Routledge
Taylor & Francis Group

Justice System Journal

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/ujsj20

Invisible Constitutions: Concurring Opinions and Plurality Judgments under *Marks v. United States*

Albert H. Rivero, Ellen M. Key & Jeffrey A. Segal

To cite this article: Albert H. Rivero, Ellen M. Key & Jeffrey A. Segal (2022): Invisible Constitutions: Concurring Opinions and Plurality Judgments under *Marks v. United States*, Justice System Journal, DOI: 10.1080/0098261X.2022.2095943

To link to this article: https://doi.org/10.1080/0098261X.2022.2095943

Published online: 18 Jul 2022.

JUSTICE SYSTEM JOURNAL
https://doi.org/10.1080/0098261X.2022.2095943

Routledge
Taylor & Francis Group

Invisible Constitutions: Concurring Opinions and Plurality Judgments under *Marks v. United States*

Albert H. Rivero[a], Ellen M. Key[b], and Jeffrey A. Segal[c]

[a]Department of Politics, University of Virginia; [b]Department of Government and Justice Studies, Appalachian State University; [c]Department of Political Science, Stony Brook University

ABSTRACT

The Supreme Court's decision in *Marks v. United States* instructs lower courts interpreting plurality judgments to follow the opinion concurring on the narrowest grounds, or the opinion closest to the dissent, creating the possibility that the position of the Court may not be one favored by the median justice. While the *Marks* doctrine creates a problem theoretically, it is unclear how frequently these problems materialize. In this paper, we explore how frequently the *Marks* doctrine actually results in non-median outcomes. We conclude with thoughts about the importance of these cases and speculate about the future of the *Marks* doctrine.

KEYWORDS

Marks doctrine; narrowest grounds; non-median outcomes

Lower courts have an obligation to carry out the wishes of the Supreme Court. While the opinion language itself may facilitate or impede a lower court judge's ability to act as a faithful agent (Black et al. 2016), the *type* of decision may also create difficulty (Hitt 2019). In cases with a plurality judgment, the judge is left trying to determine which opinion should be considered controlling. The Supreme Court's decision in *Marks v. United States*[1] provides guidelines to lower courts on how to interpret plurality judgments by the Supreme Court, instructing judges to follow the opinion concurring on the narrowest grounds. The controlling opinion of the Court should be the one that includes the median position, since a lower court judge who follows a non-median position would be reversed if the decision were reviewed. Beyond this practical concern, adopting a non-median position poses a problem for our core democratic value of majority rule, and creates social choice issues when aggregating preferences. However, the *Marks* doctrine makes the controlling opinion the one decided on the narrowest grounds, which we understand to be the opinion closest to the position of the dissenters.[2] This creates the possibility that the position of the Court may not be one favored by the median justice.

While the *Marks* doctrine creates problems theoretically, it is unclear how frequently these problems materialize. The Supreme Court seems to recognize the potential difficulty lower courts face in identifying what constitutes the "narrowest grounds" but is reluctant to do anything to remedy it. When given the opportunity to clarify or modify *Marks*, the Court usually avoids the question. This happened most recently in *Hughes v. United States*,[3] itself the result of a fractured

CONTACT Ellen M. Key keyem@appstate.edu

[1]430 U.S. 188 (1977).

[2]The phrase "narrowest grounds" is itself ambiguous, as has been noted in previous research (e.g., Re 2019), but we show that the *Marks* doctrine still works poorly even when using what we believe to be the most workable interpretation of "narrowest grounds," which is the opinion closest to the position of the dissenters.

[3]138 S.Ct. 1765 (2018).

plurality opinion in *Freeman v. United States*.[4] In settling the circuit split in *Hughes*, the Court punted on the question of what to do when they can't get to 5 votes.

Previous theoretical and empirical work on doctrinal paradoxes assumes the median voter theorem is satisfied in unidimensional cases (Pauly and Van Hees 2006; Hitt 2019). In this paper, we show that this assumption is not always justified, because the *Marks* doctrine sometimes labels non-median outcomes as precedential. After using the spatial model of politics to define a theoretical problem with the *Marks* doctrine, we explore how frequently the *Marks* doctrine actually results in non-median outcomes in unidimensional cases. In so doing, we expand the universe of previously identified *Marks*-related decisions by including those unidimensional cases previously assumed to be free from *Marks* problems (e.g., Stearns and Zywick 2009). In the following pages, we briefly explain the history of opinion writing, describe the *Marks* doctrine and its associated problems, and discuss the 23 cases we identify as potentially creating non-median precedents under *Marks*. We conclude with thoughts about the importance of these cases and lower courts' reactions to them and speculate about the future of the *Marks* doctrine.

A Brief History of Opinion Writing

The earliest justices of the United States Supreme Court followed the British practice of writing opinions seriatim. In seriatim opinion writing, each justice writes separately, rather than having a single majority opinion that speaks for the Court. While it was possible to count the votes and determine which side won, seriatim opinion writing made it much more difficult for lower courts to determine the legal rules that the Supreme Court expected them to follow. Seriatim opinion writing ended abruptly when John Marshall became Chief Justice, with only seven sets of seriatim opinions delivered between 1801 and 1815 (Haskins and Johnson 1981).

With the end of seriatim opinion writing came majority opinions, from which justices could dissent if they disagreed with the outcome. Justices could also concur if they agreed with the outcome but disagreed with the reasoning in the majority opinion or wished to highlight something the majority opinion did not, even if they joined the majority opinion. Two different types of concurring opinions exist, with very different consequences. In a so-called "regular concurrence," the justice joins the majority opinion but adds a few words of his or her own. In a so-called "special concurrence," the concurring justice does not join the majority opinion. This, of course, sets up the possibility that the majority decision coalition will not end up with a majority opinion, but rather, a plurality judgment.

The first opinion of the Court came in *Olney v. Arnold*,[5] a duty dispute from Rhode Island in which there was a two-sentence statement labeled "By the court." That was followed by "The CHIEF JUSTICE then delivered the opinion of the Court on the first point, in consequence of which the judgment of the Superior Court of Rhode Island was *Affirmed*."

The first concurring opinions appeared seriatim in the first of the three *Georgia v. Brailsford* cases that the Court heard between 1792 and 1794.[6] Once the seriatim practice substantially ended in 1801, the possibility of plurality judgments would have existed whenever justices concurred with the result without joining the majority opinion. From 1796 through 1949, using the Supreme Court Database (Spaeth et al. 2019) and citation as the unit of analysis, we find that the Court issued one plurality judgment in the following 19th century Terms: 1810, 1813, 1841, 1849, 1853, 1870, and 1900. In the 20th century, the Court issued single plurality judgments in these

[4] 564 U.S. 522 (2011).
[5] 3 U.S. 308 (1796).
[6] 2 U.S. 402 (1792).

