# UNTWISTING THE *MARKS* RULE AND PLURALITY PRECEDENT: AFFIRMANCES BY EVENLY DIVIDED COURTS AND THEORIES OF HOLDINGS

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## ABSTRACT

*Plurality decisions complicate the law of judicial precedent, leaving practitioners, courts, and academics at a loss for sound methodology to determine a binding rule of law. The cause of confusion typically revolves around the* Marks *rule, which directs lower courts to derive some binding rule of law from a plurality decision by identifying the "narrowest grounds" in support of the judgment. While some scholars have commented that the* Marks *rule should be abandoned, others seek to clarify its application. But in all this discussion and debate over plurality precedent and the* Marks *rule, a few points are overlooked, namely: the existence of another type of plurality, the historical reasons for denying pluralities' precedential value, and how these concerns fit within theories of holdings. Therefore, this Article addresses a few finer points of plurality precedent in the hopes of untwisting the confusion that the* Marks *rule has caused and provides additional avenues for arguments against the* Marks *rule.*

*First, scholars readily dismiss "affirmances by evenly divided courts" in any analysis of plurality precedent, ignoring the fact that there are two types of plurality decisions. Because scholars often ignore affirmances by evenly divided*

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The views and opinions expressed herein are mine alone, and they should not be construed in any way as representing the views or opinions of my past, present, or future employers.

*courts, there lacks any comparison of the two types of plurality decisions and the reasons for their respective precedential value. But the reasons why affirmances by evenly divided courts are universally thought to be of no precedential authority are an important consideration in deciding whether the* Marks *rule is wrong.*

*Second, scholars often briefly mention the historical treatment of plurality decisions prior to* Marks*, but there has been virtually no analysis of the opinions dealing with the question of plurality opinions prior to the U.S. Supreme Court's decision in* Marks v. United States*. Upon review of early federal and state court decisions, scholarship, and treatises, it is apparent that only the judgments rendered by courts' "no-clear-majority decisions" were regarded as having precedential value. Largely based on the same reasons for rejecting affirmances by evenly divided courts as precedential, courts have historically afforded no such precedential value to the splintered reasoning of no-clear-majority decisions.*

*Finally, scholars often overlook the more basic question of what constitutes a holding, thereby ignoring theories of exactly how or why a judicial decision binds subsequent decisions. Thus, it is helpful to root any discussion of plurality precedent in theories of holdings. While some scholars focus on court function—primarily on the reasons why the court takes certain actions—it is more helpful to view the issue in light of what court action means for courts that are deciding subsequent cases. In other words, a court function analysis asks whether the court is resolving disputes, but an analysis under theories of holdings asks what the meaning of a court's resolution signifies for subsequent cases and litigants. Thus, theories of holdings provide a helpful lens through which to view the issue of plurality precedent. This Article fills these gaps in the literature on plurality precedent.*

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## INTRODUCTION

I am a piece of twisted iron.
—St. Aloysius Gonzaga[1]

Plurality decisions and the nature of their precedential authority is an increasingly important yet undertheorized and confusing part of American law. The importance of the issue was bolstered in 1977, when the United States (U.S.) Supreme Court in *Marks v. United States*[2] promulgated what is known as "the *Marks* rule," stating that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds.'"[3] As vain as "a piece of twisted iron,"[4] the *Marks* rule has been the focus of much scholarly debate,[5] most of which has been negative.[6] There is insufficient discussion about how the *Marks*

1. James Martin, *Recovering the Real St. Aloysius Gonzaga*, AMERICA: THE JESUIT REV. (June 21, 2013), https://www.americamagazine.org/faith/2013/06/21/recoveri ng-real-st-aloysius-gonzaga.

2. 430 U.S. 188 (1977).

3. *Id.* at 193.

