
BEYOND THE MARKS RULE

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This Article explores a basic question of precedent formation: When a majority of the Supreme Court cannot agree on a rule of decision, can the Court nonetheless create a precedent? Under the Marks rule, the answer is yes: a fragmented Court decision stands for the “position taken by those members who concurred in the judgments on the narrowest grounds.” But that approach shifts costly interpretive burdens to later courts, privileges outlier views among the Justices, and discourages desirable compromises. Instead, Court precedent should form only when a single rule of decision has the express support of at least five Justices. That majority rule would promote decisional efficiency by placing the burden of precedent formation on the “cheapest precedent creators” — namely, the Justices themselves at the time of decision.

To support those conclusions, this Article presents the first systematic study of the Marks rule’s operation in appellate courts, including the Supreme Court, the federal circuit courts, and state appellate courts. Lower courts are applying Marks with rapidly increasing frequency, including to construe state court decisions. Yet most appellate citations to the Marks rule involve a relatively small number of fragmented cases. These findings allow courts and scholars to evaluate the rule’s practical operation, as well as the costs and benefits of abandoning it.

The link between decisional efficiency and precedent formation also sheds light on a number of broader issues in the law of precedent, including: whether to adhere to the results of fragmented or unexplained rulings, when Justices may legitimately compromise to form a majority, and how lower courts should discipline the Justices’ creation of precedent. But to make progress on these issues, we must first move beyond the Marks rule.

INTRODUCTION

In general, the U.S. Supreme Court creates precedent only when most Justices endorse a single rule of decision, typically by publishing a majority opinion.¹ The main exception was established in *Marks v. United States*²:

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¹ See, e.g., *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 81 (1987) (treating a plurality’s view as nonbinding because it “did not represent the views of a majority of the Court”).

² 430 U.S. 188 (1977).

When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds”³

This principle — known as “the *Marks* rule” — has been used with increasing regularity and has even jumped the federalism barrier: today, state courts sometimes use the *Marks* rule to construe their own state court precedents.⁴ Unfortunately, the *Marks* rule has generated considerable confusion. For example, *Regents of the University of California v. Bakke*⁵ famously resulted in a “fragmented” decision, that is, a ruling without a majority opinion,⁶ and so was thought to have offered a prime opportunity to apply the *Marks* rule. Yet circuit courts divided as to whether Justice Powell’s solo opinion constituted binding precedent on affirmative action.⁷ And when the Court addressed the issue, the majority acknowledged the difficulty of applying *Marks* before bracketing that issue and moving on to address the merits in the first instance.⁸ So instead of providing guidance, the *Marks* rule proved to be only a costly diversion.

In recent years, fragmented Supreme Court decisions have continued to bedevil both state and federal courts. *Freeman v. United States*⁹ is the most striking recent example. After the Court divided 4-to-1-to-4 on an important question of federal sentencing that affected thousands of criminal defendants,¹⁰ most courts applying *Marks* concluded that Justice Sotomayor’s solo concurrence in the judgment should control.¹¹ Yet the other eight Justices in *Freeman* thoroughly criticized Justice Sotomayor’s position as “erroneous” and “arbitrary.”¹² Bizarrely, the Court’s least popular view became law — except, that is, in the D.C. Circuit and the Ninth Circuit, which eventually concluded that *Freeman*

³ *Id.* at 193 (omission in original) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.)). “Judgments” because the rule’s original object was a consolidated case. See *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam).

⁴ The main text is based on the original empirical work reported below in Part I.

⁵ 438 U.S. 265 (1978).

⁶ *Id.* at 269 (plurality opinion). *Marks* itself used “fragmented” in this way. See *supra* text accompanying notes 2–3.

⁷ See *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (“In the wake of our fractured decision in *Bakke*, courts have struggled to discern whether Justice Powell’s diversity rationale, set forth in part of the opinion joined by no other Justice, is nonetheless binding precedent under *Marks*.”).

⁸ *Id.*

⁹ 564 U.S. 522 (2011).

¹⁰ *Id.* at 525 (plurality opinion); *id.* at 534 (Sotomayor, J., concurring in the judgment); *id.* at 544 (Roberts, C.J., dissenting).

¹¹ See, e.g., *United States v. Graham*, 704 F.3d 1275, 1278 (10th Cir. 2013) (collecting similar decisions by the First, Third, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits), *modified*, *Hughes v. United States*, 138 S. Ct. 1765 (2018).

¹² See *Freeman*, 564 U.S. at 532–34 (plurality opinion); *id.* at 546–51 (Roberts, C.J., dissenting).

created no precedent apart from the result.¹³ The Court had long declined to resolve circuit splits implicating *Marks*,¹⁴ even when the United States petitioned for certiorari to resolve a multisided split on whether any opinion (or opinions!) from *Rapanos v. United States*¹⁵ were binding.¹⁶ This past year, however, the Court granted review of a case implicating the *Freeman* circuit split, complete with not one but two questions presented on *Marks*.¹⁷ And the U.S. Solicitor General specifically asked that the Court rule based on *Marks*, so as to resolve deep confusion in the courts of appeals.¹⁸ But after a lively oral argument that featured discussion of a draft of this Article,¹⁹ the Court once again ignored *Marks*'s difficulties and instead resolved the underlying merits.²⁰ In short, the Court feels free to ignore its own *Marks* holdings at will, even as other courts struggle over them.

This Article argues that the *Marks* rule is wrong, root and stem, and should be abandoned. Instead of asking about the “narrowest grounds,” courts should simply ask whether a single rule of decision has the express support of at least five Justices. While *Marks* has been criticized many times before,²¹ its practical consequences and defects have not

¹³ See *United States v. Davis*, 825 F.3d 1014, 1024 (9th Cir. 2016) (en banc) (“We recognize that, with the exception of the D.C. Circuit, every other circuit that has considered the issue has adopted Justice Sotomayor’s concurrence as the controlling opinion in *Freeman*.”).

¹⁴ E.g., *Petition for a Writ of Certiorari, Negrón v. United States*, cert. denied, 137 S. Ct. 2293 (2017) (No. 16-999).

¹⁵ 547 U.S. 715 (2006).

¹⁶ *Petition for a Writ of Certiorari at I, United States v. McWane, Inc.*, cert. denied, 555 U.S. 1045 (2008) (No. 08-223).

¹⁷ See *Petition for a Writ of Certiorari at i, Hughes v. United States*, cert. granted, 138 S. Ct. 542 (2017) (No. 17-155). Both the United States and Hughes cited a draft of this paper, with Hughes arguing in the alternative that *Marks* be abandoned. See Brief for the United States at 32, *Hughes v. United States*, 138 S. Ct. 1765 (2018) (No. 17-155) [hereinafter U.S. Br.]; Brief of Petitioner at 55–59, *Hughes*, 138 S. Ct. 1765 (No. 17-155). In addition, I filed a pro se brief based on this paper. See Brief of Professor Richard M. Re as *Amicus Curiae* in Support of Neither Party, *Hughes*, 138 S. Ct. 1765 (No. 17-155) [hereinafter Re Amicus Br.].

¹⁸ See U.S. Br., *supra* note 17, at 12; Transcript of Oral Argument at 33–34, *Hughes*, 138 S. Ct. 1765 (No. 17-155), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-155_2c03.pdf [<https://perma.cc/V9NA-L9HX>] [hereinafter *Hughes* Tr.].

¹⁹ Four Justices and both advocates explicitly referenced my work, and another Justice alluded to an example from this paper and the related amicus brief. *Hughes* Tr., *supra* note 18, at 14, 19, 49, 52; see also *id.* at 16 (referencing the hypothetical). Justice Ginsburg seemed to hold a view closest to the one espoused here. See *id.* at 11–12, 30, 49. Following Justice Sotomayor, this Article’s proposal could be called “the Re test” or the Re Rule. *Id.* at 19.

²⁰ See *Hughes*, 138 S. Ct. at 1722 (deeming it “unnecessary to consider questions” concerning *Marks*). The *Hughes* litigation may affect judicial behavior in several ways. For example, Justice Sotomayor and other Justices might now strive harder to avoid fragmented rulings, and lower courts might more eagerly ignore *Marks*. See, e.g., *infra* text accompanying note 330.

²¹ See, e.g., Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 CORNELL L. REV. 1593, 1620–21 (1992) (proposing a multifaceted “legitimacy model”); Justin F. Marceau, *Lifting the Haze of Baze: Lethal Injection, the Eighth Amendment, and Plurality Opinions*, 41 ARIZ. ST. L.J. 159, 222 (2009) (arguing for an approach that is sensitive to the special

been fully recognized. As a result, commentators who start out criticizing *Marks* typically end up offering their own proposed versions of this fundamentally broken test.²² And lower courts, feeling bound by vertical stare decisis, struggle over *Marks* rather than setting it aside. It is time to step back and think about whether the *Marks* rule ever made sense in the first place. After doing so, the solution becomes apparent: courts should adhere to the normal majority rule for precedent formation in all cases.²³ When the Justices do not express majority agreement, there is no logical or inevitable basis for inferring majority approval for any particular rule of decision. Thus, no precedent should be created. This approach places the burden of precedent formation where it belongs: with the Justices of the Supreme Court. Moreover, it turns out that not much would be lost by abandoning *Marks*. The Court itself has rested only a handful of decisions on the *Marks* rule. And while lower courts frequently apply *Marks*, the rule tends to make a practical difference only in cases where it is either applied inconsistently or supportive of outlier views. The Court should declare that the *Marks* rule is no more.

To support that conclusion, this Article provides the first systematic empirical assessment of the *Marks* rule by surveying all *Marks* rule citations in appellate courts through 2018 — including the Supreme Court, the federal courts of appeals, and state appellate courts.²⁴ It turns out that the *Marks* rule is being cited in lower courts with rapidly increasing frequency. In time, *Marks* could become a framework method, somewhat akin to *Chevron*. But despite the rule's increasing importance, it is hard to see how use of the *Marks* rule has benefitted the judicial system. Because it applies precisely when there is no majority view of the law, *Marks* creates precedents that are unlikely to be either legally correct or practically desirable. The *Marks* rule is most

demands of Eighth Amendment doctrine); Douglas J. Whaley, *A Suggestion for the Prevention of No-Clear-Majority Judicial Decisions*, 46 TEX. L. REV. 370, 376 (1968) (proposing that “the opinion that the most nondissenting judges vote for” should “become the official opinion of the court”); Adam S. Hochschild, Note, *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective*, 4 WASH. U. J.L. & POL’Y 261, 286 (2000) (arguing that confusion over plurality opinions is a necessary consequence of modern vertical stare decisis, which should be rethought).

²² A recent example is Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795 (2017), discussed below in section II.B.3, pp. 1984–88. See also sources cited *supra* note 21. Mark Alan Thurmon’s perspicacious student note comes closest to the bottom line endorsed here in concluding (for different reasons) that the *Marks* rule is “insupportable,” but Thurmon went on to suggest a complex “hybrid” approach that assigns persuasive authority in proportion to the number of joins for each opinion. Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 421 (1992).

²³ I distinguish between a precedent’s *formation* (the subject of the present paper), *implementation* (such as whether it is narrowed or extended), and possible *elimination* (paradigmatically by overruling).

²⁴ See *infra* sections I.B–D, pp. 1951–128.

defensible when viewed as a “precedent default,” that is, as an interpretive principle that the Court has established to guide its own internal decisionmaking, as well as later courts’ interpretation of fragmented decisions. But even that sympathetic effort to rationalize *Marks* leads to its undoing. The most efficient precedent default is a simple requirement of majority approval. That straightforward approach would both encourage majority opinion formation and avoid speculative inquiries into what the openly disagreeing Justices “must” have agreed on. The net result would be more efficiency, lower costs, and greater accuracy. In this context, the rule of law calls for one less rule.

Once the *Marks* rule is set aside, other aspects of precedent and Supreme Court practice appear in a new light. First, the *Marks* rule’s practical operation draws attention to hierarchical differences in the U.S. judicial system. Unlike the Justices, the lower courts frequently cite the *Marks* rule — but some lower courts are choosing to construe the rule narrowly, to mute its worst effects. These hierarchical dynamics draw attention to *Marks*’s strengths, as well as opportunities for lower courts to facilitate *Marks*’s abandonment. Second, the case against the *Marks* rule suggests that even the *result* in a fragmented decision should not be treated as binding. When most Justices cannot agree on a legal principle, later courts should feel free to arrive at their own conclusions. The same reasoning suggests that unexplained summary rulings, too, should lack precedential effect.²⁵ Finally, greater attention is owed to a lesser-known principle of Supreme Court decisionmaking: the *Screws* rule.²⁶ The *Screws* rule maintains that a Justice’s vote in deciding a case may rest in part on the need to create a majority on the judgment, or even to create a majority precedent.²⁷ This principle has arisen organically in separate opinions without obtaining majority endorsement in any given case, yet it suggests a defensible view of the Justices’ power to cast precedential votes. Moreover, *Screws* offers a way to predict how judicial decisionmaking might proceed once the Court moves beyond the *Marks* rule.

I. MARKS IN PRACTICE

The *Marks* rule just turned forty and is more influential than ever. This Part explores how the rule first arose and now operates in practice, including by presenting the first comprehensive empirical study of how appellate courts actually use the *Marks* rule.

²⁵ See *infra* note 173.

²⁶ See, e.g., H. Ron Davidson, *The Mechanics of Judicial Vote Switching*, 38 SUFFOLK U. L. REV. 17, 48 (2004) (using this term).

²⁷ See *Screws v. United States*, 325 U.S. 91, 134 (1945) (Rutledge, J., concurring in the result).

A. Making Marks

Far from having an ancient pedigree, the *Marks* rule is an invention of the last forty years.²⁸ And the rule's origins suggest that it sprang more from the convenience of a specific historical moment than any deep or well-considered legal principle.

Though first adopted by a majority opinion in *Marks v. United States*, the rule originated in the plurality opinion in *Gregg v. Georgia*.²⁹ That origin is noteworthy because *Gregg* was itself a fragmented decision. In other words, the *Gregg* plurality announced a rule of precedent that — surprise — afforded precedential weight to plurality opinions. And that self-justifying assertion of authority mattered. In an even earlier case, *Furman v. Georgia*,³⁰ the Court had badly divided over the constitutionality of capital punishment.³¹ After years of confusion, *Gregg* purported to settle the constitutionality of capital punishment — yet *Gregg*, too, divided the Court. On the way toward allowing for capital punishment, the lead plurality included a footnote that applied what would later become known as the *Marks* rule. The footnote was in support of the view that the narrowest concurring opinions in *Furman* had reserved — and so left open — capital punishment's "*per se*" constitutionality.³² *Gregg* adduced no authority for the narrowest grounds test. But perhaps none was needed: if the *Marks* rule were really correct, then the *Gregg* plurality itself was likely the "narrowest" opinion and therefore binding. The *Gregg* plurality's assertion of the *Marks* rule thus has an oddly self-referential quality.

The next Term, *Marks* applied its eponymous rule in the context of a dispute over allegedly *ex post facto* criminal punishment for obscenity.

²⁸ Many pre-*Marks* authorities and cases doubted the precedential value of opinions without a majority rationale or majority agreement on a rule of decision. See HENRY CAMPBELL BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS 135–37 (1912); EUGENE WAMBAUGH, THE STUDY OF CASES § 48 (Boston, Little, Brown & Co. 1891) ("Even when all of the judges concur in the result, the value of the case as an authority may be diminished and almost wholly destroyed by the fact that the reasons given by the several judges differ materially."); Comment, *Supreme Court No-Clear-Majority Decisions: A Study in Stare Decisis*, 24 U. CHI. L. REV. 99, 99–100 (1956); see also RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW 90–93 (4th ed. 1991) (exploring the possible implications of no-majority decisions in the English judicial system); NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 71–73 (2008) ("Where a majority of judges agree as to the decision but disagree as to the correct grounds for the decision, extracting a *ratio decidendi* from the case may be an arbitrary exercise." *Id.* at 73.).

²⁹ 428 U.S. 153 (1976); see *id.* at 169 n.15 (plurality opinion of Stewart, Powell, and Stevens, JJ.).

³⁰ 408 U.S. 238 (1972) (*per curiam*).

³¹ *Id.* at 239–40.

³² *Gregg*, 428 U.S. at 169 n.15 (plurality opinion of Stewart, Powell, and Stevens, JJ.) (identifying Justice Stewart's and Justice White's opinions in *Furman* as that case's "holding"). The footnote cross-referenced another footnote relating to a discussion of what "*Furman* held." *Id.* at 188 & n.36. But that discussion seemed predicated on majority agreement across the *Furman* opinions. See *id.* n.36 (documenting that a certain "view was expressed by other Members of the Court who concurred in the judgments").

Some background is required. In 1957, *Roth v. United States*³³ had adopted a relatively permissive approach to obscenity prosecutions, notwithstanding the First Amendment.³⁴ Then, in 1966, the Court issued a fragmented decision in *Memoirs v. Massachusetts*.³⁵ Most Justices agreed that the obscenity conviction in *Memoirs* could not stand,³⁶ and every test proposed by the concurring Justices offered greater First Amendment rights than the *Roth* test.³⁷ But the Justices split as to the appropriate First Amendment standard.³⁸ In later cases, the Court began a practice of summarily reversing obscenity convictions “that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment.”³⁹ The Court applied that approach at least thirty-one separate times.⁴⁰ During that period, the defendants in *Marks* trafficked in allegedly obscene materials, before their operation came to an end in early 1973.⁴¹ A few months later, the Court decided *Miller v. California*,⁴² which rejected the test employed by the *Memoirs* plurality and restored a more pro-government standard.⁴³ The *Marks* defendants were then tried and convicted based on the new *Miller* standard. The defendants appealed, arguing that they should benefit from the more defendant-friendly legal standard that prevailed at the time of their conduct — namely, the standard set out by the *Memoirs* plurality.⁴⁴

In *Marks* the Court ruled in favor of the defendants on the theory that the *Memoirs* plurality set the governing law until *Miller*.⁴⁵ The Court began by stating the precedential rule that the *Gregg* plurality had asserted just the year before. But because *Marks* was the first majority opinion to state it, the rule is now known by that case’s name.⁴⁶ *Marks* then reviewed the opinions set out in *Memoirs*. A three-Justice plurality had adopted a multipart test offering First Amendment protection

³³ 354 U.S. 476 (1957).

³⁴ *Id.* at 492.

³⁵ 383 U.S. 413 (1966); *see id.* at 414.

³⁶ *See id.* at 419 (plurality opinion); *id.* at 421 (Black & Stewart, JJ., concurring in the judgment); *id.* at 426–27 (Douglas, J., concurring in the judgment).

³⁷ *See id.* at 419–20 (plurality opinion); *id.* at 426, 431–33 (Douglas, J., concurring in the judgment).

³⁸ *See id.* at 419–21 (plurality opinion); *id.* at 421 (Black & Stewart, JJ., concurring in the judgment); *id.* at 426, 431–33 (Douglas, J., concurring in the judgment).

³⁹ *Miller v. California*, 413 U.S. 15, 22 n.3 (1973).

⁴⁰ *Marks v. United States*, 430 U.S. 188, 193 n.7 (1977) (citing *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 82–83 n.8 (1973) (Brennan, J., dissenting)).

⁴¹ *See id.* at 189.

⁴² 413 U.S. 15 (1973).

⁴³ *Id.* at 23, 25–26.

⁴⁴ *Marks*, 430 U.S. at 189–90.

⁴⁵ *See id.* at 193–94, 196 (thus holding that the Due Process Clause precluded retroactive application of the *Miller* standard to the defendants).

⁴⁶ *See id.* at 193.

unless the expression at issue is “utterly without redeeming social value.”⁴⁷ Two Justices had concluded that obscenity prosecutions were essentially impermissible in all cases.⁴⁸ Finally, one Justice had advanced a stringent test for obscenity prosecutions, allowing them only for “hardcore pornography.”⁴⁹ After summarizing these *Memoirs* opinions, the Court concluded: “The view of the *Memoirs* plurality therefore constituted the holding of the Court and provided the governing standards.”⁵⁰ Instead of explaining that result, the Court pointed to corroborating evidence: “every Court of Appeals that considered the question between *Memoirs* and *Miller* so read our decisions.”⁵¹ In a footnote, *Marks* also alluded to its earlier practice of resolving cases summarily based on what “at least five members” of the *Memoirs* Court would do, judging from the various tests espoused in that case.⁵²

The best reading of *Marks* is indeed that it establishes the broad *Marks* rule. Yet a more cautiously reasoned opinion in *Marks* could have relied on any number of case-specific factors. *Marks* arose in the context where notice is triply essential — namely, a criminal prosecution where the defendants invoked both ex post facto and First Amendment principles. That unusual circumstance plausibly called for the government to meet an especially high standard of precedential clarity.⁵³ And there were many reasons to think that a reasonable criminal defendant would have concluded, based on the notice then available, that *Roth* no longer established the governing law. As we have seen, *Marks* itself emphasized that the lower courts had converged on the *Memoirs* plurality. And the Court’s thirty-one summary reversals — each supported by majority vote — had applied the test of the *Memoirs* plurality, in conjunction with other *Memoirs* tests, as a rule of decision.⁵⁴ Yet the Court’s statement of the *Marks* rule was not limited to the case’s ex post facto context or dependent on other case law interpreting *Memoirs*. The lower courts’ convergence on the *Memoirs* plurality was adduced more

⁴⁷ See *id.* at 193–94 (quoting *Memoirs v. Massachusetts*, 383 U.S. 413, 419 (1966) (plurality opinion)).

⁴⁸ See *id.* at 193 (first citing *Memoirs*, 383 U.S. at 421 (Black & Stewart, JJ., concurring in the judgment); and then citing *id.* at 424 (Douglas, J., concurring in the judgment)).

⁴⁹ See *id.* (first citing *Memoirs*, 383 U.S. at 421 (Black & Stewart, JJ., concurring in the judgment); and then citing *Ginzburg v. United States*, 383 U.S. 463, 499 (1966) (Stewart, J., dissenting)).

⁵⁰ *Id.* at 194.

⁵¹ *Id.* (footnote omitted).

⁵² *Id.* at 193 n.7 (citing *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 82–83 n.8 (1973) (Brennan, J., dissenting)); see *Miller v. California*, 413 U.S. 15, 22 n.3 (1973) (supplying the quoted text).

⁵³ See *Grutter v. Bollinger*, 288 F.3d 732, 779 (6th Cir. 2002) (Boggs, J., dissenting) (“Taken on its face, *Marks* might be read only for the limited proposition that a criminal defendant cannot be held liable for conduct that he did not have fair notice would be prohibited.”).

⁵⁴ See, e.g., *Marks*, 430 U.S. at 193 n.7; *Miller*, 413 U.S. at 22 n.3; *Redrup v. New York*, 386 U.S. 767, 771 (1967).

as confirmation than proof — and the Court’s own summary reversals were relegated to a footnote.⁵⁵

There is an underappreciated strategic aspect to the Court’s reliance on the *Marks* rule in *Marks* itself. As noted, the rule originated in the *Gregg* plurality, which purported to settle longstanding disputes on the constitutionality of capital punishment. But as a mere plurality, the *Gregg* plurality had only a questionable claim to precedential authority. Thus, *Gregg* arguably failed to resolve the national confusion over capital punishment that *Furman* had created. That precedential shortfall might have troubled one member of the *Gregg* plurality, namely, Justice Powell — the author of *Marks*.⁵⁶ By including the *Marks* rule in his majority opinion in *Marks*, Justice Powell retroactively suggested that his own preferred resolution in *Gregg* was the governing precedent. In this way, the clear precedential authority of a majority opinion indirectly blessed the more dubious authority of a plurality.⁵⁷ So the Court’s decision to fashion the *Marks* rule may have stemmed not just from the First Amendment and ex post facto issues posed by *Memoirs*, but also from a desire to resolve the post-*Gregg* ambiguity in the law of capital punishment.⁵⁸ As we will see, however, the *Marks* rule has come to reach well beyond that narrow compass.

