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Plurality Decisions: Upward-Flowing Precedent and Acoustic Separation

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Beginning in 1977, the U.S. Supreme Court instructed lawyers and lower courts that when there is no majority decision "in support of the judgment . . . , the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." For decades, commentators and judges alike have vocally lamented the opaque and seemingly intractable nature of this instruction, known as the Marks *rule. The usual academic trope in this field consists of a discussion of a recent plurality decision, followed by an account of how difficult it is to discern the narrowest grounds for that decision, and concluding with a statement about how the lack of clarity as to the relevant precedent impedes the Court's lawmaking function and diminishes the Court's credibility with the public. By contrast, this Article provides a new framework for understanding plurality precedent. Rather than emphasizing the problems presented by uncertain precedent under the narrowest grounds test, this Article highlights the effectiveness of the rule in simultaneously maintaining judicial credibility with the public while facilitating flexibility for lower court judges. That is to say, this Article celebrates the* Marks *rule's success in establishing an acoustic separation between the rule as it is transmitted to lower court judges, and the rule as it is understood by the public. The external message reassures society that there has been no breakdown in the judicial process when a plurality occurs, and the internal, decisional rule is that in the absence of lower court consensus, there is no plurality precedent. In short,* Marks *effectively reconciles the competing interests of public legitimacy and legal flexibility.*

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JUSTIN MARCEAU*

"Freedom slowly broadens down/From precedent to precedent."[1]

I. INTRODUCTION

As a general matter, law students are told that they should proceed with caution in applying the reasoning of a capital case to a non-capital setting,[2] and likewise they are often advised that substantial care is required when one attempts to discern a general principle from a plurality decision.[3] Moreover, at least one U.S. Court of Appeals has suggested that "footnotes and other marginalia" in United States Supreme Court opinions should not be unduly relied upon.[4] Remarkably, the Supreme Court's rule for discerning precedent from plurality decisions was born out of a process that simultaneously violates all three of these principles.

The so-called *Marks* rule, named after the 1977 decision in *Marks v. United States*,[5] purports to provide the definitive approach for treating non-majority decisions of the Supreme Court as fully precedential.[6] Notably, however, the *Marks* rule has its origins in a footnote to the Court's 1976 decision in *Gregg v. Georgia*[7] interpreting its 1972 decision in *Furman v.*

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[1] Alfred, Lord Tennyson, *You Ask Me, Why, Tho' Ill at Ease*, *reprinted in* THE POETICAL WORKS OF TENNYSON 60 (Cambridge ed. 1974) (1842) (quoted in HENRY CAMPBELL BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS (1912) (acknowledgements page)).

[2] *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 605 (1978) ("The need for treating each defendant in a capital case with that degree of . . . uniqueness of the individual is far more important than in noncapital cases.").

[3] *See, e.g.*, Adam S. Hochschild, *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective*, 4 WASH. U. J.L. & POL'Y 261, 261–62 (2000) ("[T]he discernment of a ratio decidendi from a plurality opinion . . . is more problematic.").

[4] Jack L. Landau, *Footnote Folly: A History of Citation Creep in the Law*, OR. ST. B. BULL., Nov. 2006, at 19, 24 (citing Commc'ns Workers of Am. v. Am. Tel. & Tel. Co., 513 F.2d 1024, 1028 (2d Cir. 1975), *vacated*, 429 U.S. 1033 (1977)).

[5] 430 U.S. 188, 193 (1977).

[6] *Id.* at 193.

[7] 428 U.S. 153, 169 n.15 (1976) (plurality opinion). In *Gregg*, Justice Stewart wrote an opinion announcing the judgment that was joined by Justices Powell and Stevens. *Id.* at 154. *Gregg* is often

Georgia.[8] That is to say, the now familiar *Marks* rule[9] formula for discerning precedent from a plurality decision is rooted in a *footnote to a plurality decision capital case interpreting a plurality decision capital case*. With *Gregg* and *Furman* standing as some of the longest and most undecipherable decisions in the Court's history, if there is any sense of Karmic justice in constitutional interpretation, a doctrine born out of a footnote in *Gregg* interpreting *Furman* seemed destined to produce intractability and obfuscation. It has done just that. One of the purposes of this Article is to develop the claim that such indeterminacy of interpretation actually has salutatory effects.

In *Marks*, the Court instructed lawyers and lower courts that when there is no majority decision in support of the judgment, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[] on the narrowest grounds."[10] This holding purports to provide two key rules: (1) plurality decisions generate precedent; and (2) the narrowest opinion is the holding.[11] For anyone who has attempted to discern a narrowest ground, however, the difficulty with this seemingly straightforward instruction cannot be overlooked. Consequently, for decades, commentators and judges alike have vocally lamented the opacity of this instruction.[12] The indeterminacy of plurality precedent is, according to the conventional wisdom, cause for serious concern. Indeed, the usual academic trope in this field consists of a discussion of a recent plurality decision, followed by an account of how difficult it is to discern the narrowest grounds for that decision, and concluding with a statement about how the lack of clarity as to the relevant precedent impedes the Court's lawmaking function and diminishes the Court's credibility with the public.[13] As a group of political scientists

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cited for a general proposition without any pincite indicating which opinion is binding. *See, e.g.*, California v. Brown, 479 U.S. 538, 541 (1987) ("[D]eath penalty statutes [must] be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." (citations omitted)). Or, judges might cite *Gregg* for the general proposition that the death penalty is not *per se* unconstitutional. *See* Baze v. Rees, 553 U.S. 35, 47 (2008) ("We begin with the principle, settled by *Gregg*, that capital punishment is constitutional. It necessarily follows that there must be a means of carrying it out." (citations omitted)).

[8] 408 U.S. 238 (1972).

[9] *Marks*, 430 U.S. at 193.

[10] *Id.* (quoting *Gregg*, 428 U.S. at 169 n.15 (plurality opinion of Justices Stewart, Powell, and Stevens)).

[11] *Id*.

[12] *See, e.g.*, Pamela C. Corley et al., *Extreme Dissensus: Explaining Plurality Decisions on the United States Supreme Court*, 31 JUST. SYS. J. 180, 181 (2010) ("[P]lurality decisions do not necessarily provide clear guidance to lower courts.").

[13] *See, e.g.*, 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, 348 (2008) ("[T]he lack of a clear majority rule sends a signal that courts and policy-makers must reevaluate existing rules and laws when there is no definitive interpretation from the Supreme Court."); John F.

recently described the phenomena, plurality decisions "arguably result[] in the erosion of the Court's credibility and authority as a source of legal leadership."[14] The lack of a clear, binding holding is said to undermine confidence in the Court's legal power and authority.[15]

Having thus cast non-majority decisions and the narrowest grounds test as a fundamental "breakdown in the judicial decisionmaking process"[16] best avoided, scholars have focused their research efforts on cataloguing and explaining the potential causes of plurality decisions.[17] The most recent work in this field empirically tested various "explanations for how the Court fails to produce a majority decision."[18]

Breaking ranks with previous scholarship on *Marks*, this Article develops the claim that such ambiguity, and even obfuscation, as to the decisional rules might be both necessary and desirable. Accordingly, this Article is not concerned with how or why pluralities occur, but instead with the question of what signal they send to the public and to lower courts. More to the point, this Article rejects the negative characterization of *Marks* by offering an alternative framework for understanding plurality precedent. Specifically, the argument is developed that under the theory of acoustic separation,[19] the failure of the *Marks* rule to actually establish clear and mechanically ascertainable precedent, despite claiming to do so, is the rule's greatest triumph. The Court has generated a rule that ascribes to the Court's most fractured and unintelligible decisions the illusion of success; it is as though a failure by the Court to resolve an issue is not actually a failure. The *external* rule, then, is that there is a narrowest ground and that this is something that lawyers and lower courts with their technical skills can ascertain, even if the layperson cannot. The *internal* rule, or the rule directed to the lawyers and lower courts, however, is quite

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Davis & William L. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 86 (1974) (stressing the "evil inherent" in plurality decisions for the development of the law); Douglas J. Whaley, Comment, *A Suggestion for the Prevention of No-Clear-Majority Judicial Decisions*, 46 TEX. L. REV. 370, 370 (1968) (emphasizing that plurality decisions create havoc for the rule of law and the judicial system).

[14] Corley et al., *supra* note 12, at 183.

[15] *Id*. at 197.

[16] Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 759 (1980).

[17] *See, e.g.*, Corley et al., *supra* note 12, at 183–95 (explaining why plurality decisions occur through an empirical study and concluding, among other things, that the subject matter of the case is a strong predictor as to the likelihood of a plurality); James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 GEO. L.J. 515, 533–43 (2011) (identifying factors that contribute to plurality opinions, such as ideological, collegial, legal, and contextual factors).

[18] Corley et al., *supra* note 12, at 192.

[19] Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 625 (1984) [hereinafter Dan-Cohen, *Acoustic Separation*] (developing the concept of acoustic separation in law, based on the idea that "a distinction can be drawn in the law between rules addressed to the general public and rules addressed to officials").

different. As developed in this Article, through its own handling of plurality precedent under the *Marks* rule, the Court has signaled to lower courts that, ultimately, the *Marks* rule is less a device for divining clear precedent and more profitably viewed as an invitation for a referendum among the lower courts on the statutory or constitutional question at issue. Equally important, lower courts seem to have received and adopted this message. In short, this Article advances the literature on plurality opinions by identifying public legitimacy and legal flexibility as competing interests in this realm, and recognizing that the *Marks* rule may be capable of reconciling these interests through a sort of sleight of hand or acoustic separation. Although the Supreme Court continues to recite the *Marks* rule as though it is a talismanic cure for plurality decisions, the reality appears to be much different. Indeed, an examination of the cases in which the Court actually interprets its own plurality decisions suggests that precedent in this realm actually flows upward—that is, the Supreme Court's plurality decisions signal a willingness on the part of the Supreme Court to tolerate lower court experimentation and development as to the critical questions that divided the Supreme Court.

The Article proceeds in four Parts. Part II provides an introduction to the theory of acoustic separation or internal versus external legal rules, and develops the claim that the *Marks* rule is well-suited to be regarded as a success under such theories. Part III is a brief history of plurality decisions and the Court's evolving understanding of their precedential value, including an original taxonomy of the various types of fractured plurality decisions that can arise. Next, in Part IV, every case in which the Supreme Court purports to apply or consider its own *Marks* rule is analyzed and the claim that the *Marks* rule represents a successful instance of acoustic separation is developed by, among other things, proving that precedent in this arena tends to flow upward—from lower courts to the Supreme Court. And finally, Part V considers the functioning of the *Marks* doctrine in the lower federal courts, and observes that many lower courts appear to have received the tacit message sent by the Supreme Court regarding plurality precedent, to wit, that it is not actually binding in any conventional sense. The lower courts considering *Marks* have concluded that a confusing rule that is rarely applied in a consistent manner—even if that rule comes from the Supreme Court—retains only minimal force in our precedential system. As it applies to lower courts, then, the *Marks* rule for discerning precedent does not, as a practical matter, enjoy the status of binding precedent.[20]

[20] There is, of course, room to criticize this view of the *Marks* rule as tautological—that is, if lower courts refuse to follow a precedent, then, of course, it is not precedential. As a general rule, however, the lower courts firmly and consistently apply Supreme Court holdings, and where they fail to do so, the Supreme Court eventually intervenes. In his 1912 Treatise, Henry Campbell Black summarized the American model of precedent: "If the decision cited to a court is one which it is

II. ACOUSTIC SEPARATION AND PLURALITY DECISIONS

The existence and the rise of pluralities seems an inescapable reality for the modern Court.[21] It must be conceded that there is no perfect way to manufacture a holding from a non-majority decision—that is, there is no single rule that would designate one opinion or another as binding precedent that has a more compelling claim of legitimacy than the *Marks* rule.[22] Viewed in this light, both judicial inertia in favor of existing rules and, more importantly, the theory of acoustic separation tip the scales in favor of retaining the much maligned *Marks* doctrine.

Acoustic separation is a conception of the law developed by Meir Dan-Cohen that argues that a law should be understood as providing two types of rules: (1) "conduct rules," which shape and inform public behavior and perception; and (2) "decision rules," which provide normative guidance to the courts as decision makers.[23] According to legal scholar Dan-Cohen, these two types of rules have substantial independence, and it is suggested that such independence might be a desirable feature of an optimally functioning legal framework.[24] However, critical to this theory is the recognition that if the conduct rules governing the public and the decisional rules governing judges are to be truly independent in their message, then there must be a separate message for the public as opposed to the judges—that is, there must be acoustic separation.[25]

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imperatively bound to follow, no criticism of it as an authority is either proper or permissible." HENRY CAMPBELL BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS 81 (1912).

[21] *See* Spriggs & Stras, *supra* note 17, at 519 ("Historically, plurality decisions by the Supreme Court have been relatively rare: during the 145 Terms between 1801 and 1955, the Supreme Court issued only 45 plurality decisions. However, during the 54 Terms from 1953 to 2006, the Supreme Court issued 195 plurality opinions, approximately 3.4% of the 5,711 total cases decided during the period." (footnote omitted)); *see also* Paul H. Edelman & Jim Chen, *The Most Dangerous Justice: The Supreme Court at the Bar of Mathematics*, 70 S. CAL. L. REV. 63, 75 n.62 (1996) (explaining that there were "10.3 plurality decisions per Term during the 1980s," which is an increase from previous decades).

[22] There does not appear to be any scholarly or judicial suggestion that an opinion other than that deemed controlling under *Marks* has a stronger claim to the status of binding precedent.

[23] Dan-Cohen, *Acoustic Separation*, *supra* note 19, at 627; *see also id.* at 628 ("We can successfully account for the normative constraints that the law imposes on judicial decisionmaking only if we impute to the legal system an additional relevant norm whose norm-subject is the judge and whose norm-act is the act of judging or imposing punishment."). For a brief but insightful summary of Dan-Cohen's theory, see Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 311 n.269 (1995).

[24] To be more precise, Dan-Cohen provides examples of the advantageous use of acoustic separation, but ultimately concludes that the relationship between a particular conduct rule and a decision rule is a "normative issue that must be decided in accordance with the relevant policies and values." Dan-Cohen, *Acoustic Separation*, *supra* note 19, at 629.

[25] *See id.* at 635 ("[A]ctual legal systems may in fact avail themselves of the benefits of acoustic separation by engaging in 'selective transmission'—that is, the transmission of different normative messages to officials and to the general public, respectively.").

Of course, in the real world there is not true acoustic separation. There is no absolute barrier between the norms communicated to the judges and the expectations communicated to the public. Nonetheless, Dan-Cohen perceives a form of modified acoustic separation in our legal processes. First, society is divided between the lay public and the decision-making judge, and a degree of acoustic separation is said to exist "whenever certain normative messages are more likely to register with one of the two groups than with the other."[26] In addition, legal systems tend to organically develop strategies for selectively transmitting different messages to the public and to the decision-making judges by, for example, delivering only an incomplete version of the legal rule to the public.[27]

Accepting that a degree of acoustic separation likely exists in our legal system, the natural next question is whether the process of selectively transmitting legal information to the public serves only some sinister, anti-democratic end. The existence of real-world, quasi or partial acoustic separation, according to Dan-Cohen, can serve positive ends.[28] If the decisional rules are communicated too readily to the public, then the normative force of some of the conduct rules applicable to the public could be undermined.[29] Acoustic separation will emerge, then, when social norms and customs are best served by a decisional rule that differs from its corresponding conduct rule. By way of example, consider the ignorance of the law doctrine in criminal law. As Dan-Cohen points out, courts routinely recite the maxim, "ignorance of the law is no excuse," and likewise, the public accepts this as a fundamental legal truth.[30] Notably, however, judges and lawyers recognize that the law in this area is not so easily distilled; rather, there are numerous specific exceptions to this general principle.[31] Accordingly, there is acoustic separation built into the law in order to produce the socially optimal result—that is, the public will be diligent in their efforts to learn the scope of the criminal law, and yet judges may be appropriately forgiving of certain mistakes, for example, when the mistake of law negates the requisite mens rea.[32]

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[26] *Id.* at 634.

[27] *Id.* at 635 ("My use of the term should not be understood to connote deliberate, purposeful human action. Imputing to the law strategies of selective transmission does not, therefore, imply a conspiracy view of lawmaking in which legislators, judges, and other decisionmakers plot strategies for segregating their normative communications more effectively. Instead, strategies of selective transmission may be the kinds of strategies without a strategist that Michel Foucault describes in his analysis of power.").

[28] *See id.* (mentioning the "benefits of acoustic separation").

[29] *See id.* at 632 ("A decision rule conflicts with a conduct rule if the decision rule conveys, as a side effect, a normative message that opposes or detracts from the power of the conduct rule.").

[30] *Id.* at 645–48.

[31] *Id.*

[32] *See id.* at 648 ("[T]he law might try to serve the policies of both the conduct rule and the decision rule by . . . attempting to convey to the general public a firm duty to know the law and by

Through acoustic separation, therefore, normatively desirable legal processes and public behavior are facilitated. Acoustic separation allows for dual legal purposes, which may be in tension, to be simultaneously achieved. Arguably, the *Marks* rule functions as an invaluable tool of acoustic separation, achieving socially desirable ends by facilitating distinct rules for the public and the lower courts.[33]

In the *Marks* rule context, the external or conduct rule communicated to the public is as simple as it is entrenched in American folklore and civics. The Supreme Court is the highest Court of the land, its decisions as to questions of federal law are supreme, and its rulings may not be challenged or revisited by lower state or federal courts. The principle that is communicated to the public is that, even in the face of a divided, non-majority decision, the Supreme Court fulfills its duty to create binding precedent. And such a message is likely more important than ever in times when the credibility and prestige of the Court is under siege.[34] Stated at a level of generality, then, the conduct rule is that Supreme Court decisions create binding precedent and do not represent a breakdown or failure of our judicial system. In this way, the principle of modified acoustic separation such that the norms of public behavior are communicated to distinct groups through incomplete or imperfect public dissemination can easily be discerned in this context.[35] The external rule of *Marks* is clear and unequivocal: plurality decisions generate precedent.[36]

In stark contrast to the straightforward, ready for public consumption principle that pluralities do not impact the law creating function of the Supreme Court, the decision rule born in *Marks* is masked in undecipherable legalese. The decisional rule, the rule applicable to the decision makers tasked with applying *Marks*, is the "narrowest grounds" test, which has the practical effect of affording lower courts with substantial flexibility when they are confronted with issues similar to those addressed by a plurality decision of the Supreme Court.[37] Lower court judges have come to recognize, as elaborated in Part IV, that the narrowest

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simultaneously instructing decisionmakers to excuse violations in ignorance of the law if fairness so required.").

[33] Dan-Cohen has remarked that it is "not logically necessary for the conduct rule and the decision rule, [though] conjoined in a single law, to overlap fully." *Id.* at 649.

[34] *See* Adam Liptak & Allison Kopicki, *Approval Rating for Justices Hits Just 44% in Poll*, N.Y. TIMES, June 8, 2012, at A1 ("Just 44 percent of Americans approve of the job the Supreme Court is doing and three-quarters say the justices' decisions are sometimes influenced by their personal or political views.").

[35] Rules designed to shape the public behavior will often be written in "ordinary language," but it is the "technical" judicial interpretation that may produce the relevant decisional rule. Dan-Cohen, *Acoustic Separation*, *supra* note 19, at 652.

[36] Marks v. United States, 430 U.S. 188, 193 (1977) (rejecting the notion that a plurality decision simply fails to create any binding precedent).

[37] *Id.*

grounds formula is an invitation for experimentation and percolation much more than it is a doctrine of rigid legal formality.[38] Accordingly, *Marks* signals to judges and careful observers, but not the general public, the acceptability of experimentation and percolation among the lower courts.[39]

In a nutshell, the *Marks* rule serves as a beneficial practical application of the acoustic separation theory.[40] For socially divisive issues for which there is disagreement among the Justices,[41] the *Marks* rule achieves two distinct goals that seem irreconcilable in the context of a plurality decision: (1) The *Marks* rule signals to the *public* a strong, reliable, and properly functioning system of judicial review; and (2) it simultaneously sends a message to lower courts that they ought to eschew notions of rigid unworkable *stare decicis* in favor of percolation and experimentation. In effect, experimentation that is generally regarded as antithetical to federal supremacy and the legitimacy of the Supreme Court is permitted without undermining public confidence.[42] Accordingly, rather than emphasizing the problems presented by uncertain precedent under the

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[38] *See infra* Part IV (discussing how the "narrowest grounds" formulation is mostly used as a mere utterance before making a particularized assessment of the binding force of a plurality decision on lower courts).

[39] Some might recoil at the idea of a judicial doctrine that purports to produce precedent for purposes of public appearance, yet fails to do so in any meaningful way. One might question the legitimacy of a precedent premised, at least in part, on deception. But in defending acoustic separation in the context of criminal law, it has been said that "law, like politics, is a power game . . . [and i]n such a game, strategic behavior, including bluffing and other forms of deceit, must always be expected," and indeed, should be celebrated if they further societies normative goals. Dan-Cohen, *Acoustic Separation*, *supra* note 19, at 677.

