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Exodus from the Land of Confusion: Why Hughes v. United States Supports the Overruling of the Unworkable Marks Doctrine and a Change in Court Practice

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EXODUS FROM THE LAND OF CONFUSION: WHY *HUGHES V. UNITED STATES* SUPPORTS THE OVERRULING OF THE UNWORKABLE *MARKS* DOCTRINE AND A CHANGE IN COURT PRACTICE

ABSTRACT

The Marks *doctrine was established by the Supreme Court as an earnest attempt to divine binding precedent from fractured decisions that failed to gain support from a majority of the Justices. While well-intentioned, the doctrine has proved to be, at best, difficult, and more often nearly impossible to correctly apply with any degree of certainty. Recently, in* Hughes v. United States*, the Court had the opportunity to further flesh out the doctrine and provide struggling courts and practitioners guidance when working with the rule's abstruse mandates. Instead, the Court declined this opportunity. This comment will discuss the development of the doctrine, the challenges that courts have had when working with it, and the doctrine's ultimate illogicality and unworkability. The Court's failure in* Hughes *to further develop the doctrine signifies the beginning of the end. The* Marks *doctrine more properly belongs in a museum than in contemporary American jurisprudence, and this comment will conclude that the doctrine, along with non-majority opinions in general, should be rendered obsolete and replaced by one, and only one, majority opinion that provides the binding precedent for future courts to follow.*

I. INTRODUCTION

The second half of the twentieth century has seen a marked increase in the number of concurring and dissenting opinions issued by the Supreme Court.[1] Because of this myriad of opinions, oftentimes no single opinion manages to garner the support of at least five justices.[2] The question then arises of how to determine binding precedent when a majority of the Court fails to subscribe to a single opinion. In an attempt to solve this quandary and provide lower courts guidance when weeding through a mess of concurring opinions that reach a common result but with oftentimes wildly divergent reasoning, the Court in *Marks v. United States* instructed that in these cases, the holding of the Court is the position taken by the justices who concurred in the judgments on the "narrowest grounds."[3]

Although the "narrowest grounds" doctrine was intended to dispel much of the confusion surrounding non-majority opinions and their precedential value, the doctrine has created more problems than it has solved.[4] Without directly speaking to the doctrine's continuing validity, the Court has been fickle in deciding whether to even apply the doctrine in a case where it might be appropriate.[5] The Court is fully aware of the headaches that it has caused with its *Marks* opinion. Recently, in *Hughes v. United States*, the Court was presented with an opportunity to apply the *Marks* doctrine to a prior case with a near-identical fact pattern.[6] The Court instead bypassed the *Marks* question and proceeded to resolve the case by applying the plurality opinion of the prior case.[7] Justice Sotomayor, whose lone concurrence was responsible for the lack of a majority opinion in the prior case, acquiesced to the majority in *Hughes* in order

1. Linas E. Ledebur, Comment, *Plurality Rule: Concurring Opinions and a Divided Supreme Court*, 113 PENN. ST. L. REV. 899, 900 (2009).

2. *Id.* at 904.

3. 430 U.S. 188, 193 (1977) (citing Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)).

4. Mark A. Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L. J. 419, 446 (1992) (explaining that the doctrine produces inconsistent results, fails to reliably predict the outcome of future decisions, and often leaves lower courts without guidance).

5. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 510 U.S. 1309, 1310 n.2 (1994) (identifying and treating a "narrowest grounds" concurrence in a prior opinion as controlling); Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (declining to apply *Marks* because the inquiry has "baffled and divided" the lower courts); Nichols v. United States, 511 U.S. 738, 745–46 (1994) (similarly declining to apply *Marks*); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 66 (1996) (making no mention of *Marks*, but instead proceeding to overrule a prior case due to the degree of confusion resulting from the splintered decision).

6. 138 S. Ct. 1765, 1772 (2018).

7. *Id.* at 1776.

to ensure clarity and stability in the law despite continuing to hold her divergent viewpoints on the issue.[8]

This comment will argue that *Hughes* foretells a formal overruling of the *Marks* doctrine by the Supreme Court. It will begin with a discussion of the doctrine's development. It will then explore the various methods and interpretations used to apply the doctrine, identify their shortcomings, and ultimately conclude that these shortcomings, when assessed in light of *Hughes*, warrant a full overruling of *Marks*. It will then explore different possibilities for ascertaining binding precedent in the doctrine's absence before finally concluding that plurality opinions should be altogether prohibited to streamline the Court's decisions and promote uniformity in the law. Due to the current dissension within the Court, this comment will provide an answer to those hoping for a return to a time when the Court was more unified in its voice.

II. HISTORY OF THE COURT'S APPROACHES TO SEPARATE OPINIONS AND THE EMERGENCE OF THE *MARKS* DOCTRINE

Although it is the province and duty of the Supreme Court to say what the law is,[9] the Constitution provides very little guidance as to how the Court should perform its interpretive function.[10] Consequently, at the Court's inception, it followed the English common law practice of issuing seriatim opinions.[11] Because no decision produced a single opinion of the Court, ambiguities in the law abounded, which limited the early Court's effectiveness and prevented the Court from establishing itself as the head of a strong independent branch of government.[12]

That all changed in 1801 when John Marshall took his seat as Chief Justice of the Supreme Court. Under his leadership, the Court abandoned the seriatim practice and would instead issue a single Opinion of the Court.[13] This policy revolutionized the Court by fostering a new level of certainty and stability in the law while simultaneously establishing the Court as a unified, independent, and authoritative institution in the public mind.[14] However, even Chief Justice Marshall was unable to maintain the Court's unified voice as decisions began to

8. *Id.* at 1779 (Sotomayor, J., concurring).

9. Marbury v. Madison, 5 U.S. 137, 177 (1803).

10. Ledebur, *supra* note 1, at 901–02; *see* U.S. CONST. art. III.

11. Although the Court would decide a case by a majority vote, each Justice would write a separate opinion in support of his decision. *See* Adam S. Hochschild, Note, *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective*, 4 WASH. U. J. L. & POL'Y 261, 263–65 (2000).

12. Ledebur, *supra* note 1, at 901–02.

13. Hochschild, *supra* note 11, at 267.

14. Charles F. Hobson, *Defining the Office: John Marshall as Chief Justice,* 154 U. PA. L. REV. 1421, 1443 (2006).

be regularly published with multiple opinions towards the end of his term.[15] This trend has only increased over the two centuries since Chief Justice Marshall's tenure on the Court, as the absence of his legendary leadership and the increasingly intricate decisions issued by the Court have created greater opportunities for disagreement.[16]

Although historically seriatim decisions contained no precedential value apart from the judgment as applied to the specific facts of the case, Chief Justice Marshall's legacy created an expectation in American jurisprudence that each Supreme Court decision would produce binding precedent which could then be used to decide future cases.[17] However, when the Court fails to issue a single Opinion of the Court endorsed by a majority of the Justices, confusion and inconsistency becomes rampant amongst courts and practitioners attempting to apply these decisions.[18]

The Court attempted to resolve this confusion when, in the 1977 case *Marks v. United States*, Justice Powell authored a majority opinion declaring: "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."[19] At issue in *Marks* was the precedential force of the fractured non-majority decision in the Supreme Court case, *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*,[20] which announced three different perspectives on the standard that expressive material should meet to sustain a conviction under federal obscenity laws.[21] The plurality, consisting of Justices Brennan, Warren, and Fortas, held that the material must satisfy the highly stringent standard of being

15. Hochschild, *supra* note 11, at 268.

16. *Id.* at 272–73.

17. *Id.* at 278–79.

18. Thurmon, *supra* note 4, at 427 & n.44.

19. *Marks,* 430 U.S. at 193 (quoting *Gregg*, 428 U.S. at 169 n.15 (plurality opinion)) (internal quotation marks omitted).