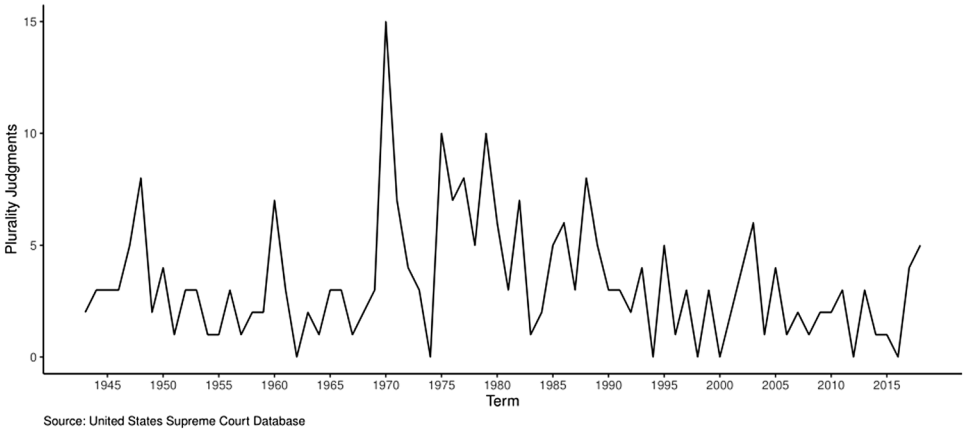

Figure 1: Plurality Judgments by Term, 1943-2018
Source: United States Supreme Court Database

terms: 1901, 1904, 1910, 1913, 1918, 1919, 1927, and 1938. Then, shortly after Harlan Fiske Stone ascended to the Chief Justice position, the number of plurality judgments rose dramatically, paralleling the rise in dissenting opinions (Walker, Epstein, and Dixon 1988). This increase may reflect changes in the Court's docket: previous empirical studies of plurality opinions have found constitutional cases and cases involving civil rights and liberties are more likely to produce plurality judgments (Corley et al. 2010; Spriggs and Stras 2011). The rise in plurality judgements has also been attributed to changes in leadership (Walker, Epstein, and Dixon 1988) and institutional norms (Caldeira and Zorn 1998). Figure 1 presents the number of plurality judgments per term beginning in 1943, the first term with two plurality judgments. The number of such judgments has generally been low, with spikes in the 1970 Term and a higher-than-average rate through the 1988 Term.[7]

The *Marks* Doctrine

The goal of Supreme Court decision-making rules is to confine social choice problems to narrow categories of cases. When interpreting plurality judgments, *Marks v. United States* offers the following guidance for lower courts: "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 the position taken by those Members who concurred in the judgments on the narrowest grounds …'"[8] To the extent that *Marks* provides a Condorcet winner – or the alternative that beats all others in pairwise competition – in the absence of a majority opinion, the rule has done its job in preventing preference aggregation issues (Stearns and Zywicki 2009).

We make three points about the guidance *Marks* offers: First, to the extent that this statement is simply the Court's inelegant way of stating that in plurality judgment cases, the position held by the median justice on that specific issue would be the holding of the Court, this is the only rule that makes any sense. Any other standard gives lower courts a doctrine for which there is a built-in majority to overrule.

Second, the *Marks* doctrine cannot literally be true. Previously, scholars treated *Marks* as posing a social choice problem only in multidimensional cases (Stearns 2000; Hitt 2019). We argue

[7]We thank an anonymous reviewer for noticing that this roughly corresponds with Warren Burger's tenure as Chief Justice; thus, it is possible that his leadership style may have played a role in the more fractured coalitions of this period.
[8]430 U.S. 188, 193 (1977).

Table 1. Level of Scrutiny Employed by USCA Judges in Abortion Cases, 1976-2006

	Pre-*Webster*				Post-*Webster*/Pre-*Casey*				Post-*Casey*			
Scrutiny Level	Dems	prop.	Reps	prop.	Dems	prop.	Reps	prop.	Dems	prop.	Reps	prop.
Other/No Mention	76	0.484	88	0.561	7	0.412	16	0.444	58	0.483	74	0.423
Rational Basis	19	0.121	20	0.127	1	0.059	7	0.194	0	0.000	3	0.017
Undue Burden	30	0.191	24	0.153	**4**	**0.235**	**6**	**0.167**	**62**	**0.517**	**98**	**0.560**
Strict Scrutiny	**32**	**0.204**	**34**	**0.217**	5	0.294	7	0.194	0	0.000	0	0.000
	157		166		17		36		120		175	

Source: Maxwell H.H. Mak, Hierarchical Constraints and the Choices Judges Make: Judicial Decision-Making at the U.S. Courts of Appeals, PhD Dissertation, Stony Brook University, 2009. Appropriate level of scrutiny for regulations that apply throughout the pregnancy in bold (and by current authors).

preference aggregation problems can arise even in "normal," or unidimensional cases, resulting in heretofore unidentified decisions that pose issues for the democratic norm of majority rule by privileging minority positions over those preferred by a majority of the Court. Consider, for example, a hypothetical incorporation case. The Court votes 7-2 to apply federal constitutional protections to the right in question in the case at hand. Two of the justices hold that all provisions of the Bill of Rights shall be incorporated as Black did in *Adamson v. California*.[9] Three more hold that the proper test is selective incorporation, as in *Palko v. Connecticut*.[10] The two remaining justices in the decisional majority reject incorporation of any amendments per se and prefer the "shocks the conscience test" enunciated by Frankfurter in *Rochin v. California*.[11] Those justices could try to negotiate an agreement with the selective incorporation justices that would come as close as possible to their policy preferences (Epstein and Knight 1997), or, under the *Marks* doctrine, they could simply write a special concurrence that would in fact be the holding of the Court as they would have concurred in the judgment on the narrowest grounds. If this happens, the Court has then accepted a doctrinal choice that grants, from left to right, the sixth and seventh justices on that issue the ability to establish the holding of the Court. It also creates an incentive for justices closest to the dissenters to write special concurrences rather than negotiate over joining a majority opinion with the coalition that includes the median. Below we investigate whether this doctrinal problem with Marks is, in fact, an empirical problem as well.

Third, we note that lower courts had a very difficult time understanding the importance of the *Marks* doctrine, even in highly salient cases and even when it was in their best interest to do so (see also Hitt 2019). Consider *Webster v. Reproductive Services*.[12] In *Webster*, four justices—Blackmun, Brennan, Marshall, and Stevens—voted to strike all of Missouri's abortion regulations under *Roe's* compelling-interest standard. Three other justices—White, Kennedy, and Scalia—joined Justice Rehnquist in upholding all of the provisions of the Missouri statute under the rational-basis test. Justice Scalia, in fact, would have gone further and overturned *Roe*, but the focus of our inquiry now is Justice O'Connor, who concurred separately to restate her preference for the "undue burden test" that she enunciated in her dissenting opinion in *Akron v. Akron Center for Reproductive Health*.[13] Thus, on the issue as to the proper standard for considering abortion regulations that apply to all stages of pregnancy, there was no majority position. From right to left, one justice wanted *Roe* overturned, three justices wanted a rational basis test, Justice O'Connor preferred "undue burden" and four justices wanted to stick with "compelling interest."

Under the *Marks* doctrine, Justice O'Connor was clearly the justice concurring on the narrowest grounds. Given the importance of the case, it should have been obvious to lower court judges, particularly conservative lower court judges, that the new standard for reviewing abortion

[9]332 U.S. 46, 68 (1947) (Black, J., dissenting).
[10]302 U.S. 319 (1937).
[11]342 U.S. 165 (1952).
[12]492 U.S. 490 (1989).
[13]462 U.S. 416 (1983).

regulations was no longer the compelling interest test of Roe but the "undue burden" test of *Casey*. While it is not surprising that presumptively liberal Court of Appeals judges appointed by Democratic presidents missed this opportunity to switch from compelling interest to undue burden, it is astounding that presumptively conservative Court of Appeals judges appointed by Republican presidents missed this opportunity, but those are among the relevant findings of Mak's (2009) examination of Court of Appeals abortion decisions following *Roe* and through 2006, displayed in Table 1. It is especially astounding when we consider that O'Connor was both the median justice on this issue and the justice concurring on the narrowest grounds; if lower court judges have difficulty interpreting *Marks* even in this circumstance, it is likely a bigger problem when the opinion concurring on the narrowest grounds does not reflect the position of the median justice.