[40] This is not an exact application of acoustic separation as envisioned by Dan-Cohen. In Dan-Cohen's imagined legal system, there is separation between the decision maker (the courts) and the governed (the public). Under the *Marks* form of separation, the courts are aware of both messages; the lower courts know of the public rule that pluralities create precedent and they also know of the internal rule that provides them flexibility in their decision-making. Nonetheless, the acoustic separation analogy seems valuable; indeed, some of Dan-Cohen's examples arise in contexts where there is incomplete separation such that the decision makers, but not the public, are aware of both the conduct and the decisional rules. *See, e.g.*, Dan-Cohen, *Acoustic Separation*, *supra* note 19, at 646 (applying the concept of acoustic separation to the ignorance of the law doctrine and noting that courts recite the maxim that ignorance of the law is no defense in order to "reinforce the popular belief that it accurately describes the law," but explaining that the judges themselves recognize that the "maxim, far from being an exhaustive statement of the law, is in reality a mere starting point for a complex set of conflicting standards and considerations" that permit a fair degree of judicial flexibility).

[41] Studies have shown that pluralities are more likely to arise in the context of politically sensitive issues. Corley et al., *supra* note 12, at 192 (finding that "controversial, emotionally charged areas of law" were the most likely to result in plurality decisions); *id.* at 193 ("[The] probability of a plurality decision also increases by 53 percent if the case involves a politically salient case."); *see also* JOEL B. GROSSMAN & RICHARD S. WELLS, CONSTITUTIONAL LAW & JUDICIAL POLICY MAKING 232 (2d ed. 1980) (noting that one should not expect Justices "to be united on politically contentious issues that divide the country").

[42] Dan-Cohen, *Acoustic Separation*, *supra* note 19, at 634 (recognizing that without acoustic separation, a decisional rule may point "in the opposite direction from, and thus detracts from the force of" conduct rules).

narrowest grounds test, as has been the norm among judges and academics, this Article applauds the effectiveness of the rule in maintaining judicial credibility with the public by maintaining a rigid façade of reliable, easily discernable precedent, while simultaneously facilitating flexibility for lower court judges as to a contentious and unsettled issue. Building on previous scholarship that has recognized a distinction between *external* and *internal* rules,[43] or an acoustic separation between legal rules that guide "official decisions" and those that guide and shape "public" beliefs and decisions,[44] this Article aims to celebrate the *Marks* rule for simultaneously achieving both functions. Public legitimacy and legal flexibility, two interests that are generally in tension, are simultaneously preserved by the *Marks* rule. Because of the *Marks* rule, in precisely those cases where the political salience is highest,[45] the Court is able to communicate to the public its interest in engaging with the issue and resolving it, and yet the very resolution of the case through a plurality decision will signal to lower courts a liberty to experiment with alternative legal rules and approaches.

In sum, the *Marks* rule is not the judicial lemon that it is popularly believed to be. It fails as a rigid and readily applied standard, but so in lies its success. There is cause to celebrate the success of the narrowest grounds doctrine because of, not in spite of, the cryptic and potentially ephemeral value of plurality precedent generated under this rule. The *Marks* rule succeeds in sending a distinct set of "normative messages" to both the general public and the judicial decision makers.[46] The façade of mathematically precise precedent flowing from the Court is preserved and safeguarded within popular culture, but lower courts and the Supreme Court itself are free to view *Marks* as a minimal or non-existent limit on their decisional authority. For the "legally untutored," the image of a well functioning judiciary reflective of the precedent model of judicial review ushered in by the Marshall Court[47] is maintained, but for the courts, as developed in Parts III and IV, it is increasingly clear that the message of *Marks* is one of flexibility and an invitation for innovation.[48]

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[43] *See, e.g.*, Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 76–77 (1983) (discussing administrative rule-maker and policymaker use of external and internal rules in promulgating rules).

[44] Dan-Cohen, *Acoustic Separation*, *supra* note 19, at 627.

[45] Corley et al., *supra* note 12, at 193–94 (noting the higher frequency of plurality decisions in cases of great political salience).

[46] Dan-Cohen, *Acoustic Separation*, *supra* note 19, at 630; *see* Marks v. United States, 430 U.S. 188, 193 (explaining how a divided Court decides a case without any overwhelming rationale that explains the nature of the agreement among the majority of Justices).

[47] *See infra* Part III.A (discussing the history of setting precedent and pluralities stemming from the Supreme Court under Chief Justice John Marshall).

[48] Likewise, to assume that the Court is so feckless as to be unaware of the doctrine's inability to create clear precedent is a mistake. The Court has likely retained the *Marks* formulation for more than three decades precisely because it achieves the goal of acoustic separation of messaging between the

III. AN OVERVIEW OF PLURALITY DECISIONS

In order to appreciate the role of acoustic separation in the *Marks* rule context, it is necessary to have a basic understanding of plurality decisions. Plurality decisions are not, of course, unanimous decisions of the Court, or even bare majority decisions such as 5-4 votes. A plurality decision is a non-majority decision, but not all non-majority decisions are pluralities. For example, there are instances where the Court arrives at a 4-4 tie, and such decisions are not pluralities. Illustrative is a decision from 2010 in which Justice Stevens did not participate, apparently because he owned beachfront land implicated by the case, and the Court split 4-4 as to whether the Fifth Amendment Takings Clause applies so as to limit judicial decisions.[49] Another example of a non-majority decision that is not a plurality arises when the Court splits in three or more ways and fails to achieve a majority judgment. For example, if a civil rights action resulted in three Justices concluding that no relief was available, three Justices voting that only injunctive relief was available, and three Justices concluding that only a damages remedy was available, then there might be a 3-3-3 split with no majority judgment.[50] Likewise a split among the Justices as between reversing the lower court, remanding to the lower court, and affirming the lower court might yield no majority judgment.[51] Notably, the Supreme Court recognizes that where the Justices fail to reach agreement on a judgment, there is no binding national precedent: the affirmance that results from such a tie is conclusive as to the judgment, but does not provide for precedent beyond the force of the lower court decision that was under review.[52] Indeed, the general practice is to avoid even

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public and the decision makers that Professor Dan-Cohen famously envisioned. Dan-Cohen, *Acoustic Separation*, *supra* note 19, at 630–31 ("[W]e may speak of messages that convey normative information . . . and we may distinguish such messages from ones aimed at guiding the decisions of officials.").

[49] *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2597 (2010) (deciding 8-0 that on the facts of this case, there was no taking); *see also* Costco Wholesale Corp. v. Omega, S.A., 131 S. Ct. 565 (2010) (producing a 4-4 split that resulted in an affirmance of the lower court's ruling); Bd. of Educ. of City Sch. Dist. of New York v. Tom F., 522 U.S. 1, 2 (2007) (resulting in a judgment affirmed by an equally divided Court with one Justice taking no part in the decision).

[50] Such a non-judgment appears to be purely hypothetical up to this point in the Court's history, perhaps because there is a little known canon of judicial decision making that dictates that at least one Justice should change his or her vote whenever necessary in order to obtain a majority judgment. H. Ron Davidson, *The Mechanics of Judicial Vote Switching*, 38 SUFFOLK U. L. REV. 17, 18 (2004) ("Every time there has been no majority on the disposition of a case . . . at least one Justice switched his or her vote to achieve a majority disposition.").

[51] *Id*. at 17–18 & n.5 (noting that *Hamdi v. Rumsfeld*, 542 U.S. 507, 508 (2004), "involves Justices divided between four different positions: upholding, overturning, and two different remanding positions").

[52] Michael Gottesman, *David Feller, Senior Partner*, 24 BERKELEY J. EMP. & LAB. L. 265, 271 (2003) ("4-4 decisions don't count, except for the unfortunate petitioner in that case . . . .").

producing any opinions, much less an opinion of the Court, when there is no majority judgment.

By contrast, plurality decisions are properly identified as those decisions for which a majority of the Justices agree on the proper outcome of the case, but fail to achieve a majority assent as to the proper rationale or holding.[53] In these circumstances, the Supreme Court issues a judgment in favor of one party, but it does not issue a majority opinion. As one commentator has put it, "Pluralities announce something like: 'We agree on who wins, but we cannot agree on the role of the Constitution in this setting.'"[54] The fact of the existence of plurality decisions, however, does not dictate that they would produce precedent.

A. *A Brief History of Precedent and Pluralities*

The problem of Supreme Court plurality precedent is one of the externalities of Chief Justice John Marshall's efforts to enhance the "power and prestige" of the Court.[55] It is not a natural or necessary conclusion that individual cases would do more than resolve the legal dispute before the Court. Indeed, the common law practice was for "all of the participating judges to write, and deliver orally, individual opinions explaining their views on a case."[56] Initially, "the *only* opinions the Court issued were oral ones, which the court reporter would transcribe and eventually publish."[57] Upon becoming the fourth Chief Justice in 1801, John Marshall quickly ushered an end to the age of seriatim opinion writing for the Supreme Court, a practice that Justice Marshall thought undermined confidence in the Court's judgment.[58] During the pre-Marshall age, then, the problem of

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[53] Spriggs & Stras, *supra* note 17, at 517 ("Plurality decisions occur when a majority of Justices agree upon the result or judgment in a case but fail to agree upon a single rationale in support of the judgment.").

[54] Robert C. Power, *Affirmative Action and Judicial Incoherence*, 55 OHIO ST. L.J. 79, 134 (1994).

[55] SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL 20 (Scott Douglas Gerber ed., 1998) [hereinafter SERIATIM] (quoting HENRY J. ABRAHAM, THE JUDICIAL PROCESS 199 (6th ed., 1993)); *see also* Justin F. Marceau, *Lifting the Haze of* Baze*: Lethal Injection, the Eighth Amendment, and Plurality Opinions*, 41 ARIZ. ST. L.J. 159, 165–67 nn. 23–33 (compiling the historical citations on this topic of Justice Marshall's attempt to enhance the Court).

[56] SERIATIM, *supra* note 55, at 20; *see also* Calder v. Bull, 3 U.S. (3 Dall.) 386, 391 (1798) (describing seriatim in the context of punishing crimes for which there are existing laws); Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 192 (1959) (noting that although "opinions 'by the Court' appeared whenever the matter could be disposed of with a memorandum, seriatim opinions were always filed in important cases").

[57] Christopher W. Schmidt & Carolyn Shapiro, *Oral Dissenting on the Supreme Court*, 19 WM. & MARY BILL RTS. J. 75, 89 (2010).

[58] *See* John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790–1945*, 77 WASH. U. L.Q. 137, 143–52 (1999) (providing a lucid summary of the history of the early Court under John Marshall, and stating that by the end of Justice Marshall's term, the practice of opinions being "nearly always delivered by one Justice speaking for the Court"). It seems that there were opinions of the Court from 1789 through 1801 when Marshall became Chief Justice, although

defining the binding precedent of a decision was non-existent insofar as there was no expectation that the Justices shared a unifying rationale in support of judgment; no single opinion represented the views of the Court, and instead each Justice largely spoke for himself.[59] It was during this new era in which the Court spoke with one voice through an "opinion of the Court,"[60] an opinion that in the early years was "almost always" signed by Chief Justice Marshall himself, that the notions of precedent and *stare decisis* were born.[61] Under the "opinion of the Court" model of judicial decision making, a decision joined by a majority of the Justices is imbued with the authority of the Court, and after *Marbury v. Madison*,[62] with the authority of the Constitution itself.[63] Accordingly, whatever virtues the precedent model provided in terms of enhancing the power and credibility of the Court, it also made possible the problem of pluralities. Although a decision without a discernable holding was the norm prior to Marshall's Court, once seriatim decisions were replaced with a system of binding precedent, a fractured, seriatim-esque decision was an invitation for the very sort of interpretive problems that courts and lawyers now experience in the realm of plurality decisions.

To be sure, the precedent model of Supreme Court decision making is one of Chief Justice Marshall's legacies that lives on as one of the hallmarks of the Court's prestige and power, but the unanimity of judicial decision making for which he was also famous has not endured.[64]

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most such opinions were on the less controversial cases and "contained very little legal analysis." *Id*. at 140.

[59] *Id.* at 142–43 (suggesting that seriatim opinions were used when the Justices were in disagreement over a difficult issue or when there was a constitutional issue).

[60] Igor Kirman, Note, *Standing Apart to Be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083, 2086 (1995) ("Marshall signaled [sic] the new understanding in his first case as Chief Justice by announcing the decision as 'the opinion of the Court.'" (quoting Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 26 (1801))).

[61] Although many scholars attribute to Chief Justice Marshall the notion that a Court announced an opinion of the court or binding precedent as to the reasoning behind a decision, the notion of *stare decisis* as to results is understood as an "accepted principle" of the common law that "was accepted before this nation was born." C. Steven Bradford, *Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling*, 59 FORDHAM L. REV. 39, 39 (1990).

[62] 5 U.S. (1 Cranch) 137 (1803).

[63] *See id*. at 177 ("It is emphatically the province and duty of the judicial department to say what the law is."); BLACK, *supra* note 20, at 131–32 ("As the majority rules, such a decision is the decision of the court, not merely the opinion of the majority judges.").

[64] *See, e.g.*, Kirman, *supra* note 60, at 2087 ("The unanimity so prized by Marshall would not, however, endure. Supreme Court decisions containing at least one separate opinion began to grow in frequency in the later years of Marshall's tenure and have escalated in number dramatically in the past fifty years." (footnotes omitted)). It has been observed that, ironically, Chief Justice Marshall's effort to unify the Court through the majority opinion model likely led to the opposite result over the long-term. *See* Kelsh, *supra* note 58, at 142 ("Now, what individual Justices thought was of serious consequence. The increased concern with what each Justice said naturally led to an increased concern with each Justice's doctrinal consistency. Concern over doctrinal consistency became, by the end of

Throughout Marshall's tenure as Chief Justice, his ability to maintain unanimity of voice in judicial decisions remained relatively strong, though far from absolute. Although the first separate opinion of a Justice during the "opinion of the Court" era was published in the U.S. Reports in 1804, just a few years after Marshall became Chief Justice[65] from 1801 to 1835 (the duration of the Marshall Court), the "Court issued 1244 opinions and only seventy dissents."[66] Dissents remained unpopular, though not unheard of, well into the early 1900s. Illustrative is a letter from Chief Justice Taft in 1922 in which he explained, "I don't approve of dissents generally, for I think that in many cases, where I differ from the majority, it is more important to stand by the Court and give its judgment weight than merely to record my individual dissent."[67] And if dissents were rare, pluralities were all but non-existent until the latter half of the twentieth century. Scholars appear to agree that the first plurality decisions arose in the mid-1800s, but they were anomalous until considerably later.[68] Regardless of their precise date of birth, the increasing frequency of plurality decisions has been well documented. A recent empirical study observed:

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the Taney period, an important reason for Justices to write separately. It is ironic, then, that Marshall adopted the innovation of having one Justice speak for the Court as a means of unifying the Court. This same innovation also introduced heightened concepts of judicial consistency that later became an excuse for many Justices to write separately." (footnotes omitted)).

[65] ZoBell, *supra* note 56, at 194 (citing Head & Armory v. Providence Ins. Co., 6 U.S. (2 Cranch) 127, 169 (1804)); *see also* Huidekoper's Lessee v. Douglass, 7 U.S. (3 Cranch) 1, 72 (1805) (Johnson, J., concurring) (announcing the first dissent from an opinion of the Court); Adam S. Hochschild, Note, *The Modern Problem of Supreme Court Plurality Decisions: Interpretation in Historical Perspective*, 4 WASH. U. J.L. & POL'Y 261, 268 (2000) ("[L]ater in his tenure as Chief Justice, Supreme Court decisions were published regularly with multiple opinions."); Kirman, *supra* note 60, at 2087 ("Supreme Court decisions containing at least one separate opinion began to grow in frequency in the later years of Marshall's tenure."). But, as ZoBell notes, during Justice Marshall's first four years, "twenty-six decisions were handed down by the Court. The Chief Justice delivered the opinion of the Court in all of these save two." ZoBell, *supra* note 56, at 194.

[66] Meredith Kolsky, Note, *Justice William Johnson and the History of the Supreme Court Dissent*, 83 GEO. L.J. 2069, 2074 (1995). That amounts to a dissent in roughly five percent of all judicial decisions of the Court. Today, plurality decisions occur in between three to four percent of all decisions of the Court. Spriggs & Stras, *supra* note 17, at 522.

[67] Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1311 (2001) (quoting Letter from President William Howard Taft to John Hessin Clarke (Feb. 10, 1922)). By contrast, by 1958 it was observed that "[u]nhappily, this unanimity has become . . . a rather atypical example of the manner in which members of the present Court have chosen to discharge their judicial duties." ZoBell, *supra* note 56, at 186; *see also id*. at 210 (finding that the ABA Canons of Judicial Ethics from 1924 states that "[i]t is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion").

[68] Kelsh, *supra* note 58, at 154 n.99 (noting that the opinions in *Ohio Life Ins. & Trust Co. v. Debolt*, 57 U.S. (16 How.) 416, 427 (1853), and *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 561 (1840), "could be the first plurality opinions in the Court's history").

> Historically, plurality decisions by the Supreme Court have been relatively rare: during the 145 Terms between 1801 and 1955, the Supreme Court issued only 45 plurality decisions. However, during the 54 Terms from 1953 to 2006, the Supreme Court issued 195 plurality opinions.[69]

In short, it was the Marshall-inspired notion of a majority opinion that created the chain of events resulting in the plurality precedent problem. It is a product of the collision between increasing dissensus among the Justices paired with a steadfast commitment to the precedent model of judicial review. Today, pluralities are relatively common as to important and divisive questions, just as seriatim opinions were common to controversial cases in the pre-Marshall era.[70] In the field of constitutional criminal law and the death penalty, pluralities are not at all uncommon. For example, it was a plurality that suspended the death penalty in *Furman*, and a plurality that reinstated it in *Gregg*, and a plurality in *Baze v. Rees*[71] that recently ended a *de facto* death penalty moratorium and upheld a state's lethal injection procedures. Similar patterns can be found in cases involving similarly divisive issues, like abortion, or Guantanamo detentions. So long as a system of precedent dominates our legal analysis, the problem of interpreting and applying pluralities is also here to stay. As discussed in the next section, the problem of the fractured plurality decision has not proven amenable to an easy or obvious interpretive solution.

B. *A Taxonomy of Plurality Decisions: Understanding the Disparate Types of Pluralities*

Although not a recent judicial phenomena, over the course of American history, there has been no more consistency as to how a plurality opinion should be interpreted than there is consensus as to a set rationale within any single plurality decision. One of the earliest treatises on judicial precedent in the United States, which was compiled in 1912 by Henry Campbell Black, the author of the *Black's Law Dictionary*, provided that:

> If all or a majority of the judges concur in the result . . . but differ as to the reasons which lead them to this conclusion, the case is not an authority except upon the general result.

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[69] Spriggs & Stras, *supra* note 17, at 519 (noting that "the occurrence of plurality opinions between 1953 and 2006 has remained fairly steady" with a mean and a median of about three pluralities per Term).

[70] Corley et al., *supra* note 12, at 181 (observing that pluralities arise in about four decisions per term, or three and one-third percent of the Court's cases).

[71] 553 U.S. 35 (2008).

> For if one judge announces certain rules, principles, or doctrines of law as the reasons which incline him to the decision to be made, and another is induced to the same end by a different view of the rules, principles or doctrines, it cannot be said that any one of the rules considered or any one of the steps in the reasoning has received the assent of the court.[72]

The approach summarized by Black seems to have enjoyed support throughout the periods in the Court's history when plurality decisions were extremely rare, and it represents a rather intuitive approach to plurality precedent. After all, "it is neither obvious as a matter of history, nor intuitive as a matter of constitutional interpretation, that pluralities do anything more than announce a judgment in the particular case."[73] Nonetheless, as pluralities became more common and the corresponding institutional embarrassment resulting from a gap in the precedent more pronounced, there arose an irresistible judicial temptation to attempt to divine binding precedent as to the rationale and not merely the result of a non-majority decision. Commentators have explained that initially the lower courts tended to regard the opinion receiving the most votes, the plurality opinion, as precedential.[74] That is to say, lower courts had coalesced around the idea that pluralities create binding precedent. In 1977, the Court reviewed its fractured obscenity case law, and in *Marks*, ratified the will of the lower courts in treating plurality decisions as the source of binding precedent.[75] Notably, however, *Marks* altered the inquiry such that the plurality opinion was no longer precedential, and instead implemented the narrowest grounds formulation for discerning precedent.[76]

The recent proliferation of plurality decisions has made familiarity with the narrowest grounds test a critical aspect of the study of constitutional law. Accordingly, there is a chorus of law professors who have called for the *Marks* rule to be given greater attention in law school. For example, leading scholars like Maxwell Stearns are shocked by the fact that young lawyers and judges "systematically err" in discerning the holding of a plurality, and thus advocate for including the *Marks* doctrine in the core of the modern legal curriculum.[77] I share the desire to increase

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[72] BLACK, *supra* note 20, at 135–36 (footnotes omitted).

