, the Supreme Court reaffirmed Roe's determination that any regulation of abortion must be "reasonably designed\(^{17}\) to further a compelling interest,\(^{18}\) striking down an Akron ordinance requiring a woman's "informed written consent" prior to performance of an abortion.\(^{19}\) The Court conceded that an informed consent requirement could be valid in light of the state's interest in protecting the health of pregnant women\(^{20}\) but ruled that the Akron ordinance's requirements for securing informed consent went beyond the scope of the health interest.\(^{21}\) In Thornburgh,
the Supreme Court reaffirmed the principles laid down in \textit{Roe} and applied the rationale developed in \textit{Akron} to strike down a Pennsylvania informed consent statute. Both \textit{Akron} and \textit{Thornburgh} are significant because the informed consent provisions which these decisions struck down are almost identical to those at issue in \textit{Casey}.

\textit{Webster v. Reproductive Health Services} signaled a substantial departure from \textit{Roe} and its progeny. For the first time a majority of the Court did not invoke strict scrutiny to review the challenged regulations. In \textit{Webster}, Missouri statutes requiring viability testing and prohibiting the use of public funds, employees, or facilities to perform or counsel about abortions were upheld, applying ostensibly rational basis scrutiny. A combination of three opinions supported the Court's result in \textit{Webster}. Writing for the plurality, Chief Justice Rehnquist found the regulations constitutional because they permissibly furthered the state's interests. Justice

\textit{Thornburgh}, 476 U.S. at 762 (citations omitted).

22. "Again today, we reaffirm the general principles laid down in \textit{Roe} and in \textit{Akron}.

23. \textit{Id.} at 762. "These two reasons [see supra note 21] apply with equal and controlling force to the specific and intrusive informational prescriptions of the Pennsylvania statutes." \textit{Id.}

24. \textit{Id.} at 759-64 (invalidating 18 PA. CONS. STAT. ANN. § 3205 (1983)).


27. \textit{Mo. ANN. STAT.} § 188.029 (Vernon Supp. 1992); see \textit{Webster}, 492 U.S. at 513-21 (Rehnquist, C.J., joined by White & Kennedy, JJ.); \textit{id.} at 525-31 (O'Connor, J., concurring in part and concurring in the judgment); \textit{id.} at 532 (Scalia, J., concurring in part and concurring in the judgment).


29. \textit{Mo. ANN. STAT.} §§ 188.205, 188.210 & 188.215 (Vernon Supp. 1992); see \textit{Webster}, 492 U.S. at 511-13 (opinion of the Court).

30. Rational basis scrutiny is the Supreme Court's least restrictive standard of review. See, e.g., \textit{Webster}, 492 U.S. at 543 (Blackmun, J., dissenting). Rational basis scrutiny requires that (1) the state have a legitimate interest; and (2) the regulation must be reasonably related to the legitimate state interest. \textit{Roe v. Wade}, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting) (citing \textit{Williamson v. Lee Optical Co.}, 348 U.S. 483, 491 (1955)).

31. \textit{Webster}, 492 U.S. at 519-20 (Rehnquist, C.J., joined by White & Kennedy, JJ.) Justice Rehnquist's language noting that the statute permissibly furthers a legitimate state interest is equated with rational basis scrutiny. See \textit{Planned Parenthood v. Casey}, 947 F.2d 682, 689 (3d Cir. 1991). Previously, Justice Rehnquist has advocated rational basis scrutiny in this area. See, e.g., \textit{Roe v,
Scalia concurred in the result but advocated the outright reversal of Roe. Justice O'Connor also concurred in the result but analyzed the regulations using an "undue burden" standard of review.

Wade, 410 U.S. 113, 173 (1973) ("The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective.").

32. Webster, 492 U.S. at 532 (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia does not articulate his standard of review. Instead, he notes that it has been adequately articulated "in dissents of my colleagues in other cases." Id. Many of these dissents generally advocate rational basis review. See, e.g., Roe, 410 U.S. at 173 (Rehnquist J., dissenting).

33. Webster, 492 U.S. at 530 (O'Connor, J., concurring in part and concurring in the judgment). According to the Casey court, Justice O'Connor's formulation of the undue burden standard requires strict scrutiny if a regulation places an undue burden on the abortion decision. Casey, 947 F.2d at 713 ("[w]e hold that § 3209 [spousal notice] constitutes an undue burden on a woman's abortion decision. Accordingly we must apply strict scrutiny . . ."). If there is no undue burden, the regulation is subject only to rational basis review. Id. at 689-90.

Although the Casey Court correctly identified Justice O'Connor's undue burden standard as the narrowest concurrence, see infra part IV.A.4, the court incorrectly interpreted one-half of the standard. Justice O'Connor does not define the undue burden standard in either Webster or Hodgson. Reference to her earlier dissents in Akron I and Thornburgh is necessary to discover its meaning. In Akron I, Justice O'Connor states that "[t]he 'undue burden' required in the abortion cases represents the required threshold inquiry that must be conducted before this Court can require a State to justify its legislative actions under the exacting 'compelling state interest' standard." Akron I, 462 U.S. 416, 463 (1983). According to Justice O'Connor, a regulation is considered unduly burdensome if it imposes "absolute obstacles or severe limitations on the abortion decision." Id. at 464. (O'Connor, J., joined by White & Rehnquist, JJ., dissenting). Later in her opinion, Justice O'Connor explains what she means by an "'exacting' standard.