20. 383 U.S. 413 (1966).

21. While the defendant in *Marks* was awaiting trial, the Court had issued a new decision holding that a defendant could be convicted upon a finding, in part, that the material "lacks serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 24 (1973). In order to not violate the defendant's constitutional rights under the Fifth Amendment Due Process Clause or the Article I Section 9 Ex Post Facto Clause, the Court, before it could apply the new standard to the case at bar, would have to find that this new standard did nothing to significantly alter the law as established under controlling precedent. *Marks*, 430 U.S. at 193. The most recent controlling case with a majority opinion, *Roth v. United States*, held that a defendant may be convicted upon finding that the objectionable material "appeals primarily to prurient interests." Roth v. United States, 354 U.S. 476, 489 (1957). The Court concluded that the *Miller* standard did not significantly depart from the holding in *Roth*. *Marks*, 430 U.S. at 193. However, the Court did find that *Miller* "marked a significant departure from *Memoirs*" by expanding criminal liability. *Id.* at 194.

"utterly without redeeming social value."[22] Justice Stewart concurred but asserted that only "hardcore pornography" should subject a defendant to culpability,[23] while Justices Black and Douglas took the absolutist view that the First Amendment altogether proscribes obscenity prosecutions.[24] The Court announced that, despite its lack of a majority consensus, *Memoirs* was in fact binding and that its holding was the position taken by the Members who concurred on the "narrowest grounds."[25] Without explaining its reasoning, the Court identified the *Memoirs* plurality as the narrowest opinion and concluded that the defendant could not be convicted unless the material was "utterly without redeeming social value."[26]

III. THE CURRENT STATE OF THE *MARKS* DOCTRINE

A. Hughes v. United States

Over forty years after the *Marks* decision, the Court for the first time granted certiorari to explain the "narrowest grounds" doctrine in the case *Hughes v. United States*.[27] In that case, the defendant entered into a plea agreement whereby he agreed to a 180-month sentence after being indicted for participating in a conspiracy to distribute methamphetamine.[28] Although the sentencing judge considered the sentencing guidelines prior to approving the agreement, the agreement itself made no mention of the guidelines.[29] However, shortly after the defendant was sentenced, the Sentencing Commission reduced the applicable sentencing range by about three to four years.[30] Consequently, the defendant filed a motion to reduce his sentence under 18 U.S.C. § 3582(c)(2), which authorizes a court to reduce a defendant's sentence if that sentence was "based on" sentencing guidelines that have subsequently been lowered by the Sentencing Commission.[31]

The controlling issue in the case was: when a defendant enters into a plea agreement, is the resulting sentence "based on" the Sentencing Guidelines so that the defendant may be eligible for a sentence reduction if those guidelines

22. *Memoirs*, 383 U.S. at 418.

23. *Id.* at 421 (Stewart, J., concurring) (citing Ginzburg v. United States, 383 U.S. 463, 499 (1966) (Stewart, J., dissenting)).

24. *Id.* at 421, 433 (Black and Douglas, JJ., concurring) (citing Mishkin v. New York, 383 U.S. 502, 517-18 (1966) (Black, J., dissenting)).

25. *Marks*, 430 U.S. at 192–94.

26. *Id.* at 194–96.

27. *Hughes,* 138 S. Ct. at 1772; *see* United States v. Negrón, 837 F.3d 91, 95 n.3 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 2293 (2017); United States v. Robison 505 F.3d 1208, 1220–21 (11th Cir. 2007), *cert. denied*, 555 U.S. 1045 (2008).

28. *Hughes*, 138 S. Ct. at 1773–74.

29. *Id.* at 1774.

30. *Id.*

31. *Id.* at 1774–75.

are subsequently lowered?[32] To determine whether the defendant was eligible for a reduction in his sentence, the Court looked to guidance from its decision in *Freeman v. United States*, decided seven years earlier.[33] That case, which dealt with the same issue as in *Hughes*, produced a fractured plurality decision that created three possible interpretations of when a sentence imposed pursuant to a plea agreement is "based on" the Sentencing Guidelines.[34] The plurality, consisting of Justices Kennedy, Ginsburg, Breyer, and Kagan, concluded that as long as the sentencing judge's decision to accept the agreement involves the judge consulting the Guidelines, then the sentence is based on the Sentencing Guidelines.[35] In a dissent, Chief Justice Roberts, along with Justices Scalia, Thomas, and Alito, argued that a sentence imposed pursuant to a plea agreement is based on the agreement and the agreement alone—not the Sentencing Guidelines.[36] Justice Sotomayor, on the other hand, concurred in the judgment asserting that while the sentence imposed is inherently based on the agreement itself, the imposed sentence may nonetheless be based on the Guidelines if either the agreement itself calls for the defendant to be sentenced within a particular Guidelines range, or the agreement prescribes a specific term of imprisonment, but the agreement expressly indicates that the basis for that term is a Guidelines sentencing range.[37]

The Court in *Hughes* was therefore confronted with an opportunity to join the legion of circuit courts who have already grappled with the endeavor of applying *Marks* to the *Freeman* decision.[38] Three questions were presented to the Court. The first two related to the proper application of *Marks*: (1) whether a concurring opinion in a 4–1–4 decision represents the holding of the Court where neither the plurality's reasoning nor the concurrence's reasoning is a logical subset of the other; and (2) whether the lower courts are bound by the four-Justice plurality opinion in *Freeman*, or, instead, by Justice Sotomayor's

32. *Id.* at 1771, 1773.

33. 564 U.S. 522 (2011); *see Hughes*, 138 S. Ct. at 1771.

34. *Id.* at 525–26. Due to *Freeman's* extensive treatment amongst the lower courts, the case provided fertile ground for the Court's decision to finally grant certiorari to a *Marks* question. *See* Richard M. Re, *Beyond the Marks Rule*, 132 HARV. L. REV. 1942, 1956 tbl.1 (2019) (identifying *Freeman* as the decision most often interpreted in conjunction with an express citation to the *Marks* rule within the federal circuit courts).

35. *Freeman*, 564 U.S. at 529–30, 534. Because a judge is statutorily required to consult the Sentencing Guidelines prior to accepting a plea agreement, the plurality concluded that any accepted plea agreement is likely to be "based on" the Guidelines. *See* 18 U.S.C. § 3553(a)(4) (2012).

36. *Freeman*, 564 U.S. at 544 (Roberts, C.J., dissenting).

37. *Id.* at 538–39 (Sotomayor, J., concurring). Because the agreement in *Freeman* stated that the proposed 106-month sentence was determined pursuant to the Sentencing Guidelines, Justice Sotomayor joined the plurality in holding that the defendant was eligible for a sentence reduction. *Id.* at 542.