[73] Marceau, *supra* note 55, at 167.

[74] Novak, *supra* note 16, at 774.

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

[76] Notably, there do not appear to be any lower court cases that relied on the "narrowest grounds" formulation until after *Marks* was decided. In *Marks*, however, the Court notes that nearly every circuit court had concluded that the plurality decision in question created binding precedent. *Id.* at 194.

[77] Maxwell L. Stearns, *The Case for Including* Marks v. United States *in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321, 322 (2000).

the attention directed at the *Marks* rule, but not for the sake of increasing the doctrine's claim of objective applicability. Rather, my expectation is that more and deeper conversations about *Marks* among lawyers and students will lift the veil of *Marks*—that is, judges and lawyers will see *Marks* for what it is, a precedent that is not truly precedential in any conventional sense.[78] As a decisional rule, or limitation on judicial decision making, the doctrine imposes few limitations, and whatever the virtues of such an approach from an acoustic separation standpoint, it is not the case that the rule provides a comprehensible path to discerning plurality precedent.

Notably, however, not all forms of plurality decisions are equally deserving of rebuke, and thus before proceeding, it is helpful to create a taxonomy of the types of plurality decisions. It is useful to divide pluralities into four categories: (1) the false plurality; (2) the false majority opinion; (3) the predictive plurality; and (4) the common denominator plurality. The remainder of this section will briefly define these four categories and consider how, in the abstract, they produce varying degrees of confusion under the *Marks* rule framework.[79] It is those pluralities that are least deserving of precedential force that benefit most from the *Marks* rule's acoustic separation.

1. *False Plurality*

The first type of plurality decision has been labeled by previous commentators as a false plurality, insofar as it is more like a majority opinion than a plurality.[80] A false plurality is said to exist when less than

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[78] A body of empirical work is beginning to develop that attempts to explain why pluralities occur and to predict the sort of circumstances that make pluralities more likely. *See, e.g.*, Spriggs & Stras, *supra* note 17, at 532 (considering various factors such as collegiality, ideology, whether the case came up after the *Marks* decision, whether the case reflects a lower court split, and measuring the impact of each on the likelihood of a plurality decision). Impressive as these studies are from a quantitative perspective, they do little to advance our understanding of the qualitative value of plurality decisions in our system of precedent. Understanding the scope and nature of plurality precedent will reduce judicial "transaction costs" and will better facilitate a consistent system of precedent. *Id.* at 529 (quoting Michael L. Eber, Comment, *When the Dissent Creates the Law: Cross-Cutting Majorities and the Prediction Model of Precedent*, 58 EMORY L.J. 207, 233 (2008)). Moreover, Chief Justice Marshall ushered in the era of the majority opinion, and with it the efficiencies and power of precedent. *See supra* Part III.A. Chief Justice Marshall also enshrined the concept of judicial review under which it is the Court that "expound[s]" and announces the content of our Constitution. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Even accepting both of these modifications to our tripartite model of governance, it is difficult to regard as constitutional a system that accepts judicial pronouncements on the Constitution with less than a majority of the Court.

[79] Previous commentators have developed a slightly different taxonomy. *See, e.g.*, Power, *supra* note 54, at 133 (identifying three categories from the previous literature—false, illegitimate, and true—and identifying a fourth category called constructive pluralities).

[80] Hochschild, *supra* note 3, at 272; *see also* Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127, 1130–32 (1981) [hereinafter *Plurality Decisions*] ("In some cases that are nominally plurality decisions, however, a majority of the Court does support a rationale

five Justices join any single opinion, but when a majority of Justices writing separately concur in an underlying rationale.[81] In other words, a false plurality decision must contain within itself an actual majority agreement as to one or more holdings. The defining feature of a false plurality is the existence of an actual, and not merely tacit, majority holding. In these circumstances, the point of majority agreement—the shared holding—although it is disguised by being spread across more than one opinion, is entitled to precedential force.[82]

An example of a false plurality is *United States v. Patane*.[83] In *Patane*, a defendant who had just been arrested interrupted the police during their *Miranda* warnings so that the full warnings were not provided, but the officers proceeded to interrogate the defendant about whether he had an illegal gun.[84] The defendant made admissions that led to the discovery of an unlawful gun, and later moved to suppress the weapon.[85] A three-Justice plurality opinion joined by Justices Thomas, Scalia, and Rehnquist concluded that the officers' conduct did not violate *Miranda* and that, in any event, a violation of *Miranda* would not justify the suppression of physical fruits like the gun at issue in this case.[86] A two-Justice concurring opinion, joined by Justices Kennedy and O'Connor, agreed that there was generally no suppression remedy available in cases of alleged *Miranda* violations that lead to the discovery of physical evidence, but the concurring Justices refused to reach the question of whether there was in fact a *Miranda* violation on the facts of the case.[87] In other words, there

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sufficient to justify the holding."); Comment, *Supreme Court No-Clear-Majority Decisions: A Study in* Stare Decisis, 24 U. CHI. L. REV. 99, 99 n.4 (1956) (omitting from "the no-clear-majority" discussion cases where "though less than a majority of the Court specifically joined in one opinion, the separate opinions contain substantial agreement as to rationale").

[81] Hochschild, *supra* note 3, at 272.

[82] Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 451–52 (1992). Some treatises have referred to decisions as pluralities even when the fifth Justice *concurs in the opinion and result* if that Justice also writes separately to explain the rule in his own terms. *See, e.g.*, Jared H. Jones, Annotation, *Women's Reproductive Rights Concerning Abortion and Governmental Regulation Thereof—Supreme Court Cases*, 20 A.L.R. FED. 2d 1, 21 n.5 (2007) (citing *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), as a plurality but noting that Justice Stevens's separate opinion in *Thornburgh* concurs in both the *rationale and judgment* of Justice Blackmun's majority opinion). Rather than referring to them as pluralities, when a Justice actually joins the reasoning of a majority opinion, the concurrence is best regarded as a "two-cents" concurrence. Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CALIF. L. REV. 1, 8 n.14 (1993) (explaining that "in 'two-cents' concurrences, the author is willing to join in both the outcome and rationale sponsored by the majority, but wishes to add her own, presumably consistent, thoughts on the matter").

[83] 542 U.S. 630 (2004).

[84] *Id.* at 635.

[85] *Id.*

[86] *Id.* at 630, 643–44.

[87] *Id.* at 645.

was a common nucleus of agreement—suppression of physical evidence is generally not available when law enforcement fails to comply with *Miranda*—but the Court failed to provide a majority opinion.[88]

In circumstances such as this, the points of majority agreement should be recognized as binding precedent, and the remainder of the decisions treated as, at best, distracting dictum. Because there is a majority rationale as to one or more dispositive issues in these cases, that holding should be recognized as binding. Had the opinions been structured differently, a majority opinion, albeit perhaps a relatively small one, could have been written, and while it is more cumbersome to discern the precedent, lower courts are duty-bound to do so. There is no need for acoustic separation because lower courts have a duty to apply, not the *Marks* rule, but ordinary principles of *stare decisis* insofar as there is explicit agreement of reasoning by a majority of the court.[89]

2. *False Majority Decisions*

A second category of cases presents exactly the opposite problem. Whereas a false plurality is a decision that has a majority rationale although it is not structured or identified as such by the Court, a false majority arises when the Court purports to provide an "opinion of the Court,"[90] but one or more concurrences demonstrate that, in actuality, there is only majority agreement as to the result and not the rationale.[91] These decisions could aptly be described as "constructive pluralit[ies],"[92] insofar as a careful study of the opinions allows one to infer the absence of a majority agreement as to one or more of the rationales underlying the majority opinion. The false majority is most likely to arise when the Court is fractured, for example 5-4, and one of the Justices who joined the opinion of the Court writes a separate concurrence that seems to present a

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[88] One commentator has described what he calls the "illegitimate pluralities" as a separate category of plurality. *Plurality Decisions*, *supra* note 80, at 1133. The key feature of this plurality is that one or more Justices concur in the judgment on the basis of some rule of law that is contrary to existing precedent. *See id.* (noting that "illegitimate pluralit[y] occur[s] when Justices choose to ignore prior cases in structuring their opinions, in spite of the fact that those cases retain majority support on the Court"). While noteworthy from the perspective of studying a particular Justice, or judicial collegiality, such decisions do not present any fundamentally distinct interpretive issues.

[89] Applying the *Marks* rule to a false plurality allows a judge to identify the "outer limit[s] of the majority agreement." Thurmon, *supra* note 82, at 453.

[90] Hochschild, *supra* note 3, at 261.

[91] *Plurality Decisions*, *supra* note 80, at 1130 n.21 ("Conversely, a case decided by a majority of which one or more members write a limiting concurrence might be best understood as a plurality decision.").

[92] At least one commentator has used the term constructive plurality before, and though he does not fully expound on its meaning, he seems to envision a scenario analogous to the false majority opinion I am describing here. Power, *supra* note 54, at 133–34 n.193 ("A constructive plurality . . . has what purports to be a majority opinion that upon examination turns out to represent different views sheltered under one rubric.").

fundamentally different approach to the legal question presented by the case.[93] In such circumstances, the concurring opinion might be regarded as the critical fifth vote, and predictive of the outcomes in future cases, and as such, the opinion may have a viable claim to the status of a holding of the Court.[94]

One example of a false majority or constructive plurality is the Court's recent decision in *Arizona v. Gant*.[95] At issue in *Gant* was the scope of the search incident to arrest exception to the warrant requirement.[96] Justice Stevens delivered an opinion for the Court, over the dissent of four Justices, holding that police may search a vehicle incident to arrest "only if the arrestee is within reaching distance" of the car at the time of the search or if "it is reasonable to believe the vehicle contains evidence of the offense of arrest."[97] Despite joining the opinion of the Court, and thus making the Stevens opinion a majority opinion, Justice Scalia wrote separately to explain that he would, given the opportunity, prefer to abandon the general rules regarding search incident to arrest in the vehicle context and "hold that a vehicle search incident to arrest is . . . 'reasonable' only when the object of the search is evidence of the crime for which the arrest was made."[98] In other words, although purporting to concur in the opinion of the Court, Justice Scalia rejects a full half of the majority's reasoning and concludes that searches incident to arrest of automobiles should never be automatically permitted, and instead would permit them only when it is reasonable to believe that there is evidence relating to the offense of arrest in the car.[99] In effect, then, Justice Scalia's concurrence converts the bare five Justice majority into a 4-1-4 plurality.[100] Only those aspects of the majority opinion that Justice Scalia agrees with enjoy the assent and support of a majority of the Justices supporting

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[93] Tristan C. Pelham-Webb, Note, *Powelling for Precedent: "Binding" Concurrences*, 64 N.Y.U. ANN. SURV. AM. L. 693, 695 (2009) (describing these as "fifth vote concurrences" (internal quotation marks omitted)); *see also id.* ("When judges on lower courts encounter this kind of opinion, they have sometimes considered the opinion of the concurring Justice as the precedent of the Court, reasoning that he provided the crucial swing vote.").

[94] *Id.* at 698 (explaining that "[g]enerally, lower courts will not express their approach as 'Justice X acted as the fifth vote, and therefore we are adopting his reasoning'" but acknowledging that this sort of reasoning does occur in published decisions).

[95] 556 U.S. 332 (2009). As the discussion that follows makes clear, the *Gant* decision is best understood as including one holding that is a true majority rationale and a second rationale that is a false majority.

[96] *Id.* at 338.

[97] *Id.* at 351.

[98] *Id.* at 353 (Scalia, J., concurring).

[99] *Id.*

[100] Justice Alito notes this in his dissenting opinion. *Id.* at 355 (Alito, J., dissenting).

judgment. One might, then, argue that Justice Scalia's opinion announces the constitutional rule rather than the majority opinion.[101]

The false majority, then, presents an interpretive conundrum not unlike a true plurality. How should lower courts proceed in assessing the binding precedent of *Gant* when the facts are such that the search would only be constitutional under one of the two approaches outlined in the majority opinion? One view is that Justice Scalia's concurrence was a brilliant judicial maneuver insofar as he avoided the confusion surrounding plurality precedent by joining the majority opinion, but by writing separately, he simultaneously limited the majority opinion. Under this view, after *Gant*, a search incident to arrest is only lawful when the officer reasonably believed that evidence of the offense of arrest will be found in the car.[102] To be sure, this is a controversial narrowing of the search incident to arrest doctrine and one might resist this reading of *Gant* by noting that there is actually majority support for the broader, older search incident to arrest doctrine relating to a search of the car contemporaneous with the arrest that Justice Scalia rejects.[103] Indeed, in support of the vision of the search incident to arrest rule rejected by Justice Scalia, one could argue that there are actually eight votes in support of the approach to the search incident to arrest doctrine that was rejected by Scalia. Specifically, the four dissenters plus the four (non-Scalia) majority Justices all favor some form of *Belton* type search, thus establishing an 8-1 split in favor of retaining this form of search.[104] Perhaps implicitly, this is the reasoning of the lower courts that have, apparently without exception, accepted the continued vitality of a *Belton*-type search. However, it is far from obvious that this approach is the appropriate means of discerning the holding in a case like *Gant.*[105] At the very least, it is worth acknowledging the

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[101] By way of analogy, in *South Dakota v. Opperman*, the Court addressed the constitutionality of warrantless, suspicionless inventory searches, and in a 5-4 decision authored by Justice Burger, the Court upheld the procedures. 428 U.S. 364, 364–67 (1976). Notably, however, Justice Powell, who joined the majority opinion, wrote separately and expressed a narrower, more fact specific approach to the constitutional question at issue. *See* Pelham-Webb, *supra* note 93, at 707 (describing the *Opperman* case, and explaining that a lower court chose to adopt Justice Powell's *Opperman* concurrence because of Justice Powell's "view of the limited nature of the permissible inventory searches"). Because Justice Powell's concurrence differed so dramatically from the rule announced in the majority opinion he joined, and because Powell was the critical fifth vote, some lower courts have treated the Powell concurrence as the controlling opinion. *Id.*

[102] Justice Scalia notes that he would "hold in the present case" that the Court should "simply abandon the *Belton-Thornton* charade," but he candidly acknowledges that "[n]o other Justice" shares his views on this point. *Gant*, 556 U.S. at 353–54 (Scalia, J., concurring).

[103] *Id.* at 335.

[104] *Cf. id.* at 353 (Scalia, J., concurring) ("In my view we should simply abandon the *Belton-Thornton* charade of officer safety and overrule those cases.").

[105] There are at least two substantial problems with such an interpretation. First, the process of discerning a holding has traditionally been limited to an examination of what rationales are necessary to the result. *Cf.* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 959

uncertainty as to the proper interpretation of such opinions. Even where the Court announces a majority opinion, it may be inconsistent with the origins and purpose of precedential reasoning to afford *stare decisis* effect to such an opinion when the reasoning of the opinion obviously lacks true majority support.[106]

3. *Predictive Plurality*

A third category of non-majority decision is the predictive plurality. As elaborated immediately below, the predictive plurality has the weakest claim to be regarded as having generated any precedent at all, but it is precisely this characteristic that provides the *Marks* rule's form of acoustic separation its most beneficent application in this context. Even more than a false majority opinion, or a common denominator plurality, a predictive plurality has a tenuous claim to precedential value and, thus, the need for acoustic separation via the *Marks* platform is at its apex in this context.

The defining feature of a predictive plurality is a majority judgment with separate opinions supporting the judgment that lack both actual and constructive agreement as to a rationale. A false plurality is not a predictive plurality because although there is not an opinion of the court, there is constructive agreement among five or more Justices as to a single determinative rationale. A false majority decision, by contrast, could be a predictive plurality if the various opinions supporting the judgment so undermine the majority opinion as to render illusory the promise of a majority holding.

By way of illustration, consider again the opinions of *Gant*. Specifically, consider the result if Justice Scalia had not joined the majority opinion authored by Justice Stevens because it was written more narrowly so as to exclude his preferred holding as to why the search in question was

(2005) ("[T]he definition of obiter dictum in *Black's Law Dictionary*: '[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential.'" (footnote omitted)). Accordingly, reliance on the reasoning of a dissent is an illogical basis for establishing the content of a majority holding. Second, there is actually no true overlap between the reasoning of the majority and the dissenting Justices as to the scope of an appropriate search incident to arrest insofar as these competing groups disagree as to what type of *Belton* searches are constitutional. Indeed, as to the holding that a search is permissible so long as the officer is within the actual reaching distance of the vehicle, Justice Alito clarified that his dissent did not overlap with this approach by noting that this rule is "truly endorsed by only four Justices." *Gant*, 556 U.S. at 355 (Alito, J., dissenting).

[106] Another example of a false majority is the Supreme Court's decision addressing whether innocence can serve as a justification for overlooking a habeas petitioner's procedural default. Schlup v. Delo, 513 U.S. 298, 300–01 (1995). A leading habeas treatise concludes that Justice O'Connor's concurrence in *Schlup* actually defines the holding, in spite of the fact that Justice O'Connor joined the majority opinion. BRIAN R. MEANS, FEDERAL HABEAS MANUAL: A GUIDE TO FEDERAL HABEAS CORPUS LITIGATION § 9B:82 (2012) (citing the *Marks* rule in order to support the claim that Justice O'Connor's concurrence was precedential).

unconstitutional.[107] This would have created three distinct opinions, a 4-1-4, each resting on a distinct rationale. First, the plurality decision for four Justices would have affirmed the judgment of the Arizona Supreme Court by concluding that an automobile search is permissible if, and only if, the arrestee is unsecured and within close proximity to the car. Second, Justice Scalia would have concurred in the judgment without joining the majority opinion and his opinion, while also concluding that the search in question was unreasonable, would have done so exclusively because there was no evidence of the offense of arrest to be found in the car. Finally, the four dissenters would have expressed the view that the search of an automobile is always permissible so long as it is done within a relatively short amount of time after the arrest of the person, regardless of whether the arrestee is unsecured or not.

Such a plurality is purely predictive. In any given future litigation about the search incident to arrest, a lower court judge could reasonably predict the outcome of the case if the case were considered by the Supreme Court based on the Court's prior plurality. And, the lower courts could make this prediction despite the absence of actual overlapping assent as to a single constitutional rationale. For example, if a search of an automobile occurred when a single police officer had arrested four individuals and was unable to secure them all, then it is certain that at least the Justices from the plurality opinion and the four Justices in dissent would sanction this search—that is, the vote would be 8-1 in support of a judgment treating such a search as constitutional. Notably, however, if the four Justices in favor of narrowing the search incident to arrest exception attempted to craft a narrow search incident to arrest doctrine that focused on the number and unsecured nature of the arrestees in this scenario, then the four dissenters would join only the result—permitting the search—and would not assent to the rationale. As a result, although a lower court could predict the result, there would be another plurality decision, this time a 4-4-1, with only Justice Scalia dissenting.[108] Similarly, in circumstances where the search would be permitted under Justice Scalia's formulation because there was a likelihood that evidence of the offense of arrest might be found in the automobile, if the events surrounding the arrest were such that the arrestee was secured in the back of the patrol car at the time of the search, then, it is likely that the decision in *Gant* would be inverted. That is to say, it would be a 4-1-4 decision, but the four Justices writing the

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[107] Recall that the majority opinion in *Gant* actually reasoned that under either of *two* alternative theories for limiting the search incident to arrest doctrine, the search in question was unconstitutional. 556 U.S. at 351.

[108] Such a prediction, of course, assumes a consistent composition on the Court. But similar vote prediction is possible if one assumes that Justice Sotomayor would join the reasoning of Justice Stevens whom she replaced.

plurality decision would now be the four Justices from the dissent in *Gant* who would authorize all automobile searches that are roughly contemporaneous with an arrest, and Justice Scalia would once again concur, resting his opinion on independent legal grounds relating to the likelihood of finding evidence in the car.

Many other rather surprising permutations are conceivable with just this one rather simple example of a plurality. The point of this hypothetical *Gant* plurality is to illustrate how strange it would be for lower courts to identify any reasoning in such a plurality as binding. In circumstances such as this, there simply is not an opinion of the Court. The necessary question, then, is whether a plurality that predicts a result, but lacks any true consensus of reasoning, produces binding precedent. It seems a stretch, even for the staunchest supporters of *Marbury*, to reason that because it is the duty of the Court to expound the meaning of the Constitution, the Court does so even if the Court itself is unable to reach bare majority agreement as to what the Constitution means in a given context. Nonetheless, numerous lower courts have blurred the line between binding constitutional holdings and merely predictive vote counting.[109]

Most revealing in this regard has been the lower courts' treatment of the Supreme Court's decision in *Baze*,[110] an approach to *stare decisis* that I have previously described as "precedent by personnel."[111] In *Baze*, the Court considered the constitutionality of Kentucky's lethal injection procedures under the Eight Amendment.[112] Unfortunately, no opinion gained more than three votes, and lower courts were left "to quarrel over the weight and precedential value to be accorded to the case's seven separate opinions."[113] In support of the judgment upholding Kentucky's lethal injection procedures, Justice Roberts—writing for Justices Alito and Kennedy—concluded that in order to violate the Eighth Amendment, a procedure must present an "objectively intolerable risk of harm" in the face of a readily available alternative procedure.[114] By contrast, Justices Thomas and Scalia concurred in judgment, but emphasized that the plurality's rationale is entirely unacceptable insofar as it is inconsistent with "the original understanding of the Cruel and Unusual Punishments Clause" and explained, instead, that the Eighth Amendment is only

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[109] Courts applying this sort of approach tend to cite without explanation the *Marks* formula and then reason in a manner similar to the following: "[A]ny conclusion that Justice Kennedy reaches in favor of federal authority . . . will command the support of five Justices." United States v. Gerke Excavating, Inc., 464 F.3d 723, 725 (7th Cir. 2006).