Interestingly, one of the few Republican judges who was able to figure this out was Samuel Alito, whose panel applied the undue-burden test when it heard the *Casey* case prior to it making its way to the Supreme Court. As he declared at his confirmation hearing: "our panel, after some effort, determined under the *Marks* standard for determining what the holding of a case is when there's no majority opinion, that the standard was the Undue Burden Standard. And there just wasn't a lot to go on. […] I looked for whatever guidance I could find."[14]

The Problems with *Marks*

The *Marks* doctrine creates several theoretical issues along with practical problems of implementation for lower courts as well as the Supreme Court. Political scientists have studied the conditions under which justices will choose to join an opinion or write separately. These calculations are a result of a strategic process and have been attributed to bargaining over opinion content (Epstein and Knight 1998), ideological heterogeneity of the non-joining coalition (Maltzman et al. 2000), the size of the coalition (Maltzman et al. 2000), the collegial game (Wahlbeck et al. 1999), issue salience (Corley et al. 2010), and disagreement at the lower court level (Corley et al. 2010). The motivation to write or join a concurrence also varies depending upon the type of concurrence (Corley 2010). Although plurality opinions weaken the force of an opinion (Ray 1990; Corley et al. 2010), there may be more benefits to the opinion writer from not going along with the majority (Black and Owens 2012; Beim et al. 2016). Special concurrences in particular are a way of winning on both dispositional and doctrinal grounds (Maveety, Turner, and Way 2010). The study of plurality opinions is useful for several reasons: these cases are disproportionately important, they create confusion and possibly noncompliance in lower courts, and they are a useful real-world example for studying problems in collective decision-making, which is a major concern of political science (Corley et al. 2010; Spriggs and Stras 2011).

While social scientists have studied why fragmented opinion coalitions occur, *Marks* has been critiqued by legal scholars on the basis of correctness, bargaining, and efficiency; it has been critiqued by judges and justices on similar bases. Briefly, by giving precedential value to minority viewpoints, *Marks* increases the likelihood of legally incorrect decisions compared to decisions where more justices agree (Re 2019; Toepfer 2021).

Similarly, by privileging the "narrowest" opinion, *Marks* deters compromise and incentivizes opportunistic opinion writing. In other words, there is an incentive for justices to write separately rather than joining a coalition because *Marks* privileges minority opinions rather than majority rule.[15] This jockeying for the "narrowest" position in order to exploit the rules and have the

[14]*Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice on the Supreme Court of the United States*. 109th Congress, p. 508.

[15]The three dissenters in *Ramos v. Louisiana*, 391 U.S. 145 (2020) note how a single justice's opinion can be controlling under *Marks*.

controlling opinion is dubbed "*Marks*-conscious judging" (Toepfer 2021; see also Gould 2021, 117–18). An example of *Marks*-conscious judging can be found in the first footnote of the concurrence in *June Medical Services LLC v. Russo*[16] where Justice Roberts notes the application of *Marks* to *Casey*.[17] Justices may also overtly describe their opinions as narrower than others in an attempt to induce other courts to follow their opinion,[18] as Kennedy did in his concurrence in *Missouri v. Seibert*.[19] With an incentive structure that privileges strategic opinion writing over cooperation, there is less motivation for justices to join opinions verses writing separately (Gould 2021).

Marks also creates costs and inefficiencies for lower courts that must determine what the narrowest opinion is. Lower court judges who wish to avoid reversal face problems applying the *Marks* standard.[20] As we shall see, *Marks* sometimes appears to require lower court judges to take a position that, if considered by the Supreme Court, would lead to reversal even without any changes in the Court's composition. Two different problems of this kind exist with the *Marks* doctrine, depending on whether the concurrences fall along the same dimension as the plurality and dissenting opinions. First, if they do not, the *Marks* doctrine falls apart, for we cannot determine who has concurred on the narrowest grounds. *Freeman v. United States*[21] confronted the justices with the following question: if the United States Sentencing Guidelines are retroactively reduced, but a criminal defendant had agreed to a sentence in the previous, higher range as part of a plea deal, can the defendant move to have his or her sentence reduced under 18 U.S.C. § 3582(c)(2)? Justice Kennedy, writing for four justices, concluded that a defendant in such a circumstance can move for such a reduction so long as "the judge's decision to accept the plea and impose the recommended sentence" was "based on the Guidelines," noting that this "likely" would be the case.[22] Justice Sotomayor, writing for herself, reasoned that the relevant factor is not the judge's considerations when deciding whether to accept a plea deal, but rather whether the plea agreement itself was "based on" the Sentencing Guidelines, in which case moving for reduction is appropriate.[23] Roberts, writing for four justices, dissented; he rejected both approaches.[24] One cannot line these opinions up in a single dimension, because Sotomayor's approach is not a subset of Kennedy's (or vice versa). A judge's decision to accept a plea could be "based on" the guidelines even if the agreement was not; conversely, the agreement could be based on the guidelines while the judge accepted the plea and imposed the sentence based on other considerations.[25] In this scenario, *Marks* is simply indeterminate; a lower court judge cannot know which position would survive future Supreme Court review.

Second, while research has noted that plurality judgments can pose difficulties in the presence of multidimensionality (Hitt 2019), the difficulties in applying *Marks* do not go away if one can line up the concurrences along a single dimension. The problem with *Marks* in the unidimensional case will be the main focus for our analysis. For this problem to establish itself, several criteria must be met. First, the Supreme Court must issue a plurality judgment rather than a majority opinion, triggering the application of the *Marks* rule. Second, in addition to the judgment of the Court, there must be two or more opinions concurring in the judgment. If there is

[16]591 U.S. ___ (2020).
[17]505 U.S. 833 (1992).
[18]See Re (2019) for a discussion of success using this tactic.
[19]542 U.S. 600 (2004).
[20]See Boyd (2015a; 2015b) for a more general discussion of strategic opinion writing by lower court judges to insulate themselves from reversal.
[21]564 U.S. 522.
[22]*Id.* at 534 (plurality opinion).
[23]*Id.* (Sotomayor, J., concurring in the judgment).
[24]*Id.* at 544 (Roberts, C.J., dissenting).
[25]See Steinman (2008) for an argument that *Freeman* falls into a general case of "biconditional rules," which preclude one opinion from being a subset of another.

only one concurring opinion, the one decided on the narrower grounds would presumably include the median on that issue.[26] Third, in a liberal (conservative) decision, on a left to right (right to left) scale, with the justices' positions ranked from 1-9, the sixth, seventh or eighth justice must concur separately from the 5th justice. If all these events happen, then the holding of the Court, according to *Marks,* is the position of either the sixth, seventh or eighth justice.

Not only does this scenario introduce a dilemma for lower court judges (whether to follow the narrowest opinion as the language of *Marks* suggests or follow the median opinion), this also poses a problem from the Supreme Court's perspective. The high Court likely already faces considerable problems in ensuring lower court compliance in cases with plurality judgments. Scholars have found that opinions with larger majority coalitions (Benjamin and Desmarais 2012) are less likely to be cited negatively by lower courts, while plurality opinions are more likely to be cited negatively (Corley 2009). In addition, unanimous opinions that overturned precedent are more likely to be followed by lower courts than non-unanimous opinions (Benesh and Reddick 2002). Thus, even before introducing the scenario we describe, plurality judgments likely introduce problems with lower court compliance.

The legal literature has characterized the possible approaches to *Marks* in a slightly different way, without direct reference to the spatial model of politics. Williams (2017, 806–819) classifies three possible interpretations of *Marks*: "implicit consensus," "fifth vote," and "issue-by-issue." Using this schema, we think that the most natural reading of *Marks* in one dimension is the "implicit consensus" or "logical subset" approach, which Williams describes as when the opinions involve "logically nested rationales" (809) and which we would describe as involving opinions that can be placed on a unidimensional spectrum. Several circuit courts, including the Ninth and D.C. circuits, endorse this approach by applying *Marks* only in cases where one opinion is a logical subset of the other opinions (Re 2019; Toepfer 2021).[27] However, under this reading the *Marks* doctrine falls apart when there are multiple dimensions or, as Williams describes it, the opinions have "partially overlapping rationales" (810). Furthermore, this means that the *Marks* rule can lead to poor predictions of what the Supreme Court would likely do in a future case.