38. *See* Re, *supra* note 34, at 1956 tbl.1.

concurrence with which all the other Justices disagreed.[39] The third question, on the other hand, directly addressed the substantive issue of whether a defendant who enters into a plea agreement is generally eligible for a sentence reduction if there is a later amendment to the Guidelines.[40]

The Court, however, declined to address the *Marks* issues and instead proceeded to resolve the substantive issue without deferring to its decision in *Freeman*.[41] The Court adhered to the plurality's reasoning in *Freeman* and held that because the sentencing judge is required to consult the Sentencing Guidelines prior to accepting a plea agreement, the imposed sentence will therefore usually be "based on" the Guidelines.[42] Interestingly, as in *Freeman*, Justice Sotomayor again wrote a separate concurrence; however, this time she explained that while she continued to believe that her *Freeman* concurrence expressed the right approach, she recognized that *Freeman* had contributed to confusion and discord amongst the lower courts and litigants, and she thereby joined the majority in full in order to "ensure clarity and stability in the law and promote[] uniformity in sentencing imposed by different federal courts for similar criminal conduct."[43]

B. Interpretations of Marks

The lack of clarity and stability in the law that followed the *Freeman* decision can be attributed to competing interpretations amongst the circuits regarding what exactly it means to apply the reasoning of the Justices who concurred on the narrowest grounds.[44] The circuit split following *Freeman* exemplified two of these interpretations. The first is the "fifth-vote" approach. Under the fifth-vote rule, a decision will produce a binding *Marks* holding even if there is no common ground in reasoning between the plurality and the concurrences.[45] Instead, the fifth-vote rule looks to the *results* of the decision and then identifies the narrowest position necessary to produce those results (or the "fifth vote" that resulted in the majority judgment).[46] The inquiry, therefore,

39. Hughes v. United States, 138 S. Ct. 1765, 1772 (2018). Unlike *Freeman*, the defendant here would be ineligible for a sentence reduction under Justice Sotomayor's reasoning because the agreement in *Hughes* made no mention of the Sentencing Guidelines. *See id.* at 1774.

40. *Id.* at 1772.

41. *Id.* One of the dissenters in *Freeman*, Justice Scalia, had since been replaced by Justice Gorsuch who endorsed the *Freeman* plurality's reasoning and thereby provided the fifth vote necessary to produce the majority opinion in *Hughes* that was lacking in *Freeman.*

42. *Id.* at 1776. The Court further reasoned that this interpretation was most consistent with the Sentencing Reform Act's purpose of ensuring uniform sentencing treatment amongst defendants. *See id.*; *see also* 18 U.S.C. §§ 3553(a)(6), 3582(c)(2).

43. *Hughes*, 138 S. Ct. at 1779 (Sotomayor, J., concurring) (internal quotation marks omitted).

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

45. John P. Neuenkirchen, *Plurality Decisions, Implicit Consensuses, and the Fifth-Vote Rule Under Marks v. United States*, 19 WIDENER L. REV. 387, 399 (2013).

46. *Id.* at 400.

is: if satisfied, which position, taken by itself, would necessarily produce results in future cases that a majority of Justices would agree with?[47] For example, recall that in *Freeman*, four Justices voted in favor of eligibility for a sentence reduction because the sentencing judge was required to consult the Sentencing Guidelines prior to accepting the plea agreement and therefore, the sentence imposed was based on the Guidelines.[48] Justice Sotomayor, on the other hand, who provided the critical fifth vote, agreed that the defendant was eligible for a sentence reduction, but only because his agreement expressly stated that the proposed sentence was determined pursuant to the Guidelines.[49] Therefore, in future cases, as long as Justice Sotomayor's standard is satisfied, at least five of the *Freeman* Justices (the plurality and Justice Sotomayor) would agree that the defendant is eligible for a sentence reduction. The same cannot be said if only the plurality's reasoning is applied. Such was the case in *Hughes*, where the plea agreement made no mention of the Guidelines.[50] Under the *Freeman* plurality's standard, the defendant in *Hughes* would still be eligible for a reduction.[51] However, Justice Sotomayor's standard was not satisfied and therefore, under the fifth-vote rule, she would not have voted in favor of a sentence reduction.[52] Consequently, had it used this approach, the *Freeman* Court would have held the defendant in *Hughes* to be ineligible for a sentence reduction.[53]

On the other side of the *Freeman* split were the Ninth and D.C. Circuits.[54] These courts followed the "logical subset" approach, which recognizes a *Marks* holding only when one opinion represents a "common denominator" of the Court's reasoning.[55] In other words, the narrowest opinion is one that must be implicitly approved by at least five Justices who support the judgment.[56] This occurs when one position posits a narrow test to which the other must necessarily agree as a logical consequence of its own, broader position.[57] The D.C. Circuit,

47. *Id.*

48. Freeman v. United States, 564 U.S. 522, 529–30, 534 (2011).

49. *Id.* at 542.

50. Hughes v. United States, 138 S. Ct. 1765, 1774 (2018).

51. *See Freeman*, 564 U.S. at 529–30, 534.

52. *Id.* at 538–39 (Sotomayor, J., concurring).

53. *See, e.g.*, United States v. Dixon, 687 F.3d 356, 359 (7th Cir. 2012) ("Even though eight Justices disagreed with Justice Sotomayor's approach . . . her reasoning provided the narrowest, most case-specific basis for deciding *Freeman*.").

54. United States v. Davis, 825 F.3d 1014, 1021–22 (9th Cir. 2016); United States v. Epps, 707 F.3d 337, 350 (D.C. Cir. 2013).

55. King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991); *but see* Re, *supra* note 34, at 1981 (acknowledging that proponents of the logical subset approach nonetheless generally focus on outcomes rather than legal principles that are implicitly endorsed by a majority of Justices).

56. *King*, 950 F.2d at 781.

57. *Epps*, 707 F.3d at 348.

in *King v. Palmer*,[58] explained the logical subset approach by returning to the *Memoirs* case. The court identified Justices Black and Douglas's absolutist position as the broadest approach.[59] It then recognized Justice Stewart's view that only "hardcore pornography" may qualify as obscenity as the next narrowest approach, followed by the plurality's view that the material must be "utterly without redeeming social value" to be considered obscene.[60] The logic is as follows: all material that has redeeming social value must not be hardcore pornography, and material that is not hardcore pornography must also be protected under Justices Black and Douglas's absolutist First Amendment view.[61] Thus, while only three Justices would agree that anything that is not hardcore pornography is protected under the First Amendment, all five Justices would agree that anything with redeeming social value is protected, and this viewpoint therefore has implicit majority support.[62]

It is not surprising if the reader is now left scratching her head. The logical subset approach is ironically fraught with illogicalities and has been heavily criticized by commentators.[63] Put simply, the fact that a decision produces a separate concurrence indicates that some Justices do not accept the narrower rule, which conflicts with the majoritarian principles underlying the *Marks* doctrine.[64] One of the rule's errors lies in the "fallacy of division," or the principle that the characteristics of the whole do not necessarily share the characteristics of its component parts.[65] A slight tweaking of the *Memoirs* plurality's rule can produce a knee-jerk response sufficient to illustrate this point. Imagine that Justices Black and Douglas continued to hold their views that obscenity prosecutions are categorically unconstitutional under the First Amendment.[66] Now, however, imagine that instead of prohibiting an obscenity

58. 950 F.2d at 781. *Freeman* would not provide an apt example of the "logical subset" approach because the 9th and D.C. Circuits held that *Marks* was inapplicable because no opinion in *Freeman* was a logical subset of another. *Davis*, 825 F.3d at 1021–22; *Epps*, 707 F.3d at 350.

59. *King*, 950 F.2d at 781.

60. *Id.* (quoting Memoirs v. Massachusetts, 383 U.S. 413, 418–19 (1966)).

61. *See id.* at 781 & n.6.

62. *See id.*

63. *See* Re, *supra* note 34, at 1981–84 (2019); Thurmon, *supra* note 4, at 432; Adam Steinman, *Nonmajority Opinions and Biconditional Rules*, 128 YALE L.J. F. 1, 11–14 (2018) (discussing the fallibility of the logical subset approach specifically in relation to biconditional ("if-and-only-if") rules); Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 CORNELL L. REV. 1593, 1604 (1992).