[110] 553 U.S. 35, 41 (2008).

[111] Marceau, *supra* note 55, at 203.

[112] *Baze*, 553 U.S. at 40–41.

[113] Marceau, *supra* note 55, at 160.

[114] *Baze*, 553 U.S. at 50 (citation omitted) (internal quotation marks omitted).

violated if the method of execution is "deliberately designed to inflict" serious pain and suffering.[115] In addition, Justice Stevens concurred, but limited his decision in support of judgment to the rationale that on these facts, there was no Eighth Amendment violation and refused to adopt a single rule of general application.[116] Interestingly, even though there is no shared reasoning between the Thomas concurrence and the Roberts plurality, Justice Thomas emphasizes that he "cannot subscribe to the plurality opinion's formulation of the governing standard"[117]—every circuit court to have addressed the issue has effectively regarded *Baze* as a clear 6-3 decision and treated the Roberts plurality as a binding rationale insofar as its application can fairly predict outcomes among the sitting judges.[118] There is a sense that the *Marks* rule's narrowest grounds formulation is functionally equivalent to an opinion that predicts results in future cases. Lower courts adopting this approach to plurality precedent attach the legal force of an opinion of the Court to a decision that lacks a shared holding, much less an opinion of the Court.

Illustrative of the lower court trend in favor of conflating narrowest grounds with predictive ability is the Ninth Circuit's ruling on *Baze* in 2011[119]:

> If an execution protocol is found constitutional under the plurality's substantial risk standard, Justices Thomas and Scalia will concur in the judgment, because their standard for constitutionality is broader—a protocol that does not present a substantial risk of serious pain likely is not deliberately designed to inflict such pain. If the protocol is found *unconstitutional* under the plurality's standard, then Justices Breyer, Ginsburg, Souter, and likely Stevens would concur in the judgment because their standards for constitutionality are narrower—a protocol that presents a substantial risk of serious pain likely also presents an unnecessary risk of serious pain. The plurality's standard, therefore, is the narrowest necessary to secure a majority in any given challenge to a method of execution.[120]

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[115] *Id.* at 94 (Thomas, J., concurring).

[116] *Id.* at 87 (Stevens, J., concurring).

[117] *Id.* at 94 (Thomas, J., concurring).

[118] *See, e.g.*, Jackson v. Danberg, 656 F.3d 157 (3d Cir. 2011); Raby v. Livingston, 600 F.3d 552 (5th Cir. 2010); Cooey v. Strickland, 589 F.3d 210 (6th Cir. 2009) (demonstrating that the circuit courts are using Justice Roberts's plurality opinion as binding precedent).

[119] Mark Alan Thurmon previously noted the inability of courts to distinguish between precedent as to a result and precedent as to a rationale. *See* Thurmon, *supra* note 82, at 439–40 (illustrating this principal using the *Marks* holdings and how the lower courts applied them to other cases).

[120] Dickens v. Brewer, 631 F.3d 1139, 1145 (9th Cir. 2011). One has to wonder if the plurality has a truly predictive quality. It is conceivable, if improbable, that a state's execution procedure is

Many other plurality decisions provide merely predictive guidance as to future voting patterns, and the question for lower courts is whether such decisions contain a narrowest ground.[121] That is to say, at least on the surface, it appears that lower courts and lawyers are saddled with the unenviable task of applying the *Marks* rule to decisions for which there is not a truly narrowest ground. However, once one accepts the existence of acoustic separation in this sphere, the existence of which is established in the remaining sections of this Article, the onerous, impossible task of manufacturing predictive precedent becomes largely unnecessary. Indeed, predictive pluralities, precisely because they have the most tenuous claim to precedential force, are most benefitted by the acoustic separation theory which facilitates the public pretense of precedent while subtly facilitating lower court experimentation.

4. *Common Denominator Pluralities*

The fourth type of plurality is a common denominator plurality.[122] A common denominator plurality is one for which there is a tacit majority holding—that is to say, the hallmark of a common denominator plurality is the existence of an "implicit" or constructive majority holding. The majority is implicit or requires an inferential step because there is not an opinion of the Court, but the key is to recognize that there must be some commonality of reasoning. In this way, all false pluralities are common denominator pluralities insofar as there is actual majority agreement as to at least one dispositive question of law. Stated another way, a court searching for a common denominator precedent is, as a practical matter, identifying the "outer limit of the majority agreement."[123]

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deliberately designed to cause pain, thus violating the limitations announced in Justice Thomas's opinion, without being objectively likely to cause substantial harm.

[121] For example, a recent Clean Water Act case, *Rapanos v. United States*, 547 U.S. 715 (2006), has produced several lower court opinions that define the Court's precedent in purely predictive terms. For example, the First Circuit has embraced a reading of the *Rapanos* plurality that turns on predicting likely vote outcomes in future cases by counting votes across the various opinions, including the dissent. United States v. Johnson, 467 F.3d 56, 64 (1st Cir. 2006) (explaining that this approach allows "lower courts [to] find jurisdiction in all cases where a majority of the Court would support such a finding"). Other courts have recognized that such vote counting is inconsistent with the plain language of the *Marks* formula, and therefore refused to apply it. *See, e.g.*, United States v. Robison, 505 F.3d 1208, 1221 (11th Cir. 2007) ("*Marks* talks about those who 'concurred in the judgment[],' not those who did not join the judgment. It would be inconsistent with *Marks* to allow the dissenting *Rapanos* Justices to carry the day and impose an 'either/or' test, whereby CWA jurisdiction would exist when either Justice Scalia's test or Justice Kennedy's test is satisfied." (citation omitted)).

[122] The *Black's Law Dictionary*'s definition of the *Marks* rule seems to favor true agreement among the Justices, and thus reflects the common denominator approach: "The doctrine that, when the U.S. Supreme Court issues a fractured, plurality opinion, the opinion of the justices concurring in the judgment on the narrowest grounds—that is, the legal standard with which a majority of the Court would agree—is considered the Court's holding." BLACK'S LAW DICTIONARY 1059 (9th ed. 2009).

[123] Thurmon, *supra* note 82, at 453.

For some courts and commentators, only common denominator pluralities should be afforded precedential status, and only to the extent of the majority agreement. The rationale for requiring a common denominator of reasoning is that a decision announcing the meaning of the Constitution without any semblance of majority assent is inconsistent with the rule of law.[124] As the D.C. Circuit has defined this application of the *Marks* rule: "the narrowest opinion must represent a common denominator of the Court's reasoning; it must *embody a position implicitly approved by at least five Justices who support the judgment*."[125] But the process of inferring majority agreement often seems just as elusive and intractable as the *Marks* formulation itself—how should a judge set out to discern a common denominator of reasoning among various opinions that are fundamentally inconsistent.[126] Unfortunately, the aesthetic purity of the common denominator approach is tarnished by its uncertain application. In many instances, applying a common denominator plurality precedent may not, in a meaningful sense, represent a holding of the Court any more than a predictive plurality. That is to say, there is always the risk that this sort of artificial, or manufactured, consensus will not, in practical terms, represent a majority holding any more than a purely predictive plurality, and unfortunately, the guidance for distinguishing common denominator pluralities has proven no less confusing than the *Marks* rule itself. Most notably, the plurality decisions that the Supreme Court and lower courts have identified as obvious, or easy examples of a common denominator rationale, are themselves substantially unhelpful.

To date, lower courts and the Supreme Court have regarded plurality decisions for which there is an absolutist concurrence as the most amenable to a straightforward common denominator approach.[127] The idea

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[124] *See* Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 715 (1995) (warning of potential rule of law concerns, such as an overemphasis on the role of individual judges, that arise when predictive methods are employed). Notably, the common denominator form of plurality is not necessarily incompatible with a predictive plurality. For example, some courts have suggested that a predictive plurality is only precedential insofar as there is a common denominator among the various concurring opinions. *See, e.g.*, Jackson v. Danberg, 594 F.3d 210, 220 (3d Cir. 2010) (recognizing that, in the absence of a true commonality of reasoning, there is no binding holding from the Supreme Court). Probably all common denominator pluralities will serve a predictive function, as does a majority opinion, but the key point is that not all predictive pluralities will have a common denominator of reasoning.

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

[126] *See* Thurmon, *supra* note 82, at 432–33 (describing how a recent case highlighted "the fallacy of applying the 'implicit consensus' justification"); *see also* Tyson Snow, *Adding* Marks *to the Mix of an Already Muddled Decision Regarding Public Forums and Freedom of Speech on the Internet*, 19 BYU J. PUB. L. 299, 304 (2004) ("Most of the confusion surrounding the *Marks* analysis arises from a single question: whether the concurring opinions must share some fundamental basis or similar reasoning before being proffered as the Court's true holding.").

[127] *See, e.g.*, United States v. Cundiff, 555 F.3d 200, 209–10 (6th Cir. 2009) ("For cases like *Furman* and *Memoirs*, *Marks'* application is straightforward."); *see also* United States v. Johnson, 467

is that the Justices with the more extreme or absolutist positions will necessarily agree with the less extreme opinions in support of the same judgment, and thus the less extreme opinion is said to be a common denominator of the two opinions. For example, in discerning the narrowest ground in *Furman*, where five separate Justices held the death penalty schemes at issue to be unconstitutional, it is routine for courts to point out that both Justices Marshall and Brennan regarded the death penalty as "unconstitutional in all circumstances" and thus, so the reasoning goes, Justices Brennan and Marshall would necessarily agree with Justices Stewart, Douglas, and White that it was unconstitutional when administered in an arbitrary and capricious manner.[128] Likewise, the First Circuit has recently considered plurality decisions in the First Amendment context, and reasoned:

> [I]n *Memoirs*, the absolutist view of the First Amendment held by two Justices would always require a ruling in favor of protecting speech, but the view of three other Justices that only non-obscene speech is protected would extend First Amendment protection only to a subset of such cases. Thus, the less sweeping opinion in each case represents the "narrowest grounds" for the decision.[129]

To be sure, there is a sort of intuitiveness to this understanding of the common denominator rule. Insofar as the opinions of some of the Justices concurring in judgment in *Furman* and *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of the Commonwealth of Massachusetts*[130] are not absolute or per se, and thus reflect a notion of narrowness that resembles nesting Russian dolls,[131] where the more absolute opinion simply encompasses the less absolute,[132]

F.3d 56, 62–66 (1st Cir. 2006) ("The *Marks* directive that [w]hen 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." (citation omitted) (internal quotation marks omitted)); *King*, 950 F.2d at 781–84 ("[T]he narrowest opinion must represent a common denominator of the Court's reasoning.").

[128] *King*, 950 F.2d at 781.

[129] *Johnson*, 467 F.3d at 64.

[130] 383 U.S. 413 (1966).

[131] These dolls are called "matryoshka": "Any of a set of traditional Russian wooden dolls of differing sizes, each somewhat resembling a skittle in shape and designed to nest inside the next largest." Oxford Univ. Press, *Oxford English Dictionary: The Definitive Record of the English Language*, *available at* http://www.oed.com/view/Entry/239595?redirectedFrom=matryoshka#eid (last visited Oct. 4, 2012).

[132] A lower court attempting to explain the result in *Marks* observed that "the plurality's opinion [in *Memoirs*] was the 'narrowest' in the sense that it was the most conservative reason for reversing the finding of obscenity *and* it was a reason that was subsumed within the grounds articulated by the other justices who concurred in the judgment." Grutter v. Bollinger, 137 F. Supp. 2d 821, 847 (E.D. Mich. 2001), *vacated*, 288 F.3d 732 (6th Cir. 2002).

it seems fair to regard the less expansive opinion as the common denominator. Upon further reflection, however, it is far from obvious that absolutist opinions are truly capable of exhibiting shared reasoning or logical overlap so as to generate any meaningful implicit majority consensus. Constitutional interpretation is not so binary as to render meaningful the view that a less absolute position is intellectually consistent with the absolutist view, but narrower. For example, while it is true that Justices Brennan and Marshall would have agreed with their fellow concurring Justices that an arbitrary capital sentencing system is unconstitutional, this agreement of result does not suggest a true overlap of reasoning. Stated more directly, it is difficult to believe that there is actually a shared trajectory of reasoning or a logical consensus between Justice Brennan's absolute rejection of the death penalty in all cases, and the purely procedural objections to certain capital sentencing systems voiced by his concurring colleagues.[133] These Justices may have agreed on certain results, as they did in *Furman*, but inferring a truly shared holding, rather than a predictive holding seems a fool's errand. Likewise, a conclusion that Justices White and Stewart provide the narrowest grounds in a case like *Furman*, as is the convention, is odd for the additional reason that the two Justices did not join each other's concurrences, but rather each wrote separately and provided his own explanation for finding the system in question unconstitutional.[134]

In short, the rule of law problems that arise out of reliance on merely predictive pluralities as precedential have led courts to look for commonality of reasoning when they seek to apply the *Marks* rule. To this end, lower courts have observed that discerning a common denominator of reasoning is, at least in some cases, like *Furman*, "straightforward."[135] But the reality is quite different. Searching for an implicit majority rationale, when there is no explicit agreement of approach, is frustratingly

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[133] *See* Thurmon, *supra* note 82, at 431–32 (making the same point as to the *Memoirs* plurality that "[a]lthough the outcomes of these approaches may sometimes coincide, the attempt to reconcile the reasoning underlying these approaches strains the credibility of the 'implicit consensus' model" (footnote omitted)).

[134] *See* Furman v. Georgia, 408 U.S. 238, 311 (1972) (White, J., concurring) ("I begin with what I consider a near truism: that the death penalty could so seldom be imposed that it would cease to be a credible deterrent."); *id.* at 309–10 (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." (footnotes omitted)).

[135] United States v. Cundiff, 555 F.3d 200, 209 (6th Cir. 2009); *see also id.* ("Specifically, *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. . . . In both *Memoirs* and *Furman* the controlling opinion was less doctrinally sweeping." (citations omitted) (internal quotation marks omitted)).

futile in most cases.[136] Attempts to construct or infer a majority rationale are inherently difficult and the resulting "narrowest ground" will not reflect any truly shared reasoning except in cases of false pluralities.[137] Constructive consensus is, in most cases, the same as non-consensus, which is the same as a non-majority opinion being afforded precedential force. Accordingly, there is good reason to believe that in many circumstances, a common denominator approach to plurality precedent will be no more capable of reliably generating authoritative precedent than the predictive plurality approach.

The remaining sections of this Article demonstrate that this disconnect between the absence of actual precedent and the *Marks* promise of precedent is the result of a salutary application of the acoustic separation theory in the realm of plurality precedent. By examining how the Supreme Court has responded to its own plurality precedent, and how lower courts tend to apply Supreme Court pluralities, it is possible to recognize that a surprising degree of acoustic separation has emerged between the precedent as promised in *Marks*, and the rule as actually applied by the courts.

IV. THE SUPREME COURT'S APPLICATION OF *MARKS*: UPWARD-FLOWING PRECEDENT AS THE *INTERNAL* MESSAGE FOR LOWER COURTS

As discussed above, Chief Justice Marshall's pursuit of a Supreme Court that was more respected and celebrated contributed to the move away from seriatim decisions toward binding opinions of the Court. One of the goals of the precedent model of judicial review, then, is the safeguarding of the Court's reputation and prestige. Pluralities, as decisions lacking an opinion of the Court, represent a recurring affront to

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[136] The complicated common denominator analysis becomes even more vexing when there are distinct rationales as to both the substantive and the procedural aspects within the various opinions of a concurring decision. The Court might conclude that a particular opinion is the narrowest ground as to a procedural issue, but not the narrowest ground as to a substantive question of law. *See, e.g.*, Christopher Seeds, *The Afterlife of* Ford *and* Panetti*: Execution Competence and the Capacity to Assist Counsel*, 53 ST. LOUIS U. L.J. 309, 335–36 (2009) (identifying such a problem with the interpretation of the Court's plurality decision in *Ford v. Wainwright*, 477 U.S. 399 (1986)).

[137] Extending the reading of *Marks* such that the existence of absolutist opinions necessarily makes the less absolute opinions "narrower," lower courts have concluded with surprising unanimity that Justice Roberts's plurality opinion in *Baze v. Rees*, 553 U.S. 35 (2008), is the narrowest grounds. *See, e.g.*, Dickens v. Brewer, 631 F.3d 1139, 1144–46 (9th Cir. 2011) ("Every circuit court that has considered a challenge to a lethal injection protocol following *Baze* has analyzed the protocol under the plurality's substantial risk standard. . . . We are, therefore, in good company in holding that *Baze* plurality's substantial risk standard is the controlling standard."). Notably, Justice Thomas's concurrence in *Baze*, while extreme, is not absolute. Justice Thomas did not hold that any execution is constitutional (as Justices Brennan and Marshall had held that all executions were unconstitutional in *Furman*), rather he reasoned that an execution is constitutional unless it is deliberately designed to inflict torturous pain. *Baze*, 553 U.S. at 94.

the legitimacy of Court. The *Marks* rule responds to this potential crisis of legitimacy by holding that even non-majority decisions create binding federal precedent.[138] And, by in large, it seems that the *Marks* rule has proved remarkably successful in preventing or defusing claims that pluralities undermine the credibility of our judicial process. Indeed, popular accounts of famous pluralities scarcely mention that the cases were non-majority decisions, much less decisions of dubious precedential value.[139] It is as though *Marks* assuages onlookers by assuring them that, even in the face of a non-majority decision, everything is functioning normally and that there was not a fundamental breakdown in the judicial process. As a signaling mechanism, *Marks* has succeeded.

As a practical matter, however, the legalistic narrowest grounds test overwhelmingly fails to create predictable precedent. There is a dichotomy or separation between the *Marks* as promised and the *Marks* as applied. As this Section demonstrates, the Supreme Court itself has signaled its approval of this separation by tolerating, and entrenching an application of *Marks* that is much less rigid and definitive than the legalistic narrowest grounds test would suggest.

A. *Overview*

Because the "primary task of the Supreme Court is not to settle the disputes between the particular parties but to enunciate legal principles" for future disputes,[140] it is conventional to understand precedent as flowing down from the high court to each of the lower state and federal courts.[141] But in the context of pluralities, the *Marks* rule notwithstanding, it seems that precedent flows upward. The famous "narrowest grounds" language is increasingly nothing more than a meaningless talisman that is uttered by

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[138] *See Marks*, 430 U.S. at 193 ("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.'" (citation omitted)).

[139] Even leading casebooks sometimes discuss plurality decisions in a manner that suggests that the absence of a majority does not impede the determination of the case's precedential value. *See, e.g.*, ERWIN CHEMERINSKY & LAURIE LEVENSON, CRIMINAL PROCEDURE 429 (1st ed. 2008) (discussing a plurality decision, the casebook provides that in "*Missouri v. Seibert*, the Court held that subsequent statements must be excluded, even if *Miranda* warnings were given before the statements were repeated"); *see also id.* (suggesting that another plurality opinion in *United States v. Patane*, 542 U.S. 630 (2004), produced an obvious and binding holding without so much as mentioning that the case was a plurality).

[140] Pamela C. Corley, *Uncertain Precedent: Circuit Court Responses to Supreme Court Plurality Opinions*, 37 AM. POL. RES. 30, 33 (2009) [hereinafter Corley, *Uncertain Precedent*].