The "fifth vote" approach of Williams is the one that we advocate in the unidimensional case, but it is not a natural interpretation of the phrase "narrowest grounds."[28] This approach, also known as the "median opinion" approach, views the controlling precedent as the one endorsed by the median justice. This approach, which has been used by the Third and Seventh circuits, paradoxically allows a single justice's opinion to carry precedential weight even if the rest of the Court disagrees with their reasoning (Gould 2021; Re 2019; Toepfer 2021, Weins 2011).[29] Scholars including Stearns (2000) advocate for this approach in multidimensional issue cases as representing the Condorcet winner, however determination of such requires bundling issues to reduce the case to a unidimensional issue space (see also Stearns and Zywicki 2009).

Finally, the "issue-by-issue" approach, also known as the "all opinions" approach, considers all opinions written in a case, including the dissents, to identify the narrowest grounds as the position (if any) agreed upon by five justices (Williams 2017; Re 2019). "Issue-by-issue" presupposes multiple dimensions; we do not focus on this problem, but we agree that the rule of *Marks* does not provide easy guidance for cases with multiple dimensions. Given the difficulty in applying

[26]However, in this circumstance judges may still have trouble identifying which of the two opinions is the narrowest, as seen in *Webster*.

[27]To clarify the "implicit consensus" approach, consider a Venn diagram with three nested circles (see Williams 2017, 809). Under this approach, the narrowest grounds would be the smallest circle that is wholly contained within the other two circles.

[28]See Neuenkirchen (2013) for a defense of the "fifth vote" approach both as normatively desirable and as an interpretation of *Marks*. Neuenkirchen (2013, 408, n. 164) argues that the implicit consensus and fifth vote approaches are likely to prove similar in practice, although he notes a "hypothetical exception" where the implicit consensus could lead to the "sixth Justice's position" being controlling. We show that this is not merely hypothetical, but arises in multiple cases.

[29]This approach has been criticized by other courts, e.g., in *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991).

this approach and the weight given to dissents, the Third and Fifth circuits have expressly disavowed this reading of *Marks* (Toepfer 2021).

Data

Whether there are in fact cases that meet these criteria for potentially non-median precedents is an empirical question that we examine using the United States Supreme Court Database (1943-2018) (Spaeth et al. 2019). After eliminating cases with either five or more votes for the majority, fewer than two justices specially concurring, or no dissenting opinions, we were left with 209 cases. Next, we manually eliminated those cases where all specially concurring justices joined the same concurrence. We then sorted the remaining opinions in each case along a single dimension (see also Stearns and Zywicki 2009) or noted if there appeared to be a multidimensionality problem.[30] We did this not through a pre-existing spatial ordering of the justices' ideologies, such as Segal-Cover (1989) or Martin-Quinn (2002) scores, but rather by reading the opinions and making a judgment about the ordering of the opinions in a left-right space. Thus, we identified the median opinion in each case for the particular issue being considered by the Court. We also noted which opinion concurred on the narrowest grounds, which we define as the opinion of the plurality and concurring opinions that was closest to the dissent. We thus were able to determine for each of these cases whether the median opinion and the narrowest opinion were the same.

Some cases in our data avoided the problem with the *Marks* rule that we have identified. When there was a single issue and the median opinion was also the opinion that concurred on the narrowest grounds, applying *Marks* is straightforward, since the "narrowest grounds" test will also lead a lower court judge to select the position that the median Supreme Court justice prefers. This often occurred when there was a five-person decision coalition, which in a single dimension necessitates that the median opinion also be the narrowest.[31] Sometimes, there was more than one issue, but the opinions could easily be ordered issue-by-issue; a relatively common occurrence was when the plurality opinion represented the median of the Court on a pair of issues, with one concurrence agreeing with the plurality opinion on the first issue but not the second, and another concurrence agreeing on the second issue but not the first.[32]

However, we identified 23 cases where applying the *Marks* doctrine leads to treating a non-median opinion as binding precedent.[33] The method we employed should identify all the cases where the *Marks* doctrine poses this particular problem in one dimension (that is, when the concurrence on the narrowest grounds is not the median opinion).[34] We used our judgment in classifying which opinion is narrowest when it is ambiguous. Often it is not obvious whether one opinion is narrower than another, and we recognize that different readers of the opinions may

[30]Whether a case is unidimensional or multidimensional often depends on the framing of the issues. We do not claim that no case that we classify as unidimensional could possibly be classified as multidimensional. Rather, we claim that *even if* we classify these opinions as unidimensional to avoid the well-known multidimensionality problems of *Marks*, the *Marks* doctrine still creates problems in these cases.

[31]*E.g.*, *Ewing v. California*, 538 U.S. 11 (2003); *Holder v. Hall*, 512 U.S. 874 (1994); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

[32]*E.g.*, *LULAC v. Perry*, 548 U.S. 339 (2006); *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996); *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988). *Sun Oil* is an example of a case where the principal opinion is in fact styled as an "opinion of the Court," but which the Supreme Court Database categorizes as not receiving five votes; however, it does receive five votes on each issue, and thus does not pose a problem of interpretation under *Marks*.

[33]A list of all 23 cases where the median opinion and the narrowest opinion differ can be found in the Appendix.

[34]While this data collection method was designed to find all the cases where *Marks* poses problems in a single dimension, two of the cases we found raise difficulties for the *Marks* doctrine because of multidimensionality and one (*Troxel v. Granville*) was difficult to classify. That the designation of an opinion as the narrowest is not always straightforward is another problem in applying *Marks*; see the Appendix table for further discussion of the most complex cases.

come to different conclusions from us—the difficulty in classifying which opinion is "narrowest" is itself another problem with the *Marks* doctrine. We emphasize that the existence of the problem we focus on in this paper need not always depend on which opinion is deemed the narrowest, as multiple arrangements of opinions on a left-right spectrum would lead to non-median opinions being controlling.[35]

There may be additional cases where the *Marks* doctrine is problematic even with only a single concurrence, as may happen when there are two dimensions to a case (such as in *Freeman v. United States*, discussed above). Thus, our estimate of the cases where the *Marks* doctrine poses potential problems is certainly an underestimate.

Importance of the cases posing *Marks* problems

While the total number of cases that are problematic under *Marks* according to our criteria may appear low, these are an unusually important group of cases. Using the *New York Times* measure of case salience by Epstein and Segal (2000), which classifies a case as salient if it appeared on the front page of the *New York Times*, 48% of the *Marks* problem cases are salient whereas only 13% of the other cases in the modern Supreme Court Database are ($p < 0.05$).[36] Another measure described in Epstein and Segal (2000) is the Congressional Quarterly measure of salience; here a case is considered salient if it is listed in Congressional Quarterly's Guide to the Supreme Court (Savage 2010). When using that measure, 30% of the *Marks* problem cases are salient while only 5% of other cases are salient ($p < 0.05$). This is consistent with the general pattern found in Corley et al. (2010) that plurality decisions are more likely to be salient. While only 30% of the other cases involve judicial review, 61% of the cases posing problems under *Marks* do ($p < 0.05$); many of the cases that pose problems are First Amendment cases.[37]

Nor is it the case that the justices changed their opinion writing practices after the *Marks* decision came down to avoid the problem of non-median opinions potentially being precedential. After the 1976 Term, there was, in fact, a statistically insignificant *increase* in the percentage of cases decided by plurality opinion where the *Marks* rule would hold a non-median opinion to be precedential (5% in the 1946-1976 Terms, 9% in the 1977-2018 Terms). Thus, *Marks* not only provides the theoretical possibility that non-median opinions may be binding on lower courts, but in fact about one in ten cases decided by plurality opinion after *Marks* have an opinion concurring on the narrowest grounds that is not the median opinion. Recall too that the 9% number is an underestimate of all the potential difficulties in applying the *Marks* rule since *Marks* also poses the multidimensionality issue the Court ducked in *Hughes v. United States*.[38]

[35]Consider the following example: A majority coalition consists of a plurality of 4, a special concurrence supported by 2 (concurrence A), and another special concurrence supported by 2 (concurrence B). There is a single dissenter from the right. If the plurality is clearly the left-most opinion but it is ambiguous whether concurrence A or concurrence B is narrower, either selection would pose a problem under the *Marks* doctrine. If concurrence A is narrower, then there would be a majority coalition that would prefer the position of concurrence B to concurrence A, since concurrence B is therefore closer to the four-justice plurality. Similarly, if concurrence B is narrower, six justices would prefer the position of concurrence A, since concurrence A is closer to the four-judge plurality. Therefore, resolving this ambiguity would not solve the Marks problem we explore in this paper.