4. Martin, *supra* note 1.

5. *See, e.g.*, Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. 1942, 1946 (2019) (arguing for abandonment of the *Marks* rule); Ryan C. Williams, *Plurality Decisions and the Ambiguity of Precedential Authority*, 74 FLA. L. REV. 1, 4 (2022) [hereinafter Williams, *Ambiguity of Precedential Authority*] (explaining the conceptual divides pertaining to the precedential nature of plurality decisions); Ryan C. Williams, *Plurality Decisions and Prior Precedent*, 14 FED. CTS. L. REV. 75, 77–78 (2022) [hereinafter Williams, *Prior Precedent*]; Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 798 (2017) [hereinafter Williams, *Questioning* Marks] (asserting that the *Marks* rule's "cryptic directive leaves many questions regarding the precedential force of Supreme Court plurality decisions unanswered"); S. Blake Davis, Comment, *Beware the Ides of* Marks*: Examining the Possible Future of the* Marks *Rule in the Roberts Court Era*, 56 WAKE FOREST L. REV. 685, 686–87 (2021) (discussing the federal circuits' and Supreme Court justices' "divergent" approaches to the *Marks* rule); Maxwell Stearns, *Modeling Narrowest Grounds*, 89 GEO. WASH. L. REV. 461, 463–64 (2021) (seeking to simplify the narrowest grounds rule to avoid a "'[w]atch what we do, not what we say'" directive). *See generally* Christine Scherer, *A Whole Woman's Mess: How the* Marks *Rule, Anticipatory Overrulings, and One Concurring Opinion Have Confused Lower Courts Ruling on Abortion Restrictions*, 47 U. DAYTON L. REV. 43 (2022) (grappling with the *Marks* rule's practical effects and issues raised in abortion cases).

6. *See* James A. Bloom, *Plurality and Precedence: Judicial Reasoning, Lower Courts, and the Meaning of* United States v. Winstar Corp, 85 WASH. U. L. REV. 1373, 1373 n.1 (2008).

decision contradicted historical treatment of plurality decisions and the underlying theoretical foundations of precedent.

Thus, scholars discussing plurality precedent, or the *Marks* rule, often make two mistakes. First, they make blanket assertions about the historical treatment of plurality decisions without examining the history and determining *why* plurality decisions should or should not be afforded precedential authority.[7] Second, virtually every scholar discussing plurality precedent presumes a clear distinction between two different types of plurality decisions: (1) "affirmances by evenly divided courts"[8] and (2) "no-clear-majority decisions."[9] While scholars often focus on the latter, the two types are not so inherently different to justify ignoring "affirmances by evenly divided courts" when discussing plurality precedent.

But scholars also ignore fundamental questions of how a case becomes binding precedent. While some have modeled functions of precedent seeking to clarify plurality decisions,[10] there seems to be a void of scholarly discussion of plurality precedent that is positioned within theories of holdings.[11]

Ignoring "affirmances by evenly divided courts" and the theories of holdings upon which a plurality precedent might rest means that a wide gap exists in the literature on plurality precedent. Such disregard also means that deficiencies arguably exist in courts' applications of the *Marks* rule.[12] While this Article does not address substantive arguments against the *Marks* rule, such as those already

7. *See, e.g.*, EUGENE WAMBAUGH, THE STUDY OF CASES § 48 (2d ed. 1894) ("Even when all of the judges concur in the result, the value of the case as an authority may be diminished and almost wholly destroyed by the fact that the reasons given by the several judges differ materially."); Comments, *Supreme Court No-Clear-Majority Decisions: A Study in Stare Decisis*, 24 U. CHI. L. REV. 99, 99–100 (1956) [hereinafter, Comment, *A Study in Stare Decisis*] (examining the use of decisions when there is no-clear-majority); NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 71-73 (Cambridge Univ. Press 2008) ("Where a majority of judges agree as to the decision but disagree as to the correct grounds for the decision, extracting a ratio decidendi from the case may be an arbitrary exercise.").

8. *See infra* Section I.A.1.

9. *See infra* Section I.A.2.

10. *See* Williams, *Ambiguity of Precedential Authority*, *supra* note 5, at 1 (explaining the implications of different models of precedential authority).

11. *See infra* Part III.

12. For example, scholars have identified three to four different applications of the *Marks* rule. *Compare* Nina Varsava, *The Role of Dissents in the Formation of Precedents*, 14 DUKE J. CONST. L. & PUB. POL'Y 285, 304 (2019) ("As I see it, there are roughly three ways to interpret *Marks*."), *with* Re, *supra* note 5, at 1976–77 (discussing four answers that *Marks* supporters have proposed to the question, "Just what is 'that position taken by those Members who concurred in the judgments on the narrowest grounds?'").

made by prominent scholar Professor Richard Re,[13] it provides a more nuanced look at two finer points in claims like his.