[141] Countless commentators have remarked on the failures of pluralities to fulfill the Court's law announcing function. *See, e.g.*, *Plurality Decisions*, *supra* note 80, at 1128 ("[T]he Court must provide definitive statements of the law. . . . [W]ithout a majority rationale for the result, the Supreme Court abdicates its responsibility to the institutions and parties depending on it for direction. Each plurality decision thus represents a failure to fulfill the Court's obligations." (footnote omitted)).

courts before making an individualized assessment of the plurality decision's precedential force in the lower courts.[142] If lower courts settle on the holding of a Supreme Court plurality, then the Court is likely to embrace that as the law of the land. Likewise, a lack of consensus suggests a lack of plurality precedent. That is to say, lower court consensus or lack thereof might be understood as playing a critical, perhaps dispositive role in determining the meaning and scope of a plurality precedent. In this way, I argue that the Supreme Court has managed to convey a confidence that even non-majority decisions produce regular and binding precedent while simultaneously devaluing the strict application of the *Marks* rule, which serves as the only tool for discerning such precedent.[143]

This section discusses the three options available to the Supreme Court when the Court itself is forced to confront the precedential value of a prior plurality decision that bears on an issue presently before the Court: (1) the Court could simply ignore the *Marks* rule *and* refuse to provide a definitive resolution of the issue that previously produced a plurality—that is to say, the Court could defer to the status quo and refuse to offer a definitive holding as to the question at issue; (2) the Court could ignore the *Marks* rule entirely, *but* nonetheless reach majority agreement in a subsequent case as to the proper resolution of an issue that previously produced a plurality—that is, the Court could define a binding precedent but do so without reliance on the *Marks* doctrine; or (3) the Court could apply the *Marks* rule, which the Court has instructed is the proper mechanism for discerning precedent from a fragmented decision of the Court, and in the process provide lower courts with a template for understanding how the narrowest ground rule applies. Since the *Marks* rule was announced in 1977, the Court has employed all three of these approaches in seeking to interpret its own prior plurality decisions. As explained in the remainder of this section, although the Court's approach to plurality precedent has been split among these three options, the cumulative effect is to entrench the view that plurality precedent is not actually precedent in any conventional sense; rather, although the dataset is small, it appears that plurality precedent flows upward. That is to say, despite the external promise (conduct rule) that the plurality decision generated rigid precedent, the internal rule for lower courts (decision rule) is one of flexibility.

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[142] *Marks*, 430 U.S. at 193 (citation omitted).

[143] Stated another way, the narrowest grounds rule reflects a "rift between conduct rules" or messages for the general public and "decision rules" for the courts. Dan-Cohen, *Acoustic Separation*, *supra* note 19, at 648.

B. *Ignoring* Marks *and Refusing to Interpret the Plurality in Question*

One approach to interpreting a prior plurality is to simply ignore the plurality, and to explicitly refuse to determine what, if any, precedent the prior plurality generated. In light of the Court's *Marks* decision, it would seem that such an approach would represent outright defiance on the part of lower courts, particularly if the previous plurality addressed issues that are of central importance to the case at issue. Nonetheless, the Supreme Court itself has dealt with some prior plurality decisions in precisely this manner. Of course, the Supreme Court is free to abandon or reconsider the *Marks* rule, but to insist that it is still precedential while ignoring the existence of the doctrine has cast *Marks* as a sort of shadow precedent—it exists in a sort of abdicated form that undermines generalized or absolutist claims of plurality precedent.

By way of example, the Court was recently called upon to address whether the Fourth Amendment provides protections for public employees in their workspaces, an issue that was previously addressed in a plurality decision, *O'Connor v. Ortega*.[144] In the *O'Connor* decision, there was widespread agreement among the Justices that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer,"[145] but the Court was unable to achieve majority consensus as to the proper test for determining the extent to which the Fourth Amendment protects the workplaces of a public employee.[146] Whereas a four Justice plurality opinion reasoned that the determination of whether the Fourth Amendment applies so as to protect a public employee must proceed on a "case-by-case basis,"[147] Justice Scalia concurred in the judgment but concluded that government employees generally enjoy the protections of the Fourth Amendment and that the case-by-case approach was inappropriate.[148] In essence, the plurality opinion concludes that the Fourth Amendment applies less broadly to public employees such that there is no reasonable expectation of privacy if you share space or allow access to other employees,[149] and by contrast the concurrence called for a standard reasonable expectation of privacy analysis that is not watered

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[144] 480 U.S. 709, 717 (1987) (plurality opinion).

[145] *Id.*

[146] *See id.* at 729 (Scalia, J., concurring) ("Although I share in the judgment that this case should be reversed and remanded . . . I disagree . . . with the standard [the plurality] prescribes for the Fourth Amendment inquiry."); *id.* at 748 (Blackmun, J., dissenting) ("[B]y announcing in the abstract a standard as to the reasonableness of an employer's workplace searches, the plurality undermines not only the Fourth Amendment rights of public employees but also any further analysis of the constitutionality of public employer searches.").

[147] *Id.* at 718.

[148] *Id.* at 730–31 (Scalia, J., concurring).

[149] *Id.* at 717–18.

down by virtue of the fact that the employer happens to be a state actor.[150]

In *City of Ontario v. Quon*,[151] the question of whether a government employer's search of a police officer's text messages on a government pager implicated the Fourth Amendment was before the Court.[152] The Court acknowledged the unfortunate reality that "[i]n the two decades since *O'Connor*, . . . the threshold test for determining the scope of an employee's Fourth Amendment rights has not been clarified."[153] That is to say, the Court had before it a case squarely presenting an issue regarding the applicability of the Fourth Amendment's protections for public employees and the Court explicitly acknowledged that its plurality decision in this field had created lasting uncertainty as to the governing rule. Equally important, the application of the narrowest grounds formula to *O'Connor* is anything but straightforward;[154] indeed, scholars have

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[150] *Id.* at 730–31 (Scalia, J., concurring). Professor LaFave's treatise summarizes the divide between the plurality and the concurrence as follows:

> In *Ortega*, the plurality opinion stated that "the question of whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis." Scalia, J. concurring, chided the plurality for not accepting the broader proposition "that the offices of government employees, and *a fortiori* the drawers and files within those offices, are covered by Fourth Amendment protections as a general matter," except in "such unusual situations" as where "the office is subject to unrestricted public access." The four dissenters (and thus a majority of the Court) expressed approval of this broader view.

WAYNE R. LAFAVE, 1 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.4 n.87 (4th ed. 2011) (citations omitted).

[151] 130 S. Ct. 2619 (2010).

[152] *Id.* at 2624.

[153] *Id.* at 2628 (citing both the plurality opinion in *O'Connor* as well as Justice Scalia's concurrence).

[154] The Ninth Circuit is the only circuit which has attempted to apply *Marks* to *O'Connor*, referring to the narrowest grounds formula and concluding that plurality approach controlled albeit without explaining why it was the narrowest grounds. *See* United States v. Gonzalez, 300 F.3d 1048, 1053 (9th Cir. 2002) (finding that although "it is difficult to identify 'that position taken by those Members who concurred in the judgment on the narrowest grounds,' . . . some propositions in *O'Connor* appear to be shared among all the concurring justices" (footnotes omitted)). Other circuits that have agreed with the result do not even cite to *Marks*. *See, e.g.*, Stewart v. Evans, 351 F.3d 1239, 1243 (D.C. Cir. 2003) ("*O'Connor* concerned '[p]ublic employees' expectation of privacy in *their* offices, desks, and file cabinets.'"); Leventhal v. Knapek, 266 F.3d 64, 73 (2d Cir. 2001) ("[T]he entire Court found a reasonable expectation of privacy with respect to the office desk and file cabinets."); Pierce v. Smith, 117 F.3d 866, 872 (5th Cir. 1997) (citing *O'Connor* for the proposition that Fourth Amendment protection extends to searches and seizures not only by law enforcement authorities, but also by other government officials); Vega-Rodriguez v. Puerto Rico Tel. Co., 110 F.3d 174, 179 (1st Cir. 1997) ("*O'Connor*'s central thesis is that a public employee sometimes may enjoy a reasonable expectation of privacy in his or her workplace vis-à-vis searches by a supervisor or other representative of a public employer."). Some of these circuits went on to apply the plurality's balancing or "case by case" approach. *See Leventhal*, 266 F.3d at 73 ("A public employer's search . . . is 'reasonable' when . . . [it is] 'reasonably related to the objectives of the search and [is] not excessively intrusive.'" (quoting *O'Connor*, 480 U.S. at 726 (plurality opinion))); *Vega-Rodriguez*, 110 F.3d at 179 ("[T]he objective component of an employee's professed expectation of privacy must be assessed in the full

lamented that the application of the *Marks* rule here is apt to make one's "head hurt."[155]

Accordingly, *Quon* presented the Court with an opportunity to resolve the "conflicting standards for judging the constitutionality of workplace searches" and, more importantly, the opportunity for the Court to elucidate on the precedential value of a plurality with no clear narrow grounds was squarely presented.[156]

Rather than applying the *Marks* rule, or attempting to discern a narrowest grounds, or even attempting to determine whether *O'Connor* produced any binding precedent at all, the Court side-stepped the *Marks* issue. The Court did not address, even obliquely, the issue as to which opinion, if any, from *O'Connor* was controlling as to the scope of the Fourth Amendment.[157] Instead, the Court simply stated the obvious—the *O'Connor* opinion could be read as generating two different and oftentimes inconsistent views of the Fourth Amendment. The precedential value of these two approaches was not discussed.[158] Instead, the Court simply acknowledged that "[t]he two *O'Connor* approaches—the plurality's and Justice SCALIA's [sic] . . . lead to the same result" in the *Quon* case, and thus steadfastly refused to identify the controlling rule.[159] After *Quon*, it is fair to say that there is more, *not less* confusion as to what is the narrowest, and controlling holding from *O'Connor*.[160]

In light of the Supreme Court's rules that specify that the Court's purpose is not simply to resolve individual cases, but rather to elucidate general principles of national importance,[161] it is noteworthy that the Court deferred a question of constitutional interpretation that has been lingering,

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context of the particular employment relation."). The Seventh Circuit, without applying *Marks*, attempted to analyze which opinion is the controlling one in *O'Connor*. *See* Shields v. Burge, 874 F.2d 1201, 1203–04 (7th Cir. 1989) (concluding that although Justice Scalia's approach adopted "arguably . . . a less stringent standard than the plurality," his approach did not differ significantly from the plurality's, and the plurality's reasonableness analysis was the controlling opinion).

[155] Orin Kerr, *Will the Supreme Court Rethink Public Employee Privacy Rights in* Quon*?*, VOLOKH CONSPIRACY (Dec. 14 2009, 10:00 PM), http://www.volokh.com/2009/12/14/will-the-supreme-court-rethink-public-employee-privacy-rights-in-quon/ ("The question makes my head hurt. So courts have mostly just figured that four Justices is more than one and that they should follow the analysis in the concurring opinion.").

[156] L. Camille Hebert, 1 EMP. PRIVACY LAW § 8A:4.

[157] *See Quon*, 130 S. Ct. at 2628 (finding that "[i]t is not necessary to resolve whether" the plurality opinion of *O'Connor* is the controlling one).

[158] *Id.* at 2628–29.

[159] *Id.* at 2629.

[160] In *Quon*, the Court made comments like "[e]ven if the Court were certain that the *O'Connor* plurality's approach were the right one," which undermine any confidence or certainty that the plurality opinion is in fact the narrowest grounds. *Id.* at 2630. If the Court itself is not certain as to the narrowest grounds, there is no basis for a lower court to conclude that one opinion or another announces the holding of the Court.

[161] SUP. CT. R. 10.

unresolved for more than two decades. If in circumstances such as those in *Quon* where the Court is unable or unwilling to discern the precedent from its own prior plurality decisions, then it seems unreasonable to expect that lower courts could or should rigidly apply the narrowest grounds test.[162]

There are other examples where the precedential force of a prior plurality decision is at issue in a pending Supreme Court case, and the Court blithely ignores *Marks* and refuses to designate one opinion or another as controlling.[163] The effect of these cases is to retain the plurality decision as the only precedent on the issue, but to refuse to determine which opinion or set of opinions from the plurality decision are binding. This sort of case strongly suggests that the *Marks* rule is not afforded the sort of binding precedent that normally accompanies a Supreme Court decision.[164] If the *Marks* rule generated precedent, then surely these cases would follow the precedent, or overrule the precedent, or at the very least identify the precedent. But cases such as *Quon*, in which *Marks* is merely ignored and there are no pronouncements on the precedential value of a

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[162] *See, e.g.*, *Quon*, 130 S. Ct. at 2630 (analyzing the plaintiff's claim under the plurality opinion's approach); *id.* at 2633 (analyzing the claim under the rationale provided by the concurrence).

[163] Another example of this approach to plurality precedent is found in the Court's recent case *Bobby v. Dixon*, 132 S. Ct. 26, 32 (2011). In *Dixon*, the Court was confronted with an issue that was addressed in a prior plurality, *Missouri v. Seibert*, 542 U.S. 600 (2004), and the Court applied the plurality by citing both the plurality and the concurring opinion as though, together, they create a patchwork of precedent that need not be carefully delineated. *See id.* ("Under *Seibert*, this significant break in time and dramatic change in circumstances created a new and distinct experience, ensuring that *Dixon*'s prior, unwarned interrogation did not undermine the effectiveness of the *Miranda* warnings he received before confessing to Hammer's murder." (citation omitted) (internal quotation marks omitted)). By citing simultaneously to both the plurality opinion and (as a *see also*) to Justice Kennedy's concurrence, the Court altogether avoided the difficulty that lower courts have faced in attempting to discern the precedent from *Seibert*. *See* Nichols v. United States, 511 U.S. 738, 746 (1994) (declining to conduct a *Marks* analysis on the precedential value of *Baldasar v. Illinois*, 446 U.S. 222 (1980), as not useful since "it has so obviously baffled and divided the lower courts that have considered it," and summarily overruling *Baldasar* instead).

[164] One might be tempted to argue that this is simply a reasoned application of judicial minimalism urged by scholars like Cass Sunstein, who has advocated for courts to simply decide the case at hand without addressing non-essential legal issues. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 10 (1999). But to the extent that judicial minimalism is designed to be democracy enhancing and to prevent judicial overreaching, settling an open dispute as to the scope of the Fourth Amendment that was created by the Court itself would seem desirable. After all, if minimalism is preoccupied with allowing the "democratic processes room to maneuver," then defining the scope of this Court created uncertainty as to the Constitution's reach would seem desirable. *Id.* at 54. By failing to define the question of what its prior decision held, it seems overly charitable to understand the Court as having created more maneuverability for the democratic branches; there is something of mismatch in arguing that Sunstein's *narrowness* principle can be applied to the *narrowest grounds* formula so as to suggest that ambiguous plurality precedent need not be sorted out. *See* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1023 (2005) ("Judicial minimalism often calls for narrow resolutions. As Sunstein acknowledges, though, in some cases, 'a wide rule, even if overinclusive and underinclusive, would be better than a narrow judgment,' because . . . [a] legal regime that insisted that issues always be resolved as narrowly as possible might invite paralysis.").

prior plurality, tend to undermine the authority of *Marks* as a general matter, and cast doubt on the value to lower courts of trying in earnest to discern a narrowest ground. If the Supreme Court evades the most opportune moments to apply the *Marks* doctrine and expound on its application, then it is difficult to believe that lower courts will miss this signal. It is unlikely that lower courts will aggressively enforce a precedent that the Supreme Court itself seems to be evading. Of course, this is not to suggest that the Supreme Court is just a feckless victim of its own *Marks* rule. Quite the contrary, there is good reason to believe that the Supreme Court accepts, even embraces the ambiguous model of precedent creation in this context; if the Court objected to the current framework, surely it would seize an opportunity like *Quon* not to evade *Marks*, but to overrule it. While hardly conclusive, considered in light of the Court's other approaches for dealing with plurality precedent, the decision to evade the *Marks* rule signals a decisional rule, or a rule for those applying *Marks*, that is not entirely consistent with the plain text of the *Marks* decision itself.

C. *Ignoring* Marks *and Announcing a Majority Rule as to a Prior Plurality*

Whereas *Quon* is indicative of an approach to plurality decisions that simply refuses to apply *Marks* and refuses to elucidate the binding precedent from a prior plurality, a second approach to addressing plurality precedent is for the Supreme Court to, again, ignore the *Marks* rule, but nonetheless generate a governing precedent as to the issue in question. This occurs when the Court refuses to apply a narrowest grounds analysis, but announces a holding as to an issue previously addressed in a Supreme Court plurality decision. Without regard to the result the *Marks* rule may have dictated, such a decision reflects a majority consensus as to a legal issue in dispute. In such circumstances, a prior plurality which has a debatable holding is of no consequence because a majority of the Court subsequently addresses the issue and announces majority support for one of the rationales advanced in the plurality—whether a particular opinion was the narrowest grounds or not, it is controlling if a majority of the Court eventually ratifies the reasoning.

An infamous example of this approach to pluralities arises out of the Court's decision in *Teague v. Lane*,[165] which addresses the retroactivity of new rules of constitutional law.[166] In *Teague*, the Court failed to obtain a majority test for determining whether a prisoner could benefit from a new rule of law. Justice O'Connor wrote a four Justice plurality opinion as to

[165] 489 U.S. 288 (1989).

[166] *Id.* at 294.

the critical issue, Justice White filed a separate concurrence, and Justice Stevens filed a separate concurrence.[167] As to the judgment, then, the Court produced a 7-2 split,[168] but the Members of the Court were unable to establish majority agreement as to a governing rationale. At least initially, the lower courts appear to have split as to the governing holding of *Teague*. A formalistic application of the narrowest grounds test would suggest that Justice Stevens's opinion was the narrowest, and therefore, controlling opinion insofar as the opinion merely called for a deference to prior precedent, and would not have developed new law on the issue.[169] For example, the Eleventh Circuit observed:

> In *Teague v. Lane* . . . the United States Supreme Court identified the retroactivity doctrine to be applied where a new constitutional rule has been created after a defendant's conviction became final. . . . Justices Stevens . . . concurred, and under the narrowest concurrence rule, that concurrence becomes the binding precedent of the Supreme Court.[170]

This was not the only reading of *Teague* based on *Marks*, but it appears to be the most likely application of the narrowest grounds formula.

Notably, however, rather than using *Teague* as an opportunity to elaborate on the meaning of the "narrowest grounds" test so as to demonstrate that the *Marks* formula is a real judicial precedent, the Court once again proceeded as though *Marks* was irrelevant. The epilogue to the *Teague* saga has been a series of Supreme Court decisions that nonchalantly apply Justice O'Connor's plurality opinion without application, much less explanation, of the *Marks* rule. That is to say, in the wake of *Teague*'s confusing plurality decision, a majority of the Court has coalesced around a single identifiable holding that now has obtained majority support without confronting *Marks*'s application. Illustrative is the Court's decision in *Saffle v. Parks*,[171] which squarely presented a

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[167] *Id.* at 291.

[168] Justice Blackmun joined in part with the concurrence of Justice White and joined in part with the concurrence of Justice Stevens. *Id.*

[169] *See, e.g.*, Marceau, *supra* note 55, at 192 n.159 (citing a lower court decision which held, in Marceau's words, that "under the narrowest grounds rule, Justice Stevens' opinion is clearly the governing law, not the plurality opinion of Justice O'Connor"); Thurmon, *supra* note 82, at 441 (identifying at least one lower court that concluded that "the concurrence by Justice Stevens and Justice Blackmun, stating a somewhat different test than the one formulated by the plurality, should be binding precedent" (internal quotation marks omitted)). Other commentators have recognized that, as a practical matter, Justice O'Connor's approach was much more far-reaching and novel. Marc E. Johnson, *Everything Old Is New Again: Justice Scalia's Activist Originalism in* Schriro v. Summerlin, 95 J. CRIM. L. & CRIMINOLOGY 763, 767 (2005) ("[T]he aggressiveness with which Justice O'Connor's plurality opinion sought to limit retroactivity marked a radical new direction in the Court's habeas jurisprudence.").

[170] Hall v. Kelso, 892 F.2d 1541, 1543 n.1 (11th Cir. 1990) (citations omitted).

[171] 494 U.S. 484 (1990).

question of retroactivity.[172] Throughout *Saffle*, the majority acknowledges that *Teague* provides the governing framework, and in so doing provides pincites to *Teague*, all of which refer to Justice O'Connor's plurality opinion. However, none of the pincites so much as mention that Justice O'Connor's opinion is not a majority decision, and not necessarily a narrowest grounds.[173] Summarizing the judicial decision-making process in this field, one commentator has observed that "[a]lthough Justice O'Connor's opinion in *Teague* was a plurality opinion, it has gained majority acceptance and is the retroactivity rule that controls today."[174]

The practical effect is a laudably clear statement of the law regarding retroactivity, and an utterly non-existent application of *Marks*. The Court interpreted its own plurality decision without making any attempt to apply the *Marks* rule and, as a result, the law of retroactivity is settled and the technical narrowest grounds doctrine remains just as much a veil of judicial obfuscation as ever. To an outsider, it may appear that pluralities are serving their function of creating binding, supreme law, but to the careful observer it seems that the *Marks* rule had nothing to do with the ultimate resolution of the question before the Court in *Teague*. Leading treatises, courts, and scholars all refer to the general retroactivity doctrine as the "*Teague* rule," by which they mean Justice O'Connor's plurality opinion.[175] All the while, however, the *Marks* rule has never been applied, or apparently even considered in this context.[176] In practical effect, then, the Supreme Court speaking through a true majority announced that the O'Connor opinion from *Teague* would be the governing rule for retroactivity, and as such it is the governing rule. The *Marks* rule had nothing to do with the determination, but because a majority of the Court has assented to this rationale it is now a binding precedent.

Other examples of this non-*Marks* rule approach to pluralities abound—that is to say, it is not uncommon for the Court to ignore the fact that prior decisional law on the issue before the Court lacks a majority opinion, but to treat one of the opinions as binding precedent without

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[172] *Id.* at 485–86; *see also* Penry v. Lynaugh, 492 U.S. 302, 313–14 (1989) (discussing the difficulty in determining whether decisions such as *Teague* articulate new rules or simply apply "well-established constitutional principle[s]" to cases that are "closely analogous to those which have been previously considered in the prior case law").