[36]All the mean comparisons are done with Welch's unequal variances *t*-test. These tests cover data from the 1946-2009 terms, for which the salience measures are available.

[37]*U.S. v. American Library Association*, 539 U.S. 194 (2003); *Ashcroft v. ACLU*, 535 U.S. 564 (2002); *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226 (1990); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *NLRB v. Retail Store Employees*, 447 U.S. 607 (1980); *Lathrop v. Donohue*, 367 U.S. 820 (1961).

[38]138 S.Ct. 1765 (2018).

Lower court struggles in applying *Marks* to these cases

Due to concerns about correctness and reversal, lower courts have increased their citations to *Marks* in an attempt to situate their decisions in the "narrowest grounds" logic (Re 2019). This increase in citations, however, has not led to more consensus in application of *Marks*, resulting in circuit splits and "*Marks* disputes," or disagreements among litigants over which position presents the narrowest grounds (Toepfer 2021; Weins 2011).[39]

Thus, it is no surprise that lower courts have struggled to apply *Marks* rule in the cases we found. By far, the most common response is to avoid citing *Marks* altogether (Re 2019). For example, *Baze v. Rees*[40] is a case on our list that has been interpreted by the federal courts with the most citations to *Marks*. As of 2018, the circuit courts have cited *Baze* and the *Marks* doctrine together in 5 cases, while *Baze* was cited overall in 137 cases (Re 2019, 1957). Similarly, both *Baze* and *Troxel v. Granville*[41] are among the most *Marks*'d cases by state appellate courts, with 3 and 5 citing cases referencing *Marks* versus 220 and 2898 citing cases overall respectively (Re 2019, 1963). As Re notes, "*Marks*-free citations to fragmented rulings may reflect implicit *Marks* applications, a lack of any need to engage *Marks*, or inattentive failures to apply the *Marks* rule" (2019, 1958). We suspect that this avoidance reflects the confusion inherent in the *Marks* standard. Categorizing all these implicit *Marks* applications would involve a great deal of subjectivity. We can, however, see if at the very least lower courts approach decisions in a consistent way when they more clearly engage with *Marks*.

However, in these cases, we find that lower courts have not taken a uniform approach when they engage squarely with *Marks*. Sometimes, as they have with *Baze*, they avoid the problem by employing a median opinion standard, even though that is a poor fit under the text of *Marks*. Other times, lower courts follow non-median opinions, which leaves a built-in majority to overturn the lower court. Furthermore, the confusion caused by this standard often leads to lower courts being unable to determine what is the "narrowest" opinion. The lack of clarity in *Marks* can lead to conflict among circuits or state courts, further increasing confusion. Thus, both across precedents and sometimes within precedents, the lower courts have not taken a consistent approach to these cases. A straightforward adoption of a median opinion standard by the Supreme Court would help alleviate these problems.

A possible way out of the *Marks* problem we have identified is to reframe the test from "narrowest grounds" to "narrowest grounds *necessary to secure a majority*."[42] Then, the opinion concurring in the narrowest grounds is simply ignored if it is not the median opinion. This has been used by the circuit courts to apply *Baze v. Rees*,[43] as noted by the 9th Circuit.[44] In *Baze*, the Court upheld Kentucky's lethal injection protocol. In the 9th Circuit case, a defendant challenging Arizona's lethal injection protocol argued that Stevens's approach in *Baze* was controlling. Stevens had upheld Kentucky's protocol based simply on his reading of precedent, making his approach narrower than both that of the plurality (Roberts with Kennedy and Alito) and Justice Thomas (joined by Scalia). The plurality's standard would find a lethal injection protocol unconstitutional only if it posed a "substantial risk of severe pain,"[45] while Thomas's would only strike it down if it was "deliberately

[39]See *Hughes v. United States*, 138 S.Ct. 1765 (2018) for an example of the circuit splits resulting from attempts to interpret *Freeman v. United States*, 564 U.S. 522 (2011). *Ramos v. Louisiana*, 391 U.S. 145 (2020) provides a good example of a "*Marks* dispute."

[40]553 U.S. 35 (2008).

[41]530 U.S. 57 (2000).

[42]*Planned Parenthood v. Casey*, 947 F.2d 682, 694 n. 7 (3d Cir. 1991). Of course, *Casey* itself was not a case where the median and narrowest opinion differed, so this portion of the circuit court opinion is dicta; it has rarely been cited for this proposition by other courts. (On Google Scholar as of 9/30/2021, a search within the citing cases for the 3rd Circuit's opinion in *Casey* for "necessary to secure a majority" only yields 7 results.)

[43]553 U.S. 35 (2008).

[44]631 F.3d 1139 (9th Cir. 2011).

[45]553 U.S. at 35 (plurality opinion).

designed to inflict pain."[46] While Stevens's opinion is clearly closer to the dissent than the plurality opinion, the 9th Circuit simply applied the plurality opinion, which was the median.[47] By turning the *Marks* standard into a median opinion standard, the 9th Circuit thus avoided the problems that arise when the narrowest concurrence is not the median.

However, lower court judges have not uniformly followed this approach, perhaps because it is an uncomfortable fit with the language of "narrowest grounds." Even regarding *Baze v. Rees* itself, the Florida Supreme Court stated that "there are no reliable means of determining the 'narrowest grounds' presented."[48] The Third Circuit simply noted that the plurality's position was narrower than that of Thomas and went on to apply that test without considering whether Stevens's or Breyer's positions were narrower still.[49] Thus, lower court judges sometimes follow the concurrence on the narrowest grounds even when it is not the median. For example, consider *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*,[50] in which the Court considered a challenge to a school policy "denying a student religious group permission to meet on school premises during noninstructional time."[51] The plaintiffs argued that this policy violated the Equal Access Act. The defendants argued that the policy was consistent with a proper interpretation of the statute, but if the statute were interpreted in the way the plaintiffs preferred, the statute would violate the Establishment Clause. The justices in the decision coalition split. O'Connor (joined by Rehnquist, White, and Blackmun) wrote an opinion representing the median position, with Kennedy and Scalia to her right and Marshall and Brennan to her left. All agreed that the statute applied and that it is did not violate the Establishment Clause on its face. While Kennedy and Scalia used a relatively government-friendly "coercion" test, which asks whether the government has forced the plaintiff into religious action, O'Connor used the more plaintiff-friendly test of whether the government has "endorsed" religion. Marshall and Brennan agreed that there was no facial constitutional violation but noted that there could be a violation as applied if Westside does not "disassociate [itself] effectively from religious clubs' speech."[52] O'Connor's position thus is the median, but Marshall's the narrowest. Therefore, a district court said (presumably applying *Marks*) that it would apply "the more exacting approach" of Marshall and Brennan, without noting that the government could have won in *Mergens* without Marshall and Brennan's votes.[53]

This has not always worked out well for lower court judges, however. One example involves *Teague v. Lane*,[54] where, *inter alia*, the petitioner on collateral review brought a Sixth Amendment claim that petit juries as well as jury venires are subject to the fair cross section requirement. Since the Court had previously held to the contrary,[55] this would amount to a "new rule;" the plurality opinion did not consider the Sixth Amendment claim since it held that new rules do not apply on collateral review except in rare circumstances. Justice Stevens would have ruled that since *Batson v. Kentucky*[56] was not applied retroactively in *Allen v. Hardy*,[57] this new rule should not apply retroactively either; however, he notes that absent this precedent, he would have ruled against the plurality and held that it would be fundamentally unfair not to apply the