The Court has never required that state regulation that burdens the abortion decision be "narrowly drawn" to express only the relevant state interest. In Roe . . . the Court never actually adopted this standard . . . . In its decision today, the Court fully endorses the Roe requirement that a burdensome health regulation, or . . . "significant obstacle[ ]" be "reasonably related" to the state compelling interest.

Id. at 467-68 n. 11 (citation omitted, emphasis added). Two things are clear from this statement. First, Justice O'Connor's interpretation of Roe does not require strict scrutiny. Second, Justice O'Connor's "'exacting" standard of review requires 1) a compelling state interest; and 2) a regulation that is reasonably related to that interest. This is the traditional formulation of exacting or mid-tier scrutiny.

With this in mind, the following is the correct formulation of the undue burden standard. If a regulation places an undue burden on the abortion decision, the Court applies exacting or mid-tier scrutiny. If a regulation does not impose an undue burden, the Court applies rational basis scrutiny. Justice O'Connor's dissent in Thornburgh confirms this conclusion.

I do, however, remain of the views expressed in my dissent in Akron . . . [H]eighened scrutiny [should be] reserved for instances in which the State has imposed an "undue burden" on the abortion decision . . . .
In *Hodgson v. Minnesota*, the Court upheld the constitutionality of an abortion statute imposing a mandatory 48-hour waiting period and a parental notification requirement on minors. The statute also provided for judicial bypass of the parental notification requirement. Again the decision of the Court was not supported by any single rationale. Justice Kennedy determined that parental notification coupled with a judicial bypass was constitutionally permissible. Justice O'Connor determined that two-parent notification coupled with a judicial bypass did not unduly burden the abortion right and was therefore constitutional.

III. THE THIRD CIRCUIT'S INTERPRETATION OF THE BINDING NATURE OF SUPREME COURT PRECEDENT

A. Procedural History of Casey

*Planned Parenthood v. Casey* was a facial challenge by a group of health care providers to the constitutionality of several amendments to the Pennsylvania Abortion Control Act of 1982. After a three day trial, the district court issued an

And if a state law does interfere with the abortion decision to an extent that is unduly burdensome, so that it becomes "necessary to apply an exacting standard of review," the possibility remains that the statute will withstand the stricter scrutiny.


34. 110 S. Ct 2926 (1990).
35. *Id.* at 2947.
36. Although Justice Kennedy's opinion does not explicitly state the standard of review employed, a careful reading of the opinion suggests his analysis is based on a rational basis review of the regulations. *See Hodgson*, 110 S. Ct. at 2961-72 (Kennedy, J., joined by Rehnquist, C.J., White and Scalia, JJ., concurring in the judgment in part and dissenting in part). The *Casey* court reached a similar conclusion. *Casey*, 947 F.2d at 696.
37. *Hodgson*, 110 S. Ct. at 2950-51 (O'Connor, J., concurring in part and concurring in the judgment in part). According to Justice O'Connor's articulation of undue burden review in *Akron I*, a finding that a regulation does not unduly burden the abortion right requires the application of rational basis scrutiny to determine whether the regulation is constitutional. *See supra* note 33.
opinion holding several sections of the act, including an informed consent requirement, unconstitutional. On appeal, the Third Circuit reversed, upholding the constitutionality of the informed consent requirement.40

B. The Third Circuit’s Reasoning in Casey.

The Third Circuit began its analysis by noting that, like Webster, the abortion statutes in question did not conflict with the holding of Roe because they “involved the regulation of abortions rather than their outright prohibition.”41 The court then addressed “whether the standard of review of abortion regulations promulgated by the Court in Roe and in later cases such as [Akron I and Thornburgh] survived Webster and the Court's subsequent decision in [Hodgson].”42

The court recognized three standards used by different Justices in reviewing abortion decisions.43 But because the results in Webster and Hodgson were not supported by majorities,44 the court turned to Marks v. United States,45 relying on it for two important propositions: (1) “a legal standard endorsed by the Court ceases to be the law of the land when a majority of the Court in a subsequent case declines to apply it, even if that majority is composed of Justices who disagree on what the proper standard should be;”46 and (2) “the controlling opinion in a splintered decision is that of the Justice or Jus-

the outcome of Webster. Id. After the Court’s ruling in Webster, the Pennsylvania legislature passed the 1989 amendments and appellees amended their complaint to include these amendments. Id.

40. The Pennsylvania informed consent provision requires the “voluntary and informed consent of the woman upon whom the abortion is to be performed.” PA. CONS. STAT. ANN. § 3205 (Supp. 1991). Sections 3206 (parental consent), 3214(a) (reporting requirements), and 3207(a) and 3214(f) (public disclosure of clinic’s reports) were also found constitutional. Casey, 947 F.2d at 687. Section 3209 (spousal notice) was declared unconstitutional. Id.