[173] *Saffle*, 494 U.S. at 488–95 (showing that opinion does not explicitly state Justice O'Connor's opinion was not a majority opinion).

[174] Lyn S. Entzeroth, *Reflections on Fifteen Years of the* Teague v. Lane *Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness, and the Perversity of the Court's Doctrine*, 35 N.M. L. REV. 161, 189 (2005).

[175] BRIAN R. MEANS, FEDERAL HABEAS MANUAL: A GUIDE TO FEDERAL HABEAS CORPUS LITIGATION 430 (2012).

[176] A Westlaw search on December, 5, 2012 revealed that the Supreme Court has cited *Teague* in ninety-six cases, and has neither applied nor mentioned *Marks* in any one of them. The search was run in the SCT database with the following parameters: ("Teague v. Lane" & "489 U.S. 288").

applying the *Marks* rule.[177] Such reasoning could be the result of carelessness or caprice on the part of the Court, but it is more likely indicative of a reasoned decision by the Court to adopt the path of least resistance in developing precedent. If there exists new found majority agreement on a dispositive issue, then pains and perils of applying *Marks* may be regarded as an unnecessary burden. After all, a holding of the court that the prior "opinion reasoning X" is the controlling opinion is the functional equivalent of holding that the "law is X," regardless of whether the prior opinion was a majority, a concurrence, or a plurality. By way of an additional example, although the governing opinion from an Eighth Amendment plurality decision, *Harmelin v. Michigan*,[178] was still a debatable issue under *Marks*,[179] the Supreme Court's recent announcement in a majority decision that Justice Kennedy's opinion was the "controlling opinion" stops the debate and compels the conclusion that Justice Kennedy's reasoning now defines the constitutional scope of the Eighth Amendment.[180] Simply put, once a majority agrees to a constitutional rule, that rule becomes law.

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[177] *See, e.g.*, Godfrey v. Georgia, 446 U.S. 420, 420–21 (1980) (plurality opinion) (indicating that there was no opinion of the court, only a plurality opinion written by Justice Stewart, and joined by Justices Blackmun, Powell, and Stevens). The Court has consistently cited this plurality opinion as the holding of the Court, without ever applying the *Marks* formula. *See, e.g.*, Bell v. Cone, 543 U.S. 447, 451 (2005) (citing the Court's plurality decision in *Godfrey* as if it were a majority decision without indication that it was such); Lambrix v. Singletary, 520 U.S. 518, 530 (1997) (citing to the Court's "holding" in Godfrey without indication that it was a plurality opinion). Another example is *Rosales-Lopez v. United States*, 451 U.S. 182, 183 (1981). There, a plurality of the Court held that a defendant accused of a violent crime could request to inquire into racial or ethnic prejudice if the defendant and the victim are members of different racial or ethnic groups where there was reasonable possibility of prejudice. *Id.* at 192. The concurring Justices opined that an inquiry on voir dire as to racial or ethnic prejudice rested primarily with the trial court even in cases of violent crimes. *Id.* at 195 (Rehnquist, J., concurring). The Court has subsequently cited the *Rosales-Lopez* plurality holding as the controlling opinion, without applying *Marks*. *E.g.*, Mu'Min v. Virginia, 500 U.S. 415, 422–23 (1991). In fact, the Court has applied *Marks* to conduct a "narrow grounds" analysis only seven times.

[178] 501 U.S. 957, 960 (1991) (including a plurality opinion by Justice Scalia, a concurrence in part by Justice Kennedy, and dissents by Justices White, Marshall, and Stevens).

[179] Hillary J. Massey, Note, *Disposing of Children: The Eighth Amendment and Juvenile Life Without Parole After* Roper, 47 B.C. L. REV. 1083, 1102 (2006) ("At least three circuit courts regard Justice Kennedy's test as the rule of *Harmelin* because it is the position taken by those members who concurred in the judgment on the narrowest grounds."); Kevin White, Comment, *Construing the Outer Limits of Sentencing Authority: A Proposed Bright-Line Rule for Noncapital Proportionality Review*, 2011 BYU L. REV. 567, 576–77 (2011) ("While the Court was able to form a majority rationale for why individualized sentencing considerations were not required in the noncapital context, five Justices were unable to agree on why the defendant's proportionality challenge failed." (footnote omitted)).

[180] Graham v. Florida, 130 S. Ct. 2011, 2021 (2010) ("A leading case is *Harmelin v. Michigan*, in which the offender was sentenced under state law to life without parole for possessing a large quantity of cocaine. A closely divided Court upheld the sentence. The controlling opinion concluded that the Eighth Amendment contains a 'narrow proportionality principle,' that 'does not require strict proportionality between crime and sentence' but rather 'forbids only extreme sentences that are grossly disproportionate to the crime.'" (citation omitted) (quoting *Harmelin*, 50 U.S. at 997, 1000–01 (Kennedy, J., concurring))). Prior to *Graham*, there was not a consensus among the circuits as

The Court's decisions that develop and announce the precedent from a plurality opinion without any recourse to the *Marks* rule tend to erode confidence in the view that the *Marks* rule defines a hard and fast, always applicable test for discerning the holding of a plurality.[181] Ignoring *Marks* and generating a constitutional rule, even more than ignoring *Marks* and refusing to define the constitutional rule, signals disinterest and disregard by the Court without the excuse of judicial minimalism. Of course, even the existence of examples of the Supreme Court flagrantly bypassing and ignoring the *Marks* analysis does not, standing alone, justify the conclusion that the *Marks* inquiry is never, or rarely, required. Indeed, it is arguable that the existence of non-*Marks* precedent elaboration in the plurality context simply reflects an idiosyncratic reaction to certain pluralities by the Court, or a recognition that applying the *Marks* rule is not always worth the headache if Court can otherwise generate majority consensus on the proper rule. However, considered in conjunction with the Court's own application of its *Marks* rule, discussed immediately below, the conclusion that the *Marks* rule is not precedential in any conventional sense, at least as it applies so as to create an internal or decisional rule, is forceful.

D. *The Court's Own Application of* Marks*: The Best Method for Understanding* Marks

Thus far I have provided examples of two separate approaches taken by the Supreme Court in applying one of its own prior plurality decisions. But these discussions have just provided examples of possible approaches to plurality precedent, and thus yield only impressionistic conclusions. That is to say, I have not surveyed every plurality decision and documented its treatment by the Court. This part, by contrast, includes an exhaustive review of every case in which the Supreme Court attempts or purports to apply the *Marks* rule.[182] It stands to reason that the most promising and definitive source of guidance as to the *Marks* rule's application would be the Supreme Court's own elaboration of the doctrine.[183] The Court is not only the final arbiter of constitutional

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to the precise impact or holding of the *Harmelin* decision. *See, e.g.*, Peter Mathis Spett, *Confounding the Gradations of Iniquity: An Analysis of Eighth Amendment Jurisprudence Set Forth in* Harmelin v. Michigan, 24 COLUM. HUM. RTS. L. REV. 203, 224–26 (1992–1993) (discussing the lack of consensus among the circuit courts).

[181] One could argue that these cases demonstrate that the *Marks* rule is precedent that binds the lower courts, but not the Supreme Court itself. The Supreme Court has never explicitly embraced such an approach to plurality precedent.

[182] It is not an examination of the Court's handling of every plurality decision, but rather an examination of every case in which the Supreme Court purports to apply or expressly refuses to apply *Marks*, as opposed to merely ignoring the doctrine.

[183] An equally strong signal about the flexibility that lower courts enjoy under *Marks* is sent by the Court's approach to lower court applications of *Marks*. That is to say, this Article focuses on the

questions but also the inventor of the *Marks* rule. Significantly, an examination of the Court's use of the rule supports the conclusion that the *Marks* rule is not capable of creating reliable precedent. By examining every case in which the Supreme Court has applied the *Marks* rule in the context of interpreting one of its own prior pluralities, the claim that the narrowest grounds test does not impose any rigid decisional rules on lower courts is strongly corroborated. The *Marks* rule, then, is precisely the sort of legalese that Dan-Cohen identified as producing "technical legal content" that is distinct from the publicly communicated message that pluralities always create identifiable precedent.[184] Although the complete dataset is small, the available cases suggest that lower courts play an important role in defining the scope and application of prior Supreme Court plurality decisions.

1. *Agreement Among Lower Courts*

As a general matter, the Supreme Court seems to place substantial value in allowing legal issues to percolate among the lower courts. The Court does not have the resources to address every issue of constitutional and statutory interpretation, and thus the Court's rules provide for Supreme Court review primarily when the lower courts have disagreed as to an important issue. In this way, conventional appellate review consists of lower court percolation that culminates in a decision by the Supreme Court, which ends the judicial discussion. By contrast, in the realm of plurality precedent, a more dialectic process seems to be emerging.[185] Under the limited class of cases in which the Court applies *Marks* there is often substantial deference shown to lower court agreement as to the precedent flowing from a prior plurality.[186] It is as though the initial plurality frames the discussion, but does not end it, and lower courts are invited, indeed expected, to revisit the legal questions left unresolved in the

message sent to the lower courts by the Supreme Court's application of the *Marks* rule, but future research should be done regarding the Court's treatment of lower court *Marks* analysis. My review of cases applying *Marks* suggests that the Court does not intervene to prevent lower courts from fumbling around with plurality precedent. For example, there is a circuit split as to the proper application of the *Rapanos* plurality, but the Court has not shown any enthusiasm for intervening. *See infra* notes 221–23 and accompanying text.

[184] Dan-Cohen, *Acoustic Separation*, *supra* note 19, at 652 (noting that the same legal rule can simultaneously convey a message to the public through its ordinary language, and a different message to judges through its technical legal terminology).

[185] There is always room for interpretation and legal argument about the meaning of a Supreme Court opinion, but as to clear holdings there is no room for lower court flexibility and innovation. With plurality decisions, by contrast, there is no final, definitive word from the Court. In this way, a plurality decision is more analogous to a concurring opinion inviting a prior precedent to be revisited.

[186] *See, e.g.*, Bell v. Cone 543 U.S. 447, 451–52 (2006) (citing the Sixth Circuit's application of the rule found in the plurality opinion of *Godfrey* to the case below).

plurality decision.[187] Most notably, in circumstances where the lower courts have coalesced and identified a single holding from a plurality, the Court itself is loathe to disregard this consensus.[188] In this way, the lower court application of the *Marks* rule tends to support the conclusion that precedent flows upward, from lower court agreement to the Supreme Court.

Before proceeding too far along this path, it is worth pointing out that the claim of upward-flowing precedent is more a theory predicated on impressionistic data than a hard empirical fact. The reason for this is that the Supreme Court has failed to apply its own *Marks* rule in enough cases to draw any absolute conclusions; indeed, since 1977 when *Marks* was decided, the Supreme Court itself has grappled with the application of the "narrowest grounds" rule to a prior plurality decision on only seven occasions.[189] Given that there are hundreds of plurality decisions on all types of divisive issues,[190] the Supreme Court's ability to avoid the use of the *Marks* rule is itself notable. The fact that it is considerably more common to ignore the *Marks* rule, as discussed in the previous sections—either in announcing or in failing to announce plurality precedent—than it is for the Court to actually apply the doctrine, is certainly not the sign of a healthy and thriving precedent. However, conclusions about the Court's aspirations for the *Marks* rule as evidenced by the Court's own use of *Marks* are subject to the caveat that the dataset is remarkably small.

Nonetheless, I think there is value in examining in detail those seven instances where the Court has addressed the *Marks* rule in the context of discerning precedent from one of its prior pluralities. Most strikingly, five of these seven cases follow a clear formula for applying *Marks*: where the application of *Marks* is ambiguous or disputed among the lower courts, there is no precedent, and where the lower courts are in consensus as to the

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[187] Of course there is always room for disagreement as to the meaning and scope of a Supreme Court decision. Lower court disagreement as to the proper application of a Court decision is not limited to pluralities. However, pluralities occupy an extreme position on the spectrum such that percolation is not only likely, but inevitable and desirable.

[188] *See infra* notes 191–97.

[189] Panetti v. Quarterman, 551 U.S. 930, 948–49 (2007); Grutter v. Bollinger, 539 U.S. 306, 322–25 (2003); O'Dell v. Netherland, 521 U.S. 151, 158–62 (1997); Romano v. Oklahoma, 512 U.S. 1, 9 (1994); Nichols v. United States, 511 U.S. 738, 743–45 (1994); City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 764–65 n.9 (1988). There is one additional case where a plurality decision purports to conduct a *Marks* analysis, but the opinion is seeking to interpret whether and to what extent a separate concurrence is the holding of the Court in the decision at issue. United States v. Santos, 553 U.S. 507, 523–24 (2008). In *Santos*, the plurality attempts to warn lower courts away from aspects of Justice Stevens's concurrence by noting that the reasoning of Stevens's concurrence is rejected by the "Justices joining this [plurality] opinion" and also the "Justices joining the principal dissent." *Id.* at 524.

[190] Spriggs & Stras, *supra* note 17, at 519 ("[D]uring the 145 Terms between 1801 and 1955, the Supreme Court issued only [forty-five] plurality decisions. However, during the [fifty-four] terms from 1953 to 2006, the Supreme Court issued 195 plurality opinions.").

proper application of *Marks*, the plurality is understood to have yielded binding precedent.[191]

In three of the seven cases, the Court found virtually unanimous agreement among the lower courts as to the proper application of *Marks* to a prior precedent.[192] In these circumstances, the Court applied the *Marks* rule so as to defend the lower court consensus as controlling. By way of example, in *Marks* itself the Court reasoned that "every Court of Appeals that considered the question" agreed that the plurality opinion from a particular case was binding precedent, and therefore, the Court held that the opinion "was the law."[193] The Court explicitly linked lower court consensus as to the rule produced by a plurality to the conclusion that such lower court consensus announced the holding of the Supreme Court. More recently, in rejecting a particular reading of a prior plurality under *Marks*, the Court emphasized that "[i]n any event, history has vindicated" the view that the plurality opinion was the controlling precedent insofar as hundreds of lower court decisions have so held.[194] In other words, to the extent there was any doubt as to the narrowest grounds, the Court resolved the issue by referencing the lower court consensus as to the precedent generated by a prior plurality.[195] Most recently, in *Panetti v. Quarterman*,[196] the Court purported to apply the *Marks* rule when it announced the holding of a prior plurality regarding the execution of incompetent individuals.[197] Notably, the view of the Eighth Amendment adopted by the Court was apparently unanimous among the lower courts who had considered the issue.[198]

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[191] *See Panetti*, 551 U.S. at 948–49 (discussing the precedent set by *Ford v. Wainwright*, 477 U.S. 399 (1986)); *Grutter*, 539 U.S. at 322–25 (discussing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, (1978), where the Court "last addressed the use of race in public higher education"); *O'Dell*, 521 U.S. at 158–62 (discussing the plurality's reliance on *Gardner v. Florida*, 430 U.S. 349 (1977)); *Nichols*, 511 U.S. at 743–45 (discussing that majority of the Court found "a prior uncounseled misdemeanor conviction" constitutional in *Baldasar v. Illinois*, 446 U.S. 222 (1980)); *City of Lakewood*, 486 U.S. at 764 n.9 (discussing the different interpretations of *Kovacs v. Cooper*, 336 U.S. 77 (1949)).

[192] *Panetti*, 551 U.S. at 947; *O'Dell*, 521 U.S. at 166 n.3; *City of Lakewood*, 486 U.S. at 764 n.9.

[193] Marks v. United States, 430 U.S. 188, 194 (1977).

[194] *City of Lakewood*, 486 U.S. at 764 n.9 ("Clearly, in *Kovacs* the plurality opinion put forth the narrowest rationale for the Court's judgment.").

[195] *Id.*

[196] 551 U.S. 930 (2007).

[197] *Id.* at 949 (citing Ford v. Wainwright, 477 U.S. 399, 424–26 (1986)).

[198] *E.g.*, Walton v. Johnson, 440 F.3d 160, 170 (4th Cir. 2006); Singleton v. Norris, 319 F.3d 1018, 1023 (8th Cir. 2003); Rohan ex. rel. Gates v. Woodford, 334 F.3d 803, 809–11 (9th Cir. 2003); Scott v. Mitchell, 250 F.3d 1011, 1013–14 (6th Cir. 2001); Lowenfield v. Butler, 843 F.2d 183, 187 (5th Cir. 1988); *see also* Seeds, *supra* note 136, at 325 (compiling federal authorities that appeared to be unanimous in their endorsement of the conclusion that Justice Powell's decision in *Ford v. Wainwright* was the narrowest ground and noting that Powell's opinion was recognized as the holding of the Court). Notably, Justice Powell's opinion is regarded as the narrowest decision as to the procedural issue of how much process is needed to determine competency to be executed, but it is not regarded as the narrowest opinion as to the substantive standard regarding what constitutes

In short, where lower courts coalesce around a common interpretation of a plurality decision, the Court's application of the *Marks* rule has served to solidify such an approach as the supreme law. Notably, this upward-flowing precedent model is primarily present when the Court itself relies on the *Marks* rule in announcing a holding. By contrast, where the Court simply revisits the issue without citing *Marks* and arrives at a majority consensus as to an issue that previously produced a plurality, as with the retroactivity rule under *Teague*, then the Court's law-announcing function is much more unilateral, or traditional, rather than dialectical. In both contexts, the narrowest grounds test is of no discernible relevance.

2. *A Lack of Consensus Among Lower Courts*

The upward-flowing precedent model obviously cannot generate precedent when there is no consensus among the lower courts. Where the lower courts have divided substantially as to the proper application of the *Marks* rule to a particular plurality, and thus failed to coalesce around a single holding, the Supreme Court has generally opted to revisit the issue wholesale, and has rejected the notion that the prior plurality created any binding precedent at all. That is to say, where the lower courts have failed to coalesce around an understanding of the plurality decision and there is no precedent that is available to flow upward, the Court is forced in the purest sense to apply its own intractable narrowest grounds formula. There are two examples of Supreme Court decisions attempting to apply the *Marks* rule in the face of lower court disagreement as to the narrowest and binding opinion from a previous plurality. Both of these cases support the conclusion that the *Marks* precedent is not binding on lower courts in any conventional sense.

The first example is the lower court and subsequent Supreme Court treatment of the plurality decision in *Regents of the University of California v. Bakke*.[199] In *Bakke*, the Court produced a plurality decision addressing the issue of affirmative action in medical school admissions,[200] and lower courts were completely divided as to the holding of the decision.[201] For example, the Ninth Circuit, among others, held that the concurring opinion by Justice Powell that permitted race to play a role in

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incompetence for purposes of an execution. *Panetti*, 551 U.S. at 949; *see also* Seeds, *supra* note 136, at 325 n.69.

[199] 438 U.S. 265, 267–68 (1978); *see* B. Andrew Bednark, Note, *Preferential Treatment: The Varying Constitutionality of Private Scholarship Preferences at Public Universities*, 85 MINN. L. REV. 1391, 1398–99 (2001) (identifying a three-circuit split as to the controlling opinion in *Bakke*).

[200] *Bakke*, 438 U.S. at 269–70.

[201] *Compare* Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188, 1199–1201 (9th Cir. 2000) (holding that an interest in facilitating diversity can satisfy strict scrutiny), *with* Hopwood v. Texas, 78 F.3d 932, 945 (5th Cir. 1996) (holding that an interest in facilitating diversity does not satisfy strict scrutiny), *overruled by* Grutter v. Bollinger, 539 U.S. 306 (2003).

admissions was the governing precedent, and thus an interest in facilitating diversity could satisfy strict scrutiny.[202] By contrast, other lower courts held that *Bakke* did not permit an interpretation of the Equal Protection Clause that would regard diversity as a compelling government interest.[203] In 2003, some twenty-five years after *Bakke* was decided, the Supreme Court resolved the substantive debate among the circuits about affirmative action in *Grutter v. Bollinger*[204] by holding that diversity can constitute a compelling government interest.[205] Notably, however, the Court did not address which opinion in the *Bakke* plurality was controlling, and instead suggested that the plurality may have failed to yield binding precedent.[206] The federal district court had concluded, in attempting to apply *Bakke*, that the "*Marks* framework cannot be applied to a case like *Bakke*,"[207] and a majority of the Supreme Court apparently agreed.[208] As the Court explained:

> 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*. . . . We do not find it necessary to decide whether Justice Powell's opinion is binding under *Marks*.[209]

It is unconventional, to say the least, for the Supreme Court to hold that it is unnecessary for it to assess what binding precedent was generated by its prior decisions on a question directly before the Court. Of course, the Court retains the power to distinguish its own precedent, or even overrule it,[210] but to acknowledge its existence while failing to apply it is

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[202] *Smith*, 233 F.3d at 1199–1201.

[203] *Hopwood*, 78 F.3d at 945 ("[T]here has been no indication from the Supreme Court, other than Justice Powell's lonely opinion in *Bakke*, that the state's interest in diversity constitutes a compelling justification for governmental race-based discrimination.").