[46] 533 U.S. at 1556 (Thomas, J., concurring in the judgment).
[47] 631 F.3d at 1145.
[48] *Ventura v. State*, 2 So.3d 194, 200 (Fla. 2009).
[49] *Jackson v. Danberg*, 594 F.3d 210, 222–23 (3d Cir. 2010). See also *Cooey v. Strickland*, 610 F.Supp.2d 853, 920–21 (S.D.Ohio 2009) (noting that while there was "no clear holding from *Baze*," nonetheless the instant case could be resolved because the intervening plaintiff would fail under any of the concurrences in *Baze*). The scholarly literature has also noted the problems with interpreting *Baze* under the "narrowest grounds" test. See Marceau (2009).
[50] 496 U.S. 226 (1990).
[51] *Id.* at 231.
[52] *Id.* at 263 (Marshall, J., concurring in the judgment).
[53] *Verbena United Methodist Church v. Chilton County*, 765 F. Supp. 704 (M.D. Ala. 1991).
[54] 489 U.S. 288 (1989).
[55] *Taylor v. Louisiana*, 419 U.S. 522 (1975).
[56] 476 U.S. 79 (1986).
[57] 478 U.S. 255 (1986).

rule retroactively. As has been noted by Thurmon (1992), Stevens's opinion in *Teague v. Lane* concurs in the narrowest grounds. Even though Stevens's opinion does not represent the opinion of the median, Thurmon notes that lower court judges in the Eleventh Circuit nonetheless faithfully applied *Marks* and took Stevens's opinion to be precedential; however, they were soon disabused of this notion when the Court started treating the plurality opinion in *Teague* as binding, in contradiction to *Marks* (1992, 441).[58]

Thus, lower court judges face two choices in these cases: follow the median opinion or attempt to follow the narrowest opinion even though it has a built-in Supreme Court majority that would reject it. As we can see with the examples of *Baze v. Rees* and *Teague v. Lane* above, lower courts have done both, so the *Marks* rule has not resulted in a uniform approach to these cases. Sometimes lower court judges come to divergent approaches in deciding how to apply a given precedent. For example, take *James B. Beam Distilling Co. v. Georgia*.[59] The issue in this case was whether *Bacchus Imports, Ltd. v. Dias*,[60] which held that Hawaii taxing out-of-state alcohol at a different rate from Hawaii-produced alcohol violated the dormant Commerce Clause, applies retroactively. Since the *Bacchus* rule applied in the case where it was announced, the plurality said it would constitute "selective prospectivity" (which the plurality thought inappropriate) not to apply the rule in subsequent cases. Scalia, joined by Marshall and Blackmun, rejected both the idea of "selective prospectivity" and "pure prospectivity" (where a rule is not applied in the progeny case nor in subsequent cases that arose before the progeny case). White, however, explicitly defended "pure prospectivity." The median opinion is that of the plurality (Souter, joined by Stevens), with Scalia, Marshall, and Blackmun concurring on broader grounds and White concurring on narrower grounds. In an example of how confusion around the *Marks* rule can lead to diverging interpretations among the circuits, one circuit said that *Beam* and related cases left "only an indistinct possibility of the application of pure prospectivity in an extremely unusual and unforeseeable case"[61] while another said "the Court has clearly retained the possibility of pure prospectivity" although acknowledging it has "fallen into disfavor."[62]

Sometimes, it is simply difficult to determine which opinion is "narrowest," in which case lower courts may try to duck the issue altogether. For example, one lower court opinion attempting to apply *Beam* mistakenly assumed that all the concurring justices agreed with Scalia, which would leave Souter with the narrowest opinion.[63] Or consider *Ashcroft v. ACLU*,[64] involving a facial challenge to the constitutionality of the Child Online Protection Act (COPA), with the plaintiff claiming that the "community standards" test violates the First Amendment. Thomas wrote for the three-justice plurality holding that the statute was not facially unconstitutional, but several justices wrote narrower concurrences. O'Connor wrote separately to note the possibility of as-applied challenges, Breyer argued that the phrase "community standards" refers to a national rather than local standard, and Kennedy (joined by Souter and Ginsburg) left open the possibility that the statute, considered as a whole, may be found to be overbroad on remand. While Kennedy's opinion appears to be the narrowest, leaving the most for the lower court to resolve and providing the greatest possibility that the statute may ultimately be found unconstitutional,

[58]It is worth noting that the median opinion in *Teague* appears to be that of White, not the plurality; White noted that he believed Court had made serious mistakes in its retroactivity jurisprudence and simply called the plurality's approach "an acceptable application" of the line of precedent that he would presumably wish to revisit. 489 U.S. at 317 (White, J., concurring in part and concurring in the judgment). Since White's approach essentially approves of the plurality's standard without explicitly joining it, a judge who followed White's opinion would have better predicted the future behavior of the Supreme Court than one who followed Stevens's opinion.

[59]501 U.S. 529 (1991).

[60]468 U.S. 263 (1984).

[61]*Hulin v. Fibreboard Corp.*, 178 F.3d 316, 333 (5th Cir. 1999).

[62]*Glazner v. Glazner*, 347 F. 3d 1212, 1216 (11th Cir. 2003).

[63]*Misciagno v. Secretary of DHHS*, 786 F. Supp. 1120 (E.D. N.Y. 1992).

[64]535 U.S. 564 (2002).

determining which opinion is the narrowest is not an easy analysis. Thus, when attempting to apply *Ashcroft v. ACLU*, the Ninth Circuit noted that O'Connor, Breyer, and Kennedy all wrote narrower opinions than Thomas, but instead of attempting to determine which of those opinions was controlling, it simply noted a point of disagreement that they all shared regarding Thomas's opinion and moved on.[65] Thus, lower court judges have had difficulty applying the *Marks* doctrine to the cases we have identified and have not approached the cases in a uniform way.

Conclusion

While purporting to remedy confusion about how to interpret plurality opinions, the *Marks* doctrine has done the opposite. Now judges must determine which opinion is decided on the "narrowest grounds," something we have shown is far more easily said than done and about which there is substantial disagreement. This confusion may affect actors other than lower court judges as well, such as government officials, administrative agencies, or private actors who must comply with Supreme Court decisions. Beyond the problems of interpretation, *Marks* creates a problem of social choice, where non-median positions are controlling even though a majority of the Court disagrees with that position. In other words, the *Marks* doctrine compounds, rather than eliminates, problems stemming from fractured opinion coalitions. This heightens the incentives for strategic justices to position their views as the "narrowest" opinion even if not the median; it also potentially increases the bargaining position for justices threatening to issue a special concurrence in order to gain concessions from other justices in the decision coalition.

Although we find non-median outcomes under *Marks* in only 23 cases, these cases are far more important than the average case on the Supreme Court's docket. This raises the concern that *Marks* may facilitate ideological voting in these high salience cases. While we do not explore the possibility here, scholars find evidence that policy preference-based voting increases when the signal from the Supreme Court is ambiguous (Corley 2009; Novak 1980; Berry, Kochan, and Parlow 2007). Consistent with Corley (2009), it is plausible that lower court difficulty in identifying the narrowest grounds provides these judges with cover to vote for their preferred position rather than the "correct" position according to *Marks*. That is, by creating confusion about interpretation, *Marks* may allow lower court judges a vehicle by which they can avoid applying precedent they do not like by identifying the opinion they most prefer as the one decided on the narrowest grounds.[66]

Given the problems identified above with the *Marks* doctrine, is it likely the Court will take steps to revise the rule? We have our doubts, particularly in light of the recent decision in *Hughes v. United States*.[67] It is not simply that the justices are unaware of the problem. Much of the oral argument in *Hughes* was spent debating *Marks*. However, rather than using the case as an opportunity to clarify *Marks*, the Court instead skirted the issue, with Justice Sotomayor abandoning her previous position and siding with the majority in the interest of creating "clarity and stability" in the law.[68] This shift and Kennedy's subsequent refusal to engage with the *Marks* issue turned what would have been an extremely significant case affecting all issue areas into a more pedestrian issue of statutory interpretation.