B. The Supreme Court

Since its invention, the *Marks* rule has made regular if infrequent appearances in the U.S. Reports. During the years immediately after *Marks*, the Court had several occasions to engage with the ex post facto and First Amendment aspects of that ruling. From 1977 to 1979, for instance, the Court cited *Marks* no fewer than six times — but never for the *Marks* rule.⁵⁹ Indeed, no Justice cited the *Marks* rule until 1986,⁶⁰

⁵⁵ *Marks*, 430 U.S. at 193 n.7.

⁵⁶ *Id.* at 188.

⁵⁷ After *Marks*, for example, Justices have posited that the *Gregg* plurality is “controlling” or applied “the narrowest ground” test to its companion decisions. See, e.g., *Johnson v. Texas*, 509 U.S. 350, 360 (1993); *id.* at 383 (O’Connor, J., dissenting) (discussing *Jurek v. Texas*, 428 U.S. 262 (1976), one of *Gregg*’s companion cases).

⁵⁸ Cf. John P. Neuenkirchen, *Plurality Decisions, Implicit Consensuses, and the Fifth-Vote Rule Under Marks v. United States*, 19 WIDENER L. REV. 387, 393 (2013) (“[I]n the wake of the *Gregg* decision and with the vast increase in plurality decisions, the Court provided its instruction on how to interpret splintered opinions in the 1977 decision *Marks v. United States*.”). On the role of increasing numbers of pluralities, see *infra* note 94.

⁵⁹ See *Pinkus v. United States*, 436 U.S. 293, 295 (1978); *Smith v. United States*, 431 U.S. 291, 296 (1977); *Ward v. Illinois*, 431 U.S. 767, 773 (1977); see also *Burch v. Louisiana*, 441 U.S. 130, 139 (1979) (Stevens, J., concurring); *Ballew v. Georgia*, 435 U.S. 223, 245 (1978) (Stevens, J., concurring); *FCC v. Pacifica Found.*, 438 U.S. 726, 779 (1978) (Stewart, J., dissenting). The Court also granted, vacated, and remanded decisions in light of *Marks*. See, e.g., *Friedman v. United States*, 430 U.S. 925 (1977) (mem.).

⁶⁰ See *Celotex Corp. v. Catrett*, 477 U.S. 317, 329 n.1 (1986) (Brennan, J., dissenting).

with the first majority opinion citing and applying *Marks* in 1988 — over a decade after *Marks* itself.⁶¹ Through 2018, the Court’s majority opinions have cited *Marks* for the *Marks* rule nine times, or about every five years.⁶² In five of those majority opinions, the Court succinctly applied the *Marks* rule to find a binding precedent,⁶³ including a precedent that created “clearly established law” for the purposes of the Anti-Terrorism and Effective Death Penalty Act.⁶⁴ In another case, the majority simply noted that the decision below had applied *Marks*.⁶⁵ In the other three majority opinions,⁶⁶ including the recent decision in *Hughes v. United States*,⁶⁷ the Court noted *Marks* rule issues only to avoid them.⁶⁸ To wit, the Court has not once but twice explained that the *Marks* rule is “more easily stated than applied”⁶⁹ and that it is “not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts.”⁷⁰ In both of those cases, the Court ultimately chose not to apply the *Marks* rule at all.⁷¹

In addition, about fifteen nonmajority opinions have cited the *Marks* rule, for various reasons.⁷² Sometimes, a Justice writes separately to bow to the force of *Marks*, such as when Chief Justice Rehnquist acknowledged that the plurality in *Planned Parenthood of Southeastern Pennsylvania v. Casey* was binding even though he had dissented in that case.⁷³ In other cases, a separate opinion disputes the majority’s application of *Marks*. Such a dispute arose in the first majority opinion that invoked the *Marks* rule: in the dissent’s view, it made no sense to choose a particular opinion as narrowest and therefore binding when that opinion’s reading of case law “was rejected by more Justices than accepted it at the time that [the earlier case] was decided.”⁷⁴ Likewise, the most

⁶¹ See *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 765 n.9 (1988).

⁶² See cases cited *infra* notes 63–68 and accompanying text.

⁶³ See *Glossip v. Gross*, 135 S. Ct. 2726, 2738 n.2 (2015); *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007); *O’Dell v. Netherland*, 521 U.S. 151, 160 (1997); *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994); *Lakewood*, 486 U.S. at 764 n.9.

⁶⁴ See *Panetti*, 551 U.S. at 949.

⁶⁵ See *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 285 (2000). A plurality may have implicitly applied *Marks*. See *id.* at 297 (plurality opinion).

⁶⁶ *Hughes v. United States*, 138 S. Ct. 1765 (2018); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Nichols v. United States*, 511 U.S. 738 (1994).

⁶⁷ 138 S. Ct. 1765.

⁶⁸ *Id.* at 1722; *Grutter*, 539 U.S. at 325; *Nichols*, 511 U.S. at 745–46.

⁶⁹ *Grutter*, 539 U.S. at 325 (quoting *Nichols*, 511 U.S. at 745).

⁷⁰ *Nichols*, 511 U.S. at 745–46; see also *Hughes*, 138 S. Ct. at 1772 (setting *Marks* aside without any explanation).

⁷¹ *Grutter*, 539 U.S. at 325; *Nichols*, 511 U.S. at 745–46.

⁷² The figure in the main text resulted from review of a Westlaw search for *Marks*’s citation, as well as of *Marks*’s citing history, through 2018.

⁷³ See *Stenberg v. Carhart*, 530 U.S. 914, 952 (2000) (Rehnquist, C.J., dissenting).

⁷⁴ *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 785 (1988) (White, J., dissenting).

recent majority opinion to apply *Marks* prompted a four-Justice dissent to dispute whether the earlier case, *Baze v. Rees*,⁷⁵ had yielded any “narrowest” and therefore binding opinion at all.⁷⁶ And, in still other cases, fragmented decisions feature separate opinions that joust over how later courts should apply *Marks*.⁷⁷

Take *United States v. Santos*,⁷⁸ where Justice Scalia led a four-Justice plurality that picked up an essential fifth vote on the judgment from Justice Stevens.⁷⁹ Justice Scalia’s plurality expressly recognized that Justice Stevens’s opinion was narrower and therefore binding under *Marks*.⁸⁰ But Justice Scalia then put his own gloss on the import of Justice Stevens’s opinion. In Justice Scalia’s view, the binding effect of Justice Stevens’s opinion was “that ‘proceeds’ means ‘profits’ when there is no legislative history to the contrary.”⁸¹ On that basis, Justice Scalia concluded that *Santos* yielded no *Marks* holding “when contrary legislative history does exist.”⁸² After all, Justice Scalia explained, eight Justices (the plurality and dissenters) had “apparently” rejected that view.⁸³ Justice Stevens responded that the plurality’s *Marks* “speculat[ion]” was dicta and that the plurality’s reading of his opinion was “not correct.”⁸⁴ As discussed below, lower courts frequently struggle with how to apply the *Marks* rule to *Santos*, thereby replicating the Court’s own confusion.

All told, there are roughly twenty Supreme Court cases that include one or more opinions that expressly cite the *Marks* rule.⁸⁵ To some extent, that tally is the tip of a larger doctrinal iceberg. The Justices might sometimes rely on the *Marks* rule implicitly, particularly when its application seems obvious. There are also examples of the Court alluding to the *Marks* rule without citing *Marks*.⁸⁶ Yet the Court more often glides

⁷⁵ 553 U.S. 35 (2008).

⁷⁶ See *Glossip v. Gross*, 135 S. Ct. 2726, 2793 (2015) (Sotomayor, J., dissenting) (arguing that *Baze* yielded no *Marks* precedent); see also *Panetti v. Quarterman*, 551 U.S. 930, 969 n.5 (2007) (Thomas, J., dissenting) (disputing the majority’s *Marks* analysis).

⁷⁷ For example, *City of Ontario v. Quon*, 560 U.S. 746 (2010), declined to decide what opinion controlled in *O’Connor v. Ortega*, 480 U.S. 709 (1987), *City of Ontario*, 560 U.S. at 757, while two separate opinions jostled over the issue, see *id.* at 766 & n.* (Stevens, J., concurring); *id.* at 767 & n.† (Scalia, J., concurring in part and concurring in the judgment).

⁷⁸ 553 U.S. 507 (2008).

⁷⁹ *Id.* at 524 (Stevens, J., concurring in the judgment).

⁸⁰ See *id.* at 523 (plurality opinion).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 524.

⁸⁴ *Id.* at 528 n.7 (Stevens, J., concurring in the judgment).

⁸⁵ Here, too, the figure in the main text resulted from review of a Westlaw search for *Marks*’s citation, as well as of *Marks*’s citing history, through 2018.

⁸⁶ See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (“We begin our review of possible standards with that proposed by Justice White’s plurality opinion in *Bandemer* because, as the narrowest ground for our decision in that case, it has been the standard employed by the lower courts.”).

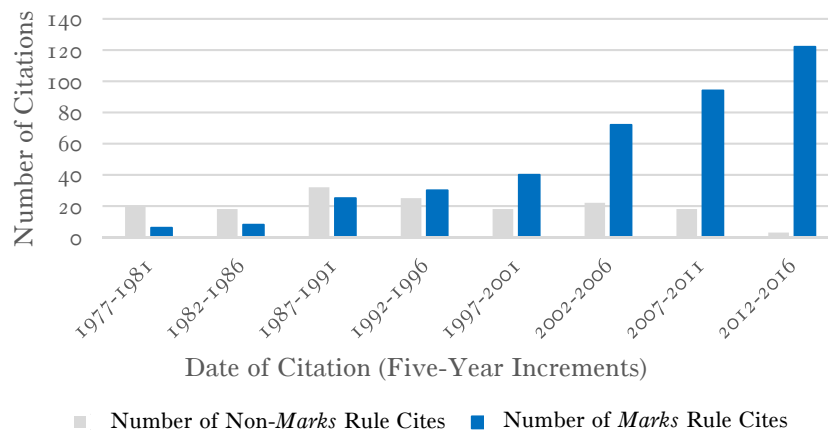
over potential *Marks* rule issues without confronting them. For example, the Court sometimes describes plurality opinions as the voice of “the Court,” without noting either that the ruling was a plurality or that the case involved a concurrence in the judgment.⁸⁷ These decisions may reflect a sub silentio *Marks* analysis, but they could also reflect simple errors, or even ignorance of the *Marks* rule.

Still, the basic picture is clear enough. After about a decade of dormancy, the *Marks* rule has become a regular if peripheral feature of Supreme Court opinions. Sometimes, application of the rule seems easy and garners consensus among the Justices. But the use of the rule has also been a source of some controversy and confusion.

C. Federal Courts of Appeals

Though only intermittently appearing in the Supreme Court, the *Marks* rule is becoming ever more salient in the federal courts of appeals. Much as in the Court, however, the *Marks* rule was initially dormant. This basic story is reflected in Figure 1 below.⁸⁸

Figure 1: Federal Circuit Court Citations to *Marks*



⁸⁷ See, e.g., *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (discussing a nonmajority analysis in *Burson v. Freeman*, 504 U.S. 191 (1992), as the reasoning of “the Court”). Interestingly, nonmajority opinions sometimes speak as though they have majority support, perhaps due to simple error or to claim precedential influence for minority views. See, e.g., *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665 (2015) (plurality opinion) (using “we hold” language in a passage that lacked majority support).

⁸⁸ All data in this section is based on Westlaw searches of recorded federal court of appeals opinions that cite *Marks* through 2018. Cases that expressly rely on prior *Marks* applications are counted as *Marks* rule citations, as are cases that ultimately find no precedent under *Marks*. Opinions that have been withdrawn or superseded are excluded. Cases were coded by me and by the research assistants noted in the star note. Some coding decisions reflect judgments, so the data is more useful for its patterns than its exact figures or rankings.

As the Figure reflects, the early years of the *Marks* rule saw it cited only a handful of times in federal courts of appeals, including both majority opinions as well as other opinions. During the same period, other aspects of *Marks* received dozens of citations. Over time, however, the *Marks* rule has come to dominate all *Marks* citations. Federal circuit court citations to the First Amendment and ex post facto aspects of *Marks* never substantially increased and eventually declined. By contrast, citations to the *Marks* rule climbed steadily in all federal circuit courts. *Marks* rule citations began to overwhelm other *Marks* citations around 2000.⁸⁹ This upward trend is significant because most precedents decline in value over time, yielding progressively fewer citations.⁹⁰ The steep rise in citations around 2000 may be partly explained by *Marks*'s salient role in affirmative action litigation up to and including *Grutter v. Bollinger*.⁹¹ In recent years, federal circuit court citations to the *Marks* rule have occurred many times more often than all other federal circuit court citations to *Marks* combined. In 2016, for example, federal circuit decisions reveal twenty citations to *Marks*, and they all pertained to the *Marks* rule. In short, *Marks* has come to stand more for its rule of precedent than for its merits holding.

As *Marks* citations increased, they focused on some cases more often than others. By 2017, the *Marks* rule appeared in over 400 federal circuit opinions (including majorities and separate writings). And those opinions had applied *Marks* to over 100 different fragmented decisions by the Supreme Court; but the federal circuits have also applied the *Marks* rule to about thirty other rulings, including decisions by federal circuit courts, state courts, and federal agencies.⁹² Remarkably, as shown below, just three Supreme Court decisions are responsible for almost a quarter of all *Marks* rule citations in the federal circuits. And just twelve Supreme Court decisions are responsible for about half of all federal circuit court *Marks* rule citations.

⁸⁹ Scholars at this time called for greater pedagogical attention to the *Marks* rule. See Maxwell L. Stearns, *The Case for Including Marks v. United States in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321, 329–30 (2000).

⁹⁰ Neal Devins & David Klein, *The Vanishing Common Law Judge?*, 165 U. PA. L. REV. 595, 614 (2017) (explaining that “precedents typically depreciate in value over time,” as “reflected mainly in smaller numbers of both positive and negative citations as a precedent ages”); see also THOMAS G. HANSFORD & JAMES F. SPRIGGS II, *THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT* 53, 116–17 (2006) (collecting horizontal and vertical evidence).

⁹¹ 539 U.S. 306 (2003); see *supra* text accompanying notes 4–7.

⁹² See, e.g., *Binderup v. Attorney Gen. U.S.*, 836 F.3d 336, 356 (3d Cir. 2016) (en banc) (applying the *Marks* rule to ascertain “the law of our Circuit”); *Ne. Beverage Corp. v. NLRB*, 554 F.3d 133, 141 (D.C. Cir. 2009) (Garland, J., dissenting) (including a “*cf.*” cite to *Marks* in construing an NLRB ruling); *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1188 n.2 (11th Cir. 2004) (construing a state court ruling); see also *Manfred v. Nat’l R.R. Passenger Corp.*, 106 F. Supp. 3d 678, 684 & n.8 (W.D. Pa. 2015) (construing a state court ruling).

Below, Table 1 lists the Court decisions that have most often been “*Marks*’d,” or interpreted in conjunction with an express citation to the *Marks* rule.⁹³ This list includes Court decisions that have been *Marks*’d in four or more federal courts of appeals cases, including in separate opinions. The Table displays the name, cite, date, and type (Plurality = P; Partial Majority = PM; Majority = M; and Per Curiam = PC) of each listed case, as well as the number of opinions *Marks*’ing each case (both majorities and separate opinions), the number of circuit courts that have *Marks*’d each case, and the total number of times each *Marks*’d case has been cited in the circuit courts. These figures reveal no significant relationship between the frequency with which a case is *Marks*’d and either the case’s age or its total number of citations.

Table 1: Decisions Most Often *Marks*’d in the Federal Circuit Courts (1977–2018)

| | Case Name | Citation | Date | Case Type | <i>Marks</i> ’ing Opinions | <i>Marks</i> ’ing Circuits | Total Circuit Court Cites |
|---|--|--------------|------|-----------|----------------------------|----------------------------|---------------------------|
| 1 | Freeman v. United States | 564 U.S. 522 | 2011 | P | 45 | 12 | 406 |
| 2 | United States v. Santos | 553 U.S. 507 | 2008 | P | 31 | 9 | 344 |
| 3 | Missouri v. Seibert | 542 U.S. 600 | 2004 | P | 28 | 11 | 223 |
| 4 | City of Los Angeles v. Alameda Books, Inc. | 535 U.S. 425 | 2002 | P | 17 | 6 | 101 |
| 5 | Barnes v. Glen Theatre, Inc. | 501 U.S. 560 | 1991 | P | 14 | 7 | 149 |
| 6 | Rapanos v. United States | 547 U.S. 715 | 2006 | P | 10 | 7 | 79 |
| 7 | E. Enters. v. Apfel | 524 U.S. 498 | 1998 | P | 9 | 7 | 154 |
| 8 | Elrod v. Burns | 427 U.S. 347 | 1976 | P | 9 | 6 | 914 |

⁹³ It is possible that easy *Marks* applications are not disputed on appeal, skewing the sample. However, federal district court citation patterns appear to be roughly similar. In 2015, for example, district courts applied *Marks* about fifty times, and four of the five cases that were most often *Marks*’d are also among the most often *Marks*’d cases in the circuits: *Freeman v. United States*, 564 U.S. 522 (2011) (fourteen cases), *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011) (eight cases), *United States v. Santos*, 553 U.S. 507 (2008) (three cases), *Missouri v. Seibert*, 542 U.S. 600 (2004) (three cases), and *Ewing v. California*, 583 U.S. 11 (2003) (three cases). The exception is *Ewing*, which is among the most *Marks*’d cases in the state courts. See *infra* Figure 2 and Table 2.

| | | | | | | | |
|----|---|-----------------|------|----|---|---|------|
| 9 | McKune v. Lile | 536 U.S. 24 | 2002 | P | 9 | 4 | 131 |
| 10 | Harmelin v. Michigan | 501 U.S. 957 | 1991 | P | 8 | 5 | 746 |
| 11 | J. McIntyre Mach., Ltd. v. Nicastro | 564 U.S. 873 | 2011 | P | 7 | 4 | 52 |
| 12 | Mitchell v. Helms | 530 U.S. 793 | 2000 | P | 7 | 4 | 40 |
| 13 | Planned Parenthood of Se. Pa. v. Casey | 505 U.S. 833 | 1992 | PM | 7 | 4 | 360 |
| 14 | City of Erie v. Pap's A.M. | 529 U.S. 277 | 2000 | PM | 6 | 5 | 198 |
| 15 | Van Orden v. Perry | 545 U.S. 677 | 2005 | P | 6 | 4 | 75 |
| 16 | Pennsylvania v. Del. Valley Citizens' Council for Clean Air | 483 U.S. 711 | 1987 | PM | 6 | 4 | 175 |
| 17 | Simmons v. South Carolina | 512 U.S. 154 | 1994 | P | 6 | 3 | 223 |
| 18 | Baze v. Rees | 553 U.S. 35 | 2008 | P | 5 | 5 | 137 |
| 19 | Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co. | 559 U.S. 393 | 2010 | PM | 5 | 4 | 107 |
| 20 | Regents of the Univ. of Cal. v. Bakke | 438 U.S. 265 | 1978 | P | 5 | 4 | 353 |
| 21 | Price Waterhouse v. Hopkins | 490 U.S. 228 | 1989 | P | 5 | 4 | 971 |
| 22 | Williams v. Illinois | 567 U.S. 50 | 2012 | P | 5 | 3 | 53 |
| 23 | Kerry v. Din | 135 S. Ct. 2128 | 2015 | P | 4 | 4 | 27 |
| 24 | Nat'l Fed'n of Indep. Bus. v. Sebelius | 567 U.S. 519 | 2012 | PM | 4 | 4 | 189 |
| 25 | FW/PBS, Inc. v. City of Dallas | 493 U.S. 215 | 1990 | PM | 4 | 4 | 372 |
| 26 | Baldasar v. Illinois | 446 U.S. 222 | 1980 | PC | 4 | 4 | 70 |
| 27 | Schlup v. Delo | 513 U.S. 298 | 1995 | M | 4 | 3 | 1168 |
| 28 | Hein v. Freedom from Religion Found., Inc. | 551 U.S. 587 | 2007 | P | 4 | 2 | 75 |
| 29 | Albright v. Oliver | 510 U.S. 266 | 1994 | P | 4 | 1 | 525 |

At the other end of the distribution, federal circuit opinions have *Marks*'d about 100 Court decisions only one or two times. Other fragmented decisions never yield an appellate court *Marks* citation — despite being cited in hundreds of appellate cases.⁹⁴ And even the most *Marks*'d cases are cited vastly more often than they are *Marks*'d.

So while the *Marks* rule is cited with increasing frequency, the great majority of federal circuit decisions that engage with fragmented rulings do so without citing *Marks* or discernibly undertaking a *Marks* analysis. Why does that disparity arise? At least some lower courts implicitly rely on *Marks*, without citing it.⁹⁵ More often, lower courts cite fragmented decisions in ways that don't require them to focus on *Marks* or to specify the decisions' precedential status. For example, circuit courts frequently cite plurality opinions for points that are peripheral to the dispute at hand or that could easily be supported by majority decisions in other cases.⁹⁶ At other times, circuit courts rely on precedent for reasons that do not involve *Marks*, such as by citing plurality opinions for their persuasive effect or piecing together majority agreement on distinct principles based on statements in separate opinions.⁹⁷ And, like the Supreme Court, circuit courts sometimes cite pluralities as providing the holding of "the Court," without evincing awareness that the cited opinion is not a majority.⁹⁸ The pivotal concurrence in the judgment may go unmentioned or even be portrayed as a full concurrence.⁹⁹ In sum, *Marks*-free citations to fragmented rulings may reflect implicit *Marks* applications, a lack of any need to engage *Marks*, or inattentive failures to apply the *Marks* rule.

But why do some cases attract *Marks* citations at all, or in greater numbers, when others don't? Again, Table 1 shows that a case's total

⁹⁴ Some commenters view *Marks* as a response to increasing rates of fractured opinions, but *Marks*'s ongoing rise in the lower courts seems not to track changes in the rates of fragmented decisions, which have substantially leveled off. Cf. Kimura, *supra* note 21, at 1626–27 (counting partial majority opinions as plurality decisions).

⁹⁵ Courts sometimes find "narrowest" or "controlling" concurrences without citing *Marks*. Cf. *infra* note 124.

⁹⁶ See, e.g., *Manuel de Jesus Ortega Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting the plurality in *Elrod v. Burns*, 427 U.S. 347, 373 (1976), as though it were a majority opinion).

⁹⁷ See, e.g., *Big Dipper Entm't, LLC v. City of Warren*, 641 F.3d 715, 721 (6th Cir. 2011) (quoting *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227 (1990) (plurality opinion)); *Redner v. Dean*, 29 F.3d 1495, 1500 (11th Cir. 1994) (citing *FW/PBS*, 493 U.S. at 229–30 (plurality opinion)); see generally *infra* section III.C, pp. 2004–06 (discussing "rule agreement").

⁹⁸ See, e.g., *Anderson v. Spear*, 356 F.3d 651, 656–57 (6th Cir. 2004) (discussing *Burson v. Freeman*, 504 U.S. 191 (1992), with no evident awareness it was a plurality); case cited *supra* note 96. From 2015 to 2017, for example, most of the eleven circuit court decisions to cite *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011), cited the plurality without indicating it was a plurality. One case applied *Marks* to follow the concurrence in the judgment — and so found the law unchanged. See *AFTG-TG, LLC v. Nuvoton Tech. Corp.*, 689 F.3d 1358, 1363 (Fed. Cir. 2012).

