

## **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 compromise. 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 court citations to the *Marks* rule involve a relatively small number of fragmented cases. These findings allow courts and scholars to evaluate the *Marks* rule’s practical operation, as well as the costs and benefits of abandoning it. The time is ripe for that empirical inquiry: after long deflecting *Marks* rule issues, the Court has granted review of a case that poses the question of just what *Marks* means.

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.

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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.<sup>1</sup> The main exception was established in *Marks v. United States*:

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 . . . .”<sup>2</sup>

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.<sup>3</sup> Yet the *Marks* rule has generated considerable confusion. For example, *University of California Regents v. Bakke* famously resulted in a “fragmented” decision, that is, a ruling without a majority opinion,<sup>4</sup> and so was thought to have offered a prime opportunity to apply the *Marks* rule.<sup>5</sup> Yet circuit courts divided as to whether Justice Lewis Powell’s solo opinion constituted binding precedent on affirmative action.<sup>6</sup> 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.<sup>7</sup> 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* is perhaps the most striking recent example.<sup>8</sup> After the Court divided 4-to-1-to-4 on an important question of federal sentencing that affected thousands of criminal defendants, most courts applying *Marks* concluded that Justice Sonia Sotomayor’s solo concurrence in the judgment should control.<sup>9</sup> Yet the other eight justices in *Freeman* thoroughly criticized Sotomayor’s position as indefensibly “arbitrary.”<sup>10</sup> Bizarrely, the Court’s least popular view became law—except, that is, in the DC Circuit and the Ninth Circuit, which eventually concluded that *Freeman* created no precedent apart from the result.<sup>11</sup> For years, the Court had declined to resolve circuit splits implicating *Marks*,<sup>12</sup> even when the United States petitioned for certiorari to resolve a multi-sided split on whether any opinion (or

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

<sup>2</sup> *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976) (opinion of Stewart, Powell, Stevens, JJ)). “Judgments” because the rule’s original object was a consolidated case.

<sup>3</sup> The main text is based on the original empirical work reported below in Part I.

<sup>4</sup> *Marks* itself uses “fragmented” in this way. See *infra* note 30.

<sup>5</sup> 438 U.S. 265 (1978).

<sup>6</sup> 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*.”).

<sup>7</sup> See *id.*

<sup>8</sup> 564 U.S. 522 (2011).

<sup>9</sup> See, e.g., *United States v. Graham*, 704 F.3d 1275, 1278 (10th Cir. 2013).

<sup>10</sup> See *id.* at 532-33 (plurality opinion); *id.* at 546-551 (Roberts, C.J., dissenting).

<sup>11</sup> 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*.”).

<sup>12</sup> E.g., *Petition for Certiorari in Negron v. United States*, No. 16-999 (cert. denied June 26, 2017).

opinions!) from *Rapanos v. United States* were binding.<sup>13</sup> But no longer. In December 2017, the Court granted review of a case implicating the *Freeman* circuit split—and so now has a perfect opportunity to take stock of *Marks*.<sup>14</sup>

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,<sup>15</sup> its practical consequences and defects have not 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.<sup>16</sup> And lower courts, feeling bound by vertical stare decisis, struggle over *Marks* rather 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.<sup>17</sup> 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. In short, the Court can and 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 November 2017—including the Supreme Court, the federal courts of appeals, and state appellate courts. 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

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<sup>13</sup> 547 U.S. 715 (2006); Petition for Certiorari in *United States v. McWan*, No. 08-223 (cert. denied Dec. 1, 2008) (petition of the United States).

<sup>14</sup> See *Hughes v. United States*, No. 17-155 (cert. granted Dec. 8, 2017). The petition argued for the relatively narrow “logical subset” version of the *Marks* rule. See *infra* Subsection I.B.3; see also *infra* note 225.

<sup>15</sup> See, e.g., 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 demands of Eighth Amendment doctrine); 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); Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 CORNELL L. REV. 1593, 1625 (1992) (proposing a multifaceted “legitimacy model”); 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”).

<sup>16</sup> A recent example is Ryan Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795 (2017), discussed below in Section II.B.3. See also previous note. 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 “unsupportable,” but Thurmon went on to suggest a complex “hybrid” approach that assigns persuasive authority in proportion to the number of joins for each opinion. Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 420 (1992).

<sup>17</sup> We might 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).

*Marks* rule is most defensible when viewed as a “precedent default,” that is, as an interpretive principle that the Court has established to guide its own internal decision-making, as well as later courts’ interpretation of fragmented decisions. Yet 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 genuine strengths, as well as to opportunities for lower courts to facilitate *Marks*’s abandonment. Second, the case against the *Marks* rule suggests that even the *result* in fractured cases 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.<sup>18</sup> Finally, greater attention is owed to a lesser known principle of Supreme Court decision-making: the *Screws* rule.<sup>19</sup> 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.<sup>20</sup> 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 decision-making 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

### A. Making *Marks*

Far from having an ancient pedigree, the *Marks* rule is an invention of the last forty years.<sup>21</sup> 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.

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<sup>18</sup> See *infra* note 124.

<sup>19</sup> See, e.g., H. Ron Davidson, *The Mechanics of Judicial Vote Switching*, 38 SUFFOLK U. L. REV. 17, 33 (2004) (using this term).

<sup>20</sup> See *Screws v. United States*, 325 U.S. 91, 134 (1945) (Rutledge, J., concurring in result).

<sup>21</sup> 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 C. BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS 133-35 (1912); EUGENE WAMBAUGH, THE STUDY OF CASES § 48 (Boston, Little, Brown & Co. 2d ed. 1894) (“Even when all 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 different judges differ materially.”); Comment, *Supreme Court No-Clear Majority Decisions: A Study in Stare Decisis*, 24 U. CHI. L. REV. 99 (1956); see also NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 71-73 (2008) (“Where a majority of judges agree as to the

Though first adopted by a majority opinion in *Marks v. United States*, the rule originated in the plurality opinion in *Gregg v. Georgia*.<sup>22</sup> 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*, the Court had badly divided over the constitutionality of capital punishment.<sup>23</sup> 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.<sup>24</sup> And *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. Some background is required. In 1957, *Roth v. United States* had adopted a relatively permissive approach to obscenity prosecutions, notwithstanding the First Amendment.<sup>25</sup> Then, in 1966, the Court issued a fragmented decision in *Memoirs v. Massachusetts*.<sup>26</sup> Most justices agreed that the obscenity conviction in *Memoirs* could not stand, and every test proposed by the concurring justices offered greater First Amendment rights than the *Roth* test. But the justices split as to the appropriate First Amendment standard. 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.”<sup>27</sup> The Court applied that approach thirty-one separate times.<sup>28</sup> During that period, the defendants in *Marks* trafficked in allegedly obscene materials, before their operation came to an end in early 1973. A few months later, the Court decided *Miller v. California*, which rejected the test employed by the *Memoirs* plurality and restored a more pro-government standard.<sup>29</sup> 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.

In *Marks* the Court ruled in favor of the defendants on the theory that the *Memoirs* plurality set the governing law until *Miller*. The Court began by stating the precedential rule that

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decision but disagree as to the correct grounds for the decision, extracting a *ratio decidendi* from the case may be an arbitrary exercise.”); 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).

<sup>22</sup> *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U. S. 153, 169 n. 15 (1976) (opinion of Stewart, Powell, Stevens, JJ.)).

<sup>23</sup> 408 U.S. 238 (1972).

<sup>24</sup> *Gregg*, 428 U.S. at 169 n.15 (identifying the Stewart and White 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 seems 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”).

<sup>25</sup> 193 U.S. 476 (1957).

<sup>26</sup> 383 U. S. 413 (1966).

<sup>27</sup> *Miller v. California*, 413 U.S. 15, 22 n.3 (1973).

<sup>28</sup> *Marks*, 430 U.S. at 193 n.7.

<sup>29</sup> 413 U.S. 15.

the *Greggs* 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.<sup>30</sup> *Marks* then reviewed the fragmented decision set out in *Memoirs*. A three-justice plurality had adopted a multipart test offering First Amendment protection unless the expression at issue is “utterly without redeeming social value.” Two justices had concluded that obscenity prosecutions were essentially impermissible in all cases. Finally, one justice had advanced a stringent test for obscenity prosecutions, allowing them only for “hardcore pornography.” 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.”<sup>31</sup> 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.”<sup>32</sup> In a footnote, *Marks* also noted 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.<sup>33</sup>

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.<sup>34</sup> 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.<sup>35</sup> Yet the Court's statement of the *Marks* rule was not limited to the case's ex post facto context or dependent on statements in the previous summary rulings. And the lower courts' convergence on the *Memoirs* plurality was adduced more as confirmation than proof—with the summary reversals relegated to a footnote.

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 Lewis F. Powell—the author of *Marks*. By including the *Marks* rule in his majority opinion in *Marks*, 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.<sup>36</sup> So the Court's decision to fashion the *Marks*

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<sup>30</sup> See *Marks*, 430 U.S. at 193; *supra* note 2 (block quoting the *Marks* rule).

<sup>31</sup> *Id.* at 194.

<sup>32</sup> *Id.*

<sup>33</sup> *Miller*, 413 U.S. at 22 n.3; see also *Marks*, 430 U.S. at 193.

<sup>34</sup> See *Gutter 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.”).

<sup>35</sup> See, e.g., *Redrup v. New York*, 386 U.S. 767, 771 (1967); *supra* note 33.

<sup>36</sup> Some justices have in fact posited that the *Gregg* plurality represented “the narrowest ground” and so was binding. See, e.g., *Johnson v. Texas*, 509 U.S. 350, 383 (1993) (O'Connor, J., dissenting).

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.<sup>37</sup> 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 US 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.<sup>38</sup> Indeed, no justice cited the *Marks* rule until 1986,<sup>39</sup> with the first majority opinion citing and applying *Marks* in 1988—over a decade after *Marks* itself.<sup>40</sup> In total, the Court’s majority opinions have cited *Marks* for the *Marks* rule eight times, or about every five years.<sup>41</sup> In five of those majority opinions, the Court succinctly applied the *Marks* rule to find a binding precedent,<sup>42</sup> including a precedent that created “clearly established law” under AEDPA.<sup>43</sup> In another case, the majority simply noted that the decision below had applied *Marks*.<sup>44</sup> In the other two majority opinions, the Court noted *Marks* rule issues only to avoid them. To wit, the Court has not once but twice explained that the *Marks* rule is “more easily stated than applied” 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.”<sup>45</sup> In both of those cases, the Court ultimately chose not to apply the *Marks* rule at all.

In addition, about fifteen non-majority opinions have cited the *Marks* rule, for various reasons. Sometimes, a justice writes separately to bow to the force of *Marks*, such as when Chief Justice Rehnquist acknowledged that the *Casey* plurality was binding even though he had dissented in that case.<sup>46</sup> In other cases, a separate opinion disputes a majority’s application of *Marks*. Such a dispute arose in the first majority opinion that invoked *Marks*: 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.”<sup>47</sup> Likewise, the most recent majority opinion to apply *Marks*

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<sup>37</sup> 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 64.

<sup>38</sup> *Smith v. United States*, 431 U.S. 291 (1977); *Ward v. Illinois*, 431 U.S. 767 (1977); *Ballew v. Georgia*, 435 U.S. 223 (1978); *Pinkus v. United States*, 436 U.S. 293 (1978); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Burch v. Louisiana*, 441 U.S. 130 (1979); see also *Friedman v. United States*, 430 U.S. 925 (1977) (GVR).

<sup>39</sup> See *Celotex Corp. v. Catrett*, 477 U.S. 317, 329 n.1 (1986) (Brennan, J., dissenting).

<sup>40</sup> See *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 764 n.9 (1988).

<sup>41</sup> See the next four notes.

<sup>42</sup> See *Lakewood*, 486 U.S. at 764 n.9; *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994); *O’Dell v. Netherland*, 521 U.S. 151, 160 (1997); *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007); *Glossip v. Gross*, 135 S. Ct. 2726, 2738 (2015).

<sup>43</sup> See *Panetti*, 551 U.S. at 949.

<sup>44</sup> See *Erie v. Pap’s AM*, 529 U.S. 277, 285 (2000). A plurality may have gone on to reach an implicit *Marks* finding. See *id.* at 297 (plurality opinion).

<sup>45</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003); *Nichols v. United States*, 511 U.S. 738, 745 (1994).

<sup>46</sup> See *Stenberg v. Carhart*, 530 U.S. 914, 952 (2000) (Rehnquist, J., dissenting).