[204] 539 U.S. 306 (2003).

[205] *Id.* at 343.

[206] *See id.* at 325 (declining to decide whether Justice Powell's *Bakke* opinion is binding under *Marks*).

[207] Grutter v. Bollinger, 137 F. Supp. 2d 821, 847 (E.D. Mich. 2001) ("[T]he various Justices' reasons for concurring in the judgment are not merely different by *degree*, as they were in *Memoirs*, but are so fundamentally different as to not be comparable in terms of 'narrowness.'"), *rev'd*, 288 F.3d 432 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003). The federal court of appeals reversed the district court, holding that "Justice Powell's opinion is binding on this court under *Marks* . . . , and . . . *Bakke* remains the law until the Supreme Court instructs otherwise." Grutter v. Bollinger, 288 F.3d 732, 739 (6th Cir. 2002); *see also Grutter*, 539 U.S. at 321 (noting that the en banc court of appeals was divided as to the proper application of *Marks* to *Bakke*).

[208] *See Grutter*, 539 U.S. at 325 (declining to rely on or to pursue a *Marks* analysis of *Bakke*).

[209] *Id.*

[210] *See* Arizona v. Gant, 556 U.S. 332, 358 (2009) (Alito, J., dissenting) (noting that the "Court must explain why [a] departure from the usual rule of *stare decisis* is justified" and that "constitutional precedent should be followed unless there is a 'special justification' for its abandonment").

sui generis. Indeed, the Court itself has developed a complicated algorithm for assessing whether, in an ordinary case, departing from *stare decisis* is permissible, and has explained that as a general matter the threshold and most important consideration in a case is identifying and applying binding precedent.[211] G*rutter*'s handling of the *Marks* rule signals to lower courts and lawyers that the narrowest grounds formula is not to be regarded as a barrier to judicial flexibility.

Similarly, in *Nichols v. United States*,[212] the Court was forced to confront an issue about the scope of the right to counsel protections as they apply to sentence enhancements based on prior convictions.[213] Of critical importance, the Supreme Court had addressed the exact same issue just over a decade earlier in a case called *Baldasar v. Illinois*.[214] Unfortunately, *Baldasar* was a plurality decision, and the lower courts had failed to reach even minimal consensus as to narrowest grounds of the decision.[215] In fact, leading up to *Nichols* there was at least a three-way circuit split as to the binding precedent that had been generated by *Baldasar*.[216] Faced with a deep circuit split as to the holding of its plurality decision in *Baldasar*, the Supreme Court concluded that *Baldasar* should be ignored, treated as a non-event, and revisited the issue *de novo*.[217] In a particularly memorable passage the Court explained, "We think 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."[218] The Court even went so far as to explain that the very "degree of confusion following a splintered decision such as *Baldasar* is itself *a reason for reexamining that decision*."[219] Accordingly, in the moments of greatest controversy as to the *Marks* precedent's meaning and application, the Supreme Court simply avoids the doctrine altogether, and in the

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[211] *See id.* (explaining that relevant factors in determining whether a precedent can be overruled "include whether the precedent has engendered reliance, whether there has been an important change in circumstances in the outside world, whether the precedent has proved to be unworkable, whether the precedent has been undermined by later decisions, and whether the decision was badly reasoned." (citations omitted)).

[212] 511 U.S. 738 (1994).

[213] *Id.* at 740.

[214] 446 U.S. 222, 222 (1980) (considering whether the right to counsel is violated when a prior uncounseled conviction is used as the justification for an enhanced recidivist sentence), *overruled by* Nichols v. United States, 511 U.S. 738 (1994).

[215] *See Nichols*, 511 U.S. at 745 (observing a three-way circuit split among the lower courts as to the proper application of *Baldasar*).

[216] *See id.* (summarizing lower court treatment of *Baldasar*).

[217] *See id.* at 745–46 (questioning the helpfulness of the *Marks* inquiry in the context of *Baldasar*).

[218] *Id.*

[219] *Id.* at 746 (emphasis added).

process leaves the impression that lower courts are duty bound to do the same when complicated questions of interpretation arise.[220]

As a result, one can feel confident that the next time lower courts split as to the holding of a plurality decision of the Supreme Court, the Court itself will side-step, evade, and further disavow the *Marks* rule, all the while maintaining the ruse that *Marks* provides a meaningful formula. Indeed, with regard to one of the more salient recent plurality decisions, *Rapanos v. United States*,[221] some lower courts are explicitly concluding that the *Marks* rule is entirely inapplicable.[222] When lower courts do not agree about the precedent provided by a plurality, the Court's decisions that apply *Marks* suggest that there is no precedent.[223]

3. *Outliers in the Realm of Plurality Precedent*

As discussed immediately above, of the seven instances where the Court has discussed the *Marks* rule in attempting to discern its own precedent, five of these instances follow a distinctive pattern of holding that precedent exists if, and only if, the lower courts have reached consensus as to the holding of the Supreme Court—that is to say, precedent rises to the Supreme Court out of unanimity among the lower courts, and precedent does not exist if there is no lower court consensus.[224] But to suggest that two of the seven instances where the Court itself has applied *Marks* undermine this conclusion is to dramatically understate the upward-flowing precedent conclusion.

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[220] *See, e.g.*, Thurmon, *supra* note 82, at 441–42 (examining *Elrod v. Burns*, 427 U.S. 347 (1976), and *Teague v. Lane*, 489 U.S. 288 (1989), and concluding that "[l]ower courts should take the Supreme Court's rejection of the *Marks* rule as an invitation to follow suit").

[221] 547 U.S. 715, 718 (2006).

[222] *See, e.g.*, United States v. Johnson, 467 F.3d 56, 65–66 (1st Cir. 2006) (citing *Nichols* and *Rapanos* and concluding that the Court has distanced itself from *Marks* in recent years).

[223] Alternatively, one could conclude that the reason *Marks* is not applied in cases like *Nichols* or *Grutter* is that it cannot be applied—that is, there is not a narrowest ground. If *Marks* does not have application, then, of course, it cannot be applied. Perhaps there is no lower court consensus only because there is no discernible way to apply the *Marks* rule. The problem with such reasoning, however, is that it is a gap that threatens to swallow the rule. As previously explained, even the supposedly paradigmatic examples of narrowest grounds, like *Furman*, are not without controversy. *See supra* Part III.B.4. There is nearly always room to disagree about what is the narrowest ground, and because the Court refuses to provide guidance as to its application, explaining circuit court disagreement as a product of the inapplicability or confusion surrounding *Marks* seems unsatisfactory. Moreover, the goal of this Article is to celebrate the indeterminacy of *Marks*. Other scholars have already catalogued and lamented the confusion surrounding the *Marks* rule. *See, e.g.*, Thurmon, *supra* note 82, at 419–21 (criticizing the *Marks* rule as a failure). The purpose of this Article is to show that the indeterminacy in this realm actually has salutary effects. This is not to say that the acoustic separation model is the only way of conceiving of Supreme Court precedent.

[224] *See supra* Part IV.D.2 (discussing the lack of consensus among the lower courts).

One of the cases that does not necessarily appear to follow the mode of upward-flowing precedent described above is *O'Dell v. Netherland*.[225] In *O'Dell*, the Court considered whether the prior plurality in *Simmons v. South Carolina*,[226] which required that a defendant be permitted to inform a jury that he is ineligible for parole when the prosecution is seeking the death penalty based on the defendant's future dangerousness, applied retroactively.[227] O'Dell argued that because he was parole ineligible, but was barred from informing the jury of this fact in order to rebut the prosecutor's arguments regarding his future dangerousness, his death sentence violated due process.[228] More specifically, *O'Dell* is a case in which the Court assessed whether a plurality decision, *Simmons*, interpreting and applying a previous plurality decision, *Gardner v. Florida*,[229] was retroactively applicable to a conviction that was already final.[230] The question before the Court as it related to *Marks* was whether the *Simmons* plurality's application of a legal principle broke new ground so as to bar retroactivity, or instead whether the legal principle applied by the plurality was sufficiently well established (by a previous plurality) so as to justify the application of the *Teague* bar.[231] Applying *Marks*, the Court held that the plurality decision in *Gardner* did not lead naturally and "ineluctably" to the result in the *Simmons* plurality; thus, the *Simmons* decision was a new rule that did not automatically apply retroactively.[232] The *Marks* analysis is cursory, but as relevant for present purposes, the Court's interpretation of *Gardner*, does not rely on any consensus or dissensus among the lower courts in defining the narrowest grounds of *Gardner*.[233] However, the failure to explicitly apply the upward-flowing precedent model in this context is probably not determinative for a variety of reasons.

As an initial matter, upon considering the role of *Marks* when there are pluralities layered on top of pluralities, one is confronted with the

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[225] 521 U.S. 151, 162 (1997) (conducting its own *Marks* analysis on *Gardner* without any reference to relevant lower court decisions). As an aside, even if *Marks* creates binding precedent as a general matter, it is not obvious that such holdings are clearly established enough to justify habeas relief for purposes of 28 U.S.C. § 2254(d)(1).

[226] 512 U.S. 154 (1994).

[227] *O'Dell*, 521 U.S. at 153.

[228] *Id.* at 155, 159.

[229] 430 U.S. 349, 360–62 (1977) (concluding that a death sentence from a judge who had reviewed a presentence report that was not made available to the defendant violated due process because the sentence was imposed, at least in part, on the basis of information which the defendant had no opportunity to deny or explain).

[230] *O'Dell*, 521 U.S. at 161–62.

[231] *Id.* at 156.

[232] *Id.* at 162.

[233] *See id.* at 160–62 (taking Justice White's narrow opinion as to the rule of *Gardner* without reference to lower court analysis).

problem of lacking any solid ground upon which to assess the Court's analysis—it is reminiscent of the old problem of turtles all the way down.[234] The limited *Marks* inquiry is at least two steps attenuated: the defendant was relying on one plurality, which applied a second plurality, and the Court conducted a *Marks* analysis of this second plurality.[235] Similarly, it must be noted that the majority's analysis in *O'Dell* was hotly contested by a four Justice dissent that accuses the majority of manipulating the *Marks* rule.[236] More importantly, it is worth pointing out that the *Teague* doctrine, the application of which is the central issue in *O'Dell*, is a procedural vehicle designed to facilitate principles of comity and federalism by regularly limiting the access of state prisoners to federal habeas relief.[237] Accordingly, it is not entirely surprising that when the Court was tasked with applying the *Teague* rule to an ambiguous situation, the prisoner's urged application of the *Marks* rule did not prevail.[238] That is to say, the *O'Dell* decision says more about the spirit of *Teague*'s limitations than it does about the *Marks* doctrine. Moreover and closely related, *O'Dell* represents such a uniquely perfect procedural storm as to defy generalizations about plurality precedent. The applicability of *Teague*, whether to a plurality or not, is at least one complicated procedural step removed from the strict application of *Marks* rule itself. Accordingly, the question of whether one plurality's interpretation of a previous plurality breaks new ground for purposes of *Teague* is simply too unique to draw generalizable conclusions. It would be odd to draw conclusions about the application of *Marks* from a single decision that is applying a procedural framework—the *Teague* doctrine—that is itself almost unrivaled in its complexity.

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[234] *See* STEPHEN W. HAWKING, A BRIEF HISTORY OF TIME 1 (1988) (describing the turtle problem).

[235] *See O'Dell*, 521 U.S. at 160–62 (discussing and analyzing the petitioner's reliance on the plurality opinions of *Simmons* and *Gardener*).

[236] *See id.* at 174–75 (Stevens, J., dissenting) ("The majority makes much of the fact that the [*Gardner* plurality] opinion was joined by only three Justices, and instead of accepting the plurality's due process analysis as the rule of *Gardner*, the Court takes Justice White's concurring opinion, which was grounded in the Eighth Amendment, as expressing the holding of the case. The Court's reading of *Gardner* ignores the fact that Justice White himself squarely adopted the due process holding of *Gardner*." (footnotes omitted)); *id.* at 175–76 (arriving at a fundamentally different conclusion as to the proper application of *Marks* to the *Gardner* plurality).

[237] *See, e.g.*, Jordan Steiker, *Habeas Exceptionalism*, 78 TEX. L. REV. 1703, 1714 (2000) ("The underlying rationale of *Teague* is that considerations of finality and comity at some point override an individual accused's claim."); Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to* Teague v. Lane *and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 AM. J. CRIM. L. 203, 244 (2001) ("[T]he importance of comity as an underlying value of *Teague* and the current federal habeas statute cannot be underestimated.").

[238] *See O'Dell*, 521 U.S. at 162 (rejecting the petitioner's *Marks* application).

There is only one other Supreme Court decision that attempts to engage in a *Marks* rule analysis: *Romano v. Oklahoma*.[239] While the *Romano* decision does not fit squarely within the upward-flowing precedent model, it also does not undermine this conceptual framework.[240] Specifically, although in *Romano* the Court purported to announce a holding based on *Marks* without explicitly considering lower court consensus on the issue, in reality the Court simply relied on a prior majority decision which had already interpreted the plurality.[241] More precisely, although *Romano* is one of the small handful of seven cases in which the Court cites and purports to apply the *Marks* standard,[242] as a practical matter the Court was simply accepting what a previous majority of the Court had considered to be the precedential reasoning of a prior plurality decision.[243] A more detailed analysis of *Romano* demonstrates why this is the case.

In *Romano*, the Court was considering whether the admission of evidence of a defendant's prior death sentence at a capital sentencing hearing violated the constitutional principle announced in the Court's prior Eighth Amendment decision in *Caldwell v. Mississippi*.[244] In *Caldwell*, there was majority agreement as to the judgment, and majority agreement for the view that the responsibility of the jury for the death sentence was reduced by the prosecutor's statements that were neither accurate nor relevant to the sentencing.[245] The plurality opinion, however, went one step farther and concluded that *even if* the information provided to the jury had not been inaccurate, if it lessened the jurors' sense of responsibility, it was inadmissible.[246] Justice O'Connor, writing for herself, concurred and disagreed only with the latter conclusion, a conclusion that was irrelevant to the judgment in *Caldwell*—that is, Justice O'Connor reasoned that only if the jury's sense of responsibility was diminished with *inaccurate and misleading* information was the constitution offended.[247] In short, both the

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[239] 512 U.S. 1, 8–10 (1994) (considering whether the admission of evidence of a defendant's prior death sentence violated the constitutional principle announced in the plurality opinion of *Caldwell v. Mississippi*, 472 U.S. 320 (1985)).

[240] *See id.* (applying the *Marks* rule without reference to lower court interpretations, and instead relying on the plurality opinion in *Caldwell*).

[241] *See id.* (arriving at its conclusion in part by its analysis of *Caldwell*).

[242] *See supra* Part IV.D.1 (discussing the seven cases in which the Court cited *Marks*).

[243] *See Romano*, 512 U.S. at 8–10 (discussing its rule from *Caldwell*).

[244] *Id.*; Caldwell v. Mississippi, 472 U.S. 320, 335–36 (1985).

[245] *Caldwell*, 472 U.S. at 335–36. As an aside, the *Romano* Court refers to *Caldwell* as a plurality decision warranting an application of the *Marks* rule. *Romano*, 512 U.S. at 9. Given the Court's parsimonious application of the *Marks* rule—only seven attempts to apply it by the Court in thirty-five years—*Caldwell* is an odd choice for its selective application insofar as *Caldwell* is not a traditional plurality because there is majority agreement as to most of the reasoning in the decision. *Caldwell*, 472 U.S. at 323, 341.

[246] *Caldwell*, 472 U.S. at 336.

[247] *Id.* at 342 (O'Connor, J., concurring).

plurality and Justice O'Connor's opinion agreed that the prosecutor's conduct in *Caldwell* unconstitutionally minimized the responsibility of the sentencing jury—they agreed on the resolution and holding of the case[248]—but Justice O'Connor wrote a separate concurrence to urge a narrower vision of the legal reasoning upon which the case rested.[249] In Justice O'Connor's view, only misleading statements about the role of the sentencing jury in the death determination could give rise to a constitutional injury under the Eighth Amendment.[250] The question, then, is whether Justice O'Connor's concurrence provides a controlling statement of Eighth Amendment law on this issue.

In the wake of the *Caldwell* decision, lower courts addressing the case's precedential value did not distinguish between the plurality opinion and Justice O'Connor's concurrence; instead, the lower courts, without so much as conducting a *Marks* analysis tended to cite *Caldwell* generally for the proposition that comments designed to diminish juror responsibility were not permitted.[251] Subsequently, however, in *Darden v. Wainwright*,[252] a majority of the Court stated that *Caldwell*'s holding is only applicable to a small class of prosecutor comments, to wit, "those that *mislead the jury* as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision."[253] In other words, *Darden* treated as precedential only Justice O'Connor's gloss on the majority decision. The *Darden* decision's discussion of *Caldwell* does not refer to *Caldwell* as a plurality, it does not apply the *Marks* rule, and it does not even cite to *Marks*.[254] Nonetheless, in light of the *Darden* decision's discussion of *Caldwell*, by the time the Court decided the *Romano* case, the *Marks* formula was largely beside the point because a majority of the Court in *Darden* had already recognized a reading of *Caldwell* that foreclosed relief in *Romano*.[255] Viewed in this light, *Romano* is nothing more than an example of a case in which a previous majority of the Court had agreed to a particular reading of a plurality.

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[248] *Id.* at 335–36, 342.

[249] *See id.* at 343 (O'Connor, J., concurring) (stating that the prosecutor's comments distorted the jury's understanding of its responsibility in deciding the death sentence).

[250] *Id.*

[251] *See* Dutton v. Brown, 788 F.2d 669, 675 (10th Cir. 1986) (discussing *Caldwell* as inapplicable to prosecutor statements that called the jury "part of a process"); Kirkpatrick v. Blackburn, 777 F.2d 272, 284 (5th Cir. 1985) (finding a prosecutor's comments did not shift the jury's burden as they did in *Caldwell*); Moore v. Blackburn, 774 F.2d 97, 98 (5th Cir. 1985) (denying a stay of execution after concluding the jury knew its responsibility in accordance with *Caldwell*).

[252] 477 U.S. 168 (1986).

[253] *Id.* at 184 n.15 (emphasis added).

[254] *See id.* (demonstrating that there is no mention of a plurality).

[255] *Id.* (adopting Justice O'Connor's formulation in *Caldwell*); *see also* Romano v. Oklahoma, 512 U.S. 1, 9 (1994) (discussing the O'Connor concurrence as controlling).

Consequently, the decision in *Romano* is not inconsistent with the framework of upward-flowing precedent. Instead, it is simply an additional example of the principle that when a majority of the Court agrees on a rationale that was previously advanced in an opinion within a plurality decision, that majority agreement is binding law. Whether attributed to shifting ideologies among the Justices, changes in the composition of the Court, or carelessness as to the application of a plurality decision, once there is majority agreement on a legal conclusion, even if that conclusion had previously divided the Court in a plurality decision, that principle becomes binding law. In this regard, *Romano* merely tends to confirm the view that plurality precedent reflects, at best, lower court consensus, and at worst, the unpredictable and untethered ability of the Supreme Court to decide issues considered in previous pluralities without the encumbrances of prior precedent.[256]

The Supreme Court's own interpretation of the *Marks* rule suggests that the doctrine is more a call for intra-judicial communication between the various levels of courts than a definitive statement of binding constitutional law.[257] While the dataset is small, the Court's application of its *Marks* precedent suggests that the role of lower courts in applying plurality precedent is much more dialectic, and much less a top-down application of legal principles. As a general rule, where lower courts have been unified in their approach to interpreting a plurality, the Supreme Court has used the *Marks* rule to endorse such interpretations and imbue them with constitutional authority. Likewise, where the lower courts have substantially disagreed as to the controlling opinion, the Supreme Court has suggested that the prior plurality did not generate a controlling opinion under *Marks*.

The goal of the foregoing analysis, then, is to expose the *Marks* rule for what it is: a ruse, a deception, a pretend precedent, a rule designed to

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[256] To the extent that the Supreme Court announces that a particular opinion is the controlling opinion of a plurality decision, lower courts would, of course, be bound to apply said opinion as binding law. In this regard, one could predict that there would be majority consensus among the circuits as to the precedential value of the plurality because there is Supreme Court precedent from a majority interpreting the plurality.