⁹⁹ See, e.g., *United States v. Ziegler*, 474 F.3d 1184, 1189–91 (9th Cir. 2007) (discussing the plurality in *O'Connor v. Ortega*, 480 U.S. 709 (1987), in terms of what "the Court" decided, while citing a concurrence in the judgment as a full "concurrence").

number of citations does not explain the number of times it is *Marks*'d. And while many judges and parties probably remain unaware of the *Marks* rule, despite its increasing salience, that point cannot explain why *Marks* attention is so concentrated on a relatively small number of cases. The most plausible explanation would focus on decisionmaking incentives: because parties and courts alike presumably try to avoid unnecessary precedential debates, they may cite and apply the *Marks* rule only when a key precedent in dispute is fragmented. Thus, fragmented decisions are especially unlikely to yield *Marks* attention when they address nondispositive topics or echo rules laid out in other cases' majority opinions. By contrast, fragmented rulings are more likely to generate *Marks* attention, especially when cases are on appeal, when they offer the only authority on a recurring question and when the opinions diverge in an outcome-determinative way. In addition, the circuit courts may be likely to cite the *Marks* rule only when they are unsure of how to assess the precedential impact of a fragmented decision. Where a decision's precedential import is apparent, whether due to *Marks* or some other principle, courts may assert as much without citation.

When applying the *Marks* rule, the federal courts of appeals only sometimes reach convergent results. Prominent examples include *Barnes v. Glen Theatre, Inc.*,¹⁰⁰ *City of Los Angeles v. Alameda Books*,¹⁰¹ *Baze v. Rees*,¹⁰² and *J. McIntyre Machinery, Ltd. v. Nicaastro*.¹⁰³ Often, however, repeated *Marks* analysis generates lasting disagreement, even after courts initially converge on a single *Marks* outcome. Examples include *Freeman v. United States*,¹⁰⁴ *United States v. Santos*,¹⁰⁵ and *Rapanos v. United States*.¹⁰⁶ An intermediate example can be found in *Missouri v. Seibert*,¹⁰⁷ where most circuits have converged on the concurrence in the judgment (perhaps in part because it declares itself "narrower" than the plurality),¹⁰⁸ but some courts have concluded that there

¹⁰⁰ 501 U.S. 560 (1991). Circuit courts tend to converge on Justice Souter's concurrence in the judgment. See, e.g., *Foxxxy Ladyz Adult World, Inc. v. Vill. of Dix*, 779 F.3d 706, 711 & n.3 (7th Cir. 2015).

¹⁰¹ 535 U.S. 425 (2002). Here too, courts generally converge on Justice Kennedy's concurrence in the judgment. See, e.g., *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460, 465 (7th Cir. 2009).

¹⁰² 553 U.S. 35 (2008). Several courts of appeals have converged on the *Baze* plurality opinion, but we have seen that four Justices have questioned that view. See cases cited *supra* note 76.

¹⁰³ 564 U.S. 873 (2011). Circuit courts tend to converge on Justice Breyer's concurrence in the judgment. See, e.g., *AFTG-TG*, 689 F.3d at 1363 ("The narrowest holding is that which can be distilled from Justice Breyer's concurrence — that the law remains the same after *McIntyre*.").

¹⁰⁴ 564 U.S. 522 (2011); see also *supra* p. 1944.

¹⁰⁵ 553 U.S. 507 (2008). See *United States v. Halstead*, 634 F.3d 270, 276–77 (4th Cir. 2011) (explaining the different approaches circuit courts have taken in applying the *Santos* opinions).

¹⁰⁶ 547 U.S. 715 (2006); see *United States v. Donovan*, 661 F.3d 174, 180–81 (3d Cir. 2011) (summarizing split).

¹⁰⁷ 542 U.S. 600 (2004).

¹⁰⁸ *Id.* at 622 (Kennedy, J., concurring in the judgment).

is no narrowest opinion under *Marks*.¹⁰⁹ Or take *Williams v. Illinois*,¹¹⁰ where Justice Kagan's dissent suggested that the lack of majority agreement undermined the case's precedential value.¹¹¹ Most (but not all) lower courts have agreed.¹¹²

D. State Courts of Appeals

State court use of the *Marks* rule has attracted little attention,¹¹³ yet it is one of the most interesting features of the rule's growth. The available evidence strongly suggests that the *Marks* rule's state court career has resembled its federal circuit experience, only more so.

Below, Figure 2 tells the basic story.¹¹⁴ The *Marks* rule was somewhat slower to take hold in the state appellate courts than in the federal circuit courts. Because of that slow start, the *Marks* rule has garnered fewer overall citations in the state appellate courts than in the federal circuits. But in the early 2000s, around the same time that federal appellate courts were increasing their *Marks* rule citations, state court citations also accelerated. And, just as in the federal courts, the increase in citations to *Marks* is overwhelmingly focused on the *Marks* rule, as opposed to other aspects of the *Marks* decision. In 2016, for example, all but four of the thirty-two appellate state court citations to *Marks* pertained to the *Marks* rule. Today, state appellate courts cite the *Marks* rule in absolute numbers that outpace their federal counterparts. There are of course many more state than federal appellate courts and cases, so the *Marks* rule's rate of appearance is far lower in state courts. Yet

¹⁰⁹ See *United States v. Wooten*, 602 F. App'x 267, 271 (6th Cir. 2015) (discussing the "somewhat lopsided circuit split" on how *Marks* applies to *Seibert*); *United States v. Heron*, 564 F.3d 879, 885 (7th Cir. 2009) ("In a situation like this, it is risky to assume that the Court has announced any particular rule of law, since the plurality and dissent approaches garnered only four votes each.").

¹¹⁰ 567 U.S. 50 (2012).

¹¹¹ Justice Kagan wrote, "The five Justices who control the outcome of today's case agree on very little," and "until a majority of this Court reverses or confines [past relevant] decisions, I would understand them as continuing to govern." *Id.* at 141 (Kagan, J., dissenting). If generalized, Justice Kagan's remarks represent a repudiation of the *Marks* rule. *But see infra* notes 158 & 258 (discussing Justice Kagan's comments in *Hughes*).

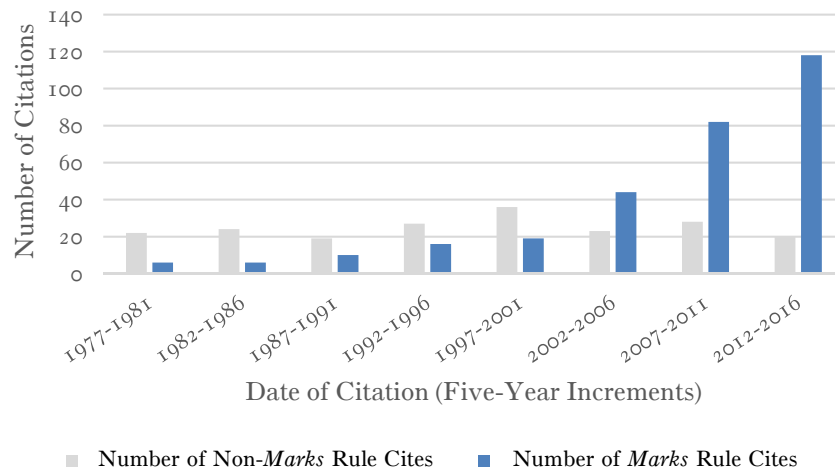
¹¹² Compare, e.g., *United States v. Duron-Caldera*, 737 F.3d 988, 994 n.4 (5th Cir. 2013) (finding no *Marks* holding under the logical subset approach), and *United States v. James*, 712 F.3d 79, 95 (2d Cir. 2013) (same), with *People v. Dungo*, 286 P.3d 442, 456 (Cal. 2012) (applying "both the plurality opinion and Justice Thomas's concurrence" in a manner akin to the shared agreement approach).

¹¹³ For two pieces that note such cases in footnotes, see Saul Levmore, *Ruling Majorities and Reasoning Pluralities*, 3 THEORETICAL INQUIRIES L. 87, 96 n.18 (2002), and Joseph M. Cacace, Note, *Plurality Decisions in the Supreme Court of the United States: A Reexamination of the Marks Doctrine After Rapanos v. United States*, 41 SUFFOLK U. L. REV. 97, 110 n.108 (2007).

¹¹⁴ All data in this section is based on Westlaw searches of state court cases that cite *Marks* through 2018, with trial-level courts excluded. Cases that expressly rely on prior *Marks* applications are counted as *Marks* rule citations, as are cases that find no precedent under *Marks*; but opinions that are withdrawn or superseded are excluded. Washington, D.C., is counted as a state. Cases were coded by me and by the research assistants noted in the star note. Some coding decisions reflect judgments, so the data is more useful for its patterns than exact figures or rankings.

the state courts' increasing use of *Marks* foretells that the rule's long-term influence could lie primarily in state court decisionmaking.

Figure 2: State Appellate Court Citations to *Marks*



Interestingly, some state courts now use the *Marks* rule when construing their own decisions. In recent years, for example, state court rulings have been *Marks*'d in the courts of California, Connecticut, Maryland, Massachusetts, and New York.¹¹⁵ Other state appellate courts to use *Marks* on their own cases include those in Mississippi, Texas, and — for a time — Washington.¹¹⁶ Though still few in number, these citations are remarkable.¹¹⁷ The *Marks* rule does not purport to apply to state court decisions, and the Court generally lacks authority over interpretation of state court precedents. Partly due to the confusion attending the *Marks* rule, some state courts have come to question or

¹¹⁵ See *People v. Villalpando*, No. G045028, 2013 WL 2366207, at *6 (Cal. Ct. App. May 30, 2013); *Little v. Comm'r of Corr.*, 172 A.3d 325, 339 (Conn. App. Ct. 2017); *Guardado v. State*, 98 A.3d 415, 421 (Md. Ct. Spec. App. 2014); *Medina v. Hochberg*, 987 N.E.2d 1206, 1211 n.11 (Mass. 2013); *People v. Brown*, 126 A.D.3d 516, 517–18 (N.Y. App. Div. 2015), *rev'd*, 68 N.E.3d 45 (N.Y. 2016).

¹¹⁶ See *Morgan v. City of Ruleville*, 627 So.2d 275, 278 (Miss. 1993); *Ervin v. State*, 331 S.W.3d 49, 53 (Tex. App. 2010) (citing *Haynes v. State*, 273 S.W.3d 183, 186 (Tex. Crim. App. 2008)). After using the *Marks* rule on their own state court rulings, Washington courts eventually adopted a rule akin to the majority rule advanced in this Article. Compare *Davidson v. Hensen*, 954 P.2d 1327, 1335 (Wash. 1998) (relying on *Marks*), with *In re Francis*, 242 P.3d 866, 874 n.7 (Wash. 2010) (“When there is no majority opinion, the holding is the narrowest ground upon which a majority agreed.”).

¹¹⁷ Cf. *Levmore*, *supra* note 113, at 97 n.18 (“[I]t seems obvious that any court (state or federal) should apply *Marks* when construing a U.S. Supreme Court opinion; the less obvious point is that the same rule applies in the context of state supreme court decisions.”).

reject the *Marks* rule as applied to their own state court rulings.¹¹⁸ Still, the *Marks* rule's presence in state jurisprudence demonstrates the Court's ability to bring uniformity to state court decisionmaking, even when it lacks binding precedential power.

The distribution of *Marks* rule citations in state appellate courts is even more focused than in the federal courts of appeals. The *Marks* rule has appeared in over 300 state appellate opinions that are searchable in Westlaw; and the state appellate courts have applied the rule to about fifty Supreme Court decisions, as well as many state court decisions. Below, Table 2 lists the twenty fragmented decisions that the state appellate courts have most often *Marks*'d, including all fragmented decisions *Marks*'d in three or more state appellate opinions (whether majorities or separate writings). As with the federal courts, there is no significant relationship between the frequency with which a case is *Marks*'d in the state appellate courts and either the case's age or its total number of citations. As the Table indicates, the two Supreme Court decisions that are most often *Marks*'d in the state courts, *Seibert* and *Williams*, are responsible for almost a third of all state court citations to *Marks*. The rapid acceleration of state court *Marks* citations in the last decade is substantially due to those two rulings. The top seven cases that are most *Marks*'d in the state appellate courts represent nearly half of all such citations to the *Marks* rule.

Table 2: Decisions Most Often *Marks*'d in State Appellate Courts
(1977–2018)

| | Case Name | Citation | Date | Case Type | <i>Marks</i> 'ing Opinions | <i>Marks</i> 'ing States | Total State Court Cites |
|---|-------------------------------------|--------------|------|-----------|----------------------------|--------------------------|-------------------------|
| 1 | Missouri v. Seibert | 542 U.S. 600 | 2004 | P | 65 | 21 | 822 |
| 2 | Williams v. Illinois | 567 U.S. 50 | 2012 | P | 39 | 19 | 542 |
| 3 | J. McIntyre Mach., Ltd. v. Nicastro | 564 U.S. 873 | 2011 | P | 13 | 10 | 107 |
| 4 | Melendez-Diaz v. Massachusetts | 557 U.S. 305 | 2009 | M | 12 | 4 | 2242 |

¹¹⁸ See, e.g., *State v. Kikuta*, 253 P.3d 639, 658 n.14 (Haw. 2011) (finding the *Marks* rule "has been discredited" based on scholarship and *Nichols v. United States*, 511 U.S. 738 (1994)); *State v. Ruem*, 313 P.3d 1156, 1170 n.7 (Wash. 2013) (en banc) (Johnson, J., concurring in part, dissenting in part) ("I see no reason for this court to follow [the *Marks*] rule because of the significant differences between this court and our federal counterpart.").

| | | | | | | | |
|----|--|--------------|------|----|----|---|------|
| 5 | Baldasar v. Illinois | 446 U.S. 222 | 1980 | PC | 10 | 9 | 420 |
| 6 | Montana v. Egelhoff | 518 U.S. 37 | 1996 | P | 8 | 2 | 352 |
| 7 | Harmelin v. Michigan | 501 U.S. 957 | 1991 | PM | 7 | 6 | 2862 |
| 8 | McKune v. Lile | 536 U.S. 24 | 2002 | P | 7 | 5 | 258 |
| 9 | Barnes v. Glen Theatre, Inc. | 501 U.S. 560 | 1991 | P | 6 | 4 | 196 |
| 10 | Ford v. Wainwright | 477 U.S. 399 | 1986 | PM | 6 | 4 | 372 |
| 11 | Troxel v. Granville | 530 U.S. 57 | 2000 | P | 5 | 4 | 2898 |
| 12 | Salinas v. Texas | 570 U.S. 178 | 2013 | P | 4 | 4 | 122 |
| 13 | City of Los Angeles v. Alameda Books, Inc. | 535 U.S. 425 | 2002 | P | 4 | 4 | 66 |
| 14 | Chavez v. Martinez | 538 U.S. 760 | 2003 | PM | 4 | 1 | 154 |
| 15 | Ewing v. California | 538 U.S. 11 | 2003 | P | 3 | 3 | 1566 |
| 16 | E. Enters. v. Apfel | 524 U.S. 498 | 1998 | P | 3 | 3 | 97 |
| 17 | Planned Parenthood of Se. Pa. v. Casey | 505 U.S. 833 | 1992 | PM | 3 | 3 | 488 |
| 18 | Elrod v. Burns | 427 U.S. 347 | 1976 | P | 3 | 3 | 290 |
| 19 | Bullcoming v. New Mexico | 564 U.S. 647 | 2011 | PM | 3 | 2 | 786 |
| 20 | Baze v. Rees | 553 U.S. 35 | 2008 | P | 3 | 1 | 220 |

While many features of the state list resemble its federal counterpart, there are some salient differences. For one thing, two of the cases that have seen the largest numbers of *Marks* rule citations in the federal courts do not appear at all on the state court list. The reason is straightforward: the two Court cases in question, *Freeman* and *Santos*, both involved federal criminal law¹¹⁹ and so don't pertain to state court practice. Likewise, *Rapanos*, a major *Marks* case in the federal courts, involves an issue of federal jurisdiction¹²⁰ and so is absent from the state

¹¹⁹ See *supra* text accompanying note 10 (discussing *Freeman*); *United States v. Santos*, 553 U.S. 507, 509–10 (2008).

¹²⁰ *Rapanos v. United States*, 547 U.S. 715, 723–24 (2006).

courts. Replacing them at the top of the state court list are two fragmented decisions on criminal procedure issues that do frequently arise in state courts. Notably, *Seibert* was in third place on the federal circuit list and is also first on the state list.

Another interesting feature is that state courts have frequently *Marks*'d the Court's decision in *Melendez-Diaz v. Massachusetts*,¹²¹ even though that case involved a full majority opinion and so — on its face — was not a “fragmented” decision at all. The basic reason for applying *Marks* in *Melendez-Diaz* is that Justice Thomas wrote a concurrence that expressly “join[ed] the Court's opinion” but only because the case's facts satisfied a separate test that Justice Thomas alone subscribed to.¹²² The fact that state courts think that *Marks* is relevant to *Melendez-Diaz* suggests either that those courts do not regard Justice Thomas's concurrence as a true concurrence or that they view *Marks* as an application of the predictive model of precedent, such that the goal of lower court judges is to anticipate how the Justices would come out in a given case.¹²³ More generally, *Melendez-Diaz* exemplifies lower courts' willingness to view “fifth vote” concurrences as limitations on the scope of majority opinions.¹²⁴

Much like the federal circuits, the state appellate courts have reached varying levels of convergence when applying the *Marks* rule. As in the federal courts, there is broad agreement in the state courts that *Marks* counsels in favor of attributing precedential force to the concurrence in the judgment in *J. McIntyre Machinery, Ltd. v. Nicastro*, which seemingly left the law unchanged.¹²⁵ By contrast, there is some disagreement over which opinion the *Marks* rule favors in *McKune v. Lile*,¹²⁶ as well

¹²¹ 557 U.S. 305 (2009).

¹²² *Id.* at 330 (Thomas, J., concurring). Justice Thomas's opinion can thus be viewed as creating a “compromise majority.” See *infra* section III.B, pp. 2000–04.

¹²³ See, e.g., *People v. Davis*, 132 Cal. Rptr. 3d 472, 479 n.6 (Ct. App. 2011) (“While on its face [*Melendez-Diaz*] could be dubbed a ‘majority’ opinion, we refer to it as a plurality opinion because the language of Justice Thomas's concurrence makes clear that his assent to the opinion was not a blanket endorsement of its entire rationale.”).

¹²⁴ See generally Thomas B. Bennett, Barry Friedman, Andrew D. Martin & Susan Navarro Smelcer, *Divide & Concur: Separate Opinions & Legal Change*, 103 CORNELL L. REV. 817, 820 (2018) (discussing “pivotal concurrences,” which “undercut[] the majority's rule in the case”). Reliance on a “fifth vote” concurrence does not necessarily reflect implicit applications of *Marks*. Rather, “fifth vote” concurrences are often used as interpretive aids when gleaning the meaning — and limitations — of admittedly precedential majority opinions.

¹²⁵ See, e.g., *Book v. Doublestar Dongfeng Tyre Co.*, 860 N.W.2d 576, 592 (Iowa 2015); *State v. NV Sumatra Tobacco Trading Co.*, 403 S.W.3d 726, 756 (Tenn. 2013); *State v. LG Elecs., Inc.*, 375 P.3d 1035, 1042 (Wash. 2016); *State ex rel. Ford Motor Co. v. McGraw*, 788 S.E.2d 319, 340 (W. Va. 2016); see also *supra* note 111.

¹²⁶ 536 U.S. 24 (2002). Compare *Johnson v. Fabian*, 735 N.W.2d 295, 304 (Minn. 2007) (“We therefore conclude that the [m]embers who concurred in the judgment[] on the narrowest grounds’ were actually the plurality . . .” (alterations in original) (quoting *Marks v. United States*, 430 U.S.

as over what, if any, precedent was established in *Williams v. Illinois*.¹²⁷ Finally, *Seibert* offers a similar story in both the federal and state courts, with most but not all courts converging on the concurrence in the judgment.¹²⁸

* * *

The *Marks* rule offers a case study in precedential expansion. Though prompted by exceptional circumstances that could easily have spawned a confined ruling, *Marks* propounded a broad rule — indeed, the very same rule that *Marks*'s author, Justice Powell, had himself earlier supported as part of the *Gregg* plurality. Neither *Gregg* nor *Marks* offered any explanation or independent authority in support of the *Marks* rule, and the rule largely lay dormant for years. Gradually, however, interest in the *Marks* rule increased. And citations to the *Marks* rule accelerated in the early 2000s, fueled by the affirmative action litigation culminating in *Grutter*, as well as consequential fragmented decisions like *Rapanos* and *Seibert*. The *Marks* rule's intuitive appeal has even caused it to be integrated into litigation over the meaning of state court precedents. But despite its increasing popularity, the *Marks* rule is cited only in a small portion of cases addressing fragmented decisions. And, in many cases, the *Marks* rule itself generates intractable disagreement, such as in the wake of *Freeman*. A rule that is so evidently both important and uncertain warrants closer scrutiny.

II. THEORIZING MARKS

This Part argues that majority agreement among the Justices should be a necessary condition for the creation of Supreme Court precedent. And the *Marks* rule is, at best, an inefficient way of communicating that

188, 193 (1977)), and *Spencer v. State*, 334 S.W.3d 559, 567 (Mo. Ct. App. 2010) (“Although numerous federal appellate courts have held that Justice O’Connor’s concurring opinion in *McKune* states the narrowest ground of decision, we disagree, and conclude that the plurality’s analysis is controlling.” (footnote omitted)), with *State v. Iowa Dist. Court for Webster Cty.*, 801 N.W.2d 513, 522 (Iowa 2011) (“Justice O’Connor’s concurrence therefore controls here.”), and *Commonwealth v. Hunt*, 971 N.E.2d 768, 775 n.5 (Mass. 2012) (“Justice O’Connor’s concurrence constitutes the holding of the Court.”).

¹²⁷ 567 U.S. 50 (2012). Compare *State v. Deadwiller*, 834 N.W.2d 362, 373 (Wis. 2013) (applying both the plurality opinion and Justice Thomas’s concurrence (quoting *People v. Dungo*, 286 P.3d 442, 455 (Cal. 2012) (Chin, J., concurring))), with *Derr v. State*, 73 A.3d 254, 270 (Md. 2013) (“The common point of agreement between the plurality opinion and Justice Thomas’s concurring opinion is that statements must, at least, be formalized, or have ‘indicia of solemnity’ to be testimonial.”), and *State v. Michaels*, 95 A.3d 648, 666 (N.J. 2014) (finding “no narrow rule” under *Marks*), *Anderson v. State*, 317 P.3d 1108, 1120–21 (Wyo. 2014) (same), and *State v. Medina*, 306 P.3d 48, 63 (Ariz. 2013) (same).

¹²⁸ Compare, e.g., *Carter v. State*, 309 S.W.3d 31, 38 (Tex. Crim. App. 2010) (finding Justice Kennedy’s *Seibert* concurrence in the judgment controlling), with *United States v. Ray*, 803 F.3d 244, 272 (6th Cir. 2015) (finding no binding precedent and then adopting the plurality’s approach).

agreement. Instead of abiding by *Marks*, the Court should create a precedent only when most Justices agree on the same legal principle. Until the Court adopts this reform, lower courts should help usher the *Marks* rule offstage.

A. *The Majority Rule*

Marks took for granted the longstanding precept that precedent can arise when there is a “single rationale explaining the result” that “enjoys the assent of five Justices.”¹²⁹ That generally sufficient condition of precedent formation, which could be called “the majority rule,” has deep roots in judicial tradition,¹³⁰ as well as intuitive appeal.¹³¹ The *Marks* rule presents itself as supplementary to the majority rule, in that it expressly dictates whether precedent is formed when the majority rule is not satisfied.¹³² But there is no persuasive reason to entertain the *Marks* rule at all, as opposed to simply adhering to the majority rule in all cases. This section defends that claim by considering various goals underlying the law of precedent.¹³³

1. *Correctness.* — Precedent substantially reflects a desire to foster correct decisions over time. Yet that basic goal is in tension with *Marks*. Consider the following argument. Each Justice has the same claim to contribute to precedent formation, either because the Justices share comparable expertise and participate in the same deliberative process or because they all obtained the same authoritative office under the Constitution.¹³⁴ Thus, it would be irrational to ascribe precedential

¹²⁹ *Marks*, 430 U.S. at 193.