To be clear, scholars are correct that the *Marks* rule is confusing, inefficient, and outright wrong.[14] But they miss important evidence, the details of which shed light on the shaky foundations of the *Marks* rule, such as the historical treatment of affirmances by evenly divided courts. Most scholars also fail to address the foundational principles that might support or reject the *Marks* rule under theories of holdings.[15] Both "affirmances by evenly divided courts" and theories of holdings are often either glossed over or addressed only in a cursory or unorganized manner. But the two are central to a discussion of plurality precedent, no matter one's ultimate conclusion on the validity of the *Marks* rule.[16] Thus, this Article fills both gaps by bringing forth cases that have never been cited by scholars in their discussions of the *Marks* rule and applying theories of holdings to the issue for the first time.

This Article proceeds in three Parts. Part I discusses the relevant terms and distinctions that need to be drawn prior to engaging with the substance of plurality precedent. For instance, Part I examines the different types of plurality

13. Re, *supra* note 5, at 1945 (asserting that "the *Marks* rule is wrong, root and stem, and should be abandoned").

14. *See, e.g.*, *id.*; Williams, *Plurality Decisions*, *supra* note 5, at 78 (stating that plurality decisions are confusing); Williams, *Questioning* Marks, *supra* note 5, at 798 (discussing the *Marks* rule's confusing applicability).

15. A couple of attempts have been made at discerning a deeper understanding of the *Marks* rule; however, Professor Ryan C. Williams's analysis focuses on court function and models of precedent rather than theories of holdings. *See* Williams, *Ambiguity of Precedential Authority*, *supra* note 5, at 1 (examining ambiguities in the law of precedent revealed by plurality decisions); Varsava, *supra* note 12, at 287. While interconnected, theories of holdings concern more foundational questions than models of precedent. Nevertheless, Williams, like many other scholars, does not discuss these models or theories in conjunction with the historical treatment of plurality precedent in case law throughout the United States. Similarly, Professor Nina Varsava discusses theoretical underpinnings of plurality precedent, but it is not entirely clear that she addresses those theoretical underpinnings as they might be conceptualized in clear, definable theories. Other scholars seem to allude to theories of holdings without addressing them head-on. *See* Bloom, *supra* note 6, at 1375 n.12. This Article attempts to discuss plurality precedent in several clear theories of holdings, largely based on the theories of holdings set forth by Professor Lawrence Solum. *See infra* Part III.

16. There are a range of views on the *Marks* rule and plurality precedent more generally. *Compare* Re, *supra* note 5, at 2000 (arguing that the *Marks* rule should be wholly abandoned in favor of the *Screws* rule), *with* Williams, *Questioning* Marks, *supra* note 5, at 839 (seeking to clarify plurality precedent without wholly abandoning the *Marks* rule).

decisions and the basic parts of an opinion that might give the opinion precedential weight.[17]

Part II discusses the historical application of each type of plurality opinion in both federal and state courts. In particular, the state court cases discussed herein provide new insight as to a general rule of precedential authority that has never been cited or discussed by modern scholars.[18] Part II summarizes the Supreme Court's shift in its treatment of plurality decisions and discusses the relevant criticisms of the modern *Marks* rule by academics and courts alike.

Aside from the historical treatment of plurality decisions, the *Marks* rule's relatively recent promulgation, and its subsequent criticism, there are additional reasons to reject the *Marks* rule. These reasons lie at the foundation of precedential theory, such as what exactly constitutes a holding.[19] Part III discusses three theories of holdings[20] and models of precedent.[21] This discussion includes an analysis of which, if any, support the continued application of the *Marks* rule as well as relevant criticisms.

17. Many scholars have felt compelled to draw these distinctions early on; however, it is unclear that any have drawn as clear of distinctions as this Article sets forth in Part I. *See, e.g.*, Linda Novak, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 756 n.1 (1980); Bloom, *supra* note 6, at 1375–76 (viewing decisions by the Court as made up of both judgments and opinions, i.e., "outcomes" and "reasoning"); John F. Davis & William L. Reynolds, *Judicial Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 59 n.1 (1974) (distinguishing affirmances by equally divided courts but noting that they technically fall into the category of plurality precedent).

18. Research for this Article included a thorough review of citing references, or complete lack thereof, to cases discussed in this Article in regard to courts' remarks on the precedential authority of plurality decisions. Some of these cases were found using old treatises, also cited herein, and others were found by looking to other state courts that have mentioned such known decisions. This Article does not claim to address all possible state court cases that have discussed the issue, but the identified cases arguably provide for an enlightening discussion.

19. *See infra* Section I.B.

20. This Article discusses the theories of holding adopted by Professor Lawrence Solum, which is the first attempt to flesh out such theories in a law review article. *See* Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451, 459 (2018) [hereinafter Solum, *Originalist Theory and Precedent*] ("Although I cannot marshal the evidence on this occasion, I believe that there are at least three distinct theories of stare decisis that are explicitly or implicitly operating in the courts in the United States.").