[65] *U.S. v. Kilbride*, 584 F.3d 1240, 1254–55 (9th Cir. 2009). The opinion stated that *Ashcroft* had "no explicit holding" but noting that "five Justices concurring in the judgment, as well as the dissenting Justice, viewed the application of local community standards in defining obscenity on the Internet as generating serious constitutional concerns."

[66] The Eleventh Circuit's misprediction of *Teague v. Lane* (see Thurmon 1992) in at least one panel may reflect ideological distance between the panel and the Supreme Court. Consider *Hall v. Kelso*, 892 F.2d 1541 (11th Cir. 1990). The panel, while majority Republican, contained two Republican judges well known for their support of civil rights in the South following *Brown v. Board of Education* (Elbert P. Tuttle and Frank M. Johnson, Jr.) (see Bass 1981). The Rehnquist-era Supreme Court thus likely sat to the right of this panel.

[67] 138 S.Ct. 1765 (2018).

[68] Justice Sotomayor was the lone concurrence in a 4-1-4 decision in *Freeman v. United States*, 564 U.S. 522 (2011).

We can only speculate as to why the Court remains unwilling to engage with *Marks*. It may be that the justices enjoy the freedom the doctrine gives themselves and other judges to select the narrowest opinion. The empowering of individual justices, discussed by Gould (2021), may help explain why it has been difficult for the Court to come up with an alternative to *Marks*, given that some justices may anticipate less influence under a different system. There may not also be a shared understanding among the justices of what *Marks* currently requires, which may make it hard to generate a consensus about what would be a superior replacement.[69] Furthermore, the justices may not always value clarity. While it is easier for others to follow clear opinions, that only works if you're facing a favorable audience. Staton and Vanberg (2008) note that justices write vague opinions when faced with hostile interpreting or implementing populations. Finally, and perhaps most likely, the justices may refuse to engage with *Marks* for a more pragmatic reason: establishing broad yet clear decision rules is quite difficult. "[L]aw is part art and part science," Justice Breyer noted during oral argument in *Hughes*.[70] "[I]f you ask me to write something better than *Marks*, I don't know what to say […] [T]hey've done all right with *Marks*. Leave it alone."[71] Despite the significant theoretical and empirical problems with the *Marks* doctrine, the Court appears to be following Breyer's advice.

ORCID

Albert H. Rivero http://orcid.org/0000-0002-9669-8452

References

Bass, Jack. 1981. *Unlikely Heroes*. New York: Simon and Schuster.

Beim, Deborah, Alexander V. Hirsch, and Jonathan P. Kastellac. 2016. "Signaling and Counter-Signaling in the Judicial Hierarchy: An Empirical Analysis of En Banc Review." *American Journal of Political Science* 60: 490–508. doi: 10.1111/ajps.12193.

Benesh, Sara C., and Malia Reddick. 2002. "Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent." *The Journal of Politics* 64(2): 534–550. doi: 10.1111/1468-2508.00138.

Benjamin, Stuart Minor, and Bruce A. Desmarais. 2012. "Standing the Test of Time: The Breadth of Majority Coalitions and the Fate of U.S. Supreme Court Precedents." *Journal of Legal Analysis* 4(2): 445–469. doi: 10.1093/jla/las016.

Berry, Melissa M., Donald J. Kochan, and Matthew Parlow. 2007. "Much Ado About Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and a Re-Percolation After *Rapanos*." *Virginia Journal of Social Policy and the Law* 15: 299.

Black, Ryan C., and Ryan J. Owens. 2012. "Consider the Source (and the Message): Supreme Court Justices and Strategic Audits of Lower Court Decisions." *Political Research Quarterly* 65(2): 385–395. doi: 10.1177/1065912910395324.

Black, Ryan C., Ryan J. Owens, Justin Wedeking, and Patrick C. Wohlfarth. 2016. *U.S. Supreme Court Opinions and Their Audiences*. Cambridge University Press.

Boyd, Christina L. 2015a. "Opinion Writing in the Federal District Courts." *Justice System Journal* 36(3):254–273. doi: 10.1080/0098261X.2014.989790.

Boyd, Christina L. 2015b. "The Hierarchical Influence of Courts of Appeals on District Courts." *The Journal of Legal Studies* 44(1): 113–141. doi: 10.1086/680993.

Caldeira, Gregory A. and Christopher J.W. Zorn. 1998. "Of Time and Consensual Norms in the Supreme Court." *American Journal of Political Science* 42(3): 874–902. doi: 10.2307/2991733.

Corley, Pamela C. 2009. "Uncertain Precedent: Circuit Court Responses to Supreme Court Plurality Opinions." *American Politics Research* 37(1): 30–49. doi: 10.1177/1532673X08319951.

[69]For example, in *Ramos*, Justice Alito writing in dissent states that if an opinion representing the views of only one justice is the narrowest, that opinion can overturn a prior Supreme Court precedent, 140 S.Ct. 1390, at 1431, while Justice Gorsuch's plurality opinion disagrees, *id.* at 1403–04. Perhaps not surprisingly, given the topic, neither justice had five votes for his position.

[70]Transcript of Oral Argument at 32, *Hughes v. United States*, 138 S.Ct. 1765 (2018) (No. 17-155).

[71]*Id.* at 33-34.