64. Kimura, *supra* note 63, at 1604.

65. Michael Herz, *Justice Byron White and the Argument That the Greater Includes the Lesser*, 1994 B.Y.U. L. REV. 227, 243 (1994). It is useful to consider the analogy that while table salt is a harmless substance, it is not true that its component elements, sodium and chlorine, are harmless by themselves. *Id.*

66. Memoirs v. Massachusetts, 383 U.S. 413, 421, 433 (1966) (Black & Douglas, JJ., concurring).

conviction unless the material is "utterly without redeeming social value,"[67] the plurality instead held that an obscenity conviction is prohibited unless the material depicts interracial couples. The logical subset approach assumes that Justices Black and Douglas would necessarily agree with this rule as a logical consequence of their own broader approach to First Amendment rights (the plurality rule would protect much of the same material as the absolutist rule would).[68] However, it can hardly be argued that such ardent proponents of Constitutional rights would implicitly support a blatantly discriminatory rule even if it upholds First Amendment rights in many—perhaps even most—cases.[69] In fact, it is likely that they would sooner support a categorical bar on all sexually explicit material before they would support a rule that discriminates based on race.[70] True, the *Memoirs* plurality's test did not involve such an appallingly blatant violation of Constitutional rights, but the principle that this hypothetical illustrates is the same: support for the broad position does not necessarily entail support for another position that places a limiting condition on the applicability of the broader position's rule.[71]

The "logical subset" rule also fails when it is applied to decisions containing biconditional rules ("if-and-only-if" rules).[72] For example, assume that, contrary to the Ninth and D.C. Circuits' determinations,[73] Justice Sotomayor's concurrence in *Freeman* was in fact a logical subset of the plurality opinion.[74] Both the plurality's rule and Justice Sotomayor's rule could both be understood as biconditional rules.[75] According to Justice Sotomayor, if the plea agreement expressly refers to the Sentencing Guidelines, then the defendant would be eligible for a sentence reduction.[76] If the agreement does not expressly refer to the Guidelines, then the defendant would not be eligible.[77] The plurality, on the other hand, would grant eligibility if *either* the agreement itself expressly referred to the Sentencing Guidelines *or* the Sentencing Guidelines were

67. *Memoirs*, 383 U.S. at 418.

68. *See* King v. Palmer, 950 F.2d 771, 781 & n.6 (D.C. Cir. 1991).

69. *See* Re, *supra* note 34, at 1983. Justices Black and Douglas both joined the unanimous decision in *Loving v. Virginia*, issued the year after the *Memoirs* decision, which declared a state statue prohibiting miscegenation unconstitutional under the equal protection clause of the Fourteenth Amendment. 388 U.S. 1, 11–12 (1967).

70. *See* Re, *supra* note 34, at 1983.

71. *See id.*

72. Steinman, *supra* note 63, at 12–14.

73. United States v. Davis, 825 F.3d 1014, 1021–22 (9th Cir. 2016); United States v. Epps, 707 F.3d 337, 350 (D.C. Cir. 2013).

74. *See* Steinman, *supra* note 63, at 11–12, 14; *see also* United States v. Rivera-Martinez, 665 F.3d 344, 348 (1st Cir. 2011).

75. Steinman, *supra* note 63, at 11.

76. Freeman v. United States, 564 U.S. 522, 538–39 (2011) (Sotomayor, J., concurring).

77. *Id.*

otherwise relevant to the sentencing judge in accepting the agreement.[78] If the agreement *neither* expressly referred to the Guidelines *nor* were the Guidelines otherwise relevant to the judge accepting the agreement, then the defendant would not be eligible.[79] In every case in which Justice Sotomayor would grant eligibility, the plurality would necessarily grant eligibility as well.[80] However, the same cannot be said for the inverse. There could be cases, like the one presented in *Hughes*,[81] where Justice Sotomayor's rule would deny eligibility while the plurality's rule would not.[82] Instead, in cases denying eligibility, the plurality's rule now becomes the logical subset of Justice Sotomayor's rule![83] Thus, when opinions rely on rules containing biconditional logic, no single opinion can be the logical subset of another.[84]

Although the fifth-vote rule has been less heavily criticized than the logical subset approach,[85] it too is problematic. The main criticism is that under this rule, the views of a single Justice can become binding even though all eight other Justices might disagree.[86] Additionally, views of dissenting Justices could seep into a concurring Justice's opinion, giving precedential weight to a dissenting viewpoint.[87] There is also a more subtle analytical problem with this rule. The idea behind the fifth-vote rule is that the Justice providing the fifth vote necessary for the judgment encapsulates the reasoning that would produce the same results in the future.[88] However, the predictive ability of the fifth-vote rule is significantly lessened when the reasoning is applied to cases that bear only some resemblance to the case that produced the opinion.[89] Take, for example, *Baldasar v. Illinois*, where the Court considered whether a prior uncounseled misdemeanor conviction could be used to convert a subsequent misdemeanor

78. *Id.* at 530 (2011) ("[M]odification proceedings should be available to permit the district court to revisit a prior sentence to *whatever extent* the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement.") (emphasis added).

79. *Id.*

80. Steinman, *supra* note 63, at 14.

81. Hughes v. United States, 138 S. Ct. 1765, 1774 (2018).

82. Steinman, *supra* note 63, at 14.

83. If the plurality would deny eligibility, then Justice Sotomayor would necessarily deny eligibility as well. *Id.*

84. *Id.* at 12.

85. *See, e.g.*, Neuenkirchen, *supra* note 45, at 388; Thurmon, *supra* note 4, at 435; Re, *supra* note 34, at 1984.

86. Neuenkirchen, *supra* note 45, at 407.

87. Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 815 (2017). For example, in *Freeman*, Justice Sotomayor agreed with the dissent that the sentence is based on the plea agreement itself and not the judge's calculation of the Sentencing Guidelines, as the plurality asserted. Freeman v. United States, 564 U.S. 522, 534 (2011) (Sotomayor, J., concurring).

88. Thurmon, *supra* note 4, at 436.

89. *Id.*

into a felony with an increased prison term under an enhanced penalty statute.[90] In a short per curiam opinion, the Court held that it may not.[91] However, the decision yielded three different concurrences, each providing a different rationale for the result. Justice Stewart reasoned that because the defendant was only being sentenced to an increased prison term because of the prior uncounseled misdemeanor conviction, his Sixth Amendment rights were thereby violated.[92] Justice Marshall, on the other hand, argued that without the assistance of counsel, the prior conviction was "not sufficiently reliable to support the severe sanction of imprisonment."[93] Finally, Justice Blackmun reiterated his views from his dissent in *Scott v. Illinois*, and maintained that the prior conviction was invalid for all purposes because the Sixth Amendment requires a defendant to be provided with counsel whenever the defendant is prosecuted for an offense punishable by more than six months' imprisonment or whenever the defendant is actually sentenced to imprisonment.[94]

Later, in *Nichols v. United States*, the Court was required to apply the *Baldasar* decision to determine whether a defendant who had already been convicted of a felony and subjected to imprisonment could receive an increased sentence because of a prior uncounseled misdemeanor conviction.[95] Although there had been considerable confusion within the lower courts as to which concurrence in *Baldasar* represented the narrowest grounds for the decision,[96] the Court recognized that Justice Blackmun's opinion represented the "fifth vote."[97] The defendant in *Nichols* had previously been convicted of driving under the influence (DUI), which was a misdemeanor punishable by up to one year's imprisonment.[98] Under Justice Blackmun's reasoning, this prior uncounseled conviction was invalid because it was punishable by more than six months' imprisonment and therefore, it could not be used in the present case to increase the defendant's term of imprisonment.[99] However, unlike *Baldasar*,

90. 446 U.S. 222, 223 (1980). In a prior case, *Scott v. Illinois*, the Court held that the Sixth Amendment only requires that a defendant be afforded the right to counsel if the defendant is actually sentenced to a term of imprisonment, regardless of whether the offense might be punishable by imprisonment. 440 U.S. 367, 373–74 (1979).

91. *Baldasar*, 446 U.S. at 224.