<sup>47</sup> See *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 785 (1988) (White, J., dissenting).

prompted a four-justice dissent to dispute whether the earlier case, *Baze v. Rees*, had yielded any “narrowest” and therefore binding opinion at all.<sup>48</sup> And, in still other cases, fragmented decisions feature separate opinions that joust over how later courts should apply *Marks*.<sup>49</sup>

Take *United States v. Santos*, where Justice Antonin Scalia led a four-justice plurality that picked up an essential fifth vote on the judgment from Justice John Paul Stevens.<sup>50</sup> Scalia’s plurality expressly recognized that Stevens’s opinion was narrower and therefore binding under *Marks*.<sup>51</sup> But Scalia then put his own gloss on the import of the Stevens opinion. In Scalia’s view, the binding effect of Stevens’s opinion was “that ‘proceeds’ means ‘profits’ when there is no legislative history to the contrary.”<sup>52</sup> On that basis, Scalia concluded that *Santos* yielded no *Marks* holding “when contrary legislative history does exist.”<sup>53</sup> After all, Scalia explained, eight justices (the plurality and dissenters) had “apparently” rejected that view.<sup>54</sup> Stevens responded that the plurality’s *Marks* “speculat[ion]” was dicta and that the plurality’s reading of Stevens’s opinion was “not correct.”<sup>55</sup> As we will see 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. 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*.<sup>56</sup> Yet the Court more often glides 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.<sup>57</sup> 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 enough and garners consensus among the justices. But the use of the rule has also been a source of some controversy and confusion on the Court.

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<sup>48</sup> See *Glossip*, 135 S. Ct. at 2793 (Sotomayor, J., dissenting) (arguing that *Baze v. Rees*, 553 U.S. 35 (2008), yielded no *Marks* precedent); see also *Panetti*, 551 U.S. 969 at n.5 (Thomas, J., dissenting) (disputing the majority’s *Marks* analysis).

<sup>49</sup> For example, the majority in *City of Ontario, California v. Quon*, 560 U.S. 746, 757, 130 S. Ct. 2619, 2628 (2010), expressly declined to decide what opinion controlled in *O’Connor v. Ortega*, 480 U.S. 709 (1987), while two separate opinions jostled over the issue. See *Quon*, 560 U.S. at 766 (Stevens, J., concurring); *id.* at 767 (Scalia, J., concurring in part and dissenting in part).

<sup>50</sup> 553 U.S. 507 (2009).

<sup>51</sup> See *id.* at 523.

<sup>52</sup> See *id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

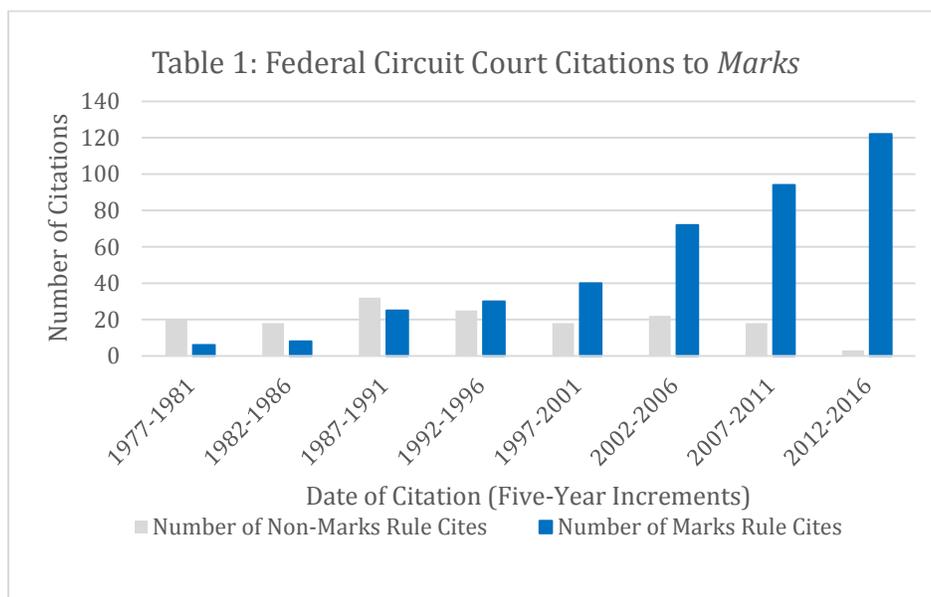
<sup>55</sup> *Id.* at 528 n.7.

<sup>56</sup> 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.”).

<sup>57</sup> For a recent example, *Packingham v. North Carolina*, No. 15-1194 (U.S. 2017), discussed *Burson v. Freeman* as providing the reasoning of “the Court” without ever noting it was quoting a plurality opinion. Also interestingly, non-majority opinions sometimes speak as though they have majority support, which could be viewed as an effort to claim precedential influence in the face of (what at least could be) majority opposition. See, e.g., *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1665 (2015) (opinion of Roberts, C.J.) (using “we hold” language in a passage that lacked majority support).

### 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 Table 1 below.<sup>58</sup>



As the Table 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 overtake other *Marks* citations around 2000.<sup>59</sup> This upward trend is significant because most precedents decline in value over time, yielding progressively fewer citations.<sup>60</sup> The steep rise in citations after 2000 may be partly explained by *Marks*'s salient role in affirmative action litigation up to and including *Grutter v. Bollinger*.<sup>61</sup> In recent

<sup>58</sup> All data in this Section is based on Westlaw searches of recorded federal court of appeals opinions that cite *Marks* through November 2017, with *Marks* citations unrelated to the *Marks* rule excluded from consideration. Cases that expressly rely on prior *Marks* applications are counted, as are cases that ultimately find no precedent under *Marks*. Opinions that are withdrawn or superseded are excluded. Cases were coded by myself and 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 this is a draft, I plan to update this information.

<sup>59</sup> Scholars at this time called for greater pedagogical attention to the *Marks* rule. Maxwell L. Stearns, *The Case for Including Marks v. United States in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321, 329-39 (2000).

<sup>60</sup> 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 53, 117 (2006) (collecting horizontal and vertical evidence).

<sup>61</sup> 539 U.S. 306 (2003); text accompanying *supra* note 5.

years, federal circuit court citations to the *Marks* rule have occurred many times more often than all other federal circuit court citations to *Mark* combined. In 2016, for example, federal circuit decisions reveal 20 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.<sup>62</sup> Remarkably, 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.

Below, Table 2 lists the Court decisions that have most often been “*Marks*’d,” or interpreted in conjunction with an express citation to the *Marks* rule.<sup>63</sup> 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; and Majority = M) 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 2: Decisions Most Often *Marks*’d in the Federal Circuit Courts**

	Case Name	Citation	Date	Case Type	<i>Marks</i> ’ing Opinions	<i>Marks</i> ’ing Circuits	Total Circuit Court Cites
1	Freeman v. U.S.	131 S. Ct. 2685	2011	P	44	12	382
2	U.S. v. Santos	553 U.S. 507	2008	P	31	9	330
3	Missouri v. Seibert	542 U.S. 600	2004	P	28	11	212
4	City of L.A. v. Alameda Books	535 U.S. 425	2002	P	17	6	95
5	Barnes v. Glen Theatre, Inc.	501 U.S. 560	1980	P	14	7	143
6	Rapanos v. U.S.	547 U.S. 715	2006	P	9	7	71
7	Eastern Enterprises v. Apfel	524 U.S. 498	1998	P	9	7	152
8	Elrod v. Burns	427 U.S. 347	1976	P	9	6	901
9	McKune v. Lile	536 U.S. 24	2002	P	9	4	127
10	Harmelin v. Michigan	501 U.S. 957	1991	P	8	5	726

<sup>62</sup> See, e.g., *Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336, 356 (3d Cir. 2016) (en banc) (applying the *Marks* rule to ascertain “the law of our circuit”); *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1188 (11th Cir. 2004) (state court ruling); *Ne. Beverage Corp. v. N.L.R.B.*, 554 F.3d 133, 141 (D.C. Cir. 2009) (Garland, J., dissenting) (including a “Cf.” cite to *Marks* in construing an NLRB ruling); *Manfred v. Nat’l R.R. Passenger Corp.*, 106 F. Supp. 3d 678, 684 (W.D. Pa. 2015) (construing state court ruling).

<sup>63</sup> It is possible that easy *Marks* applications are not disputed on appeal, skewing the sample. However, federal district court citations patterns appear to be roughly similar. In 2015, for example, district courts applied *Marks* about 50 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* (14 cases), *McIntyre* (8 cases), *Santos* (3 cases) *Seibert* (3 cases), and *Ewing* (3 cases). The exception is *Ewing*, which is among the most *Marks*’d cases in the state courts. See Tables 3 and 4.

11	Mitchell v. Helms	530 U.S. 793	2000	P	7	4	40
12	Planned Parenthood of Southeastern Penn. v. Casey	505 U.S. 833	1992	PM	7	4	344
13	City of Erie v. Pap's A.M.	529 U.S. 277	2000	PM	6	5	194
14	Van Orden v. Perry	545 U.S. 677	2005	P	6	4	70
15	Pennsylvania v. Delaware Valley Citizens' Council for Clean Air	483 U.S. 711	1987	PM	6	4	174
16	J. McIntyre Machinery, Ltd. v. Nicaastro	131 S. Ct. 2780	2011	P	6	3	46
17	Simmons v. South Carolina	512 U.S. 154	1994	P	6	3	217
18	Baze v. Rees	553 U.S. 35	2008	P	5	5	128
19	Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.	559 U.S. 393	2010	PM	5	4	94
20	Regents of the Univ. of Cal. v. Bakke	438 U.S. 265	1977	P	5	4	350
21	Kerry v. Din	135 S. Ct. 2128	2015	P	4	4	17
22	Nat'l Federation of Ind. Bus. v. Sebelius	132 S. Ct. 2566	2012	PM	4	4	155
23	FW/PBS, Inc. v. City of Dallas	493 U.S. 215	1990	PM	4	4	362
24	Price Waterhouse v. Hopkins	490 U.S. 228	1989	P	4	4	955
25	Baldasar v. Illinois	446 U.S. 222	1980	PC	4	4	70
26	Williams v. Illinois	132 S. Ct. 2221	2012	P	4	3	44
27	Hein v. Freedom From Religion Foundation	551 U.S. 587	2007	P	4	2	68
28	Albright v. Oliver	510 U.S. 266	1994	P	4	1	507

Again, the cases listed above are only the most frequently *Marks*'d decisions. At the other end of the distribution, federal circuit opinions have *Marks*'d about 100 decisions only one or two times. Other fragmented decisions never yield an appellate court *Marks* citation—despite being cited in hundreds of appellate cases.<sup>64</sup> And even the most *Marks*'d cases are cited vastly more often, sometimes many dozens of times more often, than they are *Marks*'d.

So while the *Marks* rule is cited with increasing frequency, the vast 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.<sup>65</sup> 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.<sup>66</sup> 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

<sup>64</sup> Some commenters view *Marks* as a response to increasing rates of fractured opinions, but *Marks*'s rise in the lower courts seems not to track changes in the rates of fragmented decisions. *Cf.* Kimura, *supra* note 15, at 1625 (counting partial majority opinions to find about 10 plurality decisions per term in the 1980s).

<sup>65</sup> Courts sometimes find “narrowest” or “controlling” concurrences without citing *Marks*. *Cf. infra* note 86.

<sup>66</sup> *E.g.*, 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).

principles based on statements in separate opinions.<sup>67</sup> 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.<sup>68</sup> The concurrence in the judgment may go unmentioned or even be portrayed as a full concurrence.<sup>69</sup> 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 2 shows that a case’s total 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 prospect cannot explain why *Marks* attention is so concentrated on a relatively small number of cases. The most plausible explanation would focus on decision-making 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 non-dispositive 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 *Marks*, the federal courts of appeals only sometimes reach convergent results. Prominent examples include *Barnes v. Glen Theatre, Inc.*,<sup>70</sup> *City of Los Angeles v. Alameda Books*,<sup>71</sup> *Baze v. Rees*,<sup>72</sup> and *J. McIntyre Machinery, Ltd. v. Nicastro*.<sup>73</sup> Often, however, repeated *Marks* analysis generates lasting disagreement, including after courts initially converge on a single *Marks* outcome. Examples include *Freeman v. United States*,<sup>74</sup> *Santos v. United States*,<sup>75</sup> and *Rapanos v. United States*.<sup>76</sup> An intermediate example can be found in *Missouri v. Seibert*, where most circuits have converged on the concurrence in the judgment (perhaps in part because it declares itself “narrower” than the plurality), but some courts have concluded that there is no narrowest opinion under *Marks*.<sup>77</sup>

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<sup>67</sup> See e.g. *Big Dipper Ent., LLC v. City of Warren*, 641 F.3d 715, 721 (6th Cir. 2011); *Redner v. Dean*, 29 F.3d 1495, 1500 (11th Cir. 1994); see generally *infra* Section III.C (discussing “rule agreement”).