[257] Certainly, in the context of majority opinions, there are countless examples of the Supreme Court reasserting its authority and reversing lower courts when the state or lower federal court judges seem overly dismissive of the Court's pronouncements of law. A famous example from recent years is the Court's habit of reviewing federal habeas cases where relief was granted in the Ninth Circuit Court of Appeals. The Supreme Court has reversed, sometimes summarily and sometimes in harshly worded opinions, when a majority of the Justices regard the circuit court as disregarding the Court's precedent as to the limited scope of review under the Anti-Terrorism and Effective Death Penalty Act. *See, e.g.*, Premo v. Moore, 131 S. Ct. 733, 740 (2011) (holding that the Ninth Circuit erred in granting habeas corpus); Harrington v. Richter, 131 S. Ct. 770, 780 (2011) (holding that the Ninth Circuit overstepped its authority in reviewing the lower court's judgments in habeas corpus actions); Woodford v. Visciotti, 537 U.S. 19, 24 (2002) (per curiam) (rejecting the Ninth Circuit's review of the California Supreme Court's understanding of California law).

shape the views and conduct of the public alone, and a rule that has very little practical effect on the way that plurality precedent ought to be discerned by lower courts. In short, lower courts must exercise prudence in taking the *Marks* rule's symbolic promise of ever present precedent too seriously. The *Marks* rule is only able to harmonize the dueling goals of public legitimacy and judicial flexibility if lower courts are sensitive to the more subtle decisional rule signaled by the Court's own application of the narrowest grounds test. At the very least, *Marks* must be understood as affording a margin of discretion and innovation to lower courts. When the Court itself has generated a particularly confusing and fractured plurality decision, there is room for precedent to flow in an upward direction and for lower courts to innovate, at least before the Court itself revisits the issues.[258]

V. THE SUCCESS OF THE ACOUSTIC SEPARATION: AN EXAMINATION OF *MARKS* IN THE LOWER COURTS

The Supreme Court's seeming indifference to its own *Marks* rule strongly supports the conclusion that the *Marks* rule is not, in any ordinary sense, a binding precedent. The treatment of plurality decisions by federal circuit courts tends to confirm that lower courts have received this message. The lower courts rarely apply the narrowest grounds test in the first place, and even when they do apply it, they rarely agree as to its proper application. One circuit recently concluded that the Supreme Court seems to be moving "away from the *Marks* formula."[259] All of this, then, raises a foundational question: Does a precedent for discerning precedent from plurality decisions retain precedential value if lower courts are unable or unwilling to consistently apply it? [260] Certainly not, at least in the conventional sense we have come to understand precedent.[261]

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[258] *See* Seeds, *supra* note 136, at 336 ("It may be that the Court implicitly relies on a practical exception to the *Marks* rule: where the Court's statement on an issue is not clear, where there is no clear rule, the *Marks* doctrine is moot.").

[259] United States v. Robison, 505 F.3d 1208, 1220 (11th Cir. 2007) ("The First Circuit concluded that its approach was therefore 'particularly sound given that the Supreme Court itself has moved away from [rigid application of] the Marks formula.'" (quoting United States v. Johnson, 467 F.3d 56, 64 (1st Cir. 2006))).

[260] This is reminiscent of the quarrel about trees falling in a remote forest. CHARLES RIBORG MANN & GEORGE RANSON TWISS, PHYSICS 235 (rev. ed. 1910); *see also* GEORGE BERKELEY, THREE DIALOGUES BETWEEN HYLAS AND PHILONOUS 20 (1969) (discussing the philosophy behind perception).

[261] In recent years, the Court has altered its course and revised judicially created doctrines when lower courts develop a consensus that the practice is too difficult or time consuming. *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 236–37 (2009) (reversing its prior order of decision-making precedent, in part because lower courts had objected to the rule as unnecessarily complicated and a strain on judicial resources).

There are a few objective indictors suggesting that the acoustic separation is succeeding in this realm insofar as the lower courts have come to regard the *Marks* rule as, at best, a fleeting and unpredictable source of precedent. Most notably, political scientist Pamela Corley recently published an empirical study of the treatment of plurality decisions in the lower courts, in which she found that a "plurality decision is not perceived [by lower court judges to be] as authoritative as a majority decision."[262] The crux of Corley's analysis is review of the citation history for Supreme Court plurality decisions.[263] By considering negative citing references through *Shepard's*, the study found that plurality decisions, accounting for other variables, are about forty-two percent more likely to receive negative treatment among the lower courts than a majority decision.[264] Equally revealing, the plurality opinions received positive treatment or reliance in almost thirty percent fewer cases than majority decisions.[265]

In sum, Corley's study strongly supports the conclusion that the *Marks* rule, as a decisional rule, is not regarded as truly binding precedent by lower courts.[266] Contrary to the plain language of the *Marks* rule, and despite the lack of any effort by the Court to overrule *Marks*, the force and applicability of the precedent generated by a plurality is substantially less than that of an ordinary decision. Notably, however, Corley's study is limited to the citation history for Supreme Court pluralities—that is to say, she does not look at the actual discussion of plurality precedent in the circuit courts.[267] Undertaking to consider how circuit courts have responded to every plurality of the Supreme Court post-*Marks* would be a daunting task that no researcher has yet confronted. However, more in-depth consideration of a couple of examples of prominent plurality decisions in the field of constitutional criminal procedure provides anecdotal support for Corley's conclusion.

A first and useful example is the Supreme Court's 1989 decision in *Florida v. Riley*.[268] In *Riley*, the Court considered an issue that is now standard fare in nearly every criminal procedure textbook across the country: To what extent can the police engage in aerial surveillance of one's home and yard from a helicopter?[269] Unfortunately, this threshold question of Fourth Amendment law was unable to garner a majority

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[262] Corley, *Uncertain Precedent*, *supra* note 140, at 40.

[263] *Id.* at 36.

[264] *Id.* at 37, 43.

[265] *Id.*

[266] *Id.* at 31 n.1, 44.

[267] *Id.* at 36.

[268] 488 U.S. 445, 452 (1989) (plurality opinion); *see id.* at 455 (holding that police do not need a search warrant for conducting aerial observations at 400 feet and above).

[269] *Id.* at 447–48.

opinion.[270] A four-Justice plurality opinion was authored by Justice White who, in practical effect, reasoned that any aerial surveillance is lawful for purposes of the Fourth Amendment so long as the police fly their aircraft in a manner and at an altitude that is lawful.[271] As the plurality noted, "We would have a different case if flying at [400 feet] had been contrary to law or regulation."[272] Justice O'Connor concurred in the judgment but not in the reasoning of the plurality and concluded that the proper inquiry is not whether the police flights were merely legal, but whether the helicopter in question was at a location and altitude which "members of the public travel with sufficient regularity" so as to deprive one of any reasonable expectation of privacy on the land in question.[273] Notably, Justice O'Connor concurred only in the judgment and specifically rejected the plurality's approach, explaining that such a standard "rests the scope of Fourth Amendment protection too heavily on compliance with FAA regulations."[274] Accordingly, *Riley* presents a legally significant question—the scope of Fourth Amendment limits on aerial surveillance—in a non-majority decision, and there is a material disagreement between the Justices who concurred in the judgment.[275] Equally significant, *Riley* presents what appears to be a relatively straightforward application of *Marks* because Justice O'Connor's concurrence does not announce a new test of general applicability, but rather announces a narrower preference for applying the well-established principles of Fourth Amendment law.[276] In other words, *Riley* is a plurality decision for which the narrowest grounds is unusually straightforward.

Since it was decided, the *Riley* decision has been cited in fifty circuit court decisions.[277] Incredibly, not a single one of these federal decisions has cited the *Marks* rule, or even purported to apply a narrowest grounds approach. Among these federal decisions, several circuits rely on the concurrence by Justice O'Connor as though it is the governing precedent.[278] Many other circuit court cases rely primarily or exclusively

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[270] *Id.*

[271] *Id.* at 451–52 (plurality opinion).

[272] *Id.* at 451. The final paragraph of the plurality opinion suggests that in addition to the legality of the flight, other considerations such as the amount of noise and dust, and whether intimate details are detected, might also be relevant to the question of whether an illegal search has occurred. *Id.* at 452.

[273] *Id.* at 454–55 (O'Connor, J., concurring).

[274] *Id.* at 452 (plurality opinion).

[275] *Id.* at 447–48.

[276] *See id.* at 455 (O'Connor, J., concurring) (concluding that aerial observations below 400 feet could violate privacy rights).

[277] A Shepard's Report compiled on December, 5, 2012 showed that federal circuits have cited *Riley* fifty times.

[278] United States v. Maynard, 615 F.3d 544, 559 (D.C. Cir. 2010) (discussing what level of visibility of an act denies privacy protection against police surveillance), *cert. denied*, 131 S. Ct. 1584 (2011); United States v. Warford, 439 F.3d 836, 843 (8th Cir. 2006) (holding surveillance conducted

on the plurality opinion as precedent.[279] But none of the decisions citing to *Riley* base the determination as to the decision's holding on an application of the *Marks* rule.

A recent example of a lower court relying on O'Connor's concurrence in *Riley* as precedent is the D.C. Circuit's decision in *United States v. Maynard*,[280] which held that the warrantless GPS surveillance of the defendant's car for a month violated the Fourth Amendment.[281] In a subsection of the opinion entitled relevant "precedent," the circuit court provides a detailed analysis of *Riley*, stating in part:

> In considering whether something is "exposed" to the public as that term was used in *Katz* we ask not what another person can physically and may lawfully do but rather what a reasonable person expects another might actually do. . . . Indeed, in *Riley*, Justice O'Connor, whose concurrence was necessary to the judgment, pointed out: "*Ciraolo*'s expectation of privacy was unreasonable not because the airplane was operating where it had a 'right to be,' but because public air travel at 1,000 feet is a sufficiently routine part of modern life that it is unreasonable for persons on the ground to expect that their curtilage will not be observed from the air at that altitude. If the public rarely, if ever, travels overhead at such altitudes, the observation cannot be said to be from a vantage point generally used by the public

below 400 feet to be legal because it is common for a helicopter to fly at this altitude); United States v. Boyster, 436 F.3d 986, 992 (8th Cir. 2006) (considering the altitude of surveillance in determining whether it was legal); United States v. Cusumano, 83 F.3d 1247, 1262 (10th Cir. 1996) (en banc) (comparing the use of thermal surveillance equipment to an aerial reconnaissance conducted at uncommon altitude); United States v. Hendrickson, 940 F.2d 320, 323 (8th Cir. 1991) (concluding observations made through a wire roof could reasonably be anticipated to be similar to observations from reasonable altitudes).

[279] United States v. Cuevas-Perez, 640 F.3d 272, 281 (7th Cir. 2011) (considering to what extent reasonable expectations of aerial surveillance equate to searches of the home), vacated, 132 S. Ct. 1534 (2012); United States v. Breza, 308 F.3d 430, 434–35 (4th Cir. 2002) (finding an aerial surveillance followed applicable aviation laws and regulations, and therefore does not violate the Fourth Amendment); United States v. Gori, 230 F.3d 44, 52 (2d Cir. 2000) (discussing visibility in relation to what is in public view); United States v. Ishmael, 48 F.3d 850, 854 (5th Cir. 1995) (discussing expectations of privacy involving thermal imaging); United States v. Ford, 34 F.3d 992, 996 (11th Cir. 1994) (discussing whether thermal imaging of home caused any nuisance); United States v. Ramo, 961 F.2d 217, at *2 (9th Cir. May 1, 1992) (unpublished table decision) (finding defendant could not prove a police helicopter had violated FAA regulations); United States v. Saltzman, 932 F.2d 970, at *3 (6th Cir. May 13, 1991) (unpublished table decision) (concluding the amount of disturbance from an aerial surveillance should have been considered to determine if it was a lawful search); Van Strum v. Lawn, 927 F.2d 612, at *4 (9th Cir. Mar. 5, 1991) (unpublished table decision) (determining helicopter surveillance was a privacy violation in part because it endangered their family and property).

[280] 615 F.3d 544 (D.C. Cir. 2010).

[281] *Id.* at 559, 561–62, 568.

> and Riley cannot be said to have 'knowingly expose[d]' his greenhouse to public view." . . . Applying the foregoing analysis to the present facts, we hold the whole of a person's movements over the course of a month is not actually exposed to the public because the likelihood a stranger would observe all those movements is not just remote, it is essentially nil.[282]

Without so much as a mention of *Marks*, the federal court concluded that Justice O'Connor's concurrence is precedential.[283] Other circuits have agreed with this conclusion on the merits, but have failed to provide further reasoning or analysis to support the conclusion.[284] But the lack of analysis should not be mistaken for consensus. Other circuit court decisions have unequivocally concluded that the plurality opinion is the authoritative precedent in *Riley*. For example, in discussing a Fourth Amendment claim, the Eleventh Circuit referred exclusively to the plurality opinion in *Riley* and noted that the Supreme Court had *held* that it was relevant to determining that the Fourth Amendment was not implicated that "no intimate details connected with the use of the home" were revealed.[285] Only the plurality decision in *Riley* makes any reference to the idea that the nature of the revealed details might be relevant to the scope of the Fourth Amendment protections.[286] Similarly, the Sixth Circuit has noted that an appropriate Fourth Amendment analysis of an aerial surveillance must consider the "height of, and disturbance caused by the helicopter," which are also unmistakably aspects of the plurality decision alone and are not part of the reasoning announced in Justice O'Connor's concurrence.[287]

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[282] *Id.* at 559–60 (citation omitted).

[283] *Id.*

[284] *See, e.g.*, United States v. Warford, 439 F.3d 836, 843 (8th Cir. 2006) (holding that a helicopter flying below 400 feet did not violate one's "reasonable expectation[s] of privacy"); United States v. Hendrickson, 940 F.2d 320, 323 (8th Cir. 1991) (holding that a manager's observations did not violate privacy expectations); United States v. Saltzman, 932 F.2d 970, at *3 (6th Cir. May 13, 1991) (per curiam) (unpublished table decision) (explaining that it was "apparent" that lower court had not properly conducted a *Riley* analysis insofar as the court failed to consider, among other things, the "frequency of helicopter flights in the area").

[285] United States v. Ford, 34 F.3d 992, 996 (11th Cir. 1994).

[286] Florida v. Riley, 488 U.S. 445, 451–52 (1989).

[287] United States v. Saltzman, 932 F.2d 970, at *3 (6th Cir. May 13, 1991) (per curiam) (unpublished table decision) (noting that the height and amount of disturbance are an "integral part of fourth amendment analysis"); *see also* United States v. Ramo, 961 F.2d 217, at *2 (9th Cir. May 1, 1992) (analyzing the legality of aerial surveillance by considering, among other factors, the fact that the helicopter had not violated any laws or regulations and did not cause a disturbance). And litigants, perhaps unaware of the *Marks* rule, or perhaps hoping to exploit the confusion surrounding it, routinely cite one opinion or the other as controlling authority. *See, e.g.*, Van Strum v. Lawn, 927 F.2d 612, *4 (9th Cir. 1991) (unpublished table decision) (summarizing the State's argument, which was predicated entirely on the reasoning of the plurality opinion from *Riley*). A third group of circuit court decisions, perhaps recognizing the uncertainty as to the binding precedent, also avoid an application of the *Marks*

To recap, then, since the plurality decision was issued in 1989, not a single lower federal court has so much as attempted to apply the *Marks* rule so as to discern the binding precedent from the *Riley* plurality. Lower courts have mixed and sometimes combined the reasoning of the two opinions supporting judgment without any explanation for why one opinion or rationale might be more or less precedential than another. And yet, the Supreme Court has not intervened to provide guidance in the more than two decades since *Riley* was handed down. Lower courts considering the *Riley* precedent could, quite reasonably, conclude that the Court has left it for them to decide, a flexibility of result that the *Marks* rule would not, on the face of the opinion, permit. Assuming the Court is not likely a feckless or helpless victim of its own *Marks* precedent leads almost inevitably to the conclusion that the narrowest grounds formula represents a form of acoustic separation.

A second illustrative example of the problems plaguing lower court considerations of plurality precedent is *Missouri v. Seibert*,[288] a case addressing the scope of *Miranda* protections.[289] Since the plurality was handed down in 2004, the federal circuits have cited the case more than 130 times.[290] Of those approximately 130 decisions, only 25 cite or refer to the *Marks* rule.

Justice Kennedy concurred only in the judgment in *Seibert* and, perhaps anticipating the controversy that would engulf attempts to discern the decision's precedent, explicitly credited his concurrence with applying a "narrower test."[291] That is to say, Justice Kennedy appears to have attempted to declare his opinion, joined by only one other Justice, binding precedent under *Marks*.

The effort seems to have been fairly successful insofar as the vast majority of the lower courts that have applied *Marks* to *Seibert* have declared Justice Kennedy's concurrence as the "narrowest grounds."[292] But even in the face of a Justice describing his opinion as narrower, not all lower courts agree as to which opinion is truly the narrowest. Even with

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rule but apply both the rule set forth in Justice O'Connor's concurrence and the reasoning of the plurality opinion. United States v. Breza, 308 F.3d 430, 434 (4th Cir. 2002).

[288] 542 U.S. 600 (2004).

[289] *Id.* at 604.

[290] A Shepard's Report compiled on November 8, 2012 showed that federal circuits have positively "followed" *Seibert* 146 times.

[291] *Id.* at 622 (Kennedy, J., concurring).

[292] *See, e.g.*, United States v. Nunez-Sanchez, 478 F.3d 663, 668 n.1 (5th Cir. 2007) (applying the Kennedy standard when no *Miranda* rights were read); United States v. Ollie, 442 F.3d 1135, 1142–43 (8th Cir. 2006) (holding a written confession to be excluded under the Kennedy formulation); United States v. Williams, 435 F.3d 1148, 1157–58 (9th Cir. 2006) (holding that the Kennedy opinion only allows an inquiry into two-step interrogations deliberately used as a means to subvert *Miranda*); United States v. Kiam, 432 F.3d 524, 532 (3d Cir. 2006) (holding that the Kennedy standard is the rule for determining a *Miranda* violation).

guidance from the narrowest decision declaring itself to be precedential, some lower courts balk at the apparent infringement on their ability to innovate.

The Seventh Circuit, for example, has applied the *Marks* rule to *Seibert* and explicitly rejected the conclusion that Justice Kennedy's concurrence is the narrowest grounds.[293] The panel of three judges concluded that "[a]lthough Justice Kennedy provided the crucial fifth vote for the majority, we find it a strain at best to view his concurrence taken as a whole as the narrowest ground on which a majority of the Court could agree."[294] Similarly, the Tenth Circuit has observed that there is a reasoned basis for refusing to regard Justice Kennedy's concurrence as the "narrowest grounds" for the Court's holding.[295] Even the Supreme Court, when applying the *Seibert* precedent has avoided citing *Marks*, or conclusively defining Justice Kennedy's opinion as announcing the holding.[296]

In sum, lower courts do not appear to afford plurality precedent the same respect and faithful application as majority decisions. Pluralities are cited less favorably, and when they are relied upon there appears to be greater disagreement as to their meaning and application. Lower courts seem to understand that the *Marks* rule need not be applied as rigidly as the decision itself suggests; instead, there is reasonable room for innovation and flexibility on the part of lower courts applying plurality decisions.

VI. CONCLUSION

When a difficult question of plurality interpretation is at issue—that is, when the *Marks* rule has critical application—the rule does not provide meaningful guidance to lower courts. For decades, judges and lawyers have been pulling their hair out trying to make the narrowest grounds test more determinate. This Article, however, maintains that the greatest virtue of the *Marks* rule may be its indeterminacy. When the Supreme Court fails to achieve a majority rationale, the issue is likely to be one of particular complexity or political salience, and to afford non-majority reasoning the status of supreme law will, in certain instances, prove misguided. And yet,

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[293] United States v. Heron, 564 F.3d 879, 884 (7th Cir. 2009).

[294] *Id.* (concluding that *Marks* does not apply so as to create any precedent in this context).

[295] Notably, in its most recent case addressing the issue, the Tenth Circuit simply refused to answer the question as to which opinion is the narrowest grounds. United States v. Carrizales-Toledo, 454 F.3d 1142, 1151 (10th Cir. 2006) ("Determining the proper application of the *Marks* rule to *Siebert* is not easy, because arguably Justice Kennedy's proposed holding in his concurrence was rejected by a majority of the Court. . . . [But t]his case does not require us to determine which opinion reflects the holding of *Seibert*.").

[296] *See* Bobby v. Dixon, 132 S. Ct. 26, 31–32 (2011) (per curiam) ("Under *Seibert*, . . . significant break in time and dramatic change in circumstances created 'a new and distinct experience,' ensuring that . . . unwarned interrogation did not undermine the effectiveness of the *Miranda* warnings.").

for the Court to simply hold that in these compelling cases there is no precedent, would in the reasoned view of many scholars, erode the credibility of the Court.

The *Marks* formula, then, strikes the right balance through acoustic separation. The plain language of the *Marks* decision communicates to the public a confidence-preserving message that even non-majority decisions create binding precedent. But the technical, legalistic narrowest grounds formula, particularly as applied by the Court, seems to generate an opposing rule of legal flexibility that discerning lower courts and lawyers can embrace. As applied to lower courts, *Marks* spurs a dialectic jurisprudence that does not treat Supreme Court pluralities as the final or conclusive word on a legal issue. There is an external rule fit for public consumption, and there is an internal rule masked in legalese. In this way, the doctrine should be celebrated as achieving equilibrium between public expectations and pragmatic judicial decision-making principles. The narrowest grounds test leaves courts refreshingly free to innovate, experiment, and generally facilitate the sort of percolation that is appropriate as to issues that fractured the Supreme Court, but it does so without eroding public confidence in the Court. Public legitimacy and legal flexibility are generally in tension, but through acoustic separation the *Marks* rule is able to effectively reconcile these competing interests.