92. *Id.* (Stewart, J. concurring).

93. *Id.* at 227 (Marshall, J., concurring).

94. *Id.* at 229 (Blackmun, J., concurring).

95. 511 U.S. 738, 740–41 (1994).

96. *Id.* at 745.

97. *Id.* at 744; *see also* Santillanes v. United States Parole Commission, 754 F.2d 887, 889 (10th Cir. 1985) (interpreting Justice Blackmun's concurrence in *Baldasar* to rest on the narrowest grounds because, unlike Justices Stewart and Marshall, Justice Blackmun asserted that so long as a prior conviction is Constitutionally valid then it may be used for a sentence enhancement in a future case).

98. *Nichols*, 511 U.S. at 740 & n.1.

99. *See Baldasar*, 446 U.S. at 229 (Blackmun, J., concurring).

where the defendant would not be facing a felony conviction carrying a term of imprisonment but for the prior uncounseled misdemeanor conviction,[100] the defendant in *Nichols* had already been convicted of a felony and was already facing imprisonment.[101] Acknowledging this distinction, which led both the District Court and the Court of Appeals to deny the defendant's objection to the inclusion of the DUI misdemeanor conviction in calculating his prison sentence, the Court proceeded to overrule *Baldasar* and held that the prior DUI conviction could be used to increase the sentence because the defendant was not actually imprisoned for the DUI.[102] Even though Justice Blackmun remained steadfast in the beliefs articulated in his *Baldasar* concurrence,[103] the Court took a different path largely because of the factual dissimilarity in *Nichols*. Thus, despite the "fifth-vote" rule's purpose of applying the reasoning which can accurately predict how the Court will rule in future cases,[104] the factual divergence in *Nichols* undermined the rule's underlying logic by leading the Court to a conclusion in direct conflict with the conclusion necessitated by Justice Blackmun's *Baldasar* concurrence.

C. The Court's History of Criticizing and Undermining Marks

The Court has long been aware of the problems created by its *Marks* decision. While it has been happy to apply the doctrine to cases where it found a clear narrower holding,[105] the Court has not been shy about voicing its criticism of the doctrine in those more difficult cases. Prior to overruling *Baldasar*, the Court in *Nichols* acknowledged that *Marks* was applicable to properly interpreting *Baldasar*.[106] However, noting the confusion that the fractured *Baldasar* decision had caused within the lower courts, the Court acknowledged that the *Marks* test is often "more easily stated than applied."[107] In light of this confusion, the Court declared that it was "not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled

100. *Id.* at 223.

101. *Nichols*, 511 U.S. at 740–41.

102. *Id.* at 748–49 (maintaining that this holding was the "logical consequence" of the *Scott* decision).

103. *See id.* at 756 & n.1 (Blackmun, J., dissenting).

104. Neuenkirchen, *supra* note 45, at 400.

105. *See* Panetti v. Quarterman, 551 U.S. 930, 949 (2007) (identifying Justice Powell's concurrence in *Ford v. Wainwright*, 477 U.S. 399, 411–12 (1986), as the "more limited holding" without explaining its reasoning or suggesting any difficulty in making this determination); O'Dell v. Netherland, 521 U.S. 151, 162 (1997) (expressing similar ease in determining that Justice White's concurring opinion in *Gardner v. Florida*, 430 U.S. 349, 363–64 (1977) was the narrowest holding); City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 764 n.9 (1988) (refuting the dissent's position that the plurality opinion in *Kovacs v. Cooper*, 336 U.S. 77, 85–86 (1949) was not controlling because the *Kovacs* plurality "clearly" put forth the narrowest rationale).

106. *Nichols*, 511 U.S. at 745.

107. *Id.*

and divided the lower courts that have considered it," and it proceeded to reexamine and overrule *Baldasar*.[108]

The Court again declined to apply *Marks* in *Grutter v. Bollinger*, a case that presented the question of whether a public university could justify considering race as one of many factors in selecting applicants for admission on the grounds of ensuring diversity within the institution.[109] In a landmark case on affirmative action, *Regents of the University of California v. Bakke*, the Court held that, while a public university could not be altogether prohibited from considering race in its admissions program, the program could not be designed to assure admission to a specified number of students from certain minority groups.[110] Again, that decision generated three different opinions, none of which were endorsed by a majority of the Court. Four Justices held the program invalid because they found that it violated Title VI of the Civil Rights Act of 1964,[111] while four other Justices would have upheld the program because the discrimination was not to demean or insult, but rather to remedy past racial prejudice.[112] Justice Powell, who provided the fifth vote, asserted that while an admissions program may not focus solely on ethnic diversity, race may be considered as a single element amongst a broader array of qualifications and characteristics in order to ensure a kind of diversity that furthers a compelling state interest.[113]

Although Justice Powell's opinion had come to serve as the "touchstone for constitutional analysis of race-conscious admissions policies,"[114] lower courts were nonetheless divided over whether his opinion was in fact binding.[115] In light of this disagreement, the Court in *Grutter* again took the liberty to bypass the *Marks* question because it had "so obviously baffled and divided the lower courts."[116] The Court adhered to Justice Powell's opinion in *Bakke* and found a compelling state interest in promoting institutional diversity while holding that the university may further that interest by considering an applicant's race in

108. *Id.* at 745–46.

109. 539 U.S. 306, 319, 322 (2003).

110. 438 U.S. 265, 269–72 (1978).

111. *Id.* at 412 (Stevens, J., concurring in part).

112. *Id.* at 325 (Brennan, J., concurring in part).

113. *Id.* at 315.

114. *Grutter*, 539 U.S. at 319, 322.

115. *Compare* Johnson v. Board of Regents of Univ. of Ga., 563 F.3d 1234, 1245 (11th Cir. 2001) (Justice Powell's opinion was not binding); Hopwood v. Texas, 236 F.3d 256, 274–275 (5th Cir. 2000) (same); *with* Smith v. Univ. of Wash. Law School, 233 F.3d 1188, 1200 (9th Cir. 2000) (finding Justice Powell's opinion to be the "narrowest footing" upon which a race-conscious decision making process could stand).

116. *Grutter*, 539 U.S. at 319, 325 (quoting Nichols v. United States, 511 U.S. 738, 745–46 (1994)).

order to promote the robust exchange of ideas and to prepare students for an increasingly diverse workforce and society.[117]

Then came *Hughes*. Although, unlike in *Nichols* and *Grutter*, the Court never explicitly expressed a difficulty in applying *Marks* to the case,[118] the Court could not hide its disapproval for the doctrine. By refusing to address the *Marks* question in what may have arguably been the most apropos case to come before it,[119] the Court has effectively voiced its aversion to the doctrine.[120] However, it was Justice Sotomayor who verbalized in her concurrence what the rest of the Court was undoubtedly thinking: *Marks* has done little to promote "consistency, predictability, and evenhandedness" in the criminal justice system, but instead has "contributed to ongoing discord among the lower courts, sown confusion among litigants, and left the governing rule uncertain."[121]

IV. IMPLICATIONS OF *HUGHES*

A. The Future of Marks

The question now remains as to the future of the doctrine post-*Hughes*. While optimists may understand *Hughes* as the beginning of the end for *Marks*, it is of course possible that *Marks* is here to stay. However, in light of the Court admitting to the confusion that *Marks* has caused, coupled with its inconsistency in applying the doctrine, lower courts will be left wondering what their own obligations are to follow the doctrine. Looking back to *Nichols*, courts can find helpful guidance. By taking that Court's refusal to find the narrowest ground as precedent, a lower court deciding a *Marks* issue can ask if a fractured opinion has obviously baffled and divided lower courts, and if so, then that court may choose to disregard *Marks* and apply whichever position that it finds most compelling.[122] Rather than requiring lower courts to find a *Marks* holding in every single plurality decision that they are faced with, this rule would in fact be more in line with their duty to follow Supreme Court precedent. Under *Marks*, when the Court issues a plurality opinion, it theoretically creates binding precedent which is found in the opinion that concurred on the narrowest

117. *Id.* at 329–30.