41. Casey, 947 F.2d at 687; see also Sojourner v. Roemer, 772 F. Supp. 930 (E.D. La. 1991) (invalidating a criminal prohibition of abortion similar to the Texas prohibition invalidated in Roe); supra text accompanying note 10.

42. Casey, 947 F.2d at 687-88 (citations omitted).

43. Id. at 688-91. The three standards of review according to Casey are: (1) strict scrutiny, id. at 689; see generally supra note 12; (2) rational basis scrutiny, Casey, 947 F.2d at 689; see generally supra note 30; and (3) undue burden review, Casey, 947 F.2d at 689-91; see generally supra note 33.

44. See supra text accompanying notes 31-33, 36-37.

45. 430 U.S. 188 (1977). For a brief summary of Marks see infra notes 60-63 and accompanying text.

46. Casey, 947 F.2d at 693.
Applying the Marks analysis, the court found that a majority of the Justices had not applied Roe's strict scrutiny test in Webster or Hodgson. The court also determined that Justice O'Connor's opinion was the opinion concurring in the result on the narrowest grounds. Accordingly, the court determined that the undue burden analysis had replaced Roe's strict scrutiny analysis as the proper test for reviewing abortion regulations.

Having decided that Roe's strict scrutiny did not survive Webster and Hodgson, the second issue the court addressed was whether it was "required to follow results reached by the Supreme Court in cases prior to Webster and Hodgson even though [it was] not bound by the rationale which produced those results[.]" This concerned the court "because the Supreme Court, engaging in strict scrutiny review in Akron I and Thornburgh, had struck down informed consent provisions almost identical to the provisions at issue" in Casey. The court determined that the results of Akron I and Thornburgh were not binding, reasoning that when a "standard [of review] is replaced, decisions reached under the old standard are not binding." Applying undue burden analysis, the Third Circuit determined that Pennsylvania's informed consent requirements were constitutional.

IV. ANALYSIS OF THE THIRD CIRCUIT'S INTERPRETATION AND APPLICATION OF MARKS

According to the Third Circuit, Marks stands for two relevant propositions: (1) a legal standard ceases to be law when a majority of the court does not apply it; and (2) the narrowest concurring opinion becomes the law when the court issues a splintered decision. This section will analyze Casey's inter-

47. Id.
48. Id. at 694-97.
49. Id. at 697. The Eighth Circuit has similarly determined that Justice O'Connor's undue burden standard is binding. Coe v. Melahn, No. 90-1552, slip op. at 3 (8th Cir. Mar. 2, 1992).
50. Casey, 947 F.2d at 697.
51. Id.; see supra note 25 and accompanying text.
52. Casey, 947 F.2d at 697-98 (footnote omitted).
53. Id. at 702-04. The court ruled on the constitutionality of other provisions as well. See supra note 40.
54. See supra note 46 and accompanying text.
55. See supra note 47 and accompanying text.
interpretation and application of these two propositions.

A. Precedential Value of a Splintered Decision

1. History of the narrowest grounds rule

The history of the narrowest concurring opinion or narrowest grounds rule can be traced to Gregg v. Georgia. In this death penalty case, the Court interpreted Furman v. Georgia, determining that "since five Justices wrote separately in support of the judgments in Furman, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." Ironically, Gregg itself was a splintered decision, and thus a majority of the Court did not support the narrowest grounds rule.

This defect was remedied in Marks v. United States. In Marks, a majority embraced the narrowest grounds rule to explain why the lower court erred in failing to follow the plu-

57. 408 U.S. 238 (1972).
58. Gregg, 428 U.S. at 169 n.15 (opinion of Stewart, Powell & Stevens, JJ.). Of the five Justices supporting the result in Furman, Justice Brennan and Justice Marshall determined that capital punishment was unconstitutional per se, while Justice Douglas, Justice Stewart and Justice White determined that the Georgia statute was unconstitutional without reaching the issue of per se invalidity. The Gregg plurality concluded that Georgia's revised death penalty statute was constitutional because the defects noted by Justices Stewart and White were corrected when the statute was revised. Id. at 206-07; see generally Novak, supra note 5, at 761.

Interestingly, Justice White, the author of one of Furman's narrowest grounds opinions, did not join in the conclusion that the narrowest concurring opinion became the law. Instead he wrote a separate opinion concurring in the judgment.

59. Justice Stewart announced the judgment of the Court and gave an opinion joined by Justice Powell and Justice Stevens. Gregg, 428 U.S. at 158. Chief Justice Burger and Justice Rehnquist filed a separate statement concurring in the judgment. Id. at 226. Justice White filed an opinion concurring in the judgment joined by Chief Justice Burger and Justice Rehnquist. Id. at 207. Justice Blackmun filed a separate statement concurring in the judgment. Id. at 227. Justice Brennan filed a dissenting opinion. Id. at 227. Justice Marshall also filed a dissenting opinion. Id. at 231.

60. 430 U.S. 188 (1977).
61. Justice Powell, writing for the majority, was joined by Chief Justice Burger, Justice White, Justice Blackmun, and Justice Rehnquist. Interestingly, Justice Stewart and Justice Stevens, who both supported the narrowest grounds rule in Gregg, did not support it in Marks, while Chief Justice Burger, Justice White, Justice Blackmun, and Justice Rehnquist, who did not support the narrowest grounds rule in Gregg, supported the rule in Marks.
rality opinion in the *Fanny Hill* case, which adopted a new definition of obscenity.