<sup>68</sup> E.g., *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004) (discussing *Burson v. Freeman* with no evident awareness it was a plurality); *supra* note 66. From 2015 to 2017, for example, most of the 11 circuit decisions to cite *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2013), 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.

<sup>69</sup> See, e.g., *United States v. Ziegler*, 474 F. 3d 1184, 1189-91 (9th Cir 2007) (discussing the plurality in *Ortega v. O’Connor* in terms of what “the Court” decided, while citing a concurrence in the judgment as a “concurrence”).

<sup>70</sup> 501 U.S. 560 (1991). Circuit courts tend to converge on the concurrence in the judgment

<sup>71</sup> 535 U.S. 425 (2002). Here too, courts generally converge on the separate opinions

<sup>72</sup> 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 *supra* note 48.

<sup>73</sup> 564 U.S. 873 (2011). Circuit courts tend to converge on the *McIntyre* concurrence in the judgment.

<sup>74</sup> 564 U.S. 522 (2011); see also text accompanying *supra* notes 8-11.

<sup>75</sup> 553 U.S. 507 (2008).

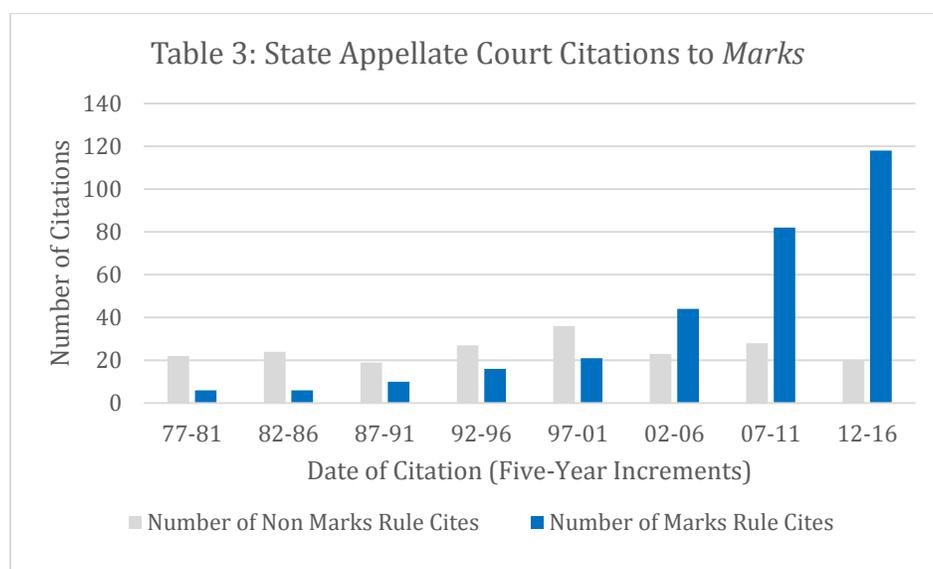
<sup>76</sup> *United States v. Donovan*, 661 F.3d 174, 181 (3d Cir. 2011) (summarizing split).

<sup>77</sup> 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 *Missouri v. Seibert*, 542 U.S. 600 (2004)); *United States v. Heron*, 564 F.3d

## D. State Courts of Appeals

State court use of the *Marks* rule has attracted little attention,<sup>78</sup> 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, Table 3 tells the basic story.<sup>79</sup> 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 32 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 the state court’s increasing use of *Marks* foretells that the rule’s long-term influence could lie primarily in state court decision-making.



879, 884 (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.”).

<sup>78</sup> For two pieces that note such cases in footnotes, see Saul Levmore, *Ruling Majorities and Reasoning Pluralities*, 3 THEORETICAL INQUIRIES L. 87, 123 n.18 (2002); Joseph M. Cacace, *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).

<sup>79</sup> All data in this Section is based on Westlaw searches of state court cases that cite *Marks* through November 2017, with *Marks* citations unrelated to the *Marks* rule and in trial-level courts excluded. As in the previous section, cases that expressly rely on prior *Marks* applications are counted, as are cases that find no precedent under *Marks*; but opinions that are withdrawn or superseded are excluded. DC is counted as a state. Cases were coded by myself and 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. Again, this is a draft, so I plan to update this data.

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.<sup>80</sup> Other state appellate courts to use *Marks* on their own cases include Mississippi, Texas, and—for a time—Washington.<sup>81</sup> Though still few in number, these citations are remarkable.<sup>82</sup> The *Marks* rule does not purport to apply to state court decisions, and the Court presumably 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 reject the *Marks* rule as applied to their own state court rulings.<sup>83</sup> Still, the *Marks* rule's presence in state jurisprudence demonstrates the Court's ability to bring uniformity to state-court decision-making, even when it lacks binding precedential power.

The distribution of *Marks* rule citations in state 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 50 Supreme Court decisions, as well as many state court decision. Below, Table 4 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 courts represent nearly half of all state court citations to the *Marks* rule.

**Table 4: Decisions Most Often *Marks*'d in State Appellate Courts**

	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	59	21	768
2	Williams v. Illinois	132 S. Ct. 2221	2012	P	38	18	484

<sup>80</sup> See *Little v. Comm'r of Correction*, 177 Conn. App. 337, 358 (2017); *Guardado v. State*, 218 Md. App. 640, 649 (Ct. App. 2014); *Medina v. Hochberg*, 465 Mass. 102, 107 (Sup. Ct. 2013); *People v. Brown*, 126 A.D.3d 516, 518 (N.Y. App. Div.), rev'd, 28 N.Y.3d 392 (Ct. App. 2016); *People v. Villalpando*, No. G045028, 2013 WL 2366207, at \*7 (Cal. Ct. App. May 30, 2013) (unpublished).

<sup>81</sup> 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 ultimately adopted a rule akin to the majority rule advanced in this Article. Compare *Davidson v. Hensen*, 135 Wash. 2d 112, 128 (1998) (relying on *Marks*), with *In re Pers. Restraint of Francis*, 170 Wash. 2d 517, 532 n.7 (2010) ("When there is no majority opinion, the holding is the narrowest ground upon which a majority agreed.").

<sup>82</sup> Cf. *Levermore*, *supra* note 78, at 123 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.").

<sup>83</sup> See, e.g., *State v. Ruem*, 179 Wash. 2d 195, 220 n.7 (Sup. Ct. 2013) (en banc) (Johnosn, J., concurring in part and 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."); *State v. Kikuta*, 125 Haw. 78, 97 n.14 (2011) (finding the *Marks* rule "has been discredited" based on scholarship and *Nichols v. United States*, 511 U.S. 738 (1994)).

3	J. McIntyre Machinery, Ltd. v. Nicastro	131 S. Ct. 2780	2011	P	13	10	90
4	Melendez-Diaz v. Massachusetts	557 U.S. 305	2009	M	12	4	2,135
5	Baldasar v. Illinois	446 U.S. 222	1980	PC	10	9	418
6	Harmelin v. Michigan	501 U.S. 957	1991	PM	7	6	2,744
7	McKune v. Lile	536 U.S. 24	2002	P	7	5	243
8	Montana v. Egelhoff	518 U.S. 37	1996	P	7	2	331
9	Barnes v. Glen Theatre, Inc.	501 U.S. 560	1991	P	6	4	194
10	Troxel v. Granville	530 U.S. 57	2000	P	5	4	2,640
11	Ford v. Wainwright	477 U.S. 399	1986	PM	5	4	355
12	Salinas v. Texas	133 S. Ct. 2174	2013	P	4	4	102
13	City of L.A. v. Alameda Books, Inc.	535 U.S. 425	2002	P	4	4	63
14	Chavez v. Martinez	538 U.S. 760	2003	PM	4	1	146
15	Ewing v. California	538 U.S. 11	2003	P	3	3	1,507
16	Eastern Enterprises v. Apfel	524 U.S. 498	1998	P	3	3	93
17	Planned Parenthood of Southeastern Penn. v. Casey	505 U.S. 833	1992	PM	3	3	472
18	Elrod v. Burns	427 U.S. 347	1976	P	3	3	287
19	Bullcoming v. New Mexico	131 S. Ct. 2705	2011	PM	3	2	722
20	Baze v. Rees	553 U.S. 35	2008	P	3	1	210

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 law and so don't pertain to state court practice. Likewise, *Rapanos*, a major *Marks* case in the federal courts, involves an issue of federal jurisdiction and so is absent from the state 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*, 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 Clarence Thomas wrote a concurrence that expressly “join[ed] the Court's opinion” but only because the case's facts satisfied a separate test that only Thomas subscribed to.<sup>84</sup> The fact that state courts think that *Marks* is relevant to *Melendez-Diaz* suggests either that those courts do not regard 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

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<sup>84</sup> *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (Thomas, J., concurring) (2009). Thomas's opinion can thus be viewed as creating a “compromise majority.” See *infra* Section III.B.

case.<sup>85</sup> More generally, *Melendez-Diaz* exemplifies lower courts' willingness to view "fifth vote" concurrences as limitations on the scope of majority opinions.<sup>86</sup>

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 rather minimalist concurrence in the judgment in *Nicastro*.<sup>87</sup> By contrast, there is some disagreement over which opinion the *Marks* rule favors in *McKune*,<sup>88</sup> as well as over what, if any, precedent was established in *Williams*.<sup>89</sup> 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.<sup>90</sup>

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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 appears in citations only in a small portion of cases addressing fragmented decisions. And, in many cases, the *Marks* rule itself generates intractable disagreement, such as when widespread agreement on the meaning of

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<sup>85</sup> See, e.g., *People v. Davis*, 132 Cal. Rptr. 3d 472, 479 n. 6 (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.").

<sup>86</sup> See generally Thomas B. Bennett, Barry Friedman, Andrew D. Martin, & Susan Navarro Smelcer, *Divide & Concur: Separate Opinions & Legal Change*, 103 CORNELL L. REV. (forthcoming) (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.

<sup>87</sup> See, e.g., *State v. LG Elecs., Inc.*, 186 Wash. 2d 169, 181 (Sup. Ct. 2016); *State ex rel. Ford Motor Co. v. McGraw*, 237 W. Va. 573, 594 (Sup. Ct. 2016); *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).

<sup>88</sup> 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 . . ."), 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."), 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 *Com. v. Hunt*, 462 Mass. 807, 814 n.5 (2012) ("Justice O'Connor's concurrence constitutes the holding of the Court.").

<sup>89</sup> Compare *State v. Deadwiller*, 2013 WI 75, ¶ 31 (applying both the plurality opinion and Justice Thomas's opinion (citing *People v. Dungo*, 55 Cal. 4th 608, 628–29 (Cal. 2012) (Chin, J., concurring)), with *Derr v. State*, 434 Md. 88, 115 (2013) (Sup. Ct.) ("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 with *State v. Michaels*, 219 N.J. 1, 31 (2014) (finding "no narrow rule" under *Marks*); *Anderson v. State*, 2014 WY 13, ¶ 37 (2014) (same); *State v. Medina*, 232 Ariz. 391 (2013) (same)).

<sup>90</sup> 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 *State v. Pye*, 282 Ga. 796, 800 (2007) ("[W]e will . . . consider the analysis presented in the plurality opinion to be that mandated by the United States Supreme Court.").

*Freeman* recently gave way to an entrenched circuit split. 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 an essential condition for the creation of Supreme Court precedent. And the *Marks* rule is, at best, an inefficient way of communicating that agreement. *Marks* thus offers an inefficient “precedent default” that is better replaced by a familiar alternative: the Court creates 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.”<sup>91</sup> That generally sufficient condition of precedent formation could be called “the majority rule.” 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.<sup>92</sup> But why add the *Marks* rule at all, as opposed to simply adhering to the majority rule in all cases? In other words, why not view the majority rule as a necessary condition for precedent formation? This Section considers various potential answers and ultimately finds them unpersuasive.<sup>93</sup>

In general, Supreme Court precedent arises when most justices endorse the same legal principle in a single decision. That majority rule has deep roots in judicial tradition,<sup>94</sup> as well as intuitive appeal.<sup>95</sup> Consider the following argument. Whatever the ultimate reason for having Court precedent, it seems fair to assume that each justice has the same claim to precedential authority, either because they all share comparable expertise and participate in the same deliberative process or because they all obtained the same office through the same constitutional

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<sup>91</sup> *Marks v. United States*, 430 U.S. 188, 193 (1977).