118. *See* Hughes v. United States, 138 S. Ct. 1765, 1772 (2018).

119. *See* Re, *supra* note 34, at 1956 tbl.1 (identifying *Freeman* as the decision most often interpreted in conjunction with an express citation to the *Marks* rule within the federal circuit courts).

120. *See* KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 84-87 (1960) (a court may avoid adhering to a precedent without expressly overruling it by choosing to not apply the precedent to the problem at hand).

121. *Hughes*, 138 S. Ct. at 1779 (Sotomayor, J., concurring) (quoting Arizona v. Gant, 556 U.S. 332, 354 (2009) (internal quotation marks omitted)).

122. *See* Nichols v. United States, 511 U.S. 738, 745–46 (1994).

grounds.[123] However, by choosing not to follow the doctrine in difficult circumstances, the Court effectively overrules this precedent that lower courts had been obliged to follow.[124] At the same time, the Supreme Court is quick to abandon the *Marks* doctrine without affording it the degree of deference that it usually gives to its own precedents.[125] By following the Court's lead in *Nichols* and *Grutter*, lower courts can mimic the Supreme Court's approach to *Marks*: follow the rule when it's easy to do so, throw it out when the going gets tough.[126]

Support for this approach can be found in the *Marks* decision itself. A close examination of the wording used to articulate the *Marks* rule reveals that the holding of the Court *may*—not shall—be viewed as the narrowest grounds position.[127] Furthermore, upon adopting this rule and finding the *Memoirs* plurality as constituting the narrowest grounds in that decision, the Court in *Marks* acknowledged that every lower court to consider the issue had come to the same conclusion.[128] Therefore, it is quite possible that the *Marks* doctrine was never intended to apply to the baffling and divisive situations encountered in *Nichols* and *Grutter*.[129]

The Court has suggested that it would condone lower courts following this approach. In *Rapanos v. United States*, the Court was asked to decide whether certain wetlands were "waters of the United States" for the purpose of establishing federal jurisdiction under the Clean Water Act.[130] The plurality opinion, authored by Justice Scalia, concluded that only wetlands with a "continuous surface connection" to a relatively permanent body of water connected to traditional interstate navigable waters were subject to federal jurisdiction.[131] Justice Kennedy, on the other hand, asserted in his concurrence that the proper test should instead be whether the wetlands possess a "significant nexus" to navigable waterways.[132] The decision was an anomaly in terms of *Marks*. Neither test was inherently narrower than the other and although Justice Scalia's was stricter in that it required a physical connection to a navigable waterway, certain situations could exist where Justice Scalia's test would find federal jurisdiction while Justice Kennedy's would not.[133] In a separate

123. Marks v. United States, 430 U.S. 188, 193 (1977).
124. Thurmon, *supra* note 4, at 441–42.
125. *Id.* at 442.
126. *See id.*
127. *Marks*, 430 U.S. at 193.
128. *Id.* at 194.
129. *See* Re, *supra* note 34, at 1996.
130. Rapanos v. United States, 547 U.S. 715, 729 (2006).
131. *Id.* at 742.
132. *Id.* at 782 (Kennedy, J., concurring).
133. Joseph M. Cacace, *Plurality Decisions in the Supreme Court of the United States: A Reexamination of the Marks Doctrine After Rapanos v. United States*, 41 SUFFOLK U. L. REV. 97, 123 (2007). This could occur when, for example, a wetland shares a slight surface connection with

concurrence, Chief Justice Roberts lamented the Court's failure to deliver a majority opinion and, citing the Court's decision in *Grutter* to disregard the *Marks* rule, observed that lower courts interpreting the holding would have to "feel their way on a case-by-case basis."[134] Dissenting, Justice Stevens directed lower courts to forgo the *Marks* analysis and find jurisdiction if either the plurality's rule or Justice Kennedy's rule is satisfied.[135] Therefore, the impossibility of properly applying the *Marks* doctrine to the *Rapanos* decision, combined with Justices Roberts and Stevens' direction to lower courts to interpret the fractured decision without regard to *Marks,* indicates that the Court would approve of lower courts disregarding the doctrine in difficult cases.

Furthermore, *Hughes* itself suggests that the Court would approve of lower courts discarding the *Marks* doctrine in exceptionally confusing circumstances. In choosing not to apply *Marks*, the Court in *Hughes* abrogated the decisions of eight different circuit courts in their earnest attempts to apply the doctrine to the *Freeman* problem.[136] Instead of taking guidance from the wisdom of eight circuits as to the proper application of *Marks* and following Justice Sotomayor's concurrence, the Court instead placed its stamp of approval on the conclusion reached by a small minority of circuits who cast *Marks* aside and applied the plurality opinion, finding it most persuasive.[137] In light of Justice Sotomayor's comment that her *Freeman* concurrence had "contributed to ongoing discord among the lower courts" and "sown confusion among litigants,"[138] the Court's refusal to follow what appeared to be binding precedent under *Marks* may therefore be construed as an invitation for the lower courts to do the same when faced with a similarly confusing decision.[139]

a navigable waterway, but that connection is so insubstantial that there is no significant nexus to the waterway. *Id.*

134. *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) (citing Grutter v. Bollinger, 539 U.S. 306, 325 (2003)).

135. *Id.* at 810 (Stevens, J., dissenting). Although the four dissenting Justices recognized much broader authority in the Executive to regulate the Nation's waters, all four of those Justices would find federal jurisdiction in all cases in which either the plurality or Justice Kennedy finds jurisdiction. *Id.* In the absence of the *Marks* analysis, and without any binding authority compelling Justice Stevens's approach to the issue, finding federal jurisdiction if either test is satisfied would likely be the most compelling interpretation of the *Rapanos* decision for the reasons articulated by Justice Stevens. *See id.*

136. Hughes v. United States, 138 S. Ct. 1765, 1771, 1774–75 (2018) (abrogating United States v. Benitez, 822 F.3d 807, 811 (5th Cir. 2016); United States v. Graham, 704 F.3d 1275, 1277–78 (10th Cir. 2013); United States v. Thompson, 682 F.3d 285, 290 (3d Cir. 2012); United States v. Browne, 698 F.3d 1042, 1045 (8th Cir. 2012); United States v. Dixon, 687 F.3d 356, 359 (7th Cir. 2012); United States v. Brown, 653 F.3d 337, 340 n.1 (4th Cir. 2011); United States v. Smith, 658 F.3d 608, 611 (6th Cir. 2011); United States v. Rivera-Martinez, 665 F.3d 344, 348 (1st Cir. 2011)).

137. *Hughes,* 138 S. Ct. at 1771, 1774–75 (citing United States v. Davis, 825 F.3d 1014, 1021–22 (9th Cir. 2016); United States v. Epps, 707 F.3d 337, 350 (D.C. Cir. 2013)).

138. *Hughes,* 138 S Ct. at 1779 (Sotomayor, J., concurring).

139. *See* Thurmon, *supra* note 4, at 441–42.