Since *Marks*, the narrowest grounds rule has been mentioned in three cases. In *Vasquez v. Hillery*, a case affirming a lower court's ruling sustaining a petition for habeas corpus, the Court helped define the limitations of the narrowest grounds rule. In dissent, Justice Powell argued that the narrowest grounds rule applies to cases in which five Justices who support the rationale in a case are not the same five Justices that support the judgment or result. This is an entirely different type of splintered decision than the ones described in *Gregg* and *Marks*. Justice Marshall, writing for the majority, correctly noted that the narrowest grounds rule, as applied in *Gregg* and *Marks*, referred "only to the manner in which one may discern a single holding of the Court in cases in which no opinion on the issue in question has garnered the support of a majority."

In *City of Lakewood v. Plain Dealer Publishing Co.*, Justice Brennan, writing for a four-Justice majority, referred to the narrowest grounds rule as the Court's "settled jurisprudence." Justice Brennan used the narrowest grounds rule to support his contention that the plurality opinion from *Kovacs v.*

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64. 474 U.S. 254 (1986).
66. Justice Marshall's opinion in *Hillery* was joined by Justice Brennan, Justice Blackmun, Justice Stevens, and in relevant part by Justice White.
67. *Hillery*, 474 U.S. at 261-62 n.4. Justice Marshall makes it clear that the narrowest grounds rule does not apply to any part of an opinion which is supported by a majority of the Court. *Id.*
69. *Plain Dealer* was decided by a 4-3 vote. Justice Brennan's opinion was joined by Justice Marshall, Justice Blackmun, and Justice Scalia. Justice White wrote a dissenting opinion which was joined by Justice Stevens and Justice O'Connor. Neither Chief Justice Rehnquist nor Justice Kennedy took part in the decision of the case.
70. *Plain Dealer*, 486 U.S. at 765 n.9. Justice Brennan's statement is interesting in light of the fact that he joined the dissent in two previous cases, *Gregg* and *Marks*, articulating the narrowest grounds rule. He did join Justice Marshall's opinion in *Hillery*. However, the *Hillery* majority did not rely on the narrowest grounds rule; it merely pointed to Justice Powell's misapplication of it.
Cooper was controlling precedent.

Most recently, in Franklin v. Lynaugh, Justice Stevens, writing in dissent, used the narrowest grounds rule to give weight to Justice Burger's opinion in Lockett v. Ohio. He stated that "[a]lthough only four Members of the Court joined the entire opinion ... it has the same precedential value as a Court opinion because JUSTICE MARSHALL's vote ... rested on a broader ground than did the plurality's." Although Justice Stevens wrote in dissent, his application of the narrowest grounds rule illustrates the purpose it is intended to serve—to facilitate the interpretation of a majority judgment supported by different rationales.

Although the narrowest grounds rule has appeared in the decisions of five Supreme Court cases, the rule can hardly be considered "settled jurisprudence." In four of five cases applying the narrowest grounds rule, its discussion has been relegated to footnotes. This, by itself, does not imply that the rule is invalid, but a careful review of the cases suggests that the narrowest grounds rule has been used as a tool to support a desired result in a limited number of cases, rather than an as established rule of case interpretation.

2. Justification for the narrowest grounds rule

From the plurality opinion in Gregg to the dissent in Franklin, neither the Court nor any of the Justices has ever explained why the Court's holding in a splintered decision should be the "position taken by those Members who concurred in the judgments on the narrowest grounds." The proposition

71. 336 U.S. 77 (1949).
74. Franklin, 487 U.S. at 191 n.1 (Stevens, J., joined by Brennan & Marshall, JJ., dissenting) (citing Marks v. United States, 430 U.S. 188, 193 (1977)).
75. But cf., Plain Dealer, 486 U.S. at 765 n.9.
76. See supra notes 58, 63, 65, 67, 70 & 74. Marks is the only case discussing the narrowest grounds rule in the text of the decision.
77. No Justice has consistently supported the narrowest grounds rule. See supra notes 59, 61, 65, 66, 69 & 74. Given that the validity of the narrowest grounds rule was not the issue before the Court in any of the five cases, the inconsistent support for the rule is not surprising. However, the fact remains that Marks is the only decision in which the rule has been used determinatively by a majority of the Court. The Hillery majority did correctly interpret the narrowest grounds rule, but merely to point out why it did not apply in that case.
78. Marks, 430 U.S. at 193 (citing Gregg v. Georgia, 428 U.S. 153, 169 n.15
has been asserted without explanation. However, it is clear that two separate arguments favor the use of the narrowest grounds rule. The first, arising from the "case or controversy" requirement, is the policy disfavoring "the formulation of unnecessarily broad principles and encourag[ing] courts to confine the scope of decisions to those issues necessary for resolution of the particular case." The second is the practical need for lower federal courts to be able to determine the meaning of a Supreme Court decision with some degree of clarity. Thus, the explanation goes, if a lower court applies the narrowest grounds rule, it will reach the result most likely to be upheld by a majority of the Supreme Court.