<sup>92</sup> *See id.*; *see also* text accompanying *supra* note 2 (quoting the rule).

<sup>93</sup> 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 130 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 15.

<sup>94</sup> U.S. CONST. art. III; *see also* 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 21 (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 (1988), are themselves products of prior majority votes.

<sup>95</sup> 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 (2014). I do not here address whether or when a supermajority should be required for precedent formation.

process.<sup>96</sup> Thus, it would be irrational to ascribe precedential 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, whose basic goal is to ascribe precedential force to certain minority views.<sup>97</sup>

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.<sup>98</sup> For example, scholars have debated the appeal of supermajority rules that aim to achieve various aims, such as advancing substantive principles of administrative deference.<sup>99</sup> 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 decision-making 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 decision-making heuristic: by inviting each justice 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.<sup>100</sup> But argument would be problematic, even apart from potential difficulties identifying which opinion is "in between" others. The virtues of trimming, even if significant, do not necessarily suffice to justify the creation of precedent, particularly since they can conflict with the results of the Court's deliberative process. It is far from clear, for example, that an "in between" view supported by, say, one justice has any greater claim to correctness than any other view. If anything, a view that eight justices have deliberately rejected would seem uniquely questionable—and so undeserving of precedential status.

Rather than celebrating minoritarian decision-making, a defender of the *Marks* rule might cast it as both a product of the majority rule and a means of facilitating that rule's future operation.<sup>101</sup> In *Marks*, a majority of the justices arguably set a meta-rule or "precedent default"

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<sup>96</sup> Some judges or justices are remembered more or less fondly, and their views accordingly take on greater or lesser persuasive force. For example, the Court sometimes points out when it cites opinions by Justice Oliver Wendell Holmes. But even then, rules of precedent formation are not thought to change.

<sup>97</sup> 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*, 430 U.S. at 193 (internal quotation marks omitted).

<sup>98</sup> On whether to require a supermajority requirement for overruling, see RANDY J. KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* ch. 7 (2017). Further, the Court itself has suggested that thin majorities might be entitled to less precedential weight. *See Payne v. Tennessee*, 501 U.S. 808, 828-829 (1991) (overruling cases "decided by the narrowest of margins").

<sup>99</sup> *See* Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 *YALE L. J.* 676 (2007).

<sup>100</sup> *See* Cass R. Sunstein, *Trimming*, 122 *HARV. L. REV.* 1049, 1051 (2009) (describing trimming as "giving careful attention to the opposing positions and attempting to steer between them"). Sunstein discusses precedent but not *Marks*.

<sup>101</sup> Some versions of the *Marks* rule purport to identify majority agreement. *See King*, at 781; Williams, *supra* note 16, at 802. *See infra* Section II.B.

in favor of ascribing precedential force to opinions that, on their face, lack majority support.<sup>102</sup> And subsequent Court majorities have endorsed, or at least declined to repudiate, that precedent default.<sup>103</sup> One might therefore conclude that most justices desire the *Marks* rule's continued application, even if it occasionally results in precedents that have only minority support. Further, the *Marks* rule arguably enables future majoritarian decision-making. In effect, the *Marks* rule allows the justices to know that the "position taken by those members who concurred in the judgments on the narrowest grounds" will be precedential.<sup>104</sup> Based on that knowledge, the justices can join or oppose opinions to achieve desired precedential outcomes—a process that Saul Levmore has called "bargaining around the narrowest-majority rule."<sup>105</sup> And even after a fragmented decision issues, the *Marks* rule continues to operate as a precedent default by helping litigants and courts to recognize the precedential rule that the justices expected.

Defending the *Marks* rule as a precedent default encounters some difficulty, since the rule is too indeterminate to allow confident predictions. As we will see in the next Section, there are several different versions of the *Marks* rule in circulation, and even the justices themselves exhibit confusion about how the *Marks* rule works.<sup>106</sup> So any attempt to use the *Marks* rule as a predictive aid is more likely to generate confusion than guidance. But the *Marks* rule's present indeterminacy only counsels in favor of adopting a more specific version of the rule, preferably one that allows for relatively objective, predictable application.<sup>107</sup>

The more fundamental problem is that any version of the *Marks* rule is bound to be a less efficient precedent default than a numerical voting rule, such as the majority rule. By requiring the justices to identify areas of majority agreement at the time that they issue a fragmented decision, the majority rule would save litigants and courts from both error and unnecessary effort. And the majority rule also gives the justices a more reliable means of anticipating the precedential consequences of their votes. To adapt the language of law and economics, the law of precedent should place burdens on the "cheapest precedent-creator"—that is, the decision-maker who can most accurately and inexpensively avoid precedential confusion.<sup>108</sup> In many contexts, the legal system benefits by delegating interpretive work to the lower courts, fostering percolation. 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 are already familiar with the facts, issues, and opinions in any fragmented decision. And the justices are uniquely knowledgeable about their own agreements and disagreements. By comparison, later courts staffed by different judges have to expend considerable energy just to formulate an intelligent opinion about the holding of a fragmented decision. And even then, later

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<sup>102</sup> 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 16, at 849. Instead, Williams attempts to ascertain what preexisting default rule is most supported by existing legal materials. *See id.*

<sup>103</sup> Viewing *Marks* as a precedent default raises the possibility that it might be revised or eliminated through means other than a case or controversy. Perhaps the justices could adopt a Supreme Court Rule on point, thereby establishing their desired mode of communicating their views to the legal system.

<sup>104</sup> *Marks*, 430 U.S. at 193.

<sup>105</sup> Levmore, *supra* note 78, at 107.

<sup>106</sup> *See infra* Sections II.B-C; *see also* Marceau, *supra* note 15, 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, 600 (1977) (citing Tr. of Oral Arg. at \*8-\*9, *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) (No. 07-343), 2008 WL 1741235)).

<sup>107</sup> The importance of clarity counsels against precedent defaults that call for speculation about what the justices must have believed or agreed on. On the perils of clarifying *Marks*, *see* text accompanying *infra* note 113.

<sup>108</sup> *E.g.*, GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970) (arguing for liability rules that burden the "cheapest cost-avoider").

courts are not as well positioned to ascertain either the “narrowest grounds” or whether the justices have reached implicit agreement. Yet the *Marks* rule forces later courts to take positions on those issues, thereby creating a new interpretive burden.

Of course, the justices’ decisions would sometimes fail to satisfy the majority rule, even if *Marks* were abandoned. In those cases, fragmented decisions would remain just that: a collection of disagreements, without precedential effect. But that result would at least lay bare what many supporters of the *Marks* rule deny—namely, that there is no majority agreement hidden amidst the competing opinions.<sup>109</sup> Further, the justices’ failure to settle on a single principle with majority support would itself be strong evidence that there is no urgent need for new precedent creation. One might worry that justices would sometimes refuse to compromise on what they perceive to be clearly correct positions, even when compromise would be highly beneficial. If that intransigence were likely, then there would be at least some reason to consider adopting a rule that generated precedent without majority agreement. But as we will see in Part III, the justices routinely compromise when joining and drafting opinions. Even formalists like Justices Black, Scalia, and Thomas have openly joined or authored compromise opinions, despite having to set aside their own personal views.<sup>110</sup> Moreover, the justices are well-positioned to assess the need for 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 could not agree or compromise on a single principle of decision, then there would likely be no need to establish such a principle. If anything, the most plausible inference would be that percolation is called for—and that rushing to make nationally uniform precedent on the merits would be harmful.

In requiring the Court to identify the precedential implications of its own fragmented decisions, consistent adherence to the majority rule would also generate desirable incentives for the justices. Let us assume that each justice is substantially if not primarily motivated by a desire to craft precedents that maximize correct outcomes in later cases.<sup>111</sup> The likelihood of correctly decided later 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 courts would adhere to her views. When that option is unavailable, the justice would have an incentive to tradeoff similarity in favor of obedience. That is, each justice will have reason to join a compromise majority that approximates her own views. And, at some point, most justices would rather establish no precedent than accept a strained compromise.<sup>112</sup>

But if the *Marks* rule were clarified and obeyed,<sup>113</sup> it would undesirably alter the justices’ incentives by creating a new option for a justice who seeks to maximize correct outcomes in later

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<sup>109</sup> See, e.g., text accompanying *infra* notes 148 & 166. See generally *infra* Section II.B.

<sup>110</sup> See *infra* note 230.

<sup>111</sup> The justices often make this goal explicit. See, e.g., *infra* notes 238 & 247. 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. (forthcoming 2017).

<sup>112</sup> See generally Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2317–19 & n.62 (1999).

<sup>113</sup> 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, 558 (2011) (“The data do not support

cases. Rather than do the hard work of forging a majority compromise, the justice can attempt to write the “narrowest” opinion in the case. If the justice accomplishes this goal, she can maximize both obedience and similarity—essentially, having her cake and eating it too—even though most justices disagree with her.<sup>114</sup> Of course, the justices would still have reason to form majorities, including opinion-writing efficiency, tradition, and collegiality.<sup>115</sup> But the *Marks* rule’s marginal effect would be to discourage the creation of majority opinions in many cases. A justice’s effort to seize the narrowest ground would be especially likely to prevail when other justices are less willing to jockey for the “narrowest” opinion, perhaps because they have previously staked out strong positions on the issue.<sup>116</sup>

At this point, a *Marks* proponent might raise two counterarguments. First, insisting on strict adherence to the majority rule necessarily means diminishing the *amount* of precedent created by fragmented decisions, particularly for lower courts.<sup>117</sup> Even *Marks*’s detractors often lambast the Court when it fails to form precedential majority opinions.<sup>118</sup> But more precedent is not necessarily better. When confronting a challenging legal issue, it may be better for the Court to err on the side of not deciding.<sup>119</sup> 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 experiment, after learning from the justices’ conflicting opinions.<sup>120</sup> The point here is not that legal correctness is always more important than settlement.<sup>121</sup> 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

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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 Melissa M. Berry et al. (“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, 300 (2008). If the latter, 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.

<sup>114</sup> See Berkolow, *supra* note 113, at 352 (“[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”).

<sup>115</sup> See also Cross, *supra* note 114, at 550 (noting the possibility of a “prestige” appeal to forming part of a majority opinion).

<sup>116</sup> This point suggests that median justices may be relatively likely to claim the middle ground, rather than form majority opinions. Notably, Justice Kennedy is responsible for some frequent objects of *Marks* attention, including concurrences in the judgment in *Rapanos* and *Seibert*.

<sup>117</sup> See, e.g., STEARNS, *supra* note 133, at 135.

<sup>118</sup> See Thurmon, *supra* note 16, at 446 (proposing “damage control” for plurality decisions); John F. Davis & William L. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 86 (intoning that “the evil inherent in decision by plurality is not a minor one”).

<sup>119</sup> 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.

<sup>120</sup> See Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1613 (2008). On uniformity’s benefits, see Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137 (2012); Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1 (2009).

<sup>121</sup> *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))).

as tradeoffs among other values, such as coherence and fairness. The majority rule facilitates the justices' efforts to weigh those tradeoffs on a case by case basis.

Second, a defender of the *Marks* rule might object that *bad 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.<sup>122</sup> 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 decision-making. These alternative means of imposing discipline also have the advantage of distinguishing between wise and manipulative decisions to avoid creating precedent. When the justices seem to issue case-specific rulings for cynical reasons, dissenters and others can and often do cry foul.<sup>123</sup> But when a cautious, case-specific approach seems wise, justices and commentators would not complain of a similarly narrow ruling.

Finally, someone uninterested in defending *Marks* might object that at least the *results* of a fragmented decision must be treated as precedential, even if no precedent forms under the *Marks* rule.<sup>124</sup> That view, sometimes called “result-based stare decisis,”<sup>125</sup> in effect represents a precedent default in favor of viewing the facts before the Court as legally requiring whatever judgment the Court issued.<sup>126</sup> A fragmented ruling might then apply only in cases whose facts differed in manifestly arbitrary ways—thereby leaving the ruling with limited future effect.<sup>127</sup> Adopting that approach in lieu of the *Marks* rule would be a major improvement, since it would minimize the precedential effects of fragmented decisions.<sup>128</sup> And it would be quite possible for

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<sup>122</sup> 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.”).

<sup>123</sup> See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000). See generally Richard M. Re, *On “A Ticket Good for One Day Only,”* 16 GREEN BAG 2D 155 (2013).