Despite Court precedent suggesting that *Marks* should not be followed in cases where the doctrine has "so obviously baffled and divided the lower courts that have considered it,"[140] it must be remembered that *Marks* has not yet been overruled and is therefore still good law. Some might argue that now, after *Hughes*, *Marks* has been so seriously undermined that it does not represent present doctrine.[141] Under the once-tenable doctrine of "implicit overrule," a lower court might conclude that *Marks* is dead and accordingly choose to not follow the doctrine, thereby saving the Supreme Court the hassle of having to address a *Marks* issue in the future.[142] After eagerly throwing out the *Marks* issues in *Hughes*, the Court might welcome the prospect of never having to wrestle with the doctrine again. Although there was a time in history where a lower court might feel free to save the Court the hassle of having to formally overrule its own outdated and eroded precedents, the Court has since—some would argue foolishly—[143] foreclosed this option.[144]

The Court owes it to both the lower courts and to itself to finally put an end to the confusion created by *Marks*. If it is true that now, after having again been criticized and ultimately disregarded in *Hughes*, the doctrine no longer represents the present state of the law, the Court must say so.[145] This was the burden that the Court took on in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, when it forbade lower courts from coming to a conclusion about the viability of precedent themselves.[146] That case considered whether arbitration agreements were valid under the Securities Act of 1933.[147] While the 1953 case *Wilko v. Swan* held that such agreements were not valid under the 1933 Act,[148] a later case, *Shearson/American Express, Inc. v. McMahon*, rejected the rationale in *Wilko* and held that arbitration agreements were in fact valid under the 1934 Act, despite the 1934 Act and the 1933 Act containing

140. Nichols v. United States, 511 U.S. 738, 745–46 (1994).

141. *See* David C. Bratz, *Stare Decisis in Lower Courts: Predicting the Demise of Supreme Court Precedent*, 60 WASH. L. REV. 87, 92 (1984).

142. *See id.* at 93.

143. C. Steven Bradford, *Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling*, 59 FORDHAM L. REV. 39, 42 (1990).

144. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) (chastising lower courts for concluding that the Supreme Court had undermined its own precedent to the extent that they were not obliged to follow the precedent even though the Court, in the following sentences of the Opinion, proceeded to overrule the precedent itself).

145. Albert P. Blaustein & Andrew H. Field, *"Overruling" Opinions in the Supreme Court*, 57 MICH. L. REV. 151, 173 (1958) (recognizing that it is necessary for the Court to expressly overrule a prior decision when that decision has already been implicitly overruled, but the Court has neglected to say so).

146. *Rodriguez de Quijas*, 490 U.S. at 484.

147. *Id.* at 478.

148. 346 U.S. 427, 434–35 (1953).

virtually identical provisions governing the waiver of judicial trial and review.[149] Although logic would dictate that *McMahon* had overruled *Wilko*, lower courts were nonetheless bound to follow this inviable precedent, making its formal overruling in *Rodriguez* necessary.

Similarly, a lower court might conclude that the Court's refusal in *Hughes* to apply the *Marks* doctrine is strong evidence that the doctrine no longer reflects the current state of the law. Until the Court expressly overrules *Marks*, though, lower courts will have to continue to weed through a mess of concurring opinions trying to identify the narrowest rationale, all while knowing that under *Hughes* the correct result in the eyes of the Court might be the one reached not by finding the narrowest grounds, but instead by disregarding *Marks* entirely.[150] A formal overruling is therefore necessary.

In addition to making explicit what is already implicit, it is necessary for the Court to overrule a prior decision when that decision is impracticable and has resulted in "great hardship or inconvenience."[151] Continuing to follow a decision that has resulted in such hardship directly contravenes the policies that the Court has identified as underlying stare decisis: clear guidance provided by the law to govern conduct, fair and expeditious adjudication, and public faith in the judiciary as a source of reasoned judgment.[152] The Court in the past has not hesitated to overrule a prior decision when a failure to do so would do violence to these policies. At the risk of causing nightmares amongst any first-year Civil Procedure students reading this article, a brief examination of the famous overruling decision, *Erie Railroad Company v. Tompkins*,[153] can illustrate this point. That case, of course, overruled the nearly century-old precedent established in *Swift v. Tyson* that directed federal courts sitting in diversity to not apply the common law as established by the state's highest court, but to instead apply general and widely-accepted legal reasoning and principles to determine the outcome of a case.[154] In overruling *Swift*, Justice Brandeis noted the "injustice and confusion" caused by the impossibility of drawing a clear line between "general law" and local law, the inherent unfairness in allowing a plaintiff to seek more favorable laws merely by filing a diversity action in federal court, and the violation of federalist principles that occurs when the federal judiciary infringes upon a state's exclusive lawmaking authority.[155]

Likewise, continuing to follow *Marks* would offend stare decisis principles, which necessitates its overruling. As aptly acknowledged by Justice Sotomayor in *Hughes*, *Marks* has done anything but provide clear guidance in determining

149. 482 U.S. 220, 238, 256 (1987).
150. *See* Hughes v. United States, 138 S. Ct. 1765, 1771, 1775 (2018).
151. Blaustein & Field, *supra* note 145, at 170.
152. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970).
153. 304 U.S. 64, 64 (1938).
154. 41 U.S. 1, 19 (1842).
155. *Erie*, 304 U.S. at 74–79.

eligibility for a sentence reduction.[156] To the contrary, the doctrine has "left the governing rule uncertain," led to the unequal treatment of criminal defendants based on the circuit in which the case arose, and has undermined the "integrity and legitimacy" of the American justice system.[157] Thus, if the past is any indication of the Court's willingness to overrule faulty doctrine when necessary, then it is only a matter of time before the Court will announce the ultimate demise of *Marks*.

B. In the Absence of Marks

If *Marks's* days truly are numbered, then how should courts interpret plurality decisions in its absence, and more fundamentally, must troublesome non-majority decisions continue to afflict Supreme Court jurisprudence at all?

Historically, the precedential value of a plurality opinion had been limited to the specific result of the decision.[158] Non-majority opinions would therefore be merely persuasive and the decision would be binding on future cases only to the extent that the future case had a nearly identical fact pattern to the prior case.[159] While this was not a problem throughout the nineteenth and the first half of the twentieth centuries, plurality decisions are far more common today.[160] Although this method would certainly remedy much of the confusion created by *Marks* and free lower courts to come to their own legal conclusions when considering the various non-majority opinions for their persuasive value, returning to this method would result in a large percentage of Court decisions that offer very little guidance in future cases, thereby contributing to the same disparate and unfair treatment that *Marks* has been criticized for causing.[161]

Admittedly, there is no perfect solution. However, a rule making the plurality opinion precedent provides a compelling alternative to the traditional approach of according no precedential weight to plurality decisions. Like the traditional approach, the value of this rule lies in its simplicity.[162] On the other hand, like *Marks*, this rule is vulnerable to attack in that it violates democratic principles by allowing less than a majority of the Court to set binding precedent.[163] It also encounters problems when there is an even split among the concurring Justices.[164] Nevertheless, its saving feature is that, unlike the *Marks* rule which could allow the views of a single justice to become binding

156. Hughes v. United States, 138 S. Ct. 1765, 1779 (2018) (Sotomayor, J., concurring).
157. *Id.*
158. Thurmon, *supra* note 4, at 420.
159. Ledebur, *supra* note 1, at 911.
160. Cacace, *supra* note 133, at 104; Hochschild, *supra* note 11, at 272.
161. *See* Cacace, *supra* note 133, at 104.
162. Ledebur, *supra* note 1, at 912.
163. *Id.*; *see supra* text accompanying notes 64, 86.
164. Ledebur, *supra* note 1, at 912.

precedent,[165] this rule would create binding precedent from a position adopted by the "majority of the majority."[166]