¹³⁰ AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 356–61 (2012) (suggesting that the majority rule for precedent formation is established by constitutional text and tradition); *supra* note 28 (collecting sources on the traditionally limited precedential implications of fragmented decisions). The judgments of an Anglo-American court traditionally flow from majority votes. That rule extends not just to cases, but also to internal court procedure. The few exceptions, like the “Rule of Four” to grant certiorari, see Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1069–71 (1988), are themselves generally subject to majority approval.

¹³¹ Commentators critical of the majority rule typically wonder why only “bare” majorities generally suffice. See Jeremy Waldron, *Five to Four: Why Do Bare Majorities Rule on Courts?*, 123 YALE L.J. 1692, 1692–1700 (2014). I do not here address whether or when a supermajority should be required for precedent formation.

¹³² See also *supra* text accompanying note 3 (quoting the rule).

¹³³ Throughout this Article, I assume the basic features of modern stare decisis, particularly that Court precedents can arise from the holding of a single case and thereby set binding, nationally uniform law. While the efficiency and uniformity benefits of modern stare decisis are apparent, a critic might argue for a return to Founding-era common law practice, which did not regard individual decisions as binding and so fostered a less hierarchical, perhaps humbler judiciary. See *infra* note 179 and accompanying text (describing weaker and more diffuse precedents at common law). Such a critic would a fortiori reject the *Marks* rule. See Hochschild, *supra* note 21.

¹³⁴ See U.S. CONST. art III, § 1; Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 845–49 (1994) (outlining a proficiency-based view).

weight to a principle that most of the Justices have deliberately declined to endorse. The fact that *some* of the Justices endorse a principle would necessarily be outweighed by the correlative fact that *more* Justices have refused to endorse it. That simple argument is at odds with the *Marks* rule, which ascribes precedential force to certain minority views.¹³⁵

A defender of the *Marks* rule might respond that the law of precedent should privilege certain types of votes, even when they are cast by only a minority of the Justices.¹³⁶ For example, scholars have debated the appeal of supermajority rules that aim to achieve various goals, such as advancing substantive principles of administrative deference.¹³⁷ And where a supermajority rule has bite, a minority gets its way. Supermajority rules normally pertain to discrete cases, but they could in principle apply as well to precedential rules. Yet the *Marks* rule is doubly disqualified from taking advantage of that line of reasoning: not only does the rule not constitute a heightened voting requirement, but it is also transsubstantive. So *Marks* does not systematically favor any substantive type of decision, such as deference to administrative agencies.

Still, the *Marks* rule's distinctive structure does lend itself to a different basis for minority empowerment. In some decisionmaking contexts, the relative orientation of different viewpoints can arguably support privileging some viewpoints over others. For example, a supporter of "trimming" might defend *Marks* as an accuracy-promoting decisionmaking heuristic: by inviting the Justices to express their views on the merits and then disqualifying extreme options, the *Marks* rule may preference "narrower" opinions that lie "in between" the relatively dubious extremes.¹³⁸ But the *Marks* rule, at least as currently understood, frequently privileges opinions without regard to whether they are moderate or "in between" the views of other Justices.¹³⁹ As we will see, *Marks* sometimes favors the most extreme or objectionable option available.¹⁴⁰ And even if that problem could be overcome, perhaps by

¹³⁵ By its terms, the *Marks* rule applies when the majority rule does not, namely, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices." *Marks v. United States*, 430 U.S. 188, 193 (1977).

¹³⁶ On supermajority requirements for overruling, see RANDY J. KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* 141–42 (2017). The Court has suggested that thin majorities might be less precedential. See *Payne v. Tennessee*, 501 U.S. 808, 828–29 (1991) (overruling cases "decided by the narrowest of margins").

¹³⁷ See Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 *YALE L.J.* 676, 679 (2007); cf. Adrian Vermeule, *Submajority Rules: Forcing Accountability upon Majorities*, 13 *J. POL. PHIL.* 74, 74 (2005) (discussing justifications for using minority rules "only for preliminary and procedural questions, and to set agendas").

¹³⁸ See Cass R. Sunstein, *Trimming*, 122 *HARV. L. REV.* 1049, 1058 (2009) (describing trimming as "giving careful attention to the opposing positions and attempting to steer between them"). Professor Cass Sunstein discusses precedent but not *Marks*.

¹³⁹ See *infra*, pp. 1976–79.

¹⁴⁰ See *infra*, pp. 1983–86.

refining the rule, the virtues of trimming would not necessarily suffice to justify the creation of precedent. After all, any effort to trim would conflict with the majority views that emanate from the Court's deliberative process. It is far from clear, for example, that an "in between" view supported by a single Justice has any special claim to correctness. If anything, a view that eight Justices have rejected would seem uniquely questionable — and so undeserving of precedential status.

2. *Efficiency*. — Besides promoting correct outcomes, the law of precedent aims to be efficient, in the sense of avoiding wasteful expenditures of resources. A defender of the *Marks* rule might accordingly cast it as an indirect means of facilitating the expression of majoritarian decisionmaking.¹⁴¹ On this view, *Marks* establishes a metarule or "precedent default" in favor of ascribing precedential force to opinions that, on their face, lack majority support.¹⁴² In effect, *Marks* allows the Justices to know that the "position taken by those Members who concurred in the judgments on the narrowest grounds" will be precedential.¹⁴³ Based on that knowledge, the Justices can join or draft opinions to achieve desired precedential outcomes — a process that has been called "bargaining around the narrowest-majority rule."¹⁴⁴ And after a fragmented decision issues, the *Marks* rule continues to operate as a precedent default by helping litigants and courts identify the precedential rule that most of the Justices implicitly expected to apply.¹⁴⁵

But is it plausible that most Justices implicitly endorse the "narrowest grounds" in a fragmented decision? As the next section will show, there are several different versions of the *Marks* rule in circulation, and even the Justices exhibit confusion about how the *Marks* rule works.¹⁴⁶

¹⁴¹ Some versions of the *Marks* rule purport to identify majority agreement. See *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc); Williams, *supra* note 22, at 802; *infra* section II.B, pp. 1976–93.

¹⁴² Professor Ryan Williams raises the possibility of viewing the *Marks* rule as a "default rule" but does not explore whether the rule is inefficient and therefore undesirable. Williams, *supra* note 22, at 849. Instead, Williams attempts to ascertain what default rule is most supported by existing legal materials. See *id.* at 849–52.

¹⁴³ *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)).

¹⁴⁴ Levmore, *supra* note 113, at 107.

¹⁴⁵ The *Marks* rule of course arose in a majoritarian judicial decision, and subsequent Court majorities have endorsed it. But if *Marks* is ultimately an internal rule of judicial administration — that is, if it works by establishing the intended meaning of judicial opinions — it might be revised or eliminated through means other than a case or controversy, somewhat like the "Rule of Four" for certiorari. Perhaps the Justices could adopt a Supreme Court rule on point, thereby establishing their desired mode of communicating their views.

¹⁴⁶ See *infra* sections II.B-C, pp. 1976–97; see also Marceau, *supra* note 21, at 193–95 (discussing Justice Scalia's oral argument remarks on the *Marks* rule's potential application to *Coker v. Georgia*, 433 U.S. 584 (1977) (citing Transcript of Oral Argument at 8–9, *Kennedy v. Louisiana*, 554

Consider for example the myriad contrasting views expressed during the litigation leading up to *Hughes v. United States*, including the Justices' disagreements during oral argument.¹⁴⁷ Given this basic indeterminacy, the Justices cannot confidently predict what, if anything, later courts will view as the narrowest ground; and it is hard to say that fragmented decisions implicitly reflect any particular majority view. Only a clarified *Marks* rule could allow for predictable application and a plausible inference of majority support.¹⁴⁸

But even if it were clarified, the *Marks* rule is still bound to be less efficient than a numerical voting rule, such as the majority rule. To adapt the language of law and economics, the law of precedent should place burdens on the “cheapest precedent creator” — that is, the decisionmaker who can most clearly and inexpensively form precedent that reflects the views of most Justices.¹⁴⁹ The legal system often benefits by delegating interpretive work to later courts, such as by fostering percolation.¹⁵⁰ But when it comes to identifying majority agreement on the Court, the most efficient actor — the cheapest precedent creator — is the Court itself, at the time of its decision. The Justices who issue a fragmented ruling are familiar with the facts, issues, and opinions in their fragmented decisions. The Justices are also uniquely knowledgeable about the scope of their own agreements. Moreover, the majority rule affords the Justices an easy, administrable means of anticipating the precedential consequences of their votes. And when the Justices identify areas of majority agreement at the time that they issue a fragmented decision, they save litigants and courts from both error and unnecessary effort.

By comparison, any version of the “narrowest grounds” test is necessarily both costlier to implement and more likely to generate precedents at odds with most Justices' views of the law. Later courts have to expend considerable energy just to understand the various opinions that comprise a fragmented ruling. And even then, later courts are not as well-positioned as the Justices to ascertain which opinions establish the “narrowest grounds,” however that phrase is defined. As we will see below, various approaches to *Marks* compel lower courts to decide how frequently different rules would find application, or whether

U.S. 407 (2008) (No. 07-343), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2007/07-343.pdf [<https://perma.cc/MFA8-GC3H>]).

¹⁴⁷ Take the differing views of Chief Justice Roberts and Justice Ginsburg. See *Hughes Tr.*, *supra* note 18, at 9–12.

¹⁴⁸ As we will see, clarifying *Marks* actually exacerbates other problems, such as by encouraging undesirable strategic behavior. See *infra* notes 161–163 and accompanying text.

¹⁴⁹ See, e.g., GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 250 (1970) (arguing for liability rules that burden the “cheapest cost avoider”).

¹⁵⁰ See, e.g., *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) (discussing “the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals”); *McCray v. New York*, 461 U.S. 961, 961–63 (1983) (Stevens, J., respecting the denial of the petitions for writs of certiorari) (discussing the value of lower court percolation).

implicit majority agreement is discernible among fragmented rulings. By forcing later courts to adjudicate those issues, *Marks* creates a new and significant interpretive burden where none is required.

3. *Settlement.* — Precedent is also concerned with settlement, or the value of having reliable, uniform legal rules. Given the Justices' general ability to bargain around precedent defaults, including the relatively efficient majority rule, any failure to settle on a single principle with majority support would offer strong evidence that there is no urgent need for precedent formation. The Justices are well-positioned to assess the value of compromise in any given case, since they monitor the lower courts via the cert pool and have the benefit of briefing from interested parties, including the United States and other amici curiae. So if most Justices cannot agree or compromise on a single rule of decision, then there is likely no need to establish such a principle. If anything, the most plausible inference is that, in the view of most Justices, rushing to make a nationally uniform precedent would be harmful.

On reflection, the Justices often have good reasons to forgo creating new precedent under *Marks*. First, delay allows for additional percolation on the merits, as well as time for new information to come to light, thereby increasing the chances that the Court can later form a correct majority opinion. Second, Justices might want lower courts to remain free to reach principled, majoritarian decisions in future cases, rather than having to struggle to identify a minority view among the Justices that might well be objectionable. Third, returning the issue to the lower courts would have the benefit of allowing a measure of regional variation and local tailoring, promoting federalism values.¹⁵¹ Finally, if any unforeseen problems arose due to the Court's failure to generate national precedent, the Court itself would remain unencumbered by precedent and so would be free to respond as appropriate in a future ruling.

One might worry that Justices would sometimes refuse to compromise on what they perceive to be correct positions, even when compromise would be beneficial. For example, fragmented decisions can occur when negotiation costs are prohibitive or when the Justices' legal preferences are irreconcilable.¹⁵² If that sort of intransigence were sufficiently likely, then there would be at least some reason to consider adopting a rule (even if not the *Marks* rule) that created precedent without majority agreement.¹⁵³ In fact, however, the Justices routinely

¹⁵¹ See Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1594–96 (2008).

¹⁵² In addition, certain fairness or other ethical concerns might bar Justices from voting in ways that would be necessary to forge majority agreement. See *infra* section III.B, pp. 300–3304.

¹⁵³ Even if maximal settlement were always essential, the *Marks* rule would still be unattractive due to its inefficiency. For example, why not simply treat the concurring opinion with the most votes as binding or, in the event of a tie, the concurrence joined by the most senior Justice? Unlike the *Marks* rule, that test would be perfectly administrable and yield precedent in all cases.

forge compromises, notwithstanding their own well-known first preferences. Even formalists like Justices Black, Scalia, and Thomas have openly joined or authored compromise opinions, despite having to set aside or qualify their own views.¹⁵⁴

By contrast, the *Marks* rule responds to the Court's failure to coalesce around a majority rationale by elevating a minority or outlier view to precedential status. That choice could be defended on the ground that uniform precedent is always desirable, even when it reflects outlier views among the Justices. But, again, more precedent is not necessarily better. At the Court, precedent formation is a high-stakes activity; and when confronting a challenging legal issue, it is often better for the Court to err on the side of not deciding.¹⁵⁵ Critics who wish that the Court more often reached binding decisions do not often account for the risk that more decisions could mean more error. Nor do these critics account for the benefits of leaving the lower courts free to ponder the merits, after learning from the Justices' conflicting opinions.¹⁵⁶

To be clear, the point here is not that legal correctness is always more important than settlement.¹⁵⁷ Rather, the point is that the Justices themselves are generally in the best position to address the inevitable tradeoff between correctness and settlement, as well as tradeoffs among other values, such as coherence and fairness.¹⁵⁸ The majority rule facilitates the Justices' efforts to weigh those tradeoffs on a case-by-case basis, rather than categorically assuming that the tradeoff always favors precedent formation. And if there were ever a truly urgent need for precedent formation, the Justices would likely overcome any negotiation costs or adjust their preferences as necessary to reach agreement.

4. *Incentives.* — Finally, the law of precedent aims to create desirable incentives for judicial decisionmakers. Again, the majority

¹⁵⁴ See *infra* note 294; *infra*, pp. 2001–02.

¹⁵⁵ And the Court often seems to adhere to that maxim, such as by persistently declining to grant certiorari on difficult issues, dismissing writs of certiorari as improvidently granted, and issuing highly fact-specific rulings that are designed to have little if any future application.

¹⁵⁶ See *supra* p. 150 (discussing percolation).

¹⁵⁷ See, e.g., *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (“[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right” (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting))).

¹⁵⁸ During the *Hughes* oral argument, Justice Kagan suggested that a narrow reading of *Marks* would generate “chaos,” *Hughes Tr.*, *supra* note 18, at 21, in that the Court would be “giving no guidance,” *id.* at 20, leaving courts “out there on their own and doing their own thing and splitting with each other,” *id.* at 20–21. But the Court frequently allows circuit disagreement to persist, see, e.g., Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1149 (2012) (showing many abiding circuit splits on Fourth Amendment issues alone), and often has good reason to do so, including to foster percolation. At any rate, the majority rule allows the Justices to strike compromises to avoid harmful disuniformity whenever they see fit. Again, the fact that most Justices choose not to forge a compromise suggests that, in the relevant case, less precedent is preferable to more.

rule fares well, as it offers an attractive way to encourage the Justices to form beneficial precedents through compromise.

Let us assume that each Justice is substantially motivated by a desire to craft precedents that maximize correct outcomes in future cases.¹⁵⁹ The prevalence of correctly decided future cases would then be a function of two variables that are at least partially within the Justice's control: first, the later court's degree of *obedience* to the precedent; and, second, the *similarity* between the precedent and the Justice's own views of the law. Each Justice's ideal outcome would thus be to generate a majority opinion that precisely corresponded with her own views, thereby maximizing the odds that later rulings would reflect her views. When that outcome is unavailable, the Justice would have an incentive to trade off similarity in favor of obedience. In other words, each Justice would have reason to join a compromise majority that approximates her own views. Of course, Justices care about other things besides maximizing correct outcomes in discrete cases, such as the overall coherence of the law and their own reputations. As a result, there comes a point when each Justice would rather establish no precedent than accept a strained or unprincipled compromise. The majority rule allows and encourages the Justices to consider these competing goals and to form compromises where appropriate.¹⁶⁰

By contrast, the *Marks* rule alters the Justices' incentives by creating a new option for a Justice who seeks to maximize what she regards as correct outcomes in later cases. Rather than doing the hard work of forging a majority opinion, a Justice who hopes to establish precedent could resist overtures to compromise and instead attempt to write the "narrowest" opinion in the case. If successful, the Justice would maximize both obedience and similarity — essentially, having her cake and eating it too — even though most Justices disagree with her.¹⁶¹ Of course, the Justice would still have reason to join majorities, including

¹⁵⁹ The Justices often make this goal explicit. See *infra* notes 303 & 314 and accompanying text. One might argue that Justices should write opinions exclusively to explain their own views of the law. But the practice has always been to the contrary, and for good reason: it would be irresponsible for judges to fail to attend to the precedential consequences of their actions. See Paul J. Watford et al., *Crafting Precedent*, 131 HARV. L. REV. 543, 575–76 (2017) (book review).

¹⁶⁰ See generally Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2317–19, 2319 n.62 (1999).

¹⁶¹ See Berkolow, *Much Ado About Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-Percolation After Rapanos*, 15 VA. J. SOC. POL'Y & L. 299, 352 (2008) ("[P]ositive political theoretical conceptions of judicial strategy suggest that the *Marks* doctrine should incentivize separate opinions."); Frank B. Cross, *The Justices of Strategy*, 48 DUKE L.J. 511, 549 (1998) (book review) (raising the possibility that, in light of the *Marks* rule and the predictive model, "a concurring fifth Justice has no reason to compromise his or her position, as his or her lone concurrence would serve to functionally define the law").

to avoid work and preserve collegiality.¹⁶² But the *Marks* rule's marginal effect would be to discourage potential occupiers of "narrowest" grounds from acceding to majority opinions.¹⁶³

Take *Missouri v. Seibert*, where Justice Kennedy wrote the critical fifth-vote concurrence in the judgment.¹⁶⁴ After emphasizing the need for a clear rule, Justice Kennedy concluded that the plurality's "test cuts too broadly" and that he "would apply a narrower test."¹⁶⁵ So, without citing *Marks*, Justice Kennedy appears to have pitched his opinion as the "narrowest ground." And dozens — though not all — lower courts have followed his lead, with many quoting his opinion's self-description as "narrower" than the plurality.¹⁶⁶ In the absence of the *Marks* rule, Justice Kennedy might have been prepared to join a compromise majority, thereby providing the legal clarity he desired. And if no majority had formed, lower courts would at least have been free to adopt a position that differed from Justice Kennedy's solitary views.

Efforts to seize the narrowest ground are especially likely to prevail when other Justices are inhibited from uniting in a compromise majority. Imagine that four Justices view capital punishment as categorically unconstitutional, four view it as categorically constitutional, and one believes that capital punishment is constitutional only for certain groups, such as communists.¹⁶⁷ In that situation, eight Justices might strongly believe that creating no precedent would be better than treating the solitary Justice's view as binding. But the *Marks* rule might still treat the solo Justice's view as precedential. Moreover, the Justices who have already staked out categorical positions might be reluctant to forge a compromise majority that would repudiate their deeply held and expressed views, even if doing so would prevent the "narrowest" opinion from becoming precedential.¹⁶⁸ So, again, an outlier view might prevail.

¹⁶² See Cross, *supra* note 161, at 549–50 (noting also the possible "vanity" appeal of forming part of a majority).

¹⁶³ Median Justices may be more likely to claim the middle ground, rather than form majorities. Notably, Justice Kennedy played such a role in some frequently *Marks*'d cases, including *Rapanos v. United States*, 547 U.S. 715, 759 (2006) (Kennedy, J., concurring in the judgment), *Missouri v. Seibert*, 542 U.S. 600, 618 (2004) (Kennedy, J., concurring in the judgment), and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 444 (2002) (Kennedy, J., concurring in the judgment).

¹⁶⁴ 542 U.S. at 618 (Kennedy, J., concurring in the judgment).

¹⁶⁵ *Id.* at 622.

¹⁶⁶ See *United States v. Wooten*, 602 F. App'x 267, 271 (6th Cir. 2015) (noting that "[s]even . . . [circuits] have concluded that Kennedy's concurrence is the controlling opinion"). Some courts have found no *Marks* precedent in *Seibert* or required application of both the plurality's test and Justice Kennedy's. See *supra* p. 1960.

¹⁶⁷ Variations on this hypothetical are discussed at greater length below in section II.B.

¹⁶⁸ In the *Hughes* oral argument, the United States tried to address problems with the all opinions approach by suggesting that, if a "middle ground" opinion would be objectionable, then the other Justices would settle on one or another opposing extreme. See *Hughes Tr.*, *supra* note 18, at 31–32. But that expectation would impose high negotiation costs and is often unrealistic. If Justices prefer

A defender of the *Marks* rule might respond in two ways. First, perhaps the error and inefficiency attending the narrowest-grounds test is actually desirable. If the Justices are aware of the quagmire that the *Marks* rule has become, they might endeavor to spare litigants and later courts by working especially hard to form majorities. Thus, the *Marks* rule might be so bad as to be good, given its effects on the Justices' incentives. Yet not every incentive to compromise is justifiable, even if it is effective. Here, the majority rule already creates an incentive for compromise by conditioning the Court's power of precedent formation on the expression of majority agreement. And it would be unfair to motivate the Justices by threatening to inflict confusing, inefficient legal rules on later courts and litigants. The more plausible implication of the *Marks* rule's indeterminacy is quite different: because the rule is presently so ambiguous, Justices are less likely to rely on it. But if the Court were to clarify the rule, as many commentators have proposed,¹⁶⁹ then the temptation to jockey for the "narrowest grounds" would greatly increase.¹⁷⁰

Second, a defender of the *Marks* rule might object that undesirable incentives would flow from denying precedential effect to fragmented decisions. Linking judgment and precedent forces the Court to see beyond the parties before it and to consider the lasting consequences of its rulings.¹⁷¹ Without that forward-looking constraint, the Court could conceivably be more tempted to issue case-specific rulings in favor of preferred parties. Yet the *Marks* rule's disciplining effect is both too small and too indiscriminate. In terms of its magnitude, the *Marks* rule still allows the Justices to rule on one-off theories or emphasize factual nuances that are unlikely to recur. And other aspects of legal practice, such as the binding force of past precedent and the general judicial duty of explanation, independently discipline judicial decisionmaking. These alternative means of imposing discipline also have the advantage of distinguishing between wise and manipulative decisions to avoid creating

that no precedent be established, they should be able to act on that wish rather than having to join (and make precedential) views diametrically contrary to their own.

¹⁶⁹ See, e.g., Williams, *supra* note 22, at 838–39.

¹⁷⁰ A recent study suggests that the *Marks* rule has not actually changed the Justices' behavior. See James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 GEO. L.J. 515, 548 (2011) ("The data do not support our hypothesis that plurality decisions are more likely to result after *Marks*, as there is virtually no difference in the rate of plurality decisions before and after *Marks*."). One possible explanation is that the *Marks* rule is too opaque and unpredictable for Justices to rely on it with any frequency. See Berkolow, *supra* note 161, at 331–32. And if that explanation is indeed true, then the risk of gaming would increase if any of the many proposals to clarify the *Marks* rule carried the day. In other words, the abiding uncertainty about how to apply *Marks* thus has the salutary effect of discouraging Justices from relying on it.