<sup>124</sup> The Court currently espouses result 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”); e.g., *Bluman v. Federal Election Commission*, 132 S. Ct. 1087 (2012) (“Appeal from the United States District Court for the District of Columbia. Judgment affirmed.”). Before the 1970s, summary rulings were often thought to be non-precedential; and commentators today often lament their obscure meaning. See STEPHEN M. SHAPIRO, ET AL., *SUPREME COURT PRACTICE* 307-08 (10th ed. 2013); Joshua A. Douglas & Michael E. Solimine, *Precedent and Three-Judge District Courts* (draft manuscript). Denying results stare decisis to unexplained rulings would encourage the justices—again, the cheapest precedent creators—to give reasons and set clearer case law.

<sup>125</sup> 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 (2013) (collecting different names and versions of this basic idea).

<sup>126</sup> As the main text indicates, a binding result can be viewed as a rule, or set of potential rules. Cf. Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989) (critiquing the result model, including for collapsing into a rule model).

<sup>127</sup> 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; Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1886 (2014).

<sup>128</sup> Unlike the shared agreement approach, results stare decisis would not require later courts to choose among the concurring opinions' rules. See *infra* Section II.B.3.

courts to throw *Marks* overboard while preserving results-based stare decisis, perhaps based on recent tradition. A critic of the *Marks* rule need not go any further.

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 *did* attempt to generalize beyond the fragmented ruling's precise factual background, it would construct a rule that could very well have been rejected by most or all justices. In fact, compliance with the majority rule is almost impossible when a later court extracts a hyper-narrow rule from a fragmented decision, since each and every justice would presumably prefer her own broader, more principled alternative.<sup>129</sup> Common law courts avoided these problems by generally withholding precedential force from isolated decisions,<sup>130</sup> as well as decisions without a common rationale.<sup>131</sup> Courts today should likewise view even the 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. Why not treat that kind of ruling as a temporary decision not to fashion precedent, thereby allowing lower courts to test out the dissents' relatively popular position? Doing so would encourage the justices to compromise 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"?<sup>132</sup> *Marks*'s defenders have proposed four principal answers, and each suggests a possible way of defending the rule against the previous Section's critique.

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<sup>129</sup> See text accompanying *infra* note 156 (exploring situations where half a loaf is worse than a whole). Results-based stare decisis can lay claim to the virtue of treating like cases alike; but the legal system frequently allows like cases to be treated differently, such as to foster percolation, when doing so is consistent with precedent. That observation leads to the question addressed here: what precedential rule is most justifiable?

<sup>130</sup> See Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1225 (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."); see also DUXBURY, *supra* note 21, 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 established 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." U.S. 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 Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994) (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.

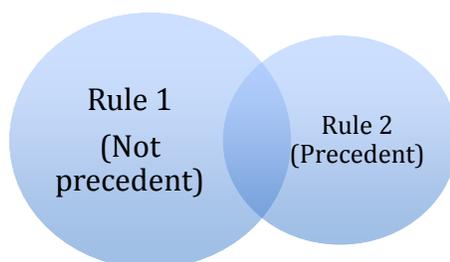
<sup>131</sup> See *supra* note 21 (collecting sources).

<sup>132</sup> *Marks v. United States*, 430 U.S. 188, 193 (1977) (citation omitted). The Court's original expression of the *Marks* rule suggested that the concurring opinion with the most limited effect should control, even if that opinion

## 1. 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.<sup>133</sup> 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 1 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 1: Median Opinion Approach**

The median opinion approach’s threshold vulnerability is its reliance on an unspecified conception of precedential narrowness.<sup>134</sup> 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 is unclear whether mere frequency should be the 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 finds no constitutional violation and so upholds a law: is the

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was not necessary to generate a majority on the judgment. That view could be defended on grounds of promoting minimalism, but it plainly contravenes judicial majoritarianism and so lacks defenders.

<sup>133</sup> See MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHANGE ANALYSIS OF SUPREME COURT DECISION MAKING 124-41 (2000); Williams, *supra* note 16, at 813 (calling this the “fifth vote approach”); *e.g.*, *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460, 465 (7th Cir. 2009) (Easterbrook, J.) (“Because the other Justices divided 4 to 4, and Justice Kennedy was in the middle, his views establish the holding.”).

<sup>134</sup> The evident difficulty of finding a principled way to identify the “narrowest” opinion is sometimes taken as support for logical subset approach, discussed below. See Subsection II.B.2 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.

“narrowest” opinion the one that would find the fewest constitutional violations, or the one that would uphold the fewest laws?<sup>135</sup>

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.<sup>136</sup> While hardly perfect, the Court represents an expert decision-making unit with access to relatively lavish resources.<sup>137</sup> So when most justices undertake an appropriate deliberative process and then reject a legal rule, there is reason to reject its precedential force. 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 principle, assigning precedential force to minority views could promote legal correctness. As we have seen, supporters of trimming could conceivably take such a position.<sup>138</sup> If anything, however, the median opinion approach seems designed to maximize the chances that erroneous legal views become law. *Freeman* 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 Sotomayor’s approach as indefensibly arbitrary.

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 non-median opinions would converge on the same outcome.<sup>139</sup> Take *Rapanos v. United States*.<sup>140</sup> 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.<sup>141</sup> 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

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<sup>135</sup> 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*] is more restrictive, Justice Kennedy’s conception of coercion ‘offers the least change to the law.’”), *superseded en banc* (Sept. 6, 2017) (reserving whether Thomas’s or Kennedy’s opinions controls under *Marks* due to intracourt disagreement). 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 Subsection. See *Planned Parenthood v. Casey*, 947 F.2d 682, 694 (3d Cir. 1991) (espousing a judgment-relative approach); see also Asher Steinberg, *A Sixth Circuit-Themed Primer on the Marks Doctrine, and an Endorsement of a Proposal to Overhaul Marks*, NARROWEST GROUNDS BLOG (July 13, 2017) (also espousing a judgment-relative approach).

<sup>136</sup> See, e.g., *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.”); *United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006).

<sup>137</sup> Caminker, *supra* note 130, at 845-49 (outlining a proficiency-based view).

<sup>138</sup> See text accompanying *supra* note 100.

<sup>139</sup> 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* note 193.

<sup>140</sup> 547 U.S. 715 (2006).

<sup>141</sup> See *Rapanos*, 547 U.S. at 739 (plurality opinion); *id.* at 742; *id.* at 759 (Kennedy, J., concurring in the judgment) (internal quotation marks and citation omitted); *id.* at 779-780. The dissent would find jurisdiction when either the plurality or Kennedy would find jurisdiction, as well as in other cases. See *Rapanos*, 547 U.S. at 810 (Stevens, J., dissenting).

cases with Condition C: assuming no relevant changes in the Court’s composition and that all justices vote consistent 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 Maxwell Stearns.<sup>142</sup> Applying public choice theory, Stearns views fragmented decisions as expressions of multi-tiered voting preferences among the justices and so seeks the opinion that would prevail over all other opinions in a series of pairwise comparisons. When such an opinion exists, it is a “Condorcet winner” and, in Stearns’s view, should be precedential under *Marks*.<sup>143</sup> 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 worryingly 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.<sup>144</sup> And why should later courts have to undertake 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.<sup>145</sup> It is entirely possible that all justices would rate the same option “second-best” but nonetheless view that option as legally wrong—and so would object to giving it precedential force. If anything, 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* can be viewed as efforts to avert some or all of these problems.

## 2. *Logical Subset*

The DC Circuit and Ninth Circuit both 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.<sup>146</sup> This version of *Marks* is often called the “logical subset”

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<sup>142</sup> See STEARNS, *supra* note 133; Stearns, *supra* note 59.

<sup>143</sup> See previous note.

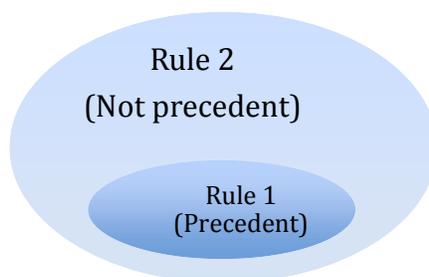
<sup>144</sup> Stearns uses *Marks* itself as an example; but to infer “the Court’s implicit consensus position,” his analysis “assumes” a “unidimensional issue spectrum.” STEARNS, *supra* note 133, at 129-29. Because the argument’s assumption is unproven—and likely unprovable—so too is its conclusion. See text accompanying *infra* note 159 (discussing the difficulties of drawing inferences about various justices’ views in *Memoirs*).

<sup>145</sup> Williams, *supra* note 16, at 851; 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, 127-28 (2007) (“[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.

<sup>146</sup> 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 Cty.*, 18 F.3d 1043, 1058 (3d Cir. 1994) (similar). *Davis* reserved whether

approach.<sup>147</sup> 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 *disagreement*—some “implicit consensus” may be logically necessary.<sup>148</sup> Yet proponents of the logic subset approach focus 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.<sup>149</sup> This 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.

Below, Figure 2 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 2: Logical Subset Approach**

The logical subset approach is designed to explain the outcome in *Marks* itself, so let us again consider *Memoirs*.<sup>150</sup> Focusing on the opinions that concurred in the judgment,<sup>151</sup> the *Memoirs* justices respectively advanced rules of decision that would invalidate some and all

dissenting opinions can contribute to logical subsets. *Davis*, 825 F.3d at 1025. *But see King*, 950 F.2d at 783 (denying that dissents can do so); *Davis*, 825 F.3d at 1028 (Christen, J., concurring) (same).

<sup>147</sup> “*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 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”).

<sup>148</sup> In fact, some commentators call this approach the “implicit consensus” version of *Marks*. See Williams, *supra* note 16, at 808; Thurmon, *supra* note 16, at 428.

<sup>149</sup> One might imagine altering the logical subset approach so that it yielded a *Marks* precedent only when a separate opinion advanced propositions that were logically entailed by the propositions in another opinion. 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 even that approach would be inefficient, insofar as the relevant interpretive and logical work could be done by the justices themselves.

<sup>150</sup> 383 U.S. 413 (1966), discussed in text accompanying *supra* note 26.

<sup>151</sup> 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 v. Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991) (en banc) (“we 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) (“we 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 *supra* note 146.

obscenity laws.<sup>152</sup> 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 every, 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*.<sup>153</sup> 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.<sup>154</sup> Thus, no concurring opinion was the logical subset of another, and the logical subset view would accordingly find no *Marks* precedent.

Yet endorsement of a “broader” proposition does not necessarily or logically entail an implicit endorsement of any “narrower” proposition.<sup>155</sup> 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.<sup>156</sup> 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. Here and elsewhere, creating a limitation on a rule can be objectionable—and can even be worse than rejecting the rule

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<sup>152</sup> See *Memoirs*, 383 U.S. at 418 (plurality opinion) (proposing three-part test for regulating obscenity); *id.* at 421 (Black & Stewart, JJ., concurring in the judgment) (proposing that obscenity prosecutions are contrary to the First Amendment).

<sup>153</sup> 547 U.S. 715 (2006).

<sup>154</sup> While Justice Kennedy would find federal jurisdiction over wetlands without a continuous surface connection to other covered bodies of water, the plurality would find federal jurisdiction where a wetland is linked to 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 also previous note.

<sup>155</sup> Several critics have made versions of this basic point. See Kimura, *supra* note 15, at 1604; Thurmon, *supra* note 16, at 429-30.

<sup>156</sup> See Michael Herz, *Justice Byron White and the Argument That the Greater Includes the Lesser*, 1994 BYU L. REV. 227, 243-49 (1994) (discussing the fallacy of division in connection with “greater includes the lesser” arguments). For an example of the fallacy of division, 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.* 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, 550 (2005) (defining the fallacy of division as “a mistaken inference from a group-level claim to an individual-level claim”).

outright.<sup>157</sup> Justices who endorse broad positions need not endorse, and could oppose, the narrower positions that other justices put forward.<sup>158</sup>

Or take *Marks* itself. Let us assume that the relevant *Memoirs* concurrence in the judgment essentially believed that no material could be obscene (Rule A), whereas the plurality believed that only material “utterly without redeeming social value” was obscene (Rule B).<sup>159</sup> Would support for Rule A *logically require* support for making Rule B a binding precedent, as expositors of the logical subset view maintain?<sup>160</sup> 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 of obscenity. Alternatively, a justice might believe that the “redeeming social value” test would be harmful due to its unworkability, even if it were closer to the correct legal answer than continuation of preexisting obscenity law. A justice might also view the appeal of Rule B in light of what legal rule would govern if there were no *Marks* holding. Assume that, before *Memoirs*, precedent recognized Rule C, which leaves “obscene” material constitutionally unprotected.<sup>161</sup> A justice might prefer to keep Rule C as the law because Rule B raises administrability problems. Or a justice might prefer to preserve Rule C 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.<sup>162</sup>

### 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

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<sup>157</sup> 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 non-communists. *Cf.* *Dennis v. United States*, 341 U.S. 494, 547 (1951) (Frankfurter, J., concurring in the judgment) (arguing that communism posed a distinctive threat).