Other more creative solutions have been proposed as well. One approach, known as the "hybrid approach," incorporates elements of the two previously mentioned alternatives with the *Marks* doctrine itself.[167] Under this approach, a court interpreting a fragmented decision would first identify the *rationes decidendi*, or the reasoning necessary to reach the conclusions (as opposed to dicta), in the various plurality, concurring, and dissenting opinions.[168] Once the *rationes decidendi* have been identified, a court would then determine which ones share the support of at least five justices.[169] The ones that have majority support would then be binding authority while the ones that do not would merely be persuasive and their persuasiveness would be correlated to the number of justices that supported the particular ratio decidendi.[170] While this approach would both cure the *Marks* defect of giving precedential weight to non-majority positions and further the *Marks* goal of establishing binding rules of law in fractured decisions, this approach threatens to be more complex and challenging to apply than *Marks* itself, especially because it is often difficult to identify the exact *ratio decidendi* in an opinion.[171]

Another inventive solution is known as the "legitimacy model." This model would place each opinion in a fractured decision into one of five different categories.[172] Whether the opinion is binding depends on its category, and the categories are delineated by considering the extent to which they promote the principles of precedential legitimacy: a judgment supported by a majority, the need for a reasoned outcome, and a nexus between the two.[173] While a detailed description of the legitimacy model, its categories, and the purpose behind the model is far beyond the scope of this analysis, suffice it to say that the legitimacy model is extraordinarily complex and, if none of a fractured decision's opinions fall into a category that is accorded precedential weight by the model, the decision would yield no binding precedent whatsoever.[174]

There is a better option. Nothing prohibits the Court from changing its rules to eliminate plurality decisions.[175] A majority vote is all that would be needed

165. Neuenkirchen, *supra* note 45, at 407.
166. Kimura, *supra* note 63, at 1601.
167. Thurmon, *supra* note 4, at 450–51.
168. *Id.* at 426, 451.
169. *Id.*
170. *Id.*
171. Ledebur, *supra* note 1, at 913.
172. Kimura, *supra* note 63, at 1604.
173. *See id.*
174. *Id.* at 1611.
175. *See* Ledebur, *supra* note 1, at 915.

to effect such a change.[176] Prior to the recent death of Justice Ginsburg, at least five of the Justices on the Court had either expressed outright dissatisfaction with non-majority opinions or have endorsed opinions criticizing *Marks*. [177] Although Justice Barrett has not yet weighed in on *Marks*, a majority vote to change the rule nonetheless looks promising.

This raises the question: how might five Justices all agree on a single majority opinion? It may not be as difficult as one might expect. *Marks* in fact promotes dissension by incentivizing the Justices to write the "narrowest" opinion so that their own personal views might become binding precedent.[178] Eliminating the *Marks* doctrine would therefore promote cohesion. Furthermore, despite the flurry of concurrences and dissents coming out of the Court these days, the Justices have shown a willingness to acquiesce to the majority when necessary to provide better guidance to lower courts.[179] The Justices have even demonstrated an ability to reconcile their differing views to come to a single majority opinion that is acceptable to all. In *Arizona v. Gant*, the Court held that police may search a vehicle incident to an arrest only when the arrestee is unsecured and has access to the passenger compartment at the time of the search.[180] Justice Scalia, on the other hand, would have held that a vehicle search incident to arrest is reasonable only when the object of the search is to discover evidence of the crime for which the arrest was made or evidence of another crime that the officer has probable cause to believe occurred.[181] In order to gain Justice Scalia's deciding vote, the Court followed Justice Scalia's suggestion and further held that a search incident to arrest may also be lawful when his evidence of a crime criteria is met.[182] This case thus demonstrates the Court's willingness to adopt a rule that neither the majority nor the concurrence fully embraced, but was nonetheless acceptable to all.

176. *Id.*

177. *See* Hughes v. United States, 138 S. Ct. 1765, 1779 (2018) (Sotomayor, J., concurring) (Justice Sotomayor seeking to eliminate confusion by abandoning her own views and endorsing the majority opinion); Rapanos v. United States, 547 U.S. 715, 758 (2006) (Roberts, C.J., concurring) (Chief Justice Roberts disappointed by the Court's failure to issue a single majority opinion in the case); Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (Justices Ginsburg and Breyer endorsing an opinion criticizing *Marks* for "baffl[ing] and divid[ing] the lower courts"); Nichols v. United States, 511 U.S. 738, 745–46 (1994) (Justice Thomas joining the opinion with the same criticism of *Marks*).

178. Berkolow, *Much Ado About Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-Percolation After Rapanos*, 15 VA. J. SOC. POL'Y & L. 299, 352 (2008).

179. *See, e.g.*, *Hughes*, 138 S. Ct. at 1779 (Sotomayor, J., concurring); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 353 (2011) (Thomas, J., concurring) (Justice Thomas "reluctantly" joins the majority to provide lower courts guidance); U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 408 (2002) (O'Connor, J., concurring) (Justice O'Connor joins the majority for the same reasons).

180. 556 U.S. 332, 343 (2009).

181. *Id.* at 353 (Scalia, J., concurring).

182. *Id.* at 335, 354.

It might be argued that a rule requiring each judicial decision to result in a single binding majority opinion would require the Justices in some cases to support decisions that they do not believe are legally sound, thereby violating their judicial duty.[183] However, Justices have been engaging in this practice for close to a century without eliciting opposition.[184] While unwavering adherence to judicial correctness is certainly an admirable principle for a Justice to follow, as Justice Sotomayor observed in *Hughes*, it is often necessary for a Justice to accede to a less-than-desirable viewpoint in order to "ensure clarity and stability in the law" when a failure to compromise would "sow[] confusion among litigants, and le[ave] the governing rule uncertain."[185]

Nothing in this proposed rule change should be read to suggest that any Justice's voice should be altogether silenced. Although some might yearn for the Court to return to the days of Chief Justice Marshall, when a decision resulted in one, and only one, Opinion of the Court,[186] that seems unlikely considering the current level of dissension within the Court.[187] Instead, a Justice should still be allowed to write a concurring or dissenting opinion, but these opinions would be limited to merely persuasive authority. Hardly without value, these opinions would allow a Justice to write to future generations so that the Court may one day recognize the errors of the past.[188] Their ability to bind other courts, however, will not be realized until it is proper to do so: when at least five Justices are willing to unequivocally stand up, sign their name to the opinion, and declare to the American legal community that the law has changed.

V. CONCLUSION

While it began as a reasonable attempt to clarify the confusion surrounding non-majority decisions, *Marks* has run its course. Its myriad problems have afflicted American jurisprudence for half of a century. The Court is well aware of these problems and, if the Court's willingness to correct itself in the past is any indication, then it will only be a matter of time before the Court announces what courts, lawyers, and scholars have understood for years: *Marks* was wrong. Ascertaining legal precedent from a Court opinion is a difficult and complex

183. Re, *supra* note 34, at 1999.

184. *Id.* at 1998; *see supra* notes 179–82 and accompanying text; *see also, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 353–54 (1974) (Blackmun, J., concurring); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 170 (1967) (Black, J., concurring); Screws v. United States, 325 U.S. 91, 134 (1945) (Rutledge, J., concurring).

185. Hughes v. United States, 138 S. Ct. 1765, 1779 (2018) (Sotomayor, J., concurring) (internal quotation marks omitted).

186. Hochschild, *supra* note 11, at 267.

187. *See* Sean McCauley, *Revising the Marks Rule in Light of a Plurality Prone Supreme Court: A Case Study of National Federation of Independent Businesses v. Sebelius*, 26 B.U. PUB. INT. L.J. 257, 266 (2017).

188. *Id.* at 263.

task as it is; there is no need to further convolute it by casting doubt upon whether a given opinion is even precedential at all. A radical change is in order. The good news is that this change can be a remarkably uncomplicated endeavor if the Court allows it to be. By throwing out *Marks* and the plurality decisions that engendered the doctrine, the Court can reestablish itself as a truly singular institution, unified in its voice and banded together in its ultimate pursuit of justice.

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