¹⁷¹ See Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 589 (1987) ("[T]he conscientious decisionmaker must recognize that future conscientious decisionmakers will treat her decision as precedent, a realization that will constrain the range of possible decisions about the case at hand.").

precedent. When the Justices seem to issue case-specific rulings for cynical reasons, dissenters and others can and often do cry foul.¹⁷² But when a cautious, case-specific approach seems wise, Justices and commentators would be more likely to celebrate a narrow ruling.

5. *Results*. — Finally, someone uninterested in defending *Marks* might object that at least the *results* of fragmented decisions must be treated as precedential, even if the Justices do not agree on a rationale or rule of decision and no precedent forms under the *Marks* rule.¹⁷³ That view, sometimes called “result-based stare decisis,”¹⁷⁴ in effect represents a precedent default in favor of viewing the facts before the Court as legally requiring whatever judgment the Court issued.¹⁷⁵ A fragmented ruling might then apply only in cases whose facts differed in manifestly arbitrary ways — thereby leaving the ruling with limited future effect.¹⁷⁶ Adopting that approach in lieu of the *Marks* rule would be a major improvement, since it would minimize the precedential effects of fragmented decisions.¹⁷⁷

Yet the logic of the majority rule ultimately cuts against even results-based stare decisis, including when it applies to unexplained summary rulings. Insofar as a later court attempted to generalize beyond the fragmented ruling’s precise factual background — as would be necessary to apply the ruling in a new case — the later court would have to construct a rule that could very well have been rejected by most or all Justices. When a later court extracts a hypernarrow rule from a fragmented decision, after all, each and every Justice would presumably prefer her

¹⁷² See, e.g., *Bush v. Gore*, 531 U.S. 98, 157–58 (2000) (Breyer, J., dissenting).

¹⁷³ The Court currently espouses result-based stare decisis for its unexplained summary rulings. See *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (summary rulings “prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions”); see also, e.g., *Bluman v. FEC*, 565 U.S. 1104 (2012) (“Affirmed on appeal from D. C. D. C.”). Before the 1970s, summary rulings were often thought to be nonprecedential; commentators today often lament their obscure meaning. See STEPHEN M. SHAPIRO ET AL., *SUPREME COURT PRACTICE* 306–08 (10th ed. 2013); Joshua A. Douglas & Michael E. Solimine, *Precedent, Three-Judge District Courts, and the Law of Democracy*, 107 GEO. L.J. 413, 431–36 (2019). Denying stare decisis to unexplained results would encourage the Justices — again, the cheapest precedent creators — to give reasons and set clearer case law.

¹⁷⁴ See, e.g., Adam N. Steinman, *To Say What the Law Is: Rules, Results, and the Dangers of Inferential Stare Decisis*, 99 VA. L. REV. 1737, 1747–48 (2013) (collecting different names and versions of this basic idea).

¹⁷⁵ As the main text indicates, a binding result can be viewed as a rule, or a set of potential rules. Cf. Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 34–45 (1989) (critiquing the result model, including for collapsing into a rule model).

¹⁷⁶ Even when the Court issues a binding majority opinion, later courts (including lower courts) frequently can and do find ways to separate new facts from old and thereby distinguish or narrow disfavored rules. See JOSEPH RAZ, *THE AUTHORITY OF LAW* 186 (1979); Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1885–86 (2014).

¹⁷⁷ Unlike the shared agreement approach, result-based stare decisis would not require later courts to choose among the concurring opinions’ rules. See *infra* section II.B.3, pp. 1984–88.

own broader, more principled alternative.¹⁷⁸ Common law courts avoided these problems by generally withholding precedential force from isolated decisions,¹⁷⁹ as well as decisions without a common rationale.¹⁸⁰ Courts today should likewise view even the isolated results in fragmented decisions as nonbinding. In a fragmented decision featuring a four-Justice dissent, for example, the dissenters' rule would have at least as much support as any other Justice's rule. Courts should treat that kind of ruling as a temporary decision not to fashion precedent, thereby allowing lower courts to test out the dissent's relatively popular position. Doing so would encourage desirable compromises on a clear rule of decision and facilitate lower court experimentation.

* * *

In sum, there is no good reason to postpone the hard work of figuring out what the Justices have decided until later litigation, when the Justices themselves could more accurately and easily do that work at the time they issue their decision. And eliminating the possibility of seizing the "narrowest grounds" would have the happy effect of encouraging the Justices to form majority opinions, creating clear precedent.

B. Versions of Marks

Just what is "that position taken by those Members who concurred in the judgments on the narrowest grounds"?¹⁸¹ *Marks*'s defenders have

¹⁷⁸ See *infra* text accompanying note 206 (exploring situations where half a loaf is worse than no loaf at all).

¹⁷⁹ See Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1225–26 (2007); H. Jefferson Powell, *Enslaved to Judicial Supremacy?*, 106 HARV. L. REV. 1197, 1205–06 (1993) (book review) ("Legal principles were considered authoritative not because a particular institution had announced them but because they had received the approval of the community over time, an approval evidenced by repeated adherence to them in individual decisions." *Id.* at 1206.); see also DUXBURY, *supra* note 28, at 17–18 ("By the late eighteenth century, there certainly existed among the English judiciary a practice of following precedents, but the fact that there was as yet no clear and unchallengeable court hierarchy made it difficult and often impossible to say that one decision was binding on another because of the source from which it emanated."). Perhaps the Constitution modified the common law rule by creating "one supreme Court" in contrast with federal "inferior Courts." See U.S. CONST. art. III, § 1. But scholars debate whether these terms were originally understood to generate any hierarchical relationship at all, much less whether they required a change in the common law rule of precedent. See Caminker, *supra* note 134, at 828–31 (discussing this literature); see also John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 521 (2000) ("It also is unlikely that there was widespread agreement as to norms of vertical precedent when the Constitution was adopted, because judicial structures were very much in flux."). More likely, *stare decisis* represents a liquidation of Article III. Cf. William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 36–42 (2019).

¹⁸⁰ See *supra* notes 28 & 179.

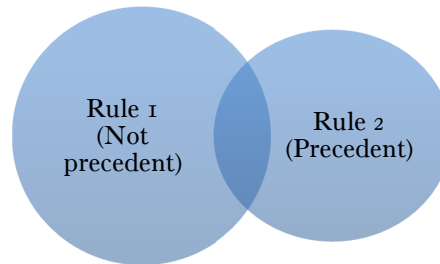
¹⁸¹ *Marks v. United States*, 430 U.S. 188, 193 (1977) (citation omitted). The Court's original expression of the rule suggested that the concurring opinion with the most limited effect should control, even if it were a "sixth vote" opinion and so was not necessary to generate a majority on

proposed four principal answers, and each suggests a possible way of defending the rule.

I. Median Opinion. — The median opinion approach is the idea that the binding precedent in a fragmented decision is the concurring opinion that represents the views of the median Justice.¹⁸² So if three Justices concurring in the judgment vote to invalidate on Condition *X* and two Justices concurring in the judgment vote to invalidate on Condition *Y*, with the rest dissenting, then *Marks* directs lower courts to inquire which of the two conditions has wider application. If Condition *X* is more often satisfied, then courts may conclude that the opinion adopting Condition *Y* is “narrower” than the other.

Below, Figure 3 illustrates this basic interrelationship. Two rules apply to fact patterns represented by their respective shapes. Rule 1 might be proposed by a four-Justice plurality and Rule 2 by a two-Justice concurrence in the judgment (with other Justices dissenting). The overlapping zone represents fact patterns where the two opinions converge on the result. Because Rule 1 applies in a wider range of cases, most courts would view Rule 2 as the median opinion.

Figure 3: Median Opinion Approach



The median opinion approach’s threshold vulnerability is its reliance on an unspecified conception of precedential narrowness.¹⁸³ The need to ascertain narrowness generates epistemic difficulties, as litigants and courts may not know how often competing legal rules will find practical application. And even if the relevant tests’ frequency of application were clear, it would be unclear whether mere frequency should be the

the judgment. That view could be defended on grounds of promoting minimalism, but it plainly contravenes judicial majoritarianism and so lacks defenders.

¹⁸² See MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 124–39 (2000); Williams, *supra* note 22, at 813–17 (calling this the “fifth vote” approach); see also, e.g., *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460, 465 (7th Cir. 2009) (“Because the other Justices divided 4 to 4, and Justice Kennedy was in the middle, his views establish the holding.”).

¹⁸³ The evident difficulty of finding a principled way to identify the “narrowest” opinion is sometimes taken as support for the logical subset approach, discussed below. See *infra* section II.B.2, pp. 1980–84. In other words, one opinion might be “narrower” than another at least (and perhaps only) when it would yield a certain result in every situation where the other opinion would as well.

sole measure of a legal rule's breadth, since a rule's practical effects are often multivalent. For example, a plurality's rule might find a rights violation in capital cases, whereas a concurrence in the judgment might find a violation in misdemeanor cases. In that situation, the concurrence in the judgment would find more frequent application, but in lower-stakes cases. Which opinion is "narrower"? The answer to that question seems to rest on an inherently disputable value judgment, rather than a feature inherent in logic or the nature of precedent. Similarly, the Sixth Circuit has recently divided as to which opinion is narrowest when a fractured Court found no constitutional violation and so upheld a law: Is the "narrowest" opinion the one that would find the fewest constitutional violations, or the one that would uphold the fewest laws?¹⁸⁴

More fundamentally, the median opinion approach paradoxically ascribes precedential force to minority opinions that all other Justices have declined to join. In fact, the median opinion approach often supports rules that most Justices actively oppose.¹⁸⁵ As we have seen, when most Justices undertake an appropriate deliberative process and then reject a legal rule, there is good reason to view the rule with caution or skepticism. And that is just what happens in most fragmented decisions: the Justices' expertise points in multiple contradictory directions, each represented in a different opinion. In nonetheless seizing on a minority view, the median opinion approach seems designed to increase the chances that erroneous legal views become law. *Freeman v. United States*¹⁸⁶ nicely illustrates this problem, as the median opinion approach would give precedential force to Justice Sotomayor's solo concurrence in the judgment, even though all eight other Justices wrote or joined opinions rejecting her approach.¹⁸⁷

¹⁸⁴ See *Bormuth v. County of Jackson*, 849 F.3d 266, 280 (6th Cir. 2017) ("Although Justice Thomas's conception of coercion [in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014),] is more restrictive, Justice Kennedy's conception of coercion 'offers the least change to the law.'" (citation omitted)), *vacated and reh'g en banc granted*, 870 F.3d 494 (6th Cir. 2017) (en banc) (reserving whether Justice Thomas's or Justice Kennedy's opinion controls under *Marks*). One way to view this dispute is to say that judges are unsure whether to assess narrowness with reference to the Court's judgment or with reference to practical consequences — an issue that also arises under the logical subset approach discussed in the next section. See *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 694 (3d Cir. 1991) (espousing a judgment-relative approach), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992); see also Asher Steinberg, *A Sixth Circuit-Themed Primer on the Marks Doctrine, and an Endorsement of a Proposal to Overhaul Marks*, NARROWEST GROUNDS (July 13, 2017), <http://narrowestgrounds.blogspot.com/2017/06/a-sixth-circuit-themed-primer-on-marks.html> [https://perma.cc/5QZP-QLPS] (also espousing a judgment-relative approach).

¹⁸⁵ See, e.g., *United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006); *King v. Palmer*, 950 F.2d 771, 782 (D.C. Cir. 1991) (en banc) ("When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be.").

¹⁸⁶ 564 U.S. 522 (2011).

¹⁸⁷ See *supra* notes 9–12 and accompanying text.

In addition to supporting precedential *rules* that are opposed by most Justices, the median opinion approach also supports case *outcomes* that most Justices oppose. In general, the median opinion would be outvoted whenever at least five Justices in nonmedian opinions would converge on the same outcome.¹⁸⁸ Take *Rapanos v. United States*.¹⁸⁹ To simplify, a four-Justice plurality adopted a rule of decision that would find federal regulatory jurisdiction in all cases with Conditions *A* or *B*; Justice Kennedy's solo concurrence in the judgment would have found jurisdiction in cases involving Conditions *B* or *C*; and the four-Justice dissent would have found jurisdiction in any case involving Conditions *A*, *B*, *C*, or *D*.¹⁹⁰ We can schematize *Rapanos* as an "*AB / BC // ABCD*" split, where the "*/*" signifies a division among the concurring Justices and a "*//*" signifies the break between concurring and dissenting Justices. If Condition *A* is more rarely present than Condition *C*, then the *AB* opinion might be the narrowest concurring opinion and binding under the median opinion approach. But the *AB* opinion would still be outvoted in cases with Condition *C*: assuming no relevant changes in the Court's composition and that all Justices vote consistently with their *Rapanos* opinions, the *BC* opinion and the *ABCD* dissenters would create a majority for jurisdiction.

The most sophisticated defender of something like the median opinion approach is Professor Maxwell Stearns.¹⁹¹ Applying social choice theory, Stearns views fragmented decisions as expressions of multitiered voting preferences among the Justices and so seeks the opinion that would prevail over all other opinions in a series of pairwise comparisons.¹⁹² When such an opinion exists, it is a "Condorcet winner" and, in Stearns's view, should be precedential under *Marks*.¹⁹³ But there are three problems with this approach. First, Stearns infers each Justice's preferred ranking of the relevant opinions when those preferences go unstated. That undertaking is worrisomely speculative, as well as inefficient. Because every Court decision involves myriad legal and pragmatic factors, there is no reliable way to infer various Justices' unstated preference rankings.¹⁹⁴ And why should later courts have to undertake

¹⁸⁸ The median opinion approach thus defies the "prediction model" of precedent, which dictates that lower courts should aim to decide cases in the way that they expect higher courts to rule. See *infra* p. 1991.

¹⁸⁹ 547 U.S. 715 (2006).

¹⁹⁰ *Id.* at 739, 742 (plurality opinion); *id.* at 759, 779–80 (Kennedy, J., concurring in the judgment). The dissent would find jurisdiction when either the plurality or Justice Kennedy would find jurisdiction, as well as in other cases. See *id.* at 787, 810 (Stevens, J., dissenting).

¹⁹¹ See STEARNS, *supra* note 182; Stearns, *supra* note 89.

¹⁹² See STEARNS, *supra* note 182, at 133–39.

¹⁹³ See *id.*; Stearns, *supra* note 89, at 328–29.

¹⁹⁴ Stearns uses *Marks*'s treatment of *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), as an example; but to infer "the Court's implicit consensus position," his analysis "assumes" a "unidimensional issue spectrum." STEARNS, *supra* note 182, at 127–28. Because the argument's

the daunting exercise of inferring preference rankings, when the Justices themselves could more efficiently address the point? Second, Stearns appears to assume that the published opinions are the total number of legal options available to the Justices, as though the opinions made up a finite slate of candidates for an office that must be filled. But there could be other relevant options, apart from the ones espoused in published opinions, and they would be left out of the search for a Condorcet winner. Finally, there is no need for every Court decision to generate precedent, so the identification of a Condorcet winner — even if accurate — does not justify treating the winner as precedential.¹⁹⁵ It is entirely possible that all Justices would rate the same view “second-best” but nonetheless view that option as harmful or legally wrong — and so prefer to create no precedent at all. In general, the fact that the Justices would have chosen not to forge a compromise majority suggests reluctance about creating any nationally binding precedent.

In sum, the median opinion approach suffers from several difficulties: it demands a fraught definition of narrowness, it tends to privilege outlier legal views, and it fails to predict the outcomes of future cases at the Court. The other versions of the *Marks* rule can be viewed as efforts to avert some or all of these problems.

2. *Logical Subset*. — Some courts construe the *Marks* rule to apply only when one opinion concurring in the judgment necessarily approves all the results reached under another concurrence in the judgment.¹⁹⁶ This version of *Marks* is often called the “logical subset” approach.¹⁹⁷ The use of the word “logical” is not merely rhetorical, for the key claim of the logical subset approach is that, in the absence of express or even conscious agreement on the law — indeed, even in the face of express

assumption is unproven — and likely incorrect — so too is its conclusion. See *infra* pp. 1983–84 (discussing the difficulties of drawing inferences about various Justices’ views in *Memoirs*).

¹⁹⁵ Williams, *supra* note 22, at 850–52; Cacace, *supra* note 113, at 127–28 (“[D]efending the *Marks* doctrine as a Condorcet-producing rule does justify the ‘winners’ that *Marks* selects, but does not justify the act of selecting a ‘winner’ in the first place.”). Stearns recognizes that not all fragmented decisions should create precedent, even under his approach. See Stearns, *supra* note 89, at 337–38 (discussing *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662 (1981)).

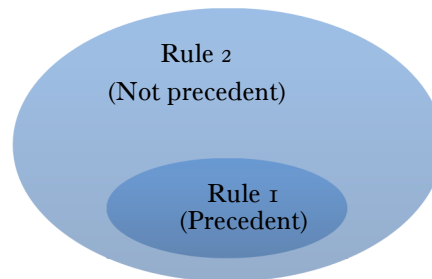
¹⁹⁶ See *United States v. Davis*, 825 F.3d 1014, 1024 (9th Cir. 2016) (en banc); *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc); see also *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) (following *King*); *Rappa v. New Castle County*, 18 F.3d 1043, 1057–58 (3d Cir. 1994) (similar). *Davis* reserved whether dissenting opinions can contribute to logical subsets. *Davis*, 825 F.3d at 1024–25. But see *id.* at 1029 (Christen, J., concurring) (denying that dissents can do so); *King*, 950 F.2d at 783 (same).

¹⁹⁷ “*Marks* is workable — one opinion can be meaningfully regarded as ‘narrower’ than another — only when one opinion is a logical subset of other, broader opinions.” *King*, 950 F.2d at 781; see also Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CALIF. L. REV. 1, 46 (1993) (discussing cases where “rationales for the majority outcome are nested, fitting within each other like Russian dolls”).

disagreement — some “implicit consensus” may be logically necessary.¹⁹⁸ Yet proponents of the logical subset approach generally focus in the first instance on whether the various opinions yield convergent outcomes, rather than searching for a legal principle that is logically entailed by the opinions of most Justices.¹⁹⁹ This threshold focus on convergent outcomes is presumably necessary in order to explain how the *Marks* rule could find a logical subset in any realistic set of cases, including in *Marks* itself.²⁰⁰

Figure 4 illustrates the logical subset approach. The less widely applicable rule, here Rule 1, exclusively applies in cases where Rule 2 also applies, yielding outcome convergence. Rule 1 would therefore qualify as a logical subset of Rule 2.

Figure 4: Logical Subset Approach



¹⁹⁸ In fact, some commentators call this approach the “implicit consensus” version of *Marks*. See Thurmon, *supra* note 22, at 428; Williams, *supra* note 22, at 808.

¹⁹⁹ Many of the most thoughtful practitioners of the *Marks* rule seek convergence on results, as opposed to agreement on a rule of decision. For example, the Third Circuit has argued for adherence to a “legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree.” *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 693 (3d Cir. 1991), *aff’d in part, rev’d in part*, 505 U.S. 833 (1992). And California Supreme Court Justice Chin has argued: “We need not find a legal opinion which a majority joined, but merely ‘a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree.’” *People v. Dungo*, 286 P.3d 442, 455 (Cal. 2012) (Chin, J., concurring) (quoting *United States v. Williams*, 435 F.3d 1148, 1157 (9th Cir. 2006)) (asking when the *Williams* plurality and concurrence in the judgment would reach the same outcome); see also *United States v. Duvall*, 740 F.3d 604, 613 (D.C. Cir. 2013) (Kavanaugh, J., concurring in the denial of rehearing en banc) (“[I]n splintered cases, there are multiple opinions precisely *because* the Justices did not agree on a common rationale.”).

²⁰⁰ One might imagine a rule that yielded precedent only when majority agreement is discernible based on true logical entailment. For example, if a plurality asserted a proposition and a fifth-vote concurrence in the judgment asserted the proposition’s contrapositive, there would indeed be logically entailed agreement. But that approach would almost never find application — and, moreover, it would *still* be inefficient, insofar as the relevant interpretive and logical work could be done by the Justices themselves.

The logical subset approach is designed to explain the outcome in *Marks* itself, so let us again consider *Memoirs v. Massachusetts*.²⁰¹ Focusing on the opinions that concurred in the judgment,²⁰² the *Memoirs* Justices respectively advanced rules of decision that would invalidate some or all obscenity laws.²⁰³ We can schematize this scenario by describing the plurality as invalidating if Condition *A* is present (Rule 1) and the concurrence in the judgment as invalidating if Condition *A* or Condition *B* is present (Rule 2), yielding an “*A / AB*” split. Under the logical subset approach, *Memoirs* yielded a binding holding that would require invalidation whenever Condition *A* is present. This situation contrasts with cases where the dueling opinions advance tests that only partially overlap with one another. Imagine that the plurality would invalidate if Conditions *A* or *B* are present and the concurrence in the judgment would invalidate if Conditions *B* or *C* are present, yielding an “*AB / BC*” split. That lineup would yield no precedent under the logical subset approach: there would be times when the plurality’s test would be satisfied and the other opinion’s test wouldn’t be, and vice versa.

In practical terms, the logical subset approach purports to sacrifice guidance in favor of confidence. That is, instead of finding *Marks* holdings in all, or even most, fractured Supreme Court decisions, the logical subset approach aspires to recognize *Marks* holdings only when one opinion is logically and therefore inescapably “narrower” than any other. To see the stark limits imposed by the logical subset approach, return to *Rapanos*. As we have seen, we can simplify and schematize *Rapanos* as an “*AB / BC // ABCD*” split. In some cases, only the plurality would find jurisdiction; in other cases, only the concurrence in the judgment would find jurisdiction.²⁰⁴ Thus, no concurring opinion was the logical subset of another, and the logical subset view would accordingly find no *Marks* precedent.

²⁰¹ 383 U.S. 413 (1966).

²⁰² The leading logical subset cases look only to concurrences, and my discussion follows that premise, even though it is neither a necessary feature of the view nor essential to my critique. See *King*, 950 F.2d at 783 (“[W]e do not think we are free to combine a dissent with a concurrence to form a *Marks* majority.”). But see *United States v. Johnson*, 467 F.3d 56, 65 (1st Cir. 2006) (“[W]e do not share the reservations of the D.C. Circuit about combining a dissent with a concurrence to find the ground of decision embraced by a majority of the Justices.”). See also cases cited *supra* note 196.

²⁰³ See *Memoirs*, 383 U.S. at 418 (plurality opinion) (describing a three-part test for regulating obscenity); *id.* at 421 (Black & Stewart, JJ., concurring in the judgment) (proposing that obscenity prosecutions are limited by the First Amendment based on their respective dissenting opinions in *Ginzburg v. United States*, 383 U.S. 463 (1966), and *Mishkin v. New York*, 383 U.S. 502 (1966)).

²⁰⁴ While Justice Kennedy would find federal jurisdiction over wetlands without a continuous surface connection to other covered bodies of water, see *Rapanos v. United States*, 547 U.S. 715, 759, 779–80 (2006) (Kennedy, J., concurring in the judgment), the plurality would find federal jurisdiction where a wetland is linked to a covered body of water only by “a slight surface hydrological connection,” *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006); see *Rapanos*, 547 U.S. at 739, 742 (plurality opinion).