<sup>158</sup> 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.

<sup>159</sup> *Memoirs*, 383 U.S. at 419 (plurality opinion); *id.* at 421 (Black & Stewart, JJ., concurring in the judgment).

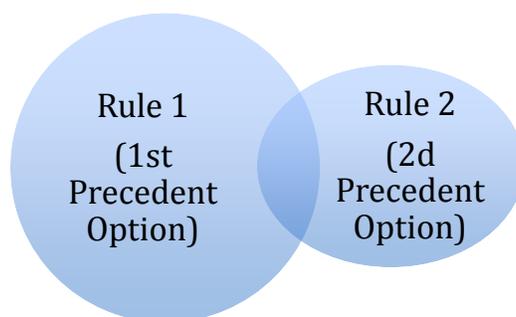
<sup>160</sup> *See* *King v. Palmer*, 950 F.2d 771, 781 (DC Cir. 1991) (en banc) (“Because Justices Black and Douglas had to agree, as a logical consequence of their own position, with the plurality’s view that anything with redeeming social value is not obscene, the plurality of three in effect spoke for five Justices”).

<sup>161</sup> This assumption is not so far from the truth. *See* *Roth v. United States*, 354 U.S. 476, 489 (1957).

<sup>162</sup> 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, 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) And Justice Ming 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*, 55 Cal. 4th 608, 628 (2012) (Chin, J., concurring) (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.”).

“shared agreement” approach.<sup>163</sup> 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.<sup>164</sup> 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 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 judgment.<sup>165</sup>

Below, Figure 3 illustrates these basic ideas. The situation again resembles Figure 1, 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 3: 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.<sup>166</sup> The shared agreement approach thus has the same core defect as the logical subset approach. We can see this by slightly modifying the examples from the previous Section.<sup>167</sup> Imagine that a plurality advocates the legal rule that capital punishment is impermissible for all non-terrorists, 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

<sup>163</sup> Williams, *supra* note 16. 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.

<sup>164</sup> 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 852 (emphasizing shared agreement’s majoritarianism). Williams argues that the shared agreement approach represents a type of “incompletely theorized agreement.” *Id.* (citing Cass R. Sunstein, Commentary, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995)). But there is no reason to infer agreement on any composite rule.

<sup>165</sup> See *id.* at 836-37

<sup>166</sup> 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 829. 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.

<sup>167</sup> See text accompanying *supra* note 156.

other. Under the shared agreement approach, however, there is a precedent—namely, that capital punishment is impermissible for Christian non-terrorists. 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.

That example is extreme, but it illustrates a widespread problem. Whenever some of the concurring justices view the other’s 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.<sup>168</sup> 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 Sotomayor’s opinion was “erroneous,” that its “consequences . . . would be significant,” and that it “would permit the very disparities [among defendants] the [relevant statute] seeks to eliminate.”<sup>169</sup> So it is hardly clear that even a single member of the plurality would approve of lower courts’ applying 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, the shared agreement allows courts to choose among the concurring opinions necessary to yield a majority on the judgment.<sup>170</sup> So, to continue the previous example, a later court would be free to choose between the plurality’s rule barring capital punishment for non-terrorists 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, giving them a guarantee of protection that other groups would lack. So even if every later court adopted the non-discriminatory rule, objectionable discrimination would still have occurred.

And later courts might not even have a choice in the matter, since preexisting precedent 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 Ins. Co.*,<sup>171</sup> which featured a fifth-justice concurrence in the judgment that arguably contradicted earlier precedent.<sup>172</sup> 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.<sup>173</sup> Thus, the shared agreement approach calls for reconciling fragmented decisions with earlier precedent. That obligation could create an obligation 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 precedent 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.

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<sup>168</sup> 564 U.S. 522, 533 (2011).

<sup>169</sup> See *id.* at 532-33 (plurality opinion); *id.* at 546-551 (Roberts, C.J., dissenting).

<sup>170</sup> See *id.*

<sup>171</sup> 559 U.S. 393 (2010).

<sup>172</sup> The earlier precedent is *Sibbach v. Wilson & Co*, 312 U.S. 1 (1941).

<sup>173</sup> Williams, *supra* note 16, at 859-64.

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 decision-maker 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.<sup>174</sup>

Take *Seibert v. Missouri*, where the plurality and concurrence in the judgment proposed different tests to determine whether post-confession *Miranda* warnings adequately secure suspects' rights against self-incrimination.<sup>175</sup> 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?<sup>176</sup> If not, the shared agreement approach would 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.<sup>177</sup> 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.<sup>178</sup> *Marks* itself illustrates this problem. The fragmented decision in *Memoirs* featured a variety of proposed rules. But when the Court later resolved the relevant legal issue, it adopted a new test that neither the *Memoirs* plurality nor the concurrence in the judgment had endorsed.<sup>179</sup>

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 judges and commentators have proposed the all opinions approach, which has been presented either as an interpretation of the *Marks* rule or a corollary of it.<sup>180</sup> The basic

<sup>174</sup> See text accompanying *infra* note 240 (discussing *Gant* as an example of a hybrid compromise rule).

<sup>175</sup> 542 U.S. 600 (2004).

<sup>176</sup> 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”).

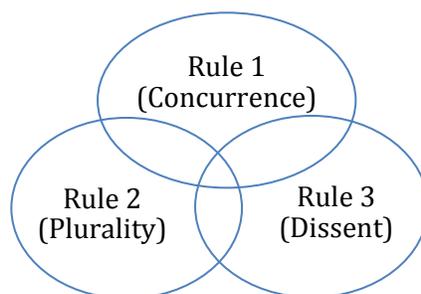
<sup>177</sup> Williams emphasizes this point as a perk. See Williams, *supra* note 16, at 858.

<sup>178</sup> See *United States v. Duvall*, 740 F.3d 604, 622 (D.C. Cir. 2013) (Williams, J., concurring in denial of rehearing en banc) (making this basic point and citing *United States v. Mendoza*, 464 U.S. 154, 160 (1984)).

<sup>179</sup> See *Miller v. California*, 413 U. S. 15 (1973).

<sup>180</sup> See BRIAN GARNER ET AL., *LAW OF JUDICIAL PRECEDENT* 206 (2016) (endorsing this approach in at least some circumstances); *United States v. Donovan*, 661 F.3d 174, 182 (3d Cir. 2011) (looking “to the votes of

idea is to view all the opinions in a Supreme Court decision, including the dissents,<sup>181</sup> as automatically 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.<sup>182</sup>



**Figure 4: All Opinions Approach**  
(Precedent is Any Area of Majority Overlap)

Figure 4 above illustrates a case where the all opinions approach would apply. Note that, under this approach, no particular opinion’s rule 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.

To illustrate this approach, again consider the stylized portrayal of *Rapanos*.<sup>183</sup> As we have seen,<sup>184</sup> the split among all the opinions can be schematized as: AB/BC//ABCD, meaning that 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

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dissenting Justices if they, combined with votes from plurality or concurring opinions, establish a majority view on the relevant issue”); *United States v. Duvall*, 740 F.3d 604, 609-11 (D.C. Cir. 2013) (Kavanaugh, J., concurring in denial of rehearing en banc) (calling this approach “the necessary logical corollary” of the *Marks* rule, applicable when there is “no ‘narrowest’ opinion”); *cf.* *United States v. Johnson*, 467 F.3d 56, 65-66 (1st Cir. 2006) (collecting cases where the Court counted dissents).

<sup>181</sup> 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 when finding binding holdings. *Compare King*, 950 F.2d at 783 (rejecting consideration of dissents), *with United States v. Johnson*, 467 F.3d 56, 65 (1st Cir.2006) (considering dissents); see also *supra* note 162. 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 text accompanying *infra* note 197.

<sup>182</sup> For 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 Associates, P.A. v. Allstate Insurance 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.”).

<sup>183</sup> 547 U.S. 715 (2006).

<sup>184</sup> See text accompanying *supra* note 153.

is unsurprisingly popular among dissenters. In *Rapanos* itself, Justice Stevens’s dissent in effect encouraged lower courts to follow the all opinions approach.<sup>185</sup>

Some judge and commentators object to versions of the all opinions approach that give binding force to dissents.<sup>186</sup> 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 precedential ruling with the force of law. As Judge Stephen Williams recently put it, a dissenter is a provocative “gadfly” that might inspire but cannot guide.<sup>187</sup> Yet this reasoning presumes its conclusion: dissents are said to be unreliable because they do not generate precedent; but whether dissents do or should generate precedent is the very matter in question.<sup>188</sup> 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,<sup>189</sup> the Court sometimes fulfills a declaratory function,<sup>190</sup> such as by establishing a precedent without modifying any judgment.<sup>191</sup>

Moreover, the all opinions approach has a natural theoretical home: the prediction model of precedent.<sup>192</sup> Under the prediction model, lower courts should aim to decide cases in the way that they expect higher courts to rule.<sup>193</sup> 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 making correct 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.

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<sup>185</sup> See *Rapanos*, 547 U.S. at 810 (Stevens, J., dissenting).

<sup>186</sup> See *supra* note 181; see also *United States v. Duvall*, 740 F.3d 604, 623 (D.C. Cir. 2013) (Williams, J., concurring in denial of rehearing en banc).

<sup>187</sup> *Id.* at 623.

<sup>188</sup> See *id.* (“Dissenting judges enjoy something of the liberty of a gadfly, as the outcome does not in fact depend on what they say.”).

<sup>189</sup> *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)).

<sup>190</sup> See generally Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 669–72 (2012).

<sup>191</sup> See *Camreta v. Greene*, 563 U.S. 692 (2011).

<sup>192</sup> See John M. Rogers, “Issue Voting” by Multimember Appellate Courts, 49 VAND. L. REV. 997, 1007-09 (1996).

<sup>193</sup> See generally Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1 (1994).

One might object that the all-opinions approach is itself contrary to good prediction, for the Court does not reliably apply the *Marks* rule at all.<sup>194</sup> 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.<sup>195</sup> This objection illustrates 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 all opinions approach is a plausible mode of prediction when the Court's composition is relevantly unchanged: so long as they remain on the bench, individual justices tend to adhere to their own previously expressed views. Thus, the prediction model may simply call for modifying the all opinions approach to allow consideration of relevant changes in Court's composition.<sup>196</sup> So modified, the all opinions approach would still have a large effect, particularly since lower court precedents applying that approach would create local precedent that could outlast any personnel 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 rejects.<sup>197</sup> 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 it. The paradigmatic case for lower court prediction arises when numerous current justices have written separate opinions asserting that a dated precedent should be reversed.<sup>198</sup> 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. 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.<sup>199</sup> And following that approach would yield a pattern of outcomes that is

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<sup>194</sup> See Thurmon, *supra* note 16, at 441 (“[T]he Supreme Court’s disregard for the *Marks* ‘narrowest grounds’ rule undermines its predictive ability”).

<sup>195</sup> See, e.g., text accompanying *supra* note 45 (noting that the Court sometimes sidesteps *Marks* issues).

<sup>196</sup> For reasons of administrability or legitimacy, however, 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 Caminker, *supra* note 193; see also Duvall, 740 F.3d at 611 & n.1 (Kavanaugh, J., concurring in 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) (suggesting that “that Justice Powell was at least inclined to reject predictive, fifth-vote approaches to *Marks*” partly due to worries about composition changes).

<sup>197</sup> See, e.g., *People v. Lopez*, 55 Cal. 4th 569, 593–94 (2012) (Liu, J., dissenting) (criticizing vote-counting approach to the *Marks* rule: “[N]oise-counting is a exercise 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.”); see generally Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 655 (1995) (critically discussing the prediction model)

<sup>198</sup> See, e.g., *Barnette v. West Virginia State Board of Education*, 47 F. Supp. 251 (S.D.W. Va. 1942), *aff’d*, 319 U.S. 624 (1943).

<sup>199</sup> Of course, the majority rule would allow the justices to commit to such a combined rule. See text accompanying *supra* note 35 (discussing explained post-*Memoirs* summary rulings), and 240 (discussing *Gant*).

incompatible with the views of all nine justices—increasing the risk of unfairness, incoherence, and harm far beyond paradigmatic cases of prediction.