Corley, Pamela C. 2010. *Concurring Opinion Writing on the U.S. Supreme Court*. Albany: SUNY Press.
Corley, Pamela C., Udi Sommer, Amy Steigerwalt, and Artemus Ward. 2010. "Extreme Dissensus: Explaining Plurality Decisions on the United States Supreme Court." *Justice System Journal* 31(2): 180–200.
Epstein, Lee, and Jack Knight. 1998. *The Choices Justices Make*. Washington, D.C.: Congressional Quarterly Press.
Epstein, Lee, and Jeffrey A. Segal. 2000. "Measuring Issue Salience." *American Journal of Political Science* 44(1): 66–83. doi: 10.2307/2669293.
Gould, Jonathan D. 2021. "Rethinking Swing Voters." *Vanderbilt Law Review* 74: 85–142.
Haskins, George L. and Herbert A. Johnson. 1981. *History of the Supreme Court of the United States: Foundations of Power: John Marshall 1801-15*. New York: Macmillan Publishing.
Hitt, Matthew P. 2019. *Inconsistency and Indecision in the United States Supreme Court*. Ann Arbor: University of Michigan Press.
Mak, Maxwell H.H. 2009. "Hierarchical Constraints and the Choices Judges Make: Judicial Decision-Making at the U.S. Courts of Appeals." PhD Dissertation, Stony Brook University.
Maltzman, Forrest, James F. Spriggs, II, and Paul J. Wahlbeck. 2000. *Crafting Law on the Supreme Court: The Collegial Game*. New York: Cambridge University Press.
Marceau, Justin F. 2009. "Lifting the Haze of *Baze*: Lethal Injection, the Eighth Amendment, and Plurality Opinions." *Arizona State Law Journal* 41: 159–222.
Martin, Andrew D., and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999." *Political Analysis* 10(2): 134–53. doi: 10.1093/pan/10.2.134.
Maveety, Nancy, Charles C. Turner, and Lori Beth Way. 2010. "The Rise of the Choral Court: Use of Concurrence in the Burger and Rehnquist Courts." *Political Research Quarterly* 63(3): 627–639. doi: 10.1177/1065912908330345.
Neuenkirchen, John P. 2013. "Plurality Decisions, Implicit Consensuses, and the Fifth-Vote Rule under *Marks v. United States*." *Widener Law Review* 19(2): 387–436.
Novak, Linda. 1980. "The Precedential Value of Supreme Court Plurality Decisions." *Columbia Law Review* 80: 756. doi: 10.2307/1122139.
Pauly, Marc and Martin Van Hees. 2006. "Logical Constraints on Judgement Aggregation." *Journal of Philosophical Logic* 35: 569–585. doi: 10.1007/s10992-005-9011-x.
Ray, Laura Klugman. 1990. "The Justices Write Separately: Uses of the Concurrence by the Rehnquist Court." *University of California, Davis Law Review* 23: 777–831.
Re, Richard M. 2019. "Beyond the *Marks* Rule." *Harvard Law Review* 132: 1942–2008.
Savage, David. 2010. *Guide to the U.S. Supreme Court*, 5th ed. Washington, D.C.: CQ Press.
Segal, Jeffrey A., and Albert D. Cover. 1989. "Ideological Values and the Votes of U.S. Supreme Court Justices." *The American Political Science Review* 83(2): 557–65. doi: 10.2307/1962405.
Spaeth, Harold J., Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger, and Sara C. Benesh. 2019 Supreme Court Database, Version 2019 Release 01. URL: http://Supremecourtdatabase.org.
Spriggs, James F., II, and David R. Stras. 2011. "Explaining Plurality Decisions." *Georgetown Law Journal* 99: 515–570.
Stearns, Maxwell L. 2000. "The Case for Including *Marks v. United States* in the Canon of Constitutional Law." *Constitutional Commentary* 17: 321–339.
Stearns, Maxwell L., and Todd Zywicki. 2009. *Public Choice Concepts and Applications in Law*. West Publishing.
Steinman, Adam. 2018. "Nonmajority Opinions and Biconditional Rules." *Yale Law Journal Forum* 128: 1–21.
Staton, Jeffrey K., and Georg Vanberg. 2008. "The Value of Vagueness: Delegation, Defiance, and Judicial Opinions." *American Journal of Political Science* 52(3): 504–19. doi: 10.1111/j.1540-5907.2008.00326.x.
Thurmon, Mark Alan. 1992. "When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions." *Duke Law Journal* 42: 419–68. doi: 10.2307/1372807.
Toepfer, Owen P. 2021. "*June Medical* and the *Marks* Rule." *Notre Dame Law Review* 96: 1725–1754.
Wahlbeck, Paul J., James F. Spriggs, II, and Forrest Maltman. 1999. "The Politics of Dissents and Concurrences on the U.S. Supreme Court." *American Politics Research* 27(4): 488–514. doi: 10.1177/1532673X99027004006.
Walker, Thomas G., Lee Epstein, and William J. Dixon. 1988. "On the Mysterious Demise of Consensual Norms in the United States Supreme Court." *The Journal of Politics* 50(2): 361–89. doi: 10.2307/2131799.
Weins, W. Jesse. 2011. "A Problematic Plurality Precedent: Why the Supreme Court Should Leave *Marks* over *Van Orden v. Perry*." *Nebraska Law Review* 85: 830–874.
Williams, Ryan C. 2017. "Questioning *Marks*: Plurality Decisions and Precedential Constraint." *Stanford Law Review* 69: 795–8.

Appendix: Cases Where the Median Opinion and the Narrowest Opinion Differ

Citation	Case Name	Median	Narrowest Concurrence
553 U.S. 35	*Baze v. Rees*	Roberts	Stevens or Breyer[72]
539 U.S. 194	*U.S. v. American Library Association*	Kennedy	Breyer
538 U.S. 644	*Pharmaceutical Research and Mfrs. of America v. Walsh*	Stevens	Breyer
535 U.S. 564	*Ashcroft v. ACLU*	Breyer	Kennedy
530 U.S. 57	*Troxel v. Granville*	Unclear[73]	
510 U.S. 266	*Albright v. Oliver*	Kennedy	Souter[74]
509 U.S. 443	*TXO Production Corp. v. Alliance Resources Corp.*	Stevens	Kennedy
501 U.S. 529	*James B. Beam Distilling Co. v. Georgia*	Souter	White
496 U.S. 226	*Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*	O'Connor	Marshall
490 U.S. 228	*Price Waterhouse v. Hopkins*	White[75]	O'Connor
489 U.S. 288	*Teague v. Lane*	White	Stevens
476 U.S. 898	*Attorney General of NY v. Soto-Lopez*	Burger	White
448 U.S. 555	*Richmond Newspapers, Inc. v. Virginia*	Burger	Stewart
447 U.S. 607	*NLRB v. Retail Store Employees*	Blackmun	Stevens[76]
446 U.S. 55	*Mobile v. Bolden*	Blackmun	Stevens (for one issue)[77]
438 U.S. 637	*Bell v. Ohio*	Burger	Blackmun
438 U.S. 586	*Lockett v. Ohio*	Burger	Blackmun
430 U.S. 144	*United Jewish Organizations of Williamsburgh, Inc. v. Carey*	Stewart	White (Parts II and III)
406 U.S. 759	*First Nat. City Bank v. Banco Nacional de Cuba*	Powell[78]	
401 U.S. 667	*Mackey v. United States*	Harlan	Brennan
401 U.S. 646	*Williams v. United States*	White	Brennan (and arguably Harlan on the collateral review issue)
367 U.S. 820	*Lathrop v. Donohue*	Brennan[79]	
338 U.S. 49	*Watts v. Indiana*	Frankfurter	Jackson[80]

[72]Either Stevens's opinion (casting doubt on the death penalty altogether) or Breyer's (adopting the dissent's test) is the narrowest.

[73]It is unclear what the narrowest ground is here. Souter presents his opinion as being narrower because it avoids wading into the substantive due process issue, but in doing so he strikes down the law in a broader way (facially rather than as-applied). It is also unclear how to order the opinions in a unidimensional way. In fact, there appear to be two dimensions here: comfort with substantive due process as a rationale and decision on the constitutionality of the statute.

[74]When ordering the opinions, it is not entirely clear which of Kennedy's or Souter's should be considered narrower; Kennedy focuses on the availability of state tort action for malicious prosecution (leaving open that the absence of such a tort would present a different case), while Souter argues that the plaintiff's claims are actually based in the Fourth Amendment (leaving open that if the claims genuinely did not arise from a search or seizure, there may be a due process claim). Whichever is placed to the right leaves the other opinion as the median. This may well simply be a case of multidimensionality, which *Marks* also does not handle well.

[75]However, White is vague as to whether he disagrees with O'Connor in any significant way.

[76]It is not entirely clear how Blackmun and Stevens differ, but whichever one is narrower leaves the other one as the median; this is thus a problem under *Marks*, albeit a trivial one.

[77]There are two dimensions here: whether the appropriate standard is objective or subjective and whether there was purposeful discrimination in this case. Blackmun falls into the median on both (refusing to answer the question of whether disparate impact would suffice and finding that there was purposeful discrimination but that the remedy was improper). On the second, he concurred on the narrowest grounds, but on the first, Stevens was actually closer to (at least some of) the dissenters.

[78]Powell's opinion appears to be both narrowest and the median if the justices are projected into one dimension. However, there is arguably a multiple dimensionality problem, as Powell would limit *Sabbatino* in a way that the plurality would not, while nonetheless being closer to the dissent on the question about the *Bernstein* exception. This poses its own problem under *Marks*.

[79]In a single dimension, Brennan's opinion would appear to be both the median and the opinion concurring on the narrowest grounds; however, as Justice Black notes, the remaining five justices believe that the constitutional issue was properly before the Court (although they split on its proper resolution), while the four members of the plurality do not. Thus, while the plurality is in some sense narrower, they are simply in the minority on that point. This shows that there are two dimensions in the case, posing a problem under the *Marks* rule.

[80]However, in the companion cases of *Turner v. Pennsylvania*, 338 U.S. 62 (1949) and *Harris v. South Carolina*, 338 U.S. 68 (1949), Jackson dissented, making it relatively clear that his position in *Watts* should not be taken as the holding of the Court.