Yet endorsement of a “broader” proposition does not necessarily or logically entail an implicit endorsement of any “narrower” proposition.²⁰⁵ Reasons for breadth do not always tolerate narrowness, and half a loaf could very well be worse than no loaf at all. By neglecting analogous possibilities, proponents of the logical subset approach commit a version of “the fallacy of division,” whose better-known sibling is the fallacy of composition.²⁰⁶ To illustrate how the fallacy of division underlies the logical subset approach, imagine two possible legal rules. Rule 1 maintains that capital punishment is categorically unlawful. Rule 2 maintains that capital punishment is unlawful for Christian defendants. Clearly, support for Rule 1 in no way requires or implies support for treating Rule 2 as precedent, which would represent (or at least allow for) religious discrimination. In fact, many people who support Rule 1 might prefer that Rule 2 be rejected, rather than allow that it be accepted as law. The example is extreme, but it makes a broadly applicable point: limiting a rule is often objectionable — and can even be worse than rejecting the rule outright.²⁰⁷ Thus, Justices who endorse broad positions need not endorse, and could oppose, the narrower positions that other Justices put forward.²⁰⁸

Take *Marks* itself. Let us assume that the relevant *Memoirs* concurrence in the judgment essentially believed that no material could be obscene (Rule A),²⁰⁹ whereas the plurality believed that only material

²⁰⁵ Several critics have made versions of this basic point. See Kimura, *supra* note 21, at 1604; Thurmon, *supra* note 22, at 429–30. In the *Hughes* oral argument, Justice Alito drew on my amicus brief in developing his own version of this point, complete with a hypothetical involving French cinema. See *Hughes* Tr., *supra* note 18, at 14–15. For another view, see Adam Steinman, *Nonmajority Opinions and Biconditional Rules*, 128 YALE L.J.F. 1, 9–17 (2018).

²⁰⁶ See Michael Herz, *Justice Byron White and the Argument that the Greater Includes the Lesser*, 1994 BYU L. REV. 227, 243–49 (discussing the fallacy of division in connection with “greater includes the lesser” arguments). For an example of the fallacy of division, Professor Michael Herz suggests the following erroneous argument: because table salt is harmless, the same must be true of its component parts, sodium and chlorine. In fact, chlorine is toxic. See *id.* at 243; see also Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 551 (2005) (defining the fallacy of division as “a mistaken inference from a group-level claim to an individual-level claim”).

²⁰⁷ To generate other, more realistic scenarios, simply replace the Eighth Amendment with any other right, and replace Christians with any other group. For instance, a plurality might extend First Amendment rights to all while a separate opinion afforded protection only to noncommunists. Cf. *Dennis v. United States*, 341 U.S. 494, 546–48 (1951) (Frankfurter, J., concurring in affirmance of the judgment) (discussing whether communism posed a distinctive threat).

²⁰⁸ The main text’s reasoning extends to votes on the judgment. That is, a Justice who joins others in forming a majority on the judgment does not necessarily approve of the other Justices’ rationales, or of treating those rationales as precedential. For example, a supporter of Rule 1 could join the Court’s judgment to show or experiment with the viability of a discrete outcome, without approving of any precedent or pattern of future outcomes.

²⁰⁹ *Memoirs v. Massachusetts*, 383 U.S. 413, 421 (1966) (Black & Stewart, JJ., concurring in the judgment); *id.* at 426, 433 (Douglas, J., concurring in the judgment).

“utterly without redeeming social value” was obscene (Rule *B*).²¹⁰ Would support for Rule *A* *logically require* support for making Rule *B* a binding precedent, as expositors of the logical subset view maintain?²¹¹ No. It would be perfectly logical for a Justice to conclude that judicial application of the “redeeming social value” test was a greater offense to the First Amendment than continued regulation by legislatures and juries. Alternatively, a Justice might believe that the “redeeming social value” test is unworkable, even if it were closer to the correct legal answer than preexisting obscenity law. A Justice might also believe that the text of the First Amendment requires a categorical rule, one way or the other. Finally, a Justice might view the various precedential options in light of a dynamic conception of how legal rules evolve over time. Assume that, before *Memoirs*, precedent recognized Rule *C*, which leaves “obscene” material constitutionally unprotected.²¹² A Justice might prefer to keep Rule *C* as the law in the hope of making the evils of obscenity regulation more visible, thereby increasing the odds that the Court might eventually adopt Rule *A*.

In sum, it is logically possible — and often likely — that some or all Justices concurring in the judgment disapprove of treating a logical subset decision as precedential. Far from being an irresistible or even attractive compromise, the logical subset opinion could very well be the least desirable option available.

3. *Shared Agreement.* — In an important 2017 article, Professor Ryan Williams criticized the logical subset approach for offering guidance too rarely and proposed a related solution that he calls the “shared agreement” approach.²¹³ The basic idea is to view a fragmented decision as majority agreement that at least one of the rules that contributed to the judgment is correct.²¹⁴ So in a case where a plurality affirms based on Rule 1 and a concurrence in the judgment relies on Rule 2, the shared agreement approach would say that later courts must affirm

²¹⁰ *Id.* at 418 (plurality opinion).

²¹¹ See *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc) (“Because Justices Black and Douglas had to agree, as a logical consequence of their own position, with the plurality’s view that anything with redeeming social value is not obscene, the plurality of three in effect spoke for five Justices . . .”).

²¹² This assumption is not so far from the truth. See *Roth v. United States*, 354 U.S. 476, 485 (1957) (“We hold that obscenity is not within the area of constitutionally protected speech or press.”).

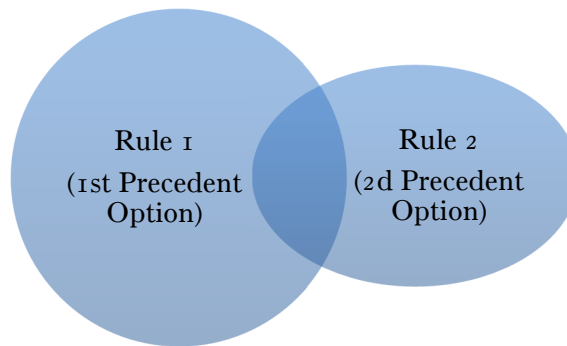
²¹³ Williams, *supra* note 22, at 801–04. Williams does not contend that the shared agreement approach has operated as a recognized precedent default or for that reason allows for the identification of implicit majoritarian decisions.

²¹⁴ See *id.* at 836–37 (“[T]he lower court judge must account for the domain of shared agreement on results defined by the respective rationales that were necessary to the precedent case’s judgment.” *Id.* at 837.); *id.* at 852 (emphasizing shared agreement’s majoritarianism). Williams argues that the shared agreement approach represents a type of “incompletely theorized agreement.” *Id.* at 827 (citing Cass R. Sunstein, Commentary, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1739–40 (1995)). But there is no reason to infer agreement on any composite rule.

when *both* Rule 1 and Rule 2 apply. In effect, the fact that the concurring Justices split between Rule 1 and Rule 2 is taken as approval of a new composite Rule 3, advocated by no Justice, that applies when both Rule 1 and Rule 2 are satisfied. The shared agreement approach further maintains that where the new Rule 3 does not apply, later courts must choose to adopt *either* Rule 1 or Rule 2, as opposed to any other rule that could support the Court's judgment.²¹⁵

Below, Figure 5 illustrates these basic ideas. The situation again resembles Figure 3, and each of the rules is espoused by a separate opinion concurring in the Court's judgment. Under the shared agreement approach, however, neither rule is necessarily binding. Instead, later courts have the option of choosing between the two rules. This means that later courts must adhere to the outcomes dictated by the zone of overlap, that is, the set of outcomes where both of the two opinions concurring in the judgment would come out the same way.

Figure 5: Shared Agreement Approach



The basic problem with the shared agreement approach is that it generates precedential rules that are unsupported by any actual or necessary “agreement” among the Justices.²¹⁶ The shared agreement approach thus has the same core defect as the logical subset approach. We can see this by slightly modifying the capital punishment examples from the previous section.²¹⁷ Imagine that a plurality advocates the legal rule that capital punishment is impermissible for all nonterrorists,

²¹⁵ See *id.* at 837.

²¹⁶ While primarily arguing that the shared agreement approach “maps directly onto the deciding majority’s actual shared agreement regarding why the precedent case’s judgment was correct,” *id.* at 852, Williams sometimes hedges by noting that shared agreement exists “at least presumptively,” *id.* at 830. Those hedges appear to concede that shared agreement is not logically necessary but do not explain why the agreement is sufficiently likely to be presumed. Moreover, Williams seeks to rationalize *Marks* and so does not explain why later courts should have to test that presumption, given the availability of the more efficient majority rule.

²¹⁷ See *supra* text accompanying note 207.

whereas a concurrence in the judgment advocates the legal rule that capital punishment is impermissible for all Christians. Neither the plurality nor the concurrence in the judgment is a logical subset of the other. Under the shared agreement approach, however, there is a precedent — namely, that capital punishment is impermissible for Christian nonterrorists. But that result is objectionable — and not something that members of the plurality would necessarily endorse. Indeed, the plurality Justices might prefer that their own rule be rejected entirely, rather than enshrine a principle of religious discrimination in law.

Again, the example is extreme, but it still illustrates a widespread problem. Whenever some of the concurring Justices view another approach as objectionable — hardly an uncommon situation when the Court has failed to generate a majority — the shared agreement approach will turn out to defy the views of most Justices. Consider *Freeman v. United States*, where an issue of statutory interpretation divided the court 4-to-1-to-4.²¹⁸ Far from viewing Justice Sotomayor’s solo concurrence in the judgment as a modest deviation from the correct view of the law, the plurality opinion argued that Justice Sotomayor’s opinion was “erroneous” and that it “would permit the very disparities [among defendants] the [relevant statute] seeks to eliminate.”²¹⁹ So it is hardly clear that even a single member of the plurality would have approved of lower courts’ applying Justice Sotomayor’s test. Yet that uncertain approval is precisely what the shared agreement approach must assume.

True, the shared agreement approach does not prevent lower courts from adopting the wisest rule adopted by any concurring Justice. Again, this approach allows courts to choose among the concurring opinions necessary to yield a majority on the judgment.²²⁰ So, to continue the previous example, a later court would be free to choose between the plurality’s rule barring capital punishment for nonterrorists and the concurrence’s rule barring capital punishment for Christians. Yet that riposte only mitigates the underlying objection. The shared agreement approach would still create a precedential rule that privileged Christians, affording a guarantee of protection that other groups would lack. So even if every later court adopted the nondiscriminatory rule, objectionable discrimination would still have occurred.

And later courts might not even have a choice in the matter, since preexisting case law might prevent courts from adopting the broader rules proposed in fractured opinions. Williams’s example is the fragmented decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate*

²¹⁸ See *supra* notes 9–12 and accompanying text.

²¹⁹ *Freeman v. United States*, 564 U.S. 522, 533 (plurality opinion); see also *id.* at 546–51 (Roberts, C.J., dissenting).

²²⁰ Williams, *supra* note 22, at 837.

Insurance Co.,²²¹ which featured a fifth-Justice concurrence in the judgment that arguably contradicted earlier precedent.²²² Williams argues that, if the earlier precedent is incompatible with the fifth-vote opinion in *Shady Grove*, then courts must follow the *Shady Grove* plurality.²²³ Thus, the shared agreement approach calls for reconciling fragmented decisions with earlier precedent. That obligation could create a need to follow separate opinions that are objectionable but consistent with previous rulings. Imagine that a plurality would bar capital punishment across the board whereas a concurrence in the judgment would bar capital punishment for Christians; and further assume that preexisting precedent had squarely rejected the categorical case against capital punishment. In that situation, preexisting case law would arguably prevent lower courts from adopting the plurality's categorical prohibition on capital punishment, thereby requiring adherence to a discriminatory rule supported only by a minority of Justices.

The shared agreement approach also has a disadvantage that the relatively restrained logical subset approach avoids: under the shared agreement approach, the binding precedent is a hybrid principle that *zero* Justices expressly or necessarily endorsed. As a result, there is no guarantee that any decisionmaker at all has considered whether it is sensible for lower courts to apply multiple tests to find cases where the plurality and concurrence in the judgment both reach the same result. In this respect, the shared agreement approach also differs from compromise rulings that establish hybrid principles pursuant to the majority rule.²²⁴

Take *Missouri v. Seibert*, where the plurality and concurrence in the judgment proposed different tests to determine whether postconfession *Miranda*²²⁵ warnings adequately secure suspects' rights against self-incrimination.²²⁶ The plurality and concurrence in the judgment were each prepared to allow for the degree of legal indeterminacy created by their respective tests — but would they have approved of the combined indeterminacy of a precedential rule in favor of applying *both* of their amorphous tests?²²⁷ If not, the shared agreement approach would

²²¹ 559 U.S. 393 (2010).

²²² *Id.* at 416 (Stevens, J., concurring in part and concurring in the judgment); *id.* at 412 (plurality opinion) (criticizing Justice Stevens for seeking to “overrule” or to “rewrite” the earlier precedent). The earlier precedent is *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941).

²²³ See Williams, *supra* note 22, at 859–64.

²²⁴ See *infra* text accompanying notes 304–311 (discussing *Arizona v. Gant*, 556 U.S. 332 (2009), as an example of a hybrid compromise rule).

²²⁵ *Miranda v. Arizona*, 384 U.S. 436 (1966).

²²⁶ See 542 U.S. 600, 611–12 (2004) (plurality opinion); *id.* at 622 (Kennedy, J., concurring in the judgment).

²²⁷ See *id.* at 622 (Kennedy, J., concurring in the judgment) (emphasizing the need for “clarity” in the *Miranda* context and objecting to “a multifactor test that . . . may serve to undermine that clarity”).

paradoxically generate a precedent that the Justices unanimously opposed.

The shared agreement approach has one more disadvantage that bears mention. As noted, the shared agreement approach maintains that a fragmented decision yields a precedential conclusion that one of the opinions concurring in the judgment must be correct. While this approach fosters lower court consideration of the various views expressed among the Justices' concurring opinions, it prevents lower courts from adopting novel legal rules that no Justice endorsed.²²⁸ The resulting constraint on ingenuity is problematic because it would obtain precisely where experimentation is most valuable — namely, where the Court has encountered such a challenging legal issue that no majority can coalesce around a single solution.²²⁹ The lead up to *Marks* itself illustrated the value of allowing for doctrinal flexibility and experimentation. The fragmented decision in *Memoirs* featured a variety of proposed rules.²³⁰ But when the Court later resolved the relevant legal issue in *Miller*, it adopted a new test that neither the *Memoirs* plurality nor the concurrence in the judgment had endorsed.²³¹

The logical subset and shared agreement approach share the same basic problem: both approaches supposedly derive support from implicit “agreement” among the Justices. Yet the needed agreement is only possible, not necessary. And, in many situations, the necessary agreement is likely absent. On reflection, this failure is unsurprising. Fragmented decisions are so anomalous and frustrating precisely because they do not disclose any actual agreement on the rule of decision. The whole point of the *Marks* rule is to solve that problem — and it cannot persuasively do so by denying that the problem exists in the first place.

4. *All Opinions.* — Finally, some commentators, judges, and even Justices have proposed the all opinions approach, which has been presented either as an interpretation of the *Marks* rule or, more plausibly,²³² as a related principle.²³³ The idea is to view all the opinions in a

²²⁸ Williams emphasizes this point as a perk. See Williams, *supra* note 22, at 858.

²²⁹ See *United States v. Duvall*, 740 F.3d 604, 622 (D.C. Cir. 2013) (Williams, J., concurring in the denial of en banc) (making this basic point and citing *United States v. Mendoza*, 464 U.S. 154, 160 (1984)).

²³⁰ See *United States v. Marks*, 430 U.S. 188, 193–94 (1977) (discussing the multiple opinions in *Memoirs*).

²³¹ See *id.* at 190 n.3, 194 (citing *Miller v. California*, 413 U.S. 15, 22, 24 (1973)).

²³² On its face, *Marks* posits that a concurring opinion will be binding, but the all opinions approach holds that the rule of decision could be found in a dissent or even in no single opinion at all.

²³³ See, e.g., *Duvall*, 740 F.3d at 609–11 (Kavanaugh, J., concurring in the denial of rehearing en banc) (calling this approach “the necessary logical corollary” of the *Marks* rule, applicable when there is “no ‘narrowest’ opinion,” *id.* at 611); *United States v. Donovan*, 661 F.3d 174, 182 (3d Cir. 2011) (“[W]e have looked to the votes of dissenting Justices if they, combined with votes from plurality or concurring opinions, establish a majority view on the relevant issue.”); *Hughes Tr.*, *supra* note 18, at 9–10 (remarks of Chief Justice Roberts); BRIAN A. GARNER ET AL., *THE LAW OF*

Supreme Court decision, including the dissents,²³⁴ as contributing to the rule of decision for future cases, at least in lower courts. Judges should therefore imagine how the facts before them would be resolved by each of the relevant Court opinions and follow the course of action (if any) that would have been agreed upon by five Justices. This approach generates precedent relatively often — namely, whenever at least five Justices espouse convergent results on a given set of facts.²³⁵

Figure 6: All Opinions Approach
(Precedent Is Any Area of Majority Overlap)

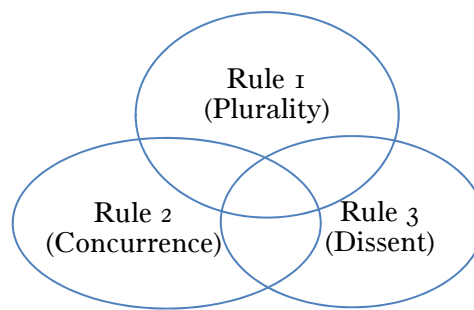


Figure 6 above illustrates the all opinions approach. Under that approach, no one opinion is precedential. Rather, precedent exists where there are zones of overlap among opinions collectively joined by a majority. So if Rule 1 were proposed by a three-Justice plurality, Rule 2 by a two-Justice concurrence in the judgment, and Rule 3 by a four-Justice dissent, then every zone of overlap would identify outcomes that bind later courts.

JUDICIAL PRECEDENT 206 (2016) (endorsing this approach in at least some circumstances); *cf.* *United States v. Johnson*, 467 F.3d 56, 65–66 (1st Cir. 2006) (collecting cases where the Court counted dissents).

²³⁴ In an effort to adhere to the language of *Marks*, some courts and commentators seek majority convergence on results but exclude consideration of dissenting opinions. *Compare* *King v. Palmer*, 950 F.3d 771, 777 (D.C. Cir. 1991) (rejecting consideration of dissents), *with Johnson*, 467 F.3d at 65 (considering dissents). *See also supra* note 199. That “results-convergence test” is best defended as an effort to qualify the predictive model of precedent so as to account for the traditional link between judgment and precedent. But the underlying recourse to prediction remains unjustified. *See infra* text accompanying note 254.

²³⁵ For a discussion of a case where at least one version of the all opinions approach yields no guidance, see *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1337 (D.C. Cir. 2015) (Kavanaugh, J.) (explaining that no opinion in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010), “can be considered the *Marks* middle ground or narrowest opinion, as the four Justices in dissent simply did not address the issue”).

To illustrate this approach, again consider the stylized portrayal of *Rapanos v. United States*.²³⁶ As we have seen,²³⁷ the split among all the opinions can be schematized as: $AB / BC // ABCD$, meaning that at least five Justices would thus find federal jurisdiction if A (plurality and dissenters), if B (all the Justices), and if C (the concurrence in the judgment and the dissenters). The all opinions approach would accordingly yield a precedent in favor of federal jurisdiction if A , B , or C . Because the all opinions approach gives equal effect to both concurring and dissenting Justices, it is unsurprisingly popular among dissenters. In *Rapanos* itself, Justice Stevens's dissent in effect encouraged lower courts to follow the all opinions approach.²³⁸

Some judges and commentators object to versions of the all opinions approach that give binding force to dissents.²³⁹ Because they do not adjudicate rights or establish precedent, dissents tend to be less inhibited than the sober majority opinions that they criticize. Dissenters let off steam, offer visionary meditations, and otherwise act in ways that the dissenters themselves would view as inappropriate in a ruling with the force of law. As Judge Williams put it, a dissenter is a provocative "gadfly" that might inspire but cannot guide.²⁴⁰

Yet that argument presumes its conclusion: dissents are said to be unreliable because they do not generate precedent,²⁴¹ but whether dissents do or should generate precedent is the very matter in question. If the all opinions approach were accepted, then the Justices would know that their dissents carry significant force in fragmented decisions. And the gravity of that realization would presumably focus the dissenting Justices' minds. Tradition-based arguments against counting dissents are likewise vulnerable. Dissents result from judges' actual efforts to resolve a case or controversy and so are not advisory in the manner of, say, the present academic article. And while federal courts are normally thought to generate precedent only when necessary to resolve discrete cases and controversies,²⁴² the Court sometimes focuses on its

²³⁶ 547 U.S. 715 (2006).

²³⁷ See *supra* text accompanying notes 189–190.

²³⁸ See *Rapanos*, 547 U.S. at 810 (Stevens, J., dissenting).

²³⁹ See *supra* note 234; see also *United States v. Duvall*, 740 F.3d 604, 623 (D.C. Cir. 2013) (Williams, J., concurring in the denial of en banc).

²⁴⁰ *Duvall*, 740 F.3d at 623.

²⁴¹ See *id.* ("Dissenting judges enjoy something of the liberty of a gadfly, as the outcome does not in fact depend on what they say.")

²⁴² See, e.g., *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (providing a now-boilerplate discussion of the "Cases" and "Controversies" requirement (citing U.S. CONST. art. III, § 2)).

declaratory function,²⁴³ such as by establishing a precedent without modifying any judgment.²⁴⁴

Moreover, the all opinions approach has a natural theoretical home: the prediction model of precedent.²⁴⁵ Under the prediction model, lower courts should aim to decide cases in the way that they expect higher courts to rule.²⁴⁶ In some circumstances, a fragmented decision might be persuasive evidence that a certain position would lose out at One First Street. And, in those cases, it might seem odd for a lower court to invite reversal by deviating from the Court's likely result. When lower courts anticipate the Court's position, they avoid the need for costly appeals, foster national uniformity, and free up the Justices to spend more time on issuing new decisions. Prediction also safeguards the interests of regulated parties who might understandably try to align their behavior with what looks like the winningest position. What's more, the prediction model's focus on vertical stare decisis strongly resonates with the patterns of *Marks* citations discussed in Part I. As we have seen, the *Marks* rule has come to play a much more significant role in the lower courts, as compared with the Supreme Court.

One might fairly object that the all opinions approach is itself contrary to good prediction, for the Court does not reliably apply *Marks* at all.²⁴⁷ When *Marks*'ing fragmented decisions gets tough, the *Marks* rule tends to get going — to the sidelines, leaving the Court to address the underlying merits.²⁴⁸ In *Hughes v. United States*,²⁴⁹ for example, the all opinions approach would have suggested a 5–4 ruling for the government.²⁵⁰ Yet a vote switch and new appointee to the Court resulted in a 6–3 ruling for the defendant.²⁵¹ Here and elsewhere, efforts to use the

²⁴³ See generally Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 669–72 (2012).

²⁴⁴ See, e.g., *Camreta v. Greene*, 563 U.S. 692, 706–09 (2011).

²⁴⁵ See John M. Rogers, “Issue Voting” by *Multimember Appellate Courts: A Response to Some Radical Proposals*, 49 VAND. L. REV. 997, 1007–09 (1996); see also *Hughes Tr.*, *supra* note 18, at 9–10 (remarks of Chief Justice Roberts) (“[I]f I’m a court of appeals judge, it seems to me the most important thing in deciding the case is to make sure that I’m not reversed. And it seems to me the best way to do that is . . . sort of counting out what would happen if you count where the different votes are.”).

²⁴⁶ See generally Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 16–22 (1994).

²⁴⁷ See Thurmon, *supra* note 22, at 441 (“[T]he Supreme Court’s disregard for the *Marks* ‘narrowest grounds’ rule undermines its predictive ability.”).

²⁴⁸ See, e.g., *supra* text accompanying notes 66–71 (demonstrating the Court’s tendency to side-step *Marks*).

²⁴⁹ 138 S. Ct. 1765 (2018).

²⁵⁰ See U.S. Br., *supra* note 17, at 16–17 (arguing that *Marks* requires courts to “decide cases in a manner consistent with the views of at least five Members of this Court in the divided case,” *id.* at 17, namely, *Freeman v. United States*, 567 U.S. 522 (2011)).