3. Limitations on the narrowest grounds rule

The narrowest grounds rule is a useful tool for deciphering the holding of the Court in the limited number of splintered decisions in which the plurality and concurring opinions have a "broader/narrower" relationship. However, the rule is not applicable to many splintered decisions. In many splintered decisions, the result is supported by rationales that are "different" as opposed to "broader/narrower."

For example, in *Arnett v. Kennedy,* the Court held that a federal employee, subject to removal only for cause, was not deprived of Fifth Amendment due process when not given a full evidentiary hearing prior to removal. The plurality determined that Fifth Amendment due process concerns were not implicated because the employee's rights were conditioned by statutory removal procedures. In their concurring opinions, Justice Powell and Justice White disagreed with the plurality. They concluded that due process concerns were implicated but found that the statutory removal procedures did not violate the employee's due process rights. The dissent agreed with the

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(1979)).
81. Id. at 767.
83. Id. at 163 (Rehnquist, J., joined by Burger, C.J. & Stewart, J.); id. at 164 (Powell, J. joined by Blackmun, J., concurring); id. at 198-97 (White, J., concurring); see also Novak, *supra* note 5, at 767.
84. *Kennedy,* 416 U.S. at 163; see Novak, *supra* note 5, at 767.
concurrence that due process must be satisfied but determined that it was not satisfied in this case.  

Obviously, the narrowest grounds rule is not dispositive in this type of case. The Court’s result, no due process violation, was supported by three Justices who said due process did not apply and three Justices who said due process was satisfied. An additional complication is that the dissent must be taken into account in determining future cases of this nature because six Justices, those concurring and those dissenting, determined that due process concerns were relevant.

4. Casey’s application of the narrowest grounds rule to Webster

According to the Third Circuit, the principal objective of the narrowest grounds rule “is to promote predictability in the law by ensuring lower court adherence to Supreme Court precedent.” The court articulated its definition of the narrowest grounds rule as follows: “[w]here a Justice or Justices concurring in the judgment in [a splintered decision] articulates a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree, that standard is the law of the land.”

86. Kennedy, 416 U.S. at 226-27; see Novak, supra note 5, at 768.
87. For more examples of cases in which the narrowest grounds rule is not helpful, see Novak, supra note 5; see also Comment, Supreme Court No-Clear-Majority Decisions: A Study in Stare Decisis, 24 U. Chi. L. Rev. 99 (1956).
88. See generally Novak, supra note 5, at 768-69.
90. Id. The court explained its definition of the narrowest grounds rule as follows:

In a constitutional case where (1) there is a 5-4 decision or where there are only two opinions in the majority and (2) the majority votes to uphold a law as constitutional, the “narrowest grounds” principle will identify as authoritative the standard articulated by a Justice or Justices that would uphold the fewest laws as constitutional. Conversely, in a constitutional case where (1) there is a 5-4 split or there are only two opinions in the majority and (2) the majority strikes down a law as unconstitutional, the authoritative standard will be that which would invalidate the fewest laws as unconstitutional.

Id. at 693-94 (emphasis added; “or” in the preceding passage was probably meant to be “and”). In a footnote the court continues its explanation:

When six or more Justices join in the judgment and they issue three or more opinions, the situation is slightly more complex. In those cases, the idea is to locate the opinion of the Justice or Justices who concurred
Third Circuit then determined that because Justice O'Connor's opinions, applying an undue burden analysis, were the narrowest of the concurring opinions in both *Webster* and *Hodgson*, they were binding.91

a. Problems with Casey's application of the narrowest grounds rule. The application of the narrowest grounds rule in *Casey* creates several theoretical difficulties.

1. Justice Scalia's criticism. According to *Casey*'s formulation of the narrowest grounds rule, Justice Scalia's concurring opinion in *Webster* is arguably the broadest of the three concurring opinions. Thus, based on a broader/narrower relationship, Justice O'Connor's opinion, as the narrowest, would be included within the parameters of Justice Scalia's opinion. However, in his opinion, Justice Scalia criticizes Justice O'Connor's undue burden standard, noting that he knows of "no basis for determining that this particular burden (or any other for that matter) is 'due.'"92 In light of this criticism, it is difficult to suggest that Justice Scalia would consider Justice O'Connor's "narrower" opinion as fitting within the parameters of his own. To do so would require the reduction of each opinion to the standard of review it purports to apply while disregarding the remainder of its analysis and commentary.

2. One-Justice majorities. The most obvious theoretical difficulty with the narrowest grounds rule is that it allows a single Justice to declare the law, even if the other eight Justices disagree.93 Arguably, following the opinion of a single Jus-

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91. *Casey*, 947 F.2d at 694 n.7. Although the court states the function of the narrowest grounds rule is to promote predictability in the law, *id.* at 693, its explanation of the narrowest grounds rule appears more supportive of the narrowness objective based on the case or controversy requirement. *See supra* text accompanying notes 76-77. In practice, however, both objectives are achieved.