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.<sup>200</sup> 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.<sup>201</sup> 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 decision-making process.

### C. Abandoning from Below

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—as the Court can and should do in a now-pending case.<sup>202</sup> 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.<sup>203</sup> To do so, courts should read the “narrowest” opinion 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.<sup>204</sup> These narrow readings of precedent are generally legitimate if they are both reasonable and supported by first principles of law.<sup>205</sup> 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.<sup>206</sup> 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.

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<sup>200</sup> See, e. g., *McCray v. New York*, 461 U.S. 961, 961-963 (1983) (Stevens, J., respecting denial) (discussing the value of lower court “percolation”).

<sup>201</sup> See Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 760 (1980)

<sup>202</sup> See *supra* note 14 and accompanying text.

<sup>203</sup> 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 prepare for its overruling at a later time.

<sup>204</sup> See *id.*

<sup>205</sup> See *id.* at 950-51.

<sup>206</sup> See text accompanying *supra* note 153.

Several courts have already narrowed *Marks* from below in just this way.<sup>207</sup> The leading case is still the 1991 en banc DC Circuit ruling in *King v. Palmer*, which adopted the logical subset approach.<sup>208</sup> 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 the “that position taken by those members who concurred in the judgments on the narrowest grounds.”<sup>209</sup> 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 DC Circuit, “*Marks* is workable . . . only when one opinion is a logical subset of other, broader opinions.” Based on that appeal to what is “workable,” *King* reasoned about what “the narrowest opinion . . . must embody,” rather than what the Court actually intended.<sup>210</sup> For good measure, the court bluntly argued that, if read more broadly, “*Marks* is problematic.”<sup>211</sup>

To move closer to abandoning *Marks*, a more aggressive form of narrowing below would be necessary, based on more recent Court decisions. In *Nichols v. United States*, the Court confronted a circuit split in which courts had diverged in applying *Marks*.<sup>212</sup> In an exercise of understatement, the Court noted that the *Marks* “test is more easily stated than applied.”<sup>213</sup> But instead of clarifying the *Marks* inquiry, the Court simply set it aside. In the Court’s view, “it 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.”<sup>214</sup> 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 *Grutter v. Bollinger* confronted a deep circuit split over how the *Marks* rule applied to *Bakke*.<sup>215</sup> Rather than resolving that evident disagreement, *Grutter* followed *Nichols* in resolving the underlying merits, without grappling with *Marks*.<sup>216</sup> In subsequent years, the Court has not found occasion to clarify the *Marks* rule’s proper application.<sup>217</sup>

Both *Nichols* and *Grutter* strongly suggest that the *Marks* rule does not bind where its application is unclear or counterintuitive. And *Marks* itself is reasonably susceptible to being read in just that way. True, *Marks* is best read 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.<sup>218</sup> 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

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<sup>207</sup> 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 they also 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* 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).

<sup>208</sup> *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc).

<sup>209</sup> *Marks*, 430 U.S. at 193.

<sup>210</sup> *King*, 950 F.2d at 781.

<sup>211</sup> *Id.* at 782.

<sup>212</sup> *Nichols v. United States*, 511 U.S. 738 (1994).

<sup>213</sup> *Id.* at 745.

<sup>214</sup> *Id.* at 746.

<sup>215</sup> 539 U.S. 306, 325 (2003) (recounting the circuit split).

<sup>216</sup> *Id.*

<sup>217</sup> See *supra* Section I.B.

<sup>218</sup> *Marks*, 430 U.S. at 193.

Clause.<sup>219</sup> *Marks* also emphasized that lower courts had converged on the same reading of a prior fragmented decision.<sup>220</sup> 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.<sup>221</sup> Thus, the Court’s precedents can reasonably be read to invite recourse to the *Marks* rule where it sensibly applies, rather than rigid adherence to it.<sup>222</sup> In other words, *Marks* might reasonably be viewed as establishing more of a guideline than a rule.

In mitigating the *Marks* rule’s vices, lower courts can also pave the way for its eventual elimination. While the Supreme Court often 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.<sup>223</sup> *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.<sup>224</sup> Since then, the Court saw fit to neglect the *Marks* rule—until the Ninth Circuit narrowly read *Freeman* and adopted the relative narrow logical subset test.<sup>225</sup> Thus, lower courts are already giving the justices insight into the *Marks* rule’s difficulties and nudging the Court to act. In principle, the Court could one day look back on the *Marks* rule and declare it a mistake that the lower courts had largely 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.

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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.

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<sup>219</sup> See *supra* note 34 and accompanying text.

<sup>220</sup> *Marks*, 430 U.S. at 194 & n.8.

<sup>221</sup> *Id.* at 193 & n.7.

<sup>222</sup> 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, taking that approach seriously would require overruling *Marks*, since the *Memoirs* opinions 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 (D.C. Cir. 2013) (Williams, J., concurring in the judgment).

<sup>223</sup> See Re, *supra* note 203. For more on lower courts guiding Supreme Court decision-making, see Neil S. Siegel, *Federalism as a Way Station: Windsor as Exemplar of Doctrine in Motion*, 6 J. LEGAL ANALYSIS 87 (2014); Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851, 851 (2014).

<sup>224</sup> See text accompanying *supra* note 215.

<sup>225</sup> See text accompanying *supra* notes 14 & 207.

### III. After *Marks*

How might judicial decision-making change if the *Marks* rule were no more? Without *Marks*, the justices should continue to 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 “result 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*.<sup>226</sup> In *Screws v. United States*, Justice Wiley B. Rutledge voted against his own preferred legal views in a merits case.<sup>227</sup> Rutledge’s goal was to avoid application of the Court’s internal rule of procedure providing that, when the justices cannot form a majority on the judgment, no judgment (and therefore no precedent) may issue.<sup>228</sup> It appears that no majority opinion of the Court has ever blessed Rutledge’s choice, yet justices have self-consciously followed his example for many decades without arousing discernible opposition.<sup>229</sup> And even more justices have engaged in reasoning tantamount to Rutledge’s, without citing *Screws*.<sup>230</sup>

Justices have thus come to view *Screws* as a non-precedential 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 forego 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 opinions.<sup>231</sup> In other words, justices have voted for judgments that they believed were legally incorrect, in order to allow the formation of majority precedents.

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<sup>226</sup> *E.g.*, *al-Marri v. Pucciarelli*, 534 F.3d 213, 293 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 14, at 19 (“the *Screws* rule”).

<sup>227</sup> *See* *Screws v. United States*, 325 U.S. 91, 134 (1945) (Rutledge, J., concurring in result).

<sup>228</sup> *See* John M. Rogers, “*I Vote This Way Because I’m Wrong*”: *The Supreme Court Justice as Epimenides*, 79 KY. L. J. 439, 458 (1991) (discussing *Screws*); Davidson, *supra* note 19, at 33 (descriptively analyzing *Screws*).

<sup>229</sup> For a high-profile example, consider Justice Souter’s critical vote in *Hamdi v. Rumsfeld*, 542 U.S. 507, 553 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (citing Rutledge’s *Screws* opinion).

<sup>230</sup> Justices as dissimilar as Hugo Black and Harry Blackmun employed the *Screws* rule, without using that name. *See, e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 353, 354 (1974) (Blackmun, J., concurring) (“If my vote not needed to create a majority, I would adhere to m prior view.”) (citing *Curtis Publishing 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).

<sup>231</sup> *See, e.g.*, *Bragdon v. Abbott*, 524 U.S. 624, 655–656 (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.”); *Olmstead v. L. C.*, 527 U.S. 581, 607–608 (1999) (Stevens, J., concurring in part and concurring in judgment).

One might object that the *Screws* rule is illegitimate because it authorizes justices to vote for dispositions that they believe are legally incorrect. That practice implicates, and arguably contravenes, the essence of judicial obligation: to decide in accordance with law.<sup>232</sup> 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' 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. And when that belief is present, the party who loses out on the justice's vote might not have any ground to complain.<sup>233</sup> True, the party could object at having been deprived of a supportive (if overridden) vote. But a justice who uses the *Screws* rule expresses her preferred outcome and so gives the party some public vindication.

Perhaps the party could fairly object to the issuance of a legally wrong judgment or precedent, particularly if the results redound to the party's disadvantage. But even that is unclear. Counterintuitive though it may seem, parties would at least sometimes want to lose supportive votes, if the changed vote would allow for more meaningful relief or, failing that, better case law for themselves and future litigants. The *Screws* rule's permissibility may thus depend on whether a justice finds that, given their colleagues' views, she actually helps (or at least don'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, 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.<sup>234</sup> Perhaps the *Screws* rule should be limited to votes on the judgment akin to Rutledge's, and so should not authorize votes in favor of precedential majority opinions where the voting justice disagrees with those opinions. But that extension seems justifiable, for much the same reasons as the core use of the *Screws* rule. Votes to form compromise majorities can effectuate the justices' actual views of the law, without unfairly harming a party or violating principles of candor. One might object 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, after 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 forego the power to create binding precedential rules. The next Section addresses one way that the *Screws* rule can bear fruit: by fostering compromise majorities.

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<sup>232</sup> See, e.g., 28 U.S.C. § 453 (federal judicial oath).

<sup>233</sup> Cf. Caminker, *supra* note 112, at 2336-37 (making similar in discussing the propriety of judicial vote trading, without discussing the *Screws* rule).

<sup>234</sup> See *Screws*, 325 U.S. at 134 (1945) (Rutledge, J., concurring in result).

## 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.<sup>235</sup> But the justices already have reason to form majority opinions.<sup>236</sup> For example, a justice might want to avoid creating difficult *Marks* questions that could divide lower courts.<sup>237</sup> Or a justices 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.”<sup>238</sup> While many 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 the *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*, where Justice Scalia supplied the critical fifth vote for the opinion of the Court.<sup>239</sup> Scalia endorsed a test that was fundamentally different from the other majority justices’.<sup>240</sup> 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 Scalia’s vote,<sup>241</sup> and Scalia confirmed as much in his concurrence.<sup>242</sup> Perhaps the most interesting aspect of 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.”<sup>243</sup> 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.<sup>244</sup> Only a new majority opinion, 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.<sup>245</sup>

Or take *AT&T v. Concepcion*, where Justice Scalia wrote a five-justice opinion.<sup>246</sup> 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 onto.<sup>247</sup> As Thomas put it:

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<sup>235</sup> See text accompanying *supra* note 114.

<sup>236</sup> See Cross, *supra* note 114, at 550.

<sup>237</sup> See *id.* at 550-51.

<sup>238</sup> See, e.g., Felix Frankfurter, *The Administrative Side of Chief Justice Hughes*, 63 HARV. L. REV. 1, 1 (1949) (noting “the compromises that an opinion may embody”); Patrick Marley, *Justice Elena Kagan Says Court Had to Reach More Consensus After Antonin Scalia’s Death*, MILWAUKEE J. SENT. (Sept 8., 2017) (discussing “times when you can decide cases consistent with your constitutional responsibilities in ways that also reflect some awareness of the danger of division and the value of consensus and collegiality and where you can — you can’t always, but where you can — compromise”); Adam Liptak, *On Justice Ginsburg’s Summer Docket: Blunt Talk on Big Cases*, N.Y. TIMES (July 31, 2017) (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); Jeffrey Rosen, *Roberts’s Rules*, THE ATLANTIC (Jan./Feb/ 2007) (emphasizing the importance of building “consensus”).

<sup>239</sup> 556 U.S. 332 (2009).

<sup>240</sup> See *id.* at 351 (Scalia, J., concurring).

<sup>241</sup> See *id.* at 343.

<sup>242</sup> *Id.* at 354 (Scalia, J., concurring).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> My Westlaw-based research reveals that *Gant* has never been *Marks*’d by an appellate court.

<sup>246</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

<sup>247</sup> See *id.* at 352 (Thomas, J., concurring).

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.<sup>248</sup>

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 Thomas’s preferred test.<sup>249</sup> Second, forming a majority opinion would better “give lower courts guidance.”<sup>250</sup> Though 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.<sup>251</sup> For example, Justice O’Connor set out very similar reasoning in *US Airways v. Barnett*: “in 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.”<sup>252</sup>

In short, Justices Thomas and O’Connor availed themselves of a broadly construed *Screws* rule and chose to trade off what they regarded as accuracy in exchange for greater settlement.<sup>253</sup> Thomas’s decision 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 Thomas had not joined 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. 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.<sup>254</sup> 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.