²⁵¹ In *Hughes*, Justice Sotomayor changed her vote from *Freeman*, and Justice Gorsuch voted differently from his predecessor, Justice Scalia.

predictive model paradoxically yield bad predictions, even when the precedent at issue is relatively recent.²⁵² This objection also suggests a circularity problem, in that whether the Court itself adopts the all opinions approach would influence whether Justices adhere to the positions that they or their predecessors had advanced in prior fragmented decisions.

Yet the prediction model may simply call for modifying the all opinions approach to allow consideration of relevant changes in either the Court's composition or the Justices' expected votes.²⁵³ So modified, the *Marks* rule would have a greatly reduced ambit, since a single Justice's departure could eliminate the precedential value of a fragmented ruling. But even so, the all opinions approach could still have a significant effect, particularly since lower court precedents applying that approach in the immediate aftermath of a fragmented ruling would create local precedent that could outlast foreseeable changes at the Court.

At this point, one plausible response is to reject the all opinions approach precisely because it rests on the prediction model — a controversial approach to precedent that the Court itself generally rejects.²⁵⁴ But the all opinions approach is actually an especially objectionable use of the prediction model and so should be rejected even by thinkers who generally endorse prediction. The paradigmatic case for lower court prediction arises when numerous current Justices have written separate

²⁵² See Richard M. Re, *The Marks Rule's Fate After Hughes*, PRAWFSBLAWG (June 5, 2018), <https://prawfsblawg.blogs.com/prawfsblawg/2018/06/the-marks-rules-fate-after-hughes.html> [<https://perma.cc/WN6B-B8LB>].

²⁵³ For reasons of administrability or legitimacy, a proponent of the prediction model could plausibly demand that predictions be grounded only in certain forms of evidence, such as published judicial opinions, thereby shrinking the gap between the prediction model and other approaches. See, e.g., Caminker, *supra* note 246, at 49 (assigning greater predictive weight to “probative evidence,” such as published opinions, as compared to articles or speeches); see also *United States v. Duvall*, 740 F.3d 604, 611 & n.1 (Kavanaugh, J., concurring in the denial of rehearing en banc) (noting the “predictive utility” of the all opinion approach, while opposing consideration of whether the Court's composition has relevantly changed); cf. Asher Steinberg, *What Justice Powell's Papers on His Opinion in Marks Tell Us About the Marks Rule*, NARROWEST GROUNDS (July 22, 2017), <http://narrowestgrounds.blogspot.com/2017/07/what-justice-powells-papers-on-his.html> [<https://perma.cc/4RZL-Y2WP>] (suggesting “that Justice Powell was at least inclined to reject predictive, fifth-vote approaches to *Marks*” partly due to worries about composition changes).

²⁵⁴ See, e.g., *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (prohibiting courts from disregarding case law based on predictions about when the Supreme Court would overrule its own precedents); see also *People v. Lopez*, 286 P.3d 469, 485 (Cal. 2012) (Liu, J., dissenting) (criticizing vote-counting approach to the *Marks* rule: “[N]ose-counting is a job for litigators, not jurists. As a court tasked with applying an evolving line of jurisprudence, our role is not simply to determine what outcome will likely garner five votes on the high court. Our job is to render the best interpretation of the law in light of the legal texts and authorities binding on us.”); Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 655 (1995) (critically discussing the prediction model).

opinions asserting that a dated precedent should be reversed.²⁵⁵ This scenario has a critical feature: the lower court believes that a considered legal view now has, or soon will obtain, the support of most Justices. In essence, the prediction model paradigmatically directs lower courts to adhere to the views of Court majorities that have not yet had the chance to express their views in a formal opinion. By contrast, the all opinions approach focuses on convergent *results* and so makes a difference precisely in those cases where there is no expectation of majority agreement on a rule of law.²⁵⁶ Under the all opinions approach, the precedential effect of a fractured opinion is the combination of all the rules advocated in various separate opinions. Yet not a single Justice would necessarily approve of the resulting combination of rules.²⁵⁷ And following that approach would yield a pattern of outcomes that is incompatible with the views of all nine Justices — increasing the risk of unfairness, incoherence, and harm far beyond paradigmatic cases of prediction.²⁵⁸

The all opinions approach also exacerbates a typically overlooked cost to the prediction model. In order for the all opinions approach to apply, most Justices would have had to choose not to form a majority opinion under the majority rule. Under those circumstances, it is especially unlikely the Justices would want lower courts to engage in prediction. The Justices often want the lower courts to do their own level best to solve difficult legal problems directly, rather than first spending time trying to get inside the Justices' confused and conflicted minds. By collectively choosing not to form precedent under the majority rule, the Justices allow for further percolation and so invite the lower courts to supply helpful illumination.²⁵⁹ But when the Justices need assistance, the all opinions approach stands in the way — and so undermines the accuracy and effectiveness of the Court's own decisionmaking process.

²⁵⁵ See, e.g., *Barnette v. W. Va. State Bd. of Educ.*, 47 F. Supp. 251, 252–53 (S.D.W. Va. 1942), *aff'd*, 319 U.S. 624 (1943).

²⁵⁶ The by-now-familiar examples involving concurrences that would give special treatment to Christians or communists make this point vivid. See, e.g., *supra* note 207 and accompanying text.

²⁵⁷ Of course, the majority rule would allow the Justices to commit to such a combined rule. See *supra* p. 1950 (discussing summary rulings post-*Memoirs v. Massachusetts*, 383 U.S. 413 (1966)); *infra* p. 2001 (discussing *Arizona v. Gant*, 556 U.S. 332 (2009)).

²⁵⁸ In the *Hughes* oral argument, Justice Kagan raised the possibility that “the second-best approach, is if you don’t have common reasoning, just ask about results.” See *Hughes Tr.*, *supra* note 18, at 21; cf. *supra* note 111 (noting Justice Kagan’s apparently contrary view in *Williams v. Illinois*, 567 U.S. 50 (2012)). But in any given case, most or all Justices might think that applying the all opinions approach is undesirable, or even the worst possible outcome. See *Re Amicus Br.*, *supra* note 17, at 8–9, 13. Justice Kagan herself later noted this problem. See *Hughes Tr.*, *supra* note 18, at 31 (“[T]here are some cases where there are middle ground positions which seem utterly incoherent.”). And the *Marks* rule does not afford the Justices a workable way to opt out of precedent creation when they oppose the “middle ground.” The majority rule does.

²⁵⁹ See Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 760 (1980); *supra* note 150 (discussing percolation).

C. Abandoning from Below

Judges and commentators often assume that because the *Marks* rule is itself endorsed in a Supreme Court majority opinion, lower courts must follow the rule until the Court itself revisits it. But while *Marks*'s overruling would require decisive action from the Court itself, a more gradual abandonment can also be implemented first by lower courts.²⁶⁰ To do so, courts should read the "narrowest" grounds test, well, narrowly. Besides immediately mitigating *Marks*'s costs, narrowing the *Marks* rule from below gives the Court useful feedback and so facilitates the Court's own eventual decision to announce a new rule. Already, some courts are effecting this transition without losing key guidance or unduly upsetting reliance interests.

Vertical stare decisis is more complicated than simply demanding that lower courts follow instructions from on high. In many instances, courts "narrow from below" by interpreting higher court precedents not to apply, even where they are best read to apply.²⁶¹ These narrow readings of precedent are generally legitimate if they are both reasonable and supported by first principles of law.²⁶² On reflection, the *Marks* rule is a suitable object of narrowing from below. As we have seen, there are several plausible ways of interpreting the *Marks* rule, and each interpretation has a different scope of application. Under the logical subset approach, for example, fragmented decisions often generate no binding precedent at all.²⁶³ So if a lower court concluded that the *Marks* rule was wrong as a matter of first principles, then it would be justified in favoring the logical subset approach over other, more widely applicable versions of the rule. In favoring a narrower reading of *Marks*, the lower court would mitigate the harmful effects of the Court's erroneous decision to adopt the *Marks* rule.

Several courts have already narrowed *Marks* from below in just this way.²⁶⁴ The leading case is still the 1991 en banc D.C. Circuit ruling in

²⁶⁰ See Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 936–42 (2016). Of course, the Court could itself narrow *Marks*, including to experiment or to prepare for its overruling at a later time.

²⁶¹ See *id.*

²⁶² See *id.* at 950–51.

²⁶³ See *supra* text accompanying note 203.

²⁶⁴ Some circuit courts have limited the *Marks* rule by narrowing from below in two interrelated ways: not only do they narrowly construe *Marks* itself by adopting the logical subset approach, but also they narrowly construe the underlying fractured opinions so that there can be no logical subset opinion. See *United States v. Davis*, 825 F.3d 1014, 1022–24 (9th Cir. 2016) (en banc) (finding no logical subset opinion in *Freeman v. United States*, 564 U.S. 522 (2011), based on a narrow reading of the *Freeman* plurality). But see *id.* at 1037 (Bea, J., dissenting) (applying the logical subset test but defending a broader reading of the *Freeman* plurality, which would create a *Marks* holding).

King v. Palmer,²⁶⁵ which adopted the logical subset approach.²⁶⁶ That holding had to reckon with the key language of the original *Marks* decision. As originally stated, the *Marks* rule calls for treating as precedential “that position taken by those Members who concurred in the judgments on the narrowest grounds.”²⁶⁷ Nothing in that statement requires that the concurring Justices’ “narrowest grounds” had to be a logical subset of the other opinions. So to support its narrower approach to finding the “narrowest grounds,” *King* turned to first principles. According to the en banc D.C. Circuit, “*Marks* is workable . . . only when one opinion is a logical subset of other, broader opinions.”²⁶⁸ Based on that appeal to what is “workable,” *King* reasoned about what “the narrowest opinion . . . must embody,” rather than what the Court actually intended.²⁶⁹ For good measure, the court bluntly argued that, if read more broadly, “*Marks* is problematic.”²⁷⁰

To move closer to abandoning *Marks*, a more aggressive form of narrowing from below would be necessary, based on more recent Court decisions. In *Nichols v. United States*,²⁷¹ the Court confronted a circuit split in which courts had diverged in applying *Marks*.²⁷² In an exercise of understatement, the Court noted that the *Marks* “test is more easily stated than applied.”²⁷³ But instead of clarifying the *Marks* inquiry, the Court simply set it aside. In the Court’s view, it is “not 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.”²⁷⁴ But if it is unproductive for the Court itself to apply *Marks* in hard cases, why should lower courts do so? That question arose again in 2003 when the Court in *Grutter v. Bollinger*²⁷⁵ confronted a deep circuit split over how the *Marks* rule applied to *Regents of the University of California v. Bakke*.²⁷⁶ Rather than resolving that evident disagreement, *Grutter* followed *Nichols* in resolving the underlying merits, without grappling with *Marks*.²⁷⁷ In subsequent years, the Court has not found occasion to clarify the *Marks* rule’s proper application.²⁷⁸

²⁶⁵ 950 F.2d 771 (D.C. Cir. 1991) (en banc).

²⁶⁶ See *id.* at 781.

²⁶⁷ *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

²⁶⁸ *King*, 950 F.2d at 781.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 782.

²⁷¹ 511 U.S. 738 (1994).

²⁷² *Id.* at 742.

²⁷³ *Id.* at 745.

²⁷⁴ *Id.* at 745–46.

²⁷⁵ 539 U.S. 306 (2003).

²⁷⁶ 438 U.S. 265 (1978); see *Grutter*, 539 U.S. at 325 (recounting the circuit split).

²⁷⁷ See *Grutter*, 539 U.S. at 325.

²⁷⁸ See *supra* section I.B, pp. 1951–54.

Both *Nichols* and *Grutter* strongly suggest that the *Marks* rule does not bind whenever its application is unclear or counterintuitive — as will be true of almost all *Marks* issues that create circuit splits or reach the Court. And *Marks* itself is reasonably susceptible to being read in just that way. True, the Court has read *Marks* as requiring application of its eponymous rule, in one form or another. But the Court’s original statement of the *Marks* rule provides only that the narrowest grounds “may” — not must — “be viewed” as the holding of the Court.²⁷⁹ Further, reading the “narrowest grounds” test as a sufficient test for precedent would ignore *Marks*’s context, which involved a challenge under both the First Amendment and the Ex Post Facto Clause.²⁸⁰ *Marks* also emphasized that lower courts had converged on the same reading of a prior fragmented decision.²⁸¹ And *Marks* noted that the Court had previously clarified the meaning of its fragmented decisions via majoritarian per curiam rulings — which under any standard qualify as precedent.²⁸² Thus, the Court’s decisions can reasonably be read to invite recourse to the *Marks* rule where it sensibly applies, rather than demanding rigid adherence to it.²⁸³ In other words, *Marks* can be viewed as establishing more of a guideline than a rule.²⁸⁴ The Court’s most recent encounter with *Marks* supports that view: in *Hughes*, the Court chose to ignore a possibly binding *Marks* precedent without providing any justification whatsoever for doing so.²⁸⁵ In sum, the Justices themselves routinely treat *Marks* as optional.

In mitigating the *Marks* rule’s vices, lower courts can also pave the way for its eventual elimination. While the Supreme Court often

²⁷⁹ *Marks v. United States*, 430 U.S. 188, 193 (1977).

²⁸⁰ *See id.* at 190–91.

²⁸¹ *Id.* at 194 & n.8.

²⁸² *Id.* at 193 & n.7. Even the common law would view a pattern of rulings as precedential. *See supra* note 179.

²⁸³ Some proponents of the logical subset approach have moved in this direction by suggesting that there must be an express majority rationale to find a *Marks* holding. *See United States v. Davis*, 825 F.3d 1014, 1024 n.10 (9th Cir. 2016) (en banc). However, that approach would require overruling *Marks*, since the *Memoirs* opinions that *Marks* analyzed featured only convergent results, not a common rationale. *See id.* at 1034 (Bea, J., dissenting); *cf. United States v. Duvall*, 705 F.3d 479, 485–87 (D.C. Cir. 2013) (Williams, J., concurring in the judgment). Indeed, the *Marks* rule expressly applies precisely when there is no majority agreement on the rationale. *See Re Amicus Br.*, *supra* note 17, at 10–11.

²⁸⁴ *Cf. PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL* (Walt Disney Pictures 2003) (“The [Pirate] Code is more of what you would call guidelines than actual rules.”). During the *Hughes* oral argument, Justice Breyer espoused essentially this view. *See Hughes Tr.*, *supra* note 18, at 32 (“And you learn in law school and thereafter how to read an opinion. There are no absolute rules.”).

²⁸⁵ *See Hughes v. United States*, 138 S. Ct. 1765, 1771–72 (2018) (declining to resolve whether the plurality opinion in *Freeman v. United States*, 564 U.S. 522 (2011), should control). *Hughes* could perhaps have avoided reliance on *Marks* by holding that any potential *Marks* holding in *Freeman* should be overruled. But the Court most certainly did not say that or otherwise engage the statutory stare decisis concerns that such an overruling would pose.

enforces precedential discipline on lower courts, the reverse can take place as well. By narrowing from below, lower courts encourage the Court not to rely on disfavored rules, including the *Marks* rule. Narrowing from below can also supply the Court with valuable new information and thereby nudge the Justices in new directions.²⁸⁶ *Nichols* and *Grutter* illustrate this dynamic, as the Court cited the lower courts' inability to apply *Marks* as a reason for the Court to skip past it.²⁸⁷ Since then, the Court saw fit to neglect the *Marks* rule — until the Ninth Circuit narrowly read *Freeman* and adopted the relatively narrow logical subset test.²⁸⁸ The Court ultimately rewarded those efforts in *Hughes*, which adopted the Ninth Circuit's position on the merits, without applying *Marks*.²⁸⁹ Thus, lower courts are already giving the Justices insight into the *Marks* rule's difficulties and nudging the Court to take corrective measures. If it persists in its neglect of the rule, the Court might one day look back on *Marks* and declare it a mistake that the lower courts had already corrected.

Lower courts might also worry about the costs of transitioning away from *Marks*. After all, the Court has arguably acted in reliance on the *Marks* rule for decades, and some lower courts have likewise applied different versions of *Marks* in creating precedent. Abandoning *Marks* would cast doubt on that accumulated case law and preclude future guidance from fragmented decisions. To evaluate those worries, we need a better sense of how precedent would operate in the absence of the *Marks* rule — which is the topic of the next Part.

* * *

No approach to the *Marks* rule finds footing in logic, prudence, or tradition. Historical and pragmatic considerations alike strongly counsel against affording precedential status to fragmented decisions. And *Marks* theories that purport to find implicit majority agreement among Justices are either constructing consensus where none existed or else tacitly relying on speculative judgments about what the Justices must have believed. Judges and scholars should no longer rationalize *Marks*. Instead, they should consider alternatives.

III. WITHOUT MARKS

How might the law and practice of precedent change if the *Marks* rule were no more? Without *Marks*, the Justices should continue to

²⁸⁶ See Re, *supra* note 260, at 951–56. For more on lower courts guiding Supreme Court decisionmaking, see Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851, 851 (2014), and Neil S. Siegel, *Federalism as a Way Station: Windsor as Exemplar of Doctrine in Motion*, 6 J. LEGAL ANALYSIS 87, 144–45 (2014).

²⁸⁷ See *supra* text accompanying notes 271–277.

²⁸⁸ See *supra* text accompanying notes 17 & 264.

²⁸⁹ See *Hughes*, 138 S. Ct. at 1765, 1771–72.

consider precedential consequences when casting their votes, as provided by the so-called “*Screws* rule.” Moreover, all courts should continue to recognize both “compromise majorities” and “rule agreement” as precedential. Thus, *Marks*’s elimination would have just one major consequence: lower courts could freely set aside fragmented rulings that exhibit only “judgment agreement,” that is, agreement on the judgment alone. That change would be a net gain for the legal system.

A. *The Screws Rule*

The law of precedent formation is partly governed by an understudied but influential legal principle that has come to have its own name. Unfortunately, that name is *Screws*.²⁹⁰ In *Screws v. United States*,²⁹¹ Justice Wiley B. Rutledge voted against his own preferred legal views in a merits case.²⁹² Justice Rutledge’s goal was to avoid application of the Court’s rule of procedure providing that, when the Justices cannot form a majority on the judgment, no judgment (and therefore no precedent) may issue.²⁹³ It appears that no majority opinion of the Court has ever blessed Justice Rutledge’s choice, yet Justices have self-consciously followed his example for many decades without arousing discernible opposition. And even more Justices have engaged in reasoning tantamount to Justice Rutledge’s, without citing *Screws*.²⁹⁴

Justices have thus come to view *Screws* as a nonprecedential guide on how to exercise their voting power: given the majority rule, a Justice may vote against her own preferred judgment in order to allow the Court to reach a majority disposition. Aptly enough, the “*Screws* rule” puts the Justices to a hard choice: reach majority agreement on the judgment or forgo the power to decide the case. And the Justices have followed that principle not just when forming majorities on the judgment, as in *Screws* itself, but also when creating compromise majority

²⁹⁰ *E.g.*, *al-Marri v. Pucciarelli*, 534 F.3d 213, 294 n.1 (4th Cir. 2008) (Wilkinson, J., concurring in part and dissenting in part) (“the so-called *Screws* rule”), *vacated and remanded sub nom.* *al-Marri v. Spagone*, 555 U.S. 1220 (2009); Davidson, *supra* note 26, at 19 (“the *Screws* rule”).

²⁹¹ 325 U.S. 91 (1945).

²⁹² *Id.* at 134 (Rutledge, J., concurring in the result).

²⁹³ *Id.*; see Davidson, *supra* note 26, at 33 (descriptively analyzing *Screws*); John M. Rogers, “*I Vote This Way Because I’m Wrong*”: *The Supreme Court Justice as Epimenides*, 79 KY. L.J. 439, 459–62 (1991) (discussing *Screws*).

²⁹⁴ Justices as dissimilar as Justice Black and Justice Blackmun employed the *Screws* rule, without using that name. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 353–54 (1974) (Blackmun, J., concurring) (“If my vote were not needed to create a majority, I would adhere to my prior view.” *Id.* at 354 (citing, among other opinions, *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 170 (1967) (Black, J., concurring in the result)); *Time, Inc. v. Hill*, 385 U.S. 374, 398 (1967) (Black, J., concurring) (“I do this, however, in order for the Court to be able at this time to agree on an opinion in this important case”); *id.* at 402 (Douglas, J., concurring) (same reasoning).

opinions.²⁹⁵ In other words, Justices have voted for judgments that they in some sense disagreed with, in order to allow the formation of majority precedents.

One might object that the *Screws* rule is illegitimate because it authorizes Justices to vote for dispositions that they believe are legally incorrect. *Screws* thus implicates, and arguably contravenes, the essence of judicial obligation: to decide in accordance with law.²⁹⁶ But that objection does not grapple with the crisis of legal fidelity that gives rise to the problem that the *Screws* rule means to solve. The relevant choice is between two plausible but imperfect means of discharging the oath of office: voting in accord with one's views to the detriment of those views' future realization, or voting differently from one's views in order to realize those views imperfectly. The *Screws* rule applies only in those unusual cases when a Justice believes that she can more fully or reliably achieve outcomes consistent with her own legal views by voting against those views.

Further, the party who loses out on the Justice's vote might not have any ground to complain.²⁹⁷ Of course, the party would have been deprived of a supportive (even if overridden) vote. But a Justice who uses the *Screws* rule expresses her preferred outcome and so gives the party some public vindication. And, counterintuitive though it may seem, parties would at least sometimes have good reason to lose supportive votes. The lost vote could be the necessary price of a ruling that allows for meaningful relief or, failing that, better case law for the losing parties and future litigants.²⁹⁸ The *Screws* rule's permissibility may thus depend on whether a Justice finds that, given her colleagues' views, she actually helps (or at least doesn't harm) the party she votes against. The Justice may also be bound to foster transparency by candidly announcing her first preference and explaining her ultimate vote.

Screws itself involved a Justice's vote to join the judgment of the Court, not the opinion of the Court. In other words, Justice Rutledge created a majority on the judgment but did not join in the majority opinion of the Court and so avoided the creation of precedent under the majority rule.²⁹⁹ Perhaps the *Screws* rule should be limited to votes on

²⁹⁵ See, e.g., *Olmstead v. L.C.*, 527 U.S. 581, 607–08 (1999) (Stevens, J., concurring in part and concurring in the judgment); *Bragdon v. Abbott*, 524 U.S. 624, 655–56 (1998) (Stevens, J., concurring) (“Because I am in agreement with the legal analysis in Justice Kennedy’s opinion, in order to provide a judgment supported by a majority, I join that opinion even though I would prefer an outright affirmance.” *Id.* at 656.).

²⁹⁶ See, e.g., 28 U.S.C. § 453 (2017) (federal judicial oath).

²⁹⁷ Cf. Caminker, *supra* note 160, at 2336–37 (making a similar argument in discussing the propriety of judicial vote trading, without discussing the *Screws* rule).

²⁹⁸ For a salient example, see *Hamdi v. Rumsfeld*, 542 U.S. 507, 553 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (citing Justice Rutledge’s *Screws* opinion and emphasizing “the need to give practical effect to the conclusions of eight Members of the Court rejecting the Government’s position”).

²⁹⁹ See *Screws v. United States*, 325 U.S. 91, 134 (1945) (Rutledge, J., concurring in the result).

the judgment akin to Justice Rutledge's, and so should not extend to authorize votes in favor of precedential majority opinions where the voting Justice disagrees with those opinions. But that extension is justifiable, for much the same reasons as the core use of the *Screws* rule. Compromise majorities can effectuate the Justices' views of the law, without unfairly harming a party or violating principles of candor.