93. This fact was not lost to the *Casey* court. "We acknowledge[ ] that, '[a]lthough there is some awkwardness in attributing precedential value to an
tice for the sake of predictability in the law is counterprod-
cutive in the long run for two reasons. First, a legal principle
supported by a single Justice is not likely to endure very long,
especially in highly controversial areas of the law such as abor-
tion. Second, uncertainty in the law is increased by discour-
aging the negotiation and compromise necessary to create a
majority opinion while encouraging splintered decisions with
each Justice expressing an individual view of the applicable
legal principle.

3. Narrowest grounds in light of the Court’s statements.
Another difficulty with Casey’s use of the narrowest grounds
rule is that every Justice in Webster, regardless of the standard
of review he or she applied, noted that Roe is still the law of
the land. To the extent that the Justices have expressly stat-
ed that Roe is still the law, it appears problematic to formulate
a rule under the narrowest grounds test which contradicts

opinion of one Supreme Court justice to which no other justice adhered, it is the
usual practice when that is the determinative opinion.” Casey, 947 F.2d at 694
(quoting Blum v. Witeo Chem. Corp., 888 F.2d 975, 981 (3d Cir. 1989)).
94. This observation is highly relevant in this case. Since Webster and Hodgson,
Justices Brennan and Marshall have retired from the Court and have been re-
placed by Justices Souter and Thomas. With these changes, many observers feel
that those Justices who advocated rational basis review of abortion regulations will
attract a majority in Casey. See, e.g., Bruce Fein, Legal Primer for Abortion’s
Future, WASH. TIMES, Jan. 28, 1992, at F1; Nancy E. Roman, Thomas a ‘Lost
Cause’ to Pro-Choice, WASH. TIMES, Mar. 11, 1992, at A4. This does not imply that
Supreme Court precedent can be overturned by attrition. The force of precedent
remains in tact regardless of the personnel changes on the Court. However, these
changes do affect the way the Court will decide an issue in the future.
95. Splintered decisions are not a new phenomenon. See generally John F.
Davis & William L. Reynolds, Juridical Cripples: Plurality Opinions in the Supre-
me Court, 1974 DUKE L.J. 59; Novak supra note 5; Comment, supra note 87; . But
from the standpoint of a lower federal court seeking to apply the Supreme Court’s
decisions, splintered decisions should not be encouraged.
96. Webster, 492 U.S. at 521 (Rehnquist, C.J., joined by White & Kennedy, JJ.)
(‘‘This case therefore affords us no occasion to revisit the holding of Roe . . . .
To the extent indicated in our opinion, we would modify and narrow Roe and suc-
seding cases.’’); id. at 525 (O’Connor, J.) (‘‘[T]here is no necessity to . . . reexamine
the constitutional validity of Roe v. Wade.’’ (citation omitted)); id. at 537 (Scalia, J.)
(‘‘Of the four courses we might have chosen today—to reaffirm Roe, to overrule it
explicitly, to overrule it sub silentio, or to avoid the question—the last [the one
chosen by the Court] is the least responsible.’’); id. at 537 (Blackmun, J. joined by
Brennan & Marshall, JJ.) (‘‘Today, Roe v. Wade, and the fundamental constituti-
Onal right of women to decide whether to terminate a pregnancy, survive but are
not secure.’’ (citation omitted)); see id. at 561 (Stevens, J., concurring in part and
dissenting in part) (‘‘[T]here is no need to modify even slightly the holdings of
prior cases in order to uphold § 188.029.’’).
these statements.

4. The implicit meaning of a splintered decision. The final difficulty with the narrowest grounds approach is that it imputes to those Justices who concur on "broader" grounds an implicit approval of the reasoning of the narrowest concurrence. The fact that Justices who support a result write separately to express their reasoning suggests that they do not agree with the reasoning of the other concurring opinions. If the Justices who concur on "broader" grounds really did agree with the "narrower" concurrence, they would join it and save the effort of expressing a "different" view. This objection highlights the fact that the narrowest grounds rule is not, in reality, a tool for discerning an actual constitutional doctrine. Rather, the rule is a tool which enables a lower federal court to reach a result that will be upheld upon review by the Supreme Court.

b. The practical advantage of the narrowest grounds rule. Despite the theoretical difficulties with the narrowest grounds rule, its application in Casey is justified from a practical perspective. The role of a lower federal court in constitutional adjudication is to decide each case based on guidance given by the Supreme Court. When the Court's guidance is unclear, the lower court must predict how the Supreme Court would decide the case. In Webster and Hodgson four Justices advocated rational basis scrutiny and four Justices advocated strict scrutiny. In both cases, the outcome of Justice O'Connor's undue burden analysis provided the swing vote for the majorities' result. Therefore, from a practical point of view, the Third Circuit was entirely correct in applying the undue burden analysis because it was dispositive in both Webster and Hodgson, notwithstanding the Justices' statements concerning the continuing validity of Roe.

B. Precedential Value of Old Results in Light of New Rationale

The decisions of the Supreme Court are the law of the

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97. See supra notes 26-37 and accompanying text.
98. See supra note 96. What appears to have occurred in the recent abortion decisions is a bifurcation of the Court’s abortion jurisprudence. Roe continues to control statutes which prohibit abortion, but not statutes which regulate abortion. See supra notes 10 & 41 and accompanying text.
To the extent they are applicable, they are binding on the lower courts until they have been reversed or overruled. These principles, though generally accepted, do not end the inquiry when the continuing validity of a Supreme Court decision is in doubt. Before a lower federal court can apply the law as stated by the Supreme Court, it must first determine what that law is.