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.<sup>255</sup>

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<sup>248</sup> *Id.* at 353.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> E.g., *Bragdon v. Abbott*, 524 U.S. 624, 655–656 (1998) (Stevens, J., concurring) (including a “*cf.*” cite to Rutledge’s *Screws* opinion); *Olmstead v. L. C.*, 527 U.S. 581, 607–608 (1999) (Stevens, J., concurring in part and concurring in the judgment).

<sup>252</sup> 535 U.S. 391, 408 (2002) (O’Connor, J., concurring) (quoting Rutledge’s *Screws* opinion); *see also 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.”).

<sup>253</sup> *See* text accompanying *supra* note 121. Again, *Screws* is cited in this line of cases. *See supra* notes 251–252.

<sup>254</sup> My Westlaw-based research reveals 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*, KAN. J.L. & PUB. POL’Y, FALL 2013, at 1, 2–3 (“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”).

<sup>255</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (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 opinion, which sets out the “central holding” of *Roe v. Wade*, 410 U. S. 113 (1973); Part III holds that *Roe* is not overruled; and other majority sections apply the “undue burden” test.

*McDonald v. City of Chicago* provides an example of a compromise partial majority with disagreement on the rationale.<sup>256</sup> The plurality held that the Second Amendment was incorporated against the states as a matter due process, whereas the partial concurrence in the judgment relied on the Privileges and Immunities Clause.<sup>257</sup> But all five of those justices formed a partial majority opinion and agreed that the Second Amendment was incorporated.<sup>258</sup> Thus, *McDonald* does not require recourse to *Marks* at all. Lower courts agree: they treat the Court’s decision on incorporation as binding, without applying the *Marks* rule.<sup>259</sup>

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. So if there is ever an urgent need to generate precedent on a particular issue, the justices can be counted on to 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, non-precedential 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.<sup>260</sup> 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*.<sup>261</sup> 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*.<sup>262</sup> As a result, *Patane* has occasioned little *Marks* attention.<sup>263</sup> In contrast, *Seibert*—another fractured *Miranda*

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<sup>256</sup> 561 U.S. 742 (2010).

<sup>257</sup> *Id.* at 748 (plurality); *id.* at 805 (Thomas, J., concurring in part and concurring in the judgment).

<sup>258</sup> See previous note. Professor 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 16, at 831-33.

<sup>259</sup> 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 85 and accompanying text.

<sup>260</sup> The difficulty of finding rule agreement across numerous separate opinions largely explains why the Supreme Court stopped issuing seriatim decisions in favor of majority opinions.

<sup>261</sup> 542 U.S. 630 (2004).

<sup>262</sup> *Id.* at 634 (plurality); *id.* at 645 (Kennedy, J., concurring in the judgment).

<sup>263</sup> *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)).

decision that was issued the same day but without rule agreement—has become one of the most *Marks*'d cases ever.<sup>264</sup>

The hard cases of rule agreement rely on the expressed views of dissenting justices to reach majority approval of a rule of decision.<sup>265</sup> In a 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*.<sup>266</sup> More recently, the Court has invoked cross-judgment majorities without treating them as precedential. For example, *Boumediene v. Bush* opened by noting that in *Hamdi v. Rumsfeld* “five Members of the Court recognized” a certain wartime detention power, citing the *Hamdi* plurality as well as Justice Thomas’s dissent.<sup>267</sup> But that point played only a place-setting role, without directly informing the Court’s holding. Similarly, *United States v. Jacobson* adverted to *Walter v. United States*,<sup>268</sup> 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.”<sup>269</sup> The Court then block quoted from a concurrence and dissent—but left the precedential import of that vote breakdown unspecified.<sup>270</sup> Overall, the Court appears to treat cross-judgment majorities as “signals,” that is, as informal cues indicating how best to interpret formal, binding precedents.<sup>271</sup>

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.”<sup>272</sup> But so long as outcome voting remains in place, majority agreement across the judgment would paradoxically create a precedent that contradicted the judgment in that very case.<sup>273</sup> That incongruity could also have practical implications for the

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<sup>264</sup> See Tables 2 and 4 in *supra* Section I.C and I.D.

<sup>265</sup> 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 (2008).

<sup>266</sup> *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).

<sup>267</sup> *Boumediene v. Bush*, 553 U.S. 723, 733 (2008) (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality); *id.* at 588 (Thomas, J., dissenting)).

<sup>268</sup> 447 U.S. 649 (1980).

<sup>269</sup> *United States v. Jacobsen*, 466 U.S. 109, 115 (1984).

<sup>270</sup> 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 dissent in *Vieth v. Jubelirer*, 541 U.S. 267 (2004)); *Alexander v. Sandoval*, 532 U.S. 275, 281-82 (2001) (counting the dissenters in *Guardians Assn. v. Civil Serv. Comm'n of New York City*, 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*—the four dissenters and Justice Stewart—” adhered to a precedent and then adopting the position of the dissenters).

<sup>271</sup> See GARNER ET AL., *supra* note 180, at 210-12 (noting that the Supreme Court has looked to dissenting opinions “in interpreting splintered decisions”); Re, *supra* note 203, at 942-44 (describing a “signals model,” in which informal statements by a majority of the Court guide interpretation of ambiguous formal precedent).

<sup>272</sup> See Kornhauser & Sager, *supra* note 147 (arguing for a “meta vote” on whether to adhere to issue voting or outcome voting in any particular case; see also David Post & Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 GEO. L.J. 743 (1992) (arguing for issue voting); Rogers, *supra* note 228 (arguing for outcome voting)).

<sup>273</sup> The classic example is *Mutual Ins. V. Tidewater Transfer Co.*, 337 U.S. 582 (1949), discussed in Post & Salop, *supra* note 272; see also Kornhauser & Sager, *supra* note 147, 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

Court’s decision-making 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.<sup>274</sup>

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 2 and 4.<sup>275</sup> 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 does that change yield a net loss, or a gain? On inspection, the *Marks* rule’s actual performance leaves much to be desired. Lower courts often fail to converge on any binding opinion; and even when one opinion does tend to be recognized as precedential under *Marks*, the result is to reward outlier views that most justices view as arbitrary. So, on balance, the net effect of the *Marks* rule is undesirable—and abandoning it would be an improvement.

To illustrate as much, consider three frequently *Marks*’d cases.<sup>276</sup> First, take *Williams v. Illinois*,<sup>277</sup> which is one of the most often *Marks*’d cases ever, despite being only about five years old. Despite sharp disagreements among the justices, lower courts have tried to apply the *Marks* rule. Yet Justice Elena Kagan’s dissenting opinion pointed out why any effort to extract precedent from *Williams* would inevitably prove to be futile. As she put it, “The five Justices who control the outcome of today’s case agree on very little,” and “no proposed limitation [on the relevant constitutional right] commands the support of a majority.”<sup>278</sup> So while she did not

under the diversity laws, since concurring justices comprising a majority agreed on that rule. However, the justices’ various rationales for that rule did not garner the necessary majority support and so would not be precedential.

<sup>274</sup> In *NFIB v. Sebelius* the majority opinion included a “we hold” 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 132 S. Ct. 2566, 2599 (2012).

<sup>275</sup> See Tables 2 and 4 in *supra* Sections I.C and I.D.

<sup>276</sup> 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 63. At any rate, even ostensibly “easy” *Marks* applications have a way of becoming anything but: fragmented decisions that initially seem tailor made for easy *Marks* analysis have ultimately generated disagreement. See, e.g., text accompanying *supra* notes 9–11 (*Freeman*), 72 (*Baze*), 106 (*Coker*), & 216 (*Bakke*).

<sup>277</sup> 567 U.S. 50 (2012).

<sup>278</sup> *Id.* at 141 (Kagan, J., dissenting).

cite the *Marks* rule, Kagan strongly suggested that the Court’s ruling was a precedential nullity that had not actually undermined previous rulings. Most (though by no means all) courts applying *Marks* have agreed.<sup>279</sup> If generalized, Kagan’s point stands as a critique of *Marks* itself: after all, the *Marks* rule purports to create precedent precisely when no single principle “commands the support of a majority.”

Second, return to the recent and extraordinarily frequently *Marks*’d 4/1//4 ruling in *Freeman v. United States*.<sup>280</sup> Far from exhibiting implicit majority agreement on the law, both the plurality and the dissent sharply criticized Justice Sonia Sotomayor’s solo concurrence in the judgment.<sup>281</sup> And the justices took no clear position on what, if any, precedent had been created, with the dissent going so far as to pity those “lower courts charged with making sense of [today’s decision] going forward.”<sup>282</sup> As it happened, most lower courts initially followed Sotomayor’s opinion based on the median opinion or all opinions approaches to the *Marks* rule; but the D.C. Circuit and Ninth Circuit eventually applied the logical subset approach to conclude that only *Freeman*’s result is binding.<sup>283</sup> Those two circuit courts then chose to adopt the plurality’s analysis. Without the *Marks* rule, lower courts would have immediately recognized that *Freeman* created no precedent, without having to undertake a meticulous analysis of the various opinions and their implications.<sup>284</sup>

Third, *Missouri v. Seibert* illustrates how even relatively convergent applications of the *Marks* rule are problematic, since they favor idiosyncratic views while undesirably influencing the justices’ incentives.<sup>285</sup> *Seibert* was another 4/1//4 split, with Justice Anthony Kennedy writing the solo concurrence in the judgment. After emphasizing the need for a clear rule, Kennedy concluded that the plurality’s “test cuts too broadly and that he “would apply a narrower test.”<sup>286</sup> Again, the justices did not cite the *Marks* rule. However, Kennedy may have been strategically pitching his opinion as the “narrowest ground” under the *Marks* rule. And dozens—though not all—lower courts have followed Kennedy’s lead, with many quoting his opinion’s self-description as “narrower” than the plurality.<sup>287</sup> In the absence of the *Marks* rule, 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 be free to adopt a position that differed from Kennedy’s outlier views.

None of this is to deny that abandoning *Marks* would come at the cost of lost precedent. But the Court could address that worry by abandoning the *Marks* rule only prospectively. In other words, the *Marks* rule could operate as a precedent default only when construing previously decided cases that were arguably issued in the shadow of *Marks*. True, even declaring

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<sup>279</sup> 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*, 55 Cal. 4th 608, 628–29 (2012) (applying “both the plurality opinion and Justice Thomas’s opinion” in a manner akin to the shared agreement approach).

<sup>280</sup> *Freeman v. United States*, 564 U.S. 522 (2011).

<sup>281</sup> See *id.* at 53 (“[T]he proposed rule would permit the very disparities the Sentencing Reform Act seeks to eliminate.”); *id.* at 550 (Roberts, J., dissenting) (The dissent will “foster confusion in an area in need of clarity”).

<sup>282</sup> *Id.* at 550.

<sup>283</sup> See *supra* note 11.

<sup>284</sup> See, e.g., *United States v. Davis*, 825 F.3d 1014, 1022–24 (9th Cir. 2016) (en banc) (finding no precedent in *Freeman* under the logical subset approach based in part on an analysis of how those opinions would resolve certain hypothetical cases).

<sup>285</sup> 542 U.S. 600 (2004).

<sup>286</sup> *Id.* at 622 (Kennedy, J., concurring in the judgment).

<sup>287</sup> See text accompanying *supra* note 77.

that *Marks* should not be used to interpret to later-decided Court decisions would still prevent the formation of new precedent under the *Marks* rule. But, as we have seen, exclusive use of the majority rule would afford the justices an efficient means of forming precedent when there is majority agreement, and later courts would likewise have an efficient means of recognizing that precedent.<sup>288</sup> Thus, any precedent that might be lost in the future would represent only minority 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 be cast into doubt. 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.<sup>289</sup> 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.

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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 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.<sup>290</sup>

## Conclusion

The *Marks* rule is fast becoming a staple of judicial decision-making in both federal and state court. 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 discernibly garners 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 Court should hold as much in *Hughes v. United States*.<sup>291</sup> But even if the Court leaves the *Marks* rule intact, the lower courts have an important if counter-intuitive role to play: by narrowly construing *Marks*, lower courts can discipline justices who might otherwise take advantage of the *Marks* rule, rather than form majority opinions.<sup>292</sup> 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.

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<sup>288</sup> See *supra* Section II.A (The Majority Rule).

<sup>289</sup> See text accompanying *supra* note 67 (discussing the causes of citations to fragmented decisions that are unaccompanied by citations to *Marks*).

<sup>290</sup> Circuit courts have already shown themselves ready to reconsider *Marks* applications, at least where doing so is consistent with general principles of *stare decisis*. *E.g.*, *supra* note 11.

<sup>291</sup> See *supra* note 14 (noting the cert grant in *Hughes*).

<sup>292</sup> See *supra* Section II.C.