One might argue that the need for Justices to vote against their legal views is less urgent in the context of precedent formation. The judgment must form in the case at hand or not at all, whereas the Court can usually set a precedent in any other case with appropriate facts. Yet a delay in creating precedent will alter the judgments of discrete cases that become final before the new precedent is established. So if a *Screws* vote can be justified by the need to improve the judgment in a single case, then it can also be justified by the need to improve judgments in separate cases that would be resolved under precedent.

The *Screws* rule provides a model for how Justices can react to fragmented decisions in the absence of the *Marks* rule. Rather than forcing later courts to struggle with fragmented decisions, the Justices themselves should sort out their differences where appropriate, or else forgo the power to create binding precedential rules. The next section addresses one way that the *Screws* rule can bear fruit: by fostering compromise majorities.

B. *Compromise Majorities*

We have seen that eliminating the *Marks* rule would encourage the formation of majority opinions by eliminating the median Justice's incentive to occupy the narrowest ground.³⁰⁰ But the Justices already have reason to form majority opinions.³⁰¹ For example, a Justice might want to avoid creating difficult *Marks* questions that could divide lower courts.³⁰² Or a Justice might form a majority opinion to establish a desirable precedent, despite misgivings regarding the rule that she votes to establish. These are cases of "compromise majorities."³⁰³ While many

³⁰⁰ See *supra* text accompanying note 161.

³⁰¹ See Cross, *supra* note 161, at 550.

³⁰² See *id.*

³⁰³ See, e.g., Felix Frankfurter, "The Administrative Side" of Chief Justice Hughes, 63 HARV. L. REV. 1, 1 (1949) (noting "[t]he compromises that an opinion may embody"); Adam Liptak, *On Justice Ginsburg's Summer Docket: Blunt Talk on Big Cases*, N.Y. TIMES (July 31, 2017), <https://nyti.ms/2hfaGg7> [<https://perma.cc/RP5J-5PRC>] (discussing Justice Ginsburg's statement that she sometimes will "compromise" and suppress her dissenting views, but not on certain issues, such as free speech and gender equality); Patrick Marley, *Justice Elena Kagan Says Court Had to Reach More Consensus After Antonin Scalia's Death*, MILWAUKEE J. SENTINEL (Sept. 8, 2017, 6:19 PM), <https://www.jsonline.com/story/news/politics/2017/09/08/justice-elena-kagan-says-court-had-reach-more-consensus-after-antonin-scalias-death/646125001/> [<https://perma.cc/V7EN-D64A>] (discussing Justice Kagan's views); Jeffrey Rosen, *Roberts's Rules*, THE ATLANTIC (Jan./Feb. 2007), <https://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/>

compromise majorities are doubtless forged without leaving any public trace, the Justices sometimes go out of their way to reveal that a compromise majority has resulted. These cases illuminate how a broadly understood *Screws* rule operates in practice — and can help us glean how the world would look without the *Marks* rule.

For perhaps the most elaborate compromise majority in recent years, consider *Arizona v. Gant*,³⁰⁴ where Justice Scalia supplied the critical fifth vote for the opinion of the Court.³⁰⁵ Justice Scalia endorsed a test that was fundamentally different from the other majority Justices'.³⁰⁶ Yet the desire to form a majority was so strong that five Justices forged a hybrid rule that no individual Justice thought was entirely correct. The majority all but acknowledged that its rule of decision resulted from the need to get Justice Scalia's vote,³⁰⁷ and Justice Scalia confirmed as much in his concurrence.³⁰⁸ Perhaps the most interesting aspect of Justice Scalia's concurrence is that it acknowledged not just the need for "certainty" in this field but also the problem of "leaving the current understanding of [precedent] in effect."³⁰⁹ In other words, a fractured "4-to-1-to-4 opinion" seemed undesirable in part because it would leave open the possibility that past, erroneous rulings would still be followed.³¹⁰ Only a new majority opinion, Justice Scalia suggested, would definitively establish a new rule of decision. And so it has: since *Gant*, there has been no serious question that the majority opinion controls.³¹¹

Or take *AT&T Mobility LLC v. Concepcion*,³¹² where Justice Scalia wrote a five-Justice opinion.³¹³ In addition to joining the majority, Justice Thomas wrote a concurrence to explain that he disagreed with the very rule of decision he had just signed on to.³¹⁴ As Justice Thomas put it:

I think that the Court's test will often lead to the same outcome as my textual interpretation and that, when possible, it is important in interpreting statutes to give lower courts guidance from a majority of the Court. . . . Therefore, although I adhere to my views . . . I reluctantly join the Court's opinion.³¹⁵

[<https://perma.cc/EV4D-E6KN>] (discussing an interview in which Chief Justice Roberts emphasized the importance of building "consensus").

³⁰⁴ 556 U.S. 332 (2009).

³⁰⁵ *Id.* at 333.

³⁰⁶ *See id.* at 352–53 (Scalia, J., concurring).

³⁰⁷ *See id.* at 342–43 (majority opinion).

³⁰⁸ *Id.* at 354 (Scalia, J., concurring).

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ My Westlaw-based research reveals that *Gant* has never been *Marks*'d by an appellate court.

³¹² 563 U.S. 333 (2011).

³¹³ *Id.* at 334.

³¹⁴ *See id.* at 353 (Thomas, J., concurring).

³¹⁵ *Id.*

Justice Thomas adduced two main reasons for “reluctantly” joining an opinion he disagreed with. First, the Court’s opinion would “often lead to the same outcome” as Justice Thomas’s preferred test.³¹⁶ Second, forming a majority opinion would better “give lower courts guidance.”³¹⁷ Though Justice Thomas did not cite any authority for that two-prong rationale, other Justices have acted similarly — and pointed to one another’s decisions as authority.³¹⁸ For example, Justice O’Connor set out very similar reasoning in *US Airways, Inc. v. Barnett*³¹⁹: “[I]n order that the Court may adopt a rule, and because I believe the Court’s rule will often lead to the same outcome as the one I would have adopted, I join the Court’s opinion despite my concerns.”³²⁰

In short, Justices O’Connor and Thomas availed themselves of a broadly construed *Screws* rule and chose to trade off what they regarded as accuracy in exchange for greater settlement.³²¹ Those decisions to form a compromise majority may have been informed by an unstated assumption about precedent default rules, including the likely operation of the *Marks* rule. For example, if Justice Thomas had not joined Justice Scalia’s opinion, then at least some lower courts would probably have applied the logical subset version of the *Marks* rule and concluded that *Concepcion* created no binding precedent at all. Meanwhile, other courts might have opted for the all opinions approach and so found a binding precedent. Justice Thomas’s decision averted those outcomes. Both lower courts and the Court itself have treated *Concepcion* as though it were any other majority opinion — despite the express disagreement among the majority.³²² And that approach is correct. As we have seen, efficiency dictates that express agreement among the Justices should control the precedential effect of otherwise legitimate rulings.

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *E.g.*, *Olmstead v. L.C.*, 527 U.S. 581, 607–08 (1999) (Stevens, J., concurring in part and concurring in the judgment); *Bragdon v. Abbott*, 524 U.S. 624, 655–56 (1998) (Stevens, J., concurring) (including a “*cf.*” citation to Justice Rutledge’s *Screws* opinion).

³¹⁹ 535 U.S. 391 (2002).

³²⁰ *Id.* at 408 (O’Connor, J., concurring); *see also id.* (quoting Justice Rutledge’s *Screws* opinion); *id.* at 411 (“Because I think the Court’s test will often lead to the correct outcome, and because I think it important that a majority of the Court agree on a rule when interpreting statutes, I join the Court’s opinion.”).

³²¹ Again, *Screws* is cited in this line of cases. *See supra* notes 318, 320.

³²² My Westlaw-based research indicates that *Concepcion* has never been *Marks*’d by an appellate court. However, at least one academic piece has questioned the precedential value of *Concepcion*. *See* Lisa Tripp & Evan R. Hanson, *AT&T v. Concepcion: The Problem of a False Majority*, 23 KAN. J.L. & PUB. POL’Y 1, 2–3 (2013) (“This article posits that because Justice Thomas explicitly rejects the rationale of the Scalia opinion, the two opinions share no common ground and therefore . . . the case is not binding precedent in any court.”).

Notably, compromise majorities can and often do coexist with partial plurality opinions. In other words, the Justices supporting the judgment may form a partial majority opinion that expresses the agreed-upon rule, even as they write separately in pluralities and concurrences in the judgment to disagree with one another, either as to the ideal rule or as to the rationale.³²³ *McDonald v. City of Chicago*³²⁴ provides an example of a compromise partial majority with disagreement on the rationale. The plurality held that the Second Amendment was incorporated against the states as a matter of due process,³²⁵ whereas the partial concurrence in the judgment relied on the Privileges or Immunities Clause.³²⁶ But all five of those Justices formed a partial majority opinion and expressly agreed that the Second Amendment was incorporated.³²⁷ Thus, *McDonald* does not require recourse to *Marks* at all.³²⁸ Lower courts agree: they treat the Court's decision on incorporation as binding, without applying the *Marks* rule.³²⁹

The Court's regular practice of forging compromise majorities is instructive for several reasons. For one thing, this practice shows that it is realistic to expect that, in the absence of the *Marks* rule, the Justices would often form compromise majorities rather than issue fragmented decisions. More than that, these cases show that the Justices recognize the need for precedential guidance and respond accordingly, even to the point of changing their votes on the judgment of the Court. *Hughes* offers the most recent example, as Justice Sotomayor abandoned her earlier position and joined the majority in large part because of the confusion that her separate opinion in *Freeman* had caused.³³⁰ So if there were ever an urgent need to generate precedent on a particular issue,

³²³ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), supplies an example of a partial majority despite disagreement on the ideal rule of decision. In *Casey*, a majority joined: Part I of the lead opinion, which sets out the "central holding" of *Roe v. Wade*, see *Casey*, 505 U.S. at 843–45; Part III, which holds that *Roe* is not overruled, *id.* at 869; and various plurality sections that apply the "undue burden" test, *id.* at 874–79.

³²⁴ 561 U.S. 742 (2010).

³²⁵ *Id.* at 791 (plurality opinion).

³²⁶ *Id.* at 806 (Thomas, J., concurring in part and concurring in the judgment).

³²⁷ *Id.* at 748 (plurality opinion); *id.* at 805 (Thomas, J., concurring in part and concurring in the judgment).

³²⁸ By contrast, Williams has argued that *McDonald* affords an opportunity to apply his shared agreement approach to *Marks*, even though the case featured a partial majority opinion that set a controlling principle of law. Williams, *supra* note 22, at 831–33.

³²⁹ My research indicates that *McDonald* has never been *Marks*'d. For an example of a majority decision that is sometimes *Marks*'d by state courts, see *supra* note 123 and accompanying text.

³³⁰ See *Hughes v. United States*, 138 S. Ct. 1765, 1778–79 (2018) (Sotomayor, J., concurring) ("[M]y individual views, which '[n]o other Justice . . . shares,' have contributed to ongoing discord among the lower courts, sown confusion among litigants, and left 'the governing rule uncertain.'" (alteration and omission in original) (quoting *Arizona v. Gant*, 556 U.S. 332, 354 (2009) (Scalia, J., concurring))).

there is good reason to think that the Justices would reach a compromise, despite their disagreements. Finally, these cases demonstrate that compromise majorities accord with tradition, since most recent Justices have explicitly engaged in this practice at one time or another — and no Justice seems to have opposed it. Indeed, at least some of the Justices have explicitly extended the logic of the *Screws* rule to precedent formation, thereby developing a nascent, nonprecedential jurisprudence of compromise majorities.

C. Rule Agreement

Compromise majorities are an especially straightforward and efficient means of expressing majority agreement among the Justices. But what about instances of “rule agreement,” where two or more opinions that together express the views of a majority separately endorse a single legal rule? Expressing majority views in this way is somewhat inefficient insofar as it requires interpreters to pore over multiple opinions rather than one.³³¹ But rule agreement has nonetheless proven workable in many instances, leading virtually all practitioners to converge on how to read certain fragmented decisions. Take *United States v. Patane*.³³² Though the plurality and concurrence in the judgment advanced different theories, all five of those Justices agreed that courts should not suppress physical evidence obtained in violation of *Miranda*.³³³ As a result, *Patane* has occasioned little *Marks* attention.³³⁴ In contrast, *Missouri v. Seibert* — another fractured *Miranda* decision that was issued the same day but without rule agreement — has become one of the most *Marks*’d cases ever.³³⁵

The hard cases of rule agreement rely on the expressed views of dissenting Justices to reach majority approval of a rule of decision.³³⁶ In a

³³¹ The difficulty of discerning rule agreement across numerous opinions is often viewed as an important reason why the Supreme Court stopped issuing seriatim decisions in favor of majority opinions.

³³² 542 U.S. 630 (2004).

³³³ *Id.* at 633–34 (plurality opinion) (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)); *id.* at 644–45 (Kennedy, J., concurring in the judgment) (same).

³³⁴ *Patane* has only rarely been cited in connection with *Marks*, and those rulings generally focus on rule agreement. See, e.g., *United States v. Jackson*, 506 F.3d 1358, 1361 (11th Cir. 2007) (“[T]he *Patane* plurality and concurrence agreed, at least, that *Miranda* does not require the exclusion of physical evidence that is discovered on the basis of a voluntary, although unwarned, statement. As several of our sister circuits have recognized, this narrow agreement is the holding of *Patane*.”) (collecting cases).

³³⁵ See *supra* Tables 1–2.

³³⁶ See Michael L. Eber, Comment, *When the Dissent Creates the Law: Cross-Cutting Majorities and the Prediction Model of Precedent*, 58 EMORY L.J. 207, 208, 216 (2008); see also Nina Varsava, *The Role of Dissents in the Formation of Precedent*, 14 DUKE J. CONST. L. & PUB. POL’Y (forthcoming 2019) (manuscript at 1), <https://ssrn.com/abstract=3094016> [<https://perma.cc/E58U-MNV3>] (arguing that majority agreement should be binding “even if the judges in principled agreement are divided as to result”).

footnote, *Marks* itself looked to dissents from a circuit court decision, but only as evidence that lower courts had agreed on how to understand *Memoirs*.³³⁷ More recently, the Court has invoked cross-judgment majorities without treating them as precedential. For example, *Boumediene v. Bush*³³⁸ opened by noting that in *Hamdi v. Rumsfeld*³³⁹ “five Members of the Court recognized” a certain wartime detention power, citing the *Hamdi* plurality as well as Justice Thomas’s dissent.³⁴⁰ But that point played only a place-setting role, without directly informing the Court’s holding. Similarly, *United States v. Jacobsen*³⁴¹ adverted to *Walter v. United States*,³⁴² explaining: “While there was no single opinion of the Court [in *Walter*], a majority did agree on the appropriate analysis of a governmental search which follows on the heels of a private one.”³⁴³ The Court then block quoted from a two-Justice plurality and a four-Justice dissent — but left the precedential import of that vote breakdown unspecified.³⁴⁴ Overall, the Court appears to treat cross-judgment majorities as “signals,” that is, as informal cues indicating how best to interpret formal, binding precedents.³⁴⁵

The Court’s apparent if implicit approach strikes a sensible balance. Affording precedential status to rule agreement that spans both sides of the Court’s judgment would make some sense, since that agreement would reflect a view shared by most Justices. And those benefits might be worthwhile if accompanied by a broader move toward “issue voting,” as opposed to “outcome voting.”³⁴⁶ But so long as outcome voting remains in place, majority agreement across the judgment would

³³⁷ *Marks* footnoted an en banc ruling by the Fifth Circuit and parenthetically noted that “seven dissenting judges and one judge concurring in the result — constituting a majority on this issue — found that *Memoirs* stated the governing standard.” *Marks v. United States*, 430 U.S. 188, 194 n.8 (1977) (citing *United States v. Groner*, 479 F.2d 577 (5th Cir.) (en banc), *vacated and remanded on other grounds*, 414 U.S. 969 (1973)).

³³⁸ 553 U.S. 723 (2008).

³³⁹ 542 U.S. 507 (2004).

³⁴⁰ *Boumediene*, 553 U.S. at 733 (first citing *Hamdi*, 542 U.S. at 518 (plurality); and then citing *id.* at 588–89 (Thomas, J., dissenting)).

³⁴¹ 466 U.S. 109 (1984).

³⁴² 447 U.S. 649 (1980).

³⁴³ *Jacobsen*, 466 U.S. at 115.

³⁴⁴ *Id.* at 115–17; *see also* *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 414 (2006) (finding a “justiciability holding” based on the concurrence in the judgment and dissents in *Vieth v. Jubelirer*, 541 U.S. 267 (2004)); *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001) (counting the dissenters in *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582 (1983), to ascertain what “the Court made clear”); *Nichols v. United States*, 511 U.S. 738, 746 (1994) (emphasizing that “[f]ive Members of the Court in *Baldasar [v. Illinois]*, 446 U.S. 222 (1980),] — the four dissenters and Justice Stewart —” adhered to a precedent and then adopting the position of the dissenters).

³⁴⁵ *See* GARNER ET AL., *supra* note 233, at 210–12 (noting that the Supreme Court has looked to dissenting opinions “in interpreting splintered decisions,” *id.* at 210); *Re*, *supra* note 260, at 942–44 (describing a “signals model”).

³⁴⁶ *See* Kornhauser & Sager, *supra* note 197, at 57 (proposing a “metavote” on issue voting or outcome voting in each case); *see also* David Post & Steven C. Salop, *Rowing Against the Tidewater*:

paradoxically create a precedent that contradicted the judgment in that very case.³⁴⁷ That incongruity could also have practical implications for the Court's decisionmaking process by distorting advocates' incentives. Many parties would understandably focus on piecing together a majority on the judgment, rather than raising potentially meritorious arguments that should lead the Court to adopt a single, precedential rule of decision. These difficulties are avoided if the Justices create binding rules of decision only when a majority joins in creating the Court's judgment.³⁴⁸

Without the *Marks* rule, courts would — and should — continue to treat cases of rule agreement largely the way that they already do. Precedent would still arise from the easy cases, where there is rule agreement among Justices who concur in the judgment. And courts would likely continue to view rule agreement that depends on the votes of dissenting Justices as informative but not binding.

D. Judgment Agreement

We come at last to the *Marks* rule's unique contribution to the law: its purported ability to derive precedent from cases of "judgment agreement," that is, cases where the only relevant majority agreement is on the judgment. An important part of that impact is reflected in the frequently *Marks*'d cases in Tables 1 and 2.³⁴⁹ While cases featuring partial majorities or rule agreement would still offer at least some precedential guidance after the *Marks* rule's demise, most fragmented decisions would be ineligible to qualify as precedent. But, on inspection, the

A Theory of Voting by Multijudge Panels, 80 GEO. L.J. 743, 762–70 (1992) (critiquing outcome voting). *But see* Rogers, *supra* note 245, at 1025–37 (defending outcome voting).

³⁴⁷ The classic example is *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949), discussed in Post & Salop, *supra* note 346, at 748–50. *See also* Kornhauser & Sager, *supra* note 197, at 20–21 (discussing *Tidewater*). Under the approach advanced here, *Tidewater* would stand for the proposition that the District of Columbia is treated as a state under the diversity laws, since concurring Justices comprising a majority agreed on that rule. *See Tidewater*, 337 U.S. at 604, 626 (Rutledge, J., concurring). However, the Justices' various rationales for that rule did not garner the necessary majority support and so would not be precedential.

³⁴⁸ In *NFIB v. Sebelius*, 567 U.S. 519 (2012), the majority opinion included a "[t]he Court today holds" statement that seems to assert the existence of rule agreement on the scope of the Commerce Clause — which may have been an effort to overcome the problem of treating dissenting votes as contributing to precedent. *See id.* at 572.

³⁴⁹ Examining cases that are frequently *Marks*'d in the appellate courts makes sense insofar as those rulings represent the *Marks* rule's clearest effect on the legal system. Still, focusing on those cases might yield an exaggerated view of how difficult it is to apply *Marks*, insofar as easy *Marks* applications might be handled without a *Marks* citation or appeal. But that appropriate point of caution should not be overstated. Courts have reason to cite *Marks* whenever they confront cases of mere judgment agreement that are potentially outcome-determinative. And federal district court citation patterns resemble circuit court patterns. *See supra* note 93. At any rate, even ostensibly "easy" *Marks* applications have a way of becoming anything but. *See, e.g., supra* notes 9–12 (*Freeman*), 75–76 (*Baze*), 146 (*Coker*), 276–277 (*Bakke*) and accompanying text.

Marks rule's actual performance leaves much to be desired. As we have seen, lower courts often fail to converge on any binding opinion; and even when one opinion (or set of opinions) does tend to be recognized as precedential under *Marks*, the result is to reward outlier views that most or all Justices have rejected. So, on balance, the net effect of the *Marks* rule is objectionable — and abandoning it would be an improvement.

None of this is to deny that abandoning *Marks* would sacrifice some precedent. But, if necessary, the Court could mitigate that problem by abandoning the *Marks* rule prospectively, much as it might prospectively revise the “Rule of Four” or other principles of internal judicial administration. On that approach, the *Marks* rule would operate only when construing previously decided cases that were arguably issued in the shadow of *Marks*. That approach would still forgo the formation of new precedent under the *Marks* rule. But, as we have seen, exclusive use of the majority rule would afford the Justices a more efficient means of forming precedent when there is majority agreement, and later courts would likewise have an efficient means of recognizing that precedent.³⁵⁰ Thus, any precedent lost in the future would be costly or reflective of outlier views — and so should not be precedential anyway.

Taking the additional step of abandoning *Marks* retroactively would incur greater costs. Retroactive abandonment would erase the precedential force of prior fragmented rulings, and any precedents that rested on *Marks* applications would also become open to question. Moreover, the magnitude of any retroactive precedential loss would exceed the set of decisions that expressly relied on *Marks*, since there are at least some cases in which judges implicitly applied the *Marks* rule.³⁵¹ Yet that loss of precedent, too, would yield a net gain for the legal system. Where it has been used, *Marks* has frequently generated confusion. And we have seen that *Marks* systematically favors outlier views, even when it is applied in a uniform way. Wiping away those old *Marks* applications would thus create room for renewed thinking — and clearer, more accurate precedent — on the underlying merits issues.

* * *

The *Marks* game simply isn't worth the candle — and quitting it would have little net cost. Instead of struggling to derive precedent from disagreement, courts should simply understand from the outset that mere judgment agreement establishes no precedent at all. And because the guidance that *Marks* has afforded is so ambivalent and dubious, the

³⁵⁰ See *supra* section II.A, pp. 1968–70.

³⁵¹ See *supra* notes 86–87 and accompanying text (discussing citations to fragmented decisions without *Marks* citations).

Court can safely abandon the *Marks* rule not just prospectively — that is, for newly decided fragmented ruling — but also retroactively, thereby freeing itself and lower courts from the confusing, arbitrary implications of previously fragmented decisions.³⁵²

CONCLUSION

The *Marks* rule is fast becoming a staple of judicial decisionmaking in both federal and state courts. Yet the rule is ill-advised. Rather than seeking out the “narrowest grounds,” however defined, courts should attribute precedential effect to Supreme Court rulings only where a rule of decision garners express majority support. That majority rule for precedent formation would vest the power to make Court precedent with the most efficient precedent creators: the Justices themselves at the time of decision. The Justices should accordingly throw *Marks* overboard. But even if the Court leaves the *Marks* rule intact, lower courts have an important if counterintuitive role to play: by narrowly construing *Marks*, they can discipline Justices who might otherwise go it alone, rather than forming majority opinions. That basic approach also points the way beyond *Marks*. It suggests that the results of fragmented and unexplained decisions should be nonbinding. And it supports the Justices’ exercise of their legitimate if limited power to form compromise majorities.

³⁵² Circuit courts have already shown themselves ready to reconsider *Marks* applications, at least where doing so is consistent with general principles of stare decisis. See, e.g., *supra* note 13 and accompanying text.