1. Precedent may be overruled by implication

The rationale or ratio decidendi of a later case may eviscerate the precedential value of older authority as effectively as a statement expressly overturning it. Often "the overruling must be deduced from the principles of related cases." The Supreme Court noted over 100 years ago in Asher v. Texas.

99. See supra note 4 and accompanying text.
100. Rodriguez De Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533, 535 (1983) (per curiam) ("[O]nly this Court may overrule one of its precedents"); see also supra note 4 and accompanying text. Thus, the duty of a lower federal court is to apply the law as it finds it, not to reshape the law by overruling precedent. See, e.g., Sojourner v. Roemer, 772 F. Supp. 930, 931-32 (E.D. La. 1991); Kennard v. United Parcel Service, Inc., 531 F. Supp. 1139, 1142 (E.D. Mich. 1982).

101. In situations like this it is "emphatically the province and duty of the" lower federal court to try to figure out "what the law is." Cf. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

102. See supra part I.
103. See infra note 105 and accompanying text.
106. 128 U.S. 129 (1888). In Asher, the Court found that the law and the facts were indistinguishable from those considered in a previous case, Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887). The petitioner contended that the deci-
that it may overrule its precedent by implication.

We had supposed that a later decision in conflict with prior ones had the effect to overrule [the previous ones], whether mentioned and commented on or not. And as to the constitutional principles involved, our views were quite fully and carefully, if not clearly and satisfactorily expressed in the [later case].

More recently, in *Lehnhausen v. Lake Shore Auto Parts Co.*, Justice Douglas, writing for a unanimous Court, referred to *Quaker City Cab Co. v. Pennsylvania*, a case undermined by subsequent opinions, as "only a relic of a bygone era" and refused to follow its precedent.

Another recent example of a silent or implicit reversal is *Employment Division, Department of Human Resources v. Smith.* In *Smith*, the Court applied rational basis scrutiny in place of the previous standard—strict scrutiny—and determined that the Free Exercise Clause did not protect religiously inspired use of peyote from state criminal sanctions. As the dissent noted, "In short, it effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution." Although the majority did not expressly state that it was overruling the Court's previous Free

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109. *Lehnhausen*, 410 U.S. at 366. While it is true that *Quaker City Cab* was decided in 1928, some 45 years before *Lehnhausen*, the fact remains that *Quaker City Cab* was never expressly overruled. The Court disregarded the case because its vitality had been undermined by subsequent decisions.
Exercise Clause decisions, its refusal to apply strict scrutiny rendered these previous decisions impotent.\(^{116}\) In similar fashion, the Webster and Hodgson majorities' refusal to apply strict scrutiny undermines part of the precedential value of Roe.\(^{117}\)

2. **Lower federal courts are not required to follow precedent which has been implicitly overruled**

When the Supreme Court adopts a new rule or test for deciding a case, that rule or test is binding on the lower courts.\(^{118}\) The Third Circuit extended this principle in Casey, determining that not only is a new test binding, but if the new test will not support the holding or result of a previous case, the previous result is no longer the law.\(^{119}\) This conclusion is not necessarily erroneous considering the importance American jurisprudence places on "rule stare decisis\(^{120}\)—the consistent application of legal rules or tests developed in prior cases.

a. **Living v. dead law.** In Norris v. United States,\(^{121}\) Judge Posner commented that

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\(^{117}\) But see United States v. Moreland, 258 U.S. 433, 436 (1922) ("a case is not overruled by an omission to mention it"). The Court's statement, though facially inconsistent with the concept of implicit reversal, is not dispositive of the issue in Casey. In Moreland, the Court merely noted that the failure to cite a previous case did not affect the validity of its precedent. It did not address the effect subsequent analysis might have on the vitality of a precedent or the effect of specifically considering a case and not applying its analysis.

\(^{118}\) See Marks v. United States, 430 U.S. 188, 194 (1977); cf. County of Allegheny v. ACLU, 492 U.S. 573, 668 (1989) (Kennedy, J. joined by Rehnquist, C.J., White & Scalia, J.J., dissenting) (cited in Planned Parenthood v. Casey, 947 F.2d 682, 692 (3d Cir. 1991) ("As a general rule, the principle of stare decisis directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law.").

\(^{119}\) See supra notes 50-52 and accompanying text. In holding that the result of the older case is no longer binding, the Casey court did not mean that the result is wrong, rather the court reasoned that if the application of a new standard of review leads to a different result, the result of the old case ceases to control. See Casey, 947 F.2d at 698 n.12.

\(^{120}\) Novak, supra note 5, at 757-58 and nn.7-10. Rule stare decisis requires the adherence to the general rule of law promulgated by a prior court in support of its judgment." Id. at 758 n.10. Arguably, result stare decisis allows a court to "adopt a new justifying rule so long as the result reached is consistent with the result in the earlier case." Id.

\(^{121}\) 687 F.2d 899 (7th Cir. 1982).
[c]onstitutional law is very largely a prediction of how the Supreme Court will decide particular issues when presented to it for decision. . . . Sometimes later decisions, though not explicitly overruling or even mentioning an earlier decision, indicate that the Court very probably will not decide the issue the same way the next time. In such a case, to continue to follow the earlier case blindly until it is formally overruled is to apply the dead, not the living, law.\textsuperscript{122}

The Ninth Circuit reached a similar conclusion in \textit{Vukasovich, Inc. v. Commissioner},\textsuperscript{123} stating:

\begin{quote}
[T]he Supreme Court has long held that "a later decision in conflict with prior ones [has] the effect to overrule them, whether mentioned and commented on or not." . . . Following an obviously outdated Supreme Court decision gives effect to an old decision only at the cost of ignoring more recent decisions. It forces the Supreme Court to reverse lower court decisions following the older law, burdening both the Supreme Court and litigants. It also deprives the Supreme Court of the benefit of a contemporary decision on the merits by the Court of Appeals.\textsuperscript{124}
\end{quote}

The Ninth Circuit concluded that "the courts of appeal should decide cases according to their reasoned view of the way [the] Supreme Court would decide the pending case today."\textsuperscript{125}

\textbf{b. Detecting an implicit reversal.} In \textit{United States v. Burke},\textsuperscript{126} Judge Easterbrook noted that "[a district] court need not blindly follow decisions that have been undercut by subsequent cases" if it has "an adequate basis for believing that this court would no longer follow [its precedent]."\textsuperscript{127} Although

\begin{itemize}
\item \textsuperscript{122} \textit{Id.} at 904. In \textit{Norris}, the Seventh Circuit upheld a district court ruling that failure to raise a constitutional issue on a direct appeal barred its use in a section 2255 motion despite the Supreme Court's ruling in \textit{Kaufman v. United States}, 394 U.S. 217 (1969) ("failure to raise a constitutional issue on direct appeal does not prevent raising it later in a section 2255 motion unless the movant was deliberately bypassing the appellate process."). The Seventh Circuit noted that in light of subsequent Supreme Court opinions, \textit{Kaufman} was no longer binding precedent even though it had not been expressly overturned. \textit{Norris}, 687 F.2d at 903-04.
\item \textsuperscript{123} 790 F.2d 1409 (9th Cir. 1986).
\item \textsuperscript{124} \textit{Id.} at 1416 (citations omitted).
\item \textsuperscript{125} \textit{Id.}
\item \textsuperscript{126} 781 F.2d 1234 (7th Cir. 1985).
\item \textsuperscript{127} \textit{Id.} at 1239 n.2. Judge Easterbrook's comment was prompted by a district court's decision not to give the "standing alone" instruction required by \textit{United
Burke dealt with a precedent established by the Seventh Circuit, it is instructive in the context of Supreme Court precedent as well. If a lower federal court has an adequate basis for believing that the Supreme Court will no longer follow an outdated precedent, the lower federal court may be justified in disregarding that precedent. However, in order to avoid chaos in the federal judicial system, an adequate basis must include, at a minimum, evidence that the precedential value of an older decision has been seriously undermined. This standard for evaluating the validity of an older decision was endorsed by the Supreme Court in Limbach v. Hooven & Allison Co. The Court stated that "[a]lthough Hooven I was not expressly overruled in Michelin, it must be regarded as retaining no vitality since the Michelin decision. The conclusion of the Supreme Court of Ohio that Hooven I retains current validity in this respect is therefore in error."129

In light of the Supreme Court’s analysis in Webster and Hodgson, the Third Circuit was justified in asserting an adequate basis for believing that the Supreme Court would not follow the precedent of Roe, Akron I, or Thornburgh.

V. CONCLUSION

The narrowest grounds rule suffers from significant theoretical inconsistencies. However, from a practical standpoint, it is a useful tool for lower federal courts to use in interpreting the precedential value of Supreme Court splintered decisions. Given the voting patterns of the Justices in Webster and Hodgson, the Casey court properly applied the narrowest grounds rule, resulting in a finding that undue burden review is the appropriate standard for reviewing abortion regulations. The Casey court's decision to discard the holdings in Akron I and Thornburgh is facially troubling because the Supreme Court has not expressly repudiated them. However, the Court has arguably changed its standard of review for abortion regulations to undue burden review. Therefore, the Third Circuit appropriately discarded a result which, according to the court's

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States v. Donnelly, 179 F.2d 227, 233 (7th Cir. 1950). Judge Easterbrook noted that "recent decisions ... [had] distinguished Donnelly on such thin grounds as to undermine its foundations." Burke, 781 F.2d at 1239 n.2.
129. Id. at 361 (referring to Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976)).
analysis, would not be supported by that standard.

Although these issues arose in the abortion context, they are applicable to other substantive areas of the law as well. At a time when the Supreme Court is modifying many of its previous precedents and issuing splintered decisions, lower federal courts will need to make use of tools such as rule *stare decisis* and the narrowest grounds rule to reach a decision which reasonably predicts how the Court would decide the case. If the Supreme Court objects to this type of jurisprudence, the Court has, indeed always had, the mechanism to prevent it. The Justices of the Supreme Court can clearly state "what the law is."

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