21. This Article also incorporates Williams's models of precedent. *See* Williams, *Ambiguity of Precedential Authority*, *supra* note 5, at 1. Although it seems that models of precedent are slightly different than theories of holdings, this Article discusses Williams's models within its discussion of the theories of holdings. *See infra* Part III.

## I. IMPORTANT PRELIMINARY DISTINCTIONS

The discussion of plurality precedent is fraught with rabbit holes, any one of which could consume the mind for weeks on end. However, this Part clears the air, providing a succinct background of plurality precedent to set the stage for an analysis of the *Marks* rule. This Part proceeds by defining "plurality decision" and "holding"—as well as what makes a holding precedential.

### A. *There Are Two Types of Plurality Decisions*

Much of the scholarship on plurality precedent is flawed because it assumes that there is only one type of plurality decision.[22] However, the term "plurality decision" includes two main types of plurality decisions.[23] The first, an "affirmance by an evenly divided court," is generally dismissed quickly in academia. Instead, scholars focus on the precedential effect of "no-clear-majority decisions."[24] This Article argues that a focus on the commonality between the two types of pluralities provides critical insight as to whether the *Marks* rule is a good rule of precedent. That is, both an affirmance by an evenly divided court and a no-clear-majority decision share the common characteristic of having no majority in favor of the reasoning or rule of law upon which the case is decided. It is important to compare the two at a fundamental level because when a court is deciding whether either decision has precedential value, it should take stock of the principles that underpin why an opinion has precedential value in the first place. The precedential value of affirmances by an evenly divided court is settled and that rule has a much longer history than the confusing and controversial *Marks* rule. Thus, looking at common characteristics between the two could help anchor the precedential value of plurality opinions in a common value—that an opinion's reasoning is only binding if joined by a majority of the court. To begin,

22. *See generally* Re *supra* note 5 (discussing the *Marks* rule and pluralities in depth without discussing affirmances by evenly divided courts).

23. There are others, of course. For example, the four-to-three plurality on a nine-member court is an interesting decision. It is not clear whether such a decision is entirely binding, as a majority of the court did not support the judgment or the reasoning. For one state that has not afforded precedential authority to such decisions, see Roofing Wholesale Co. v. Palmer, 502 P.2d 1327, 1329–31 (Ariz. 1972) (in banc).

24. *E.g.*, Comments, *A Study in Stare Decisis*, *supra* note 7, at 99 (1956); Novak, *supra* note 17, at 756 n.1; Mark Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 419 n.1 (1992); Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 CORNELL L. REV. 1593, 1595 (1992).

a brief explanation of both types of plurality decisions and their identifying characteristics is helpful.

### 1. Affirmances by Evenly Divided Courts

Affirmances by evenly divided courts are decisions rendered by an even-numbered court.[25] This typically happens when one judge or justice is recused, there is a vacancy on the bench, or courts are created with an even number of judges.[26] When such a court cannot reach a majority and the court is evenly divided as to the outcome of the case, the judgment of the lower court will always be affirmed—hence the moniker of "affirmance by an evenly divided court."[27] The reason for this has been described akin to parliamentary procedures—that there must be a majority vote to take affirmative action, like reversing a lower court's decision.[28] In other words, throughout government, a tie-vote leaves things as they are. Therefore, an evenly divided court's affirmance is considered a non-action.

Thus, affirmances by evenly divided courts are universally thought to have no precedential value.[29] This is because there is no majority vote in favor of either the judgment or the reasoning.[30] Without laying down an affirmative judgment or reasoning that creates or stands for a rule of law, there can be no precedential significance of that decision.[31]

25. *See, e.g.*, BRYAN GARNER, CARLOS BEA, REBECCA WHITE BERCH, NEIL M. GORSUCH, HARRIS L. HARTZ, NATHAN L. HECHT, BRETT M. KAVANAUGH, ALEX KOZINSKI, SANDRA L. LYNCH, WILLIAM H. PRYOR JR., THOMAS M. REAVLEY, JEFFREY S. SUTTON & DIANE P. WOOD, THE LAW OF JUDICIAL PRECEDENT 220 (2016); WAMBAUGH, *supra* note 7, at § 47. Some courts, like the Mississippi Court of Appeals, still consist of an even number of judges, though even numbered courts seem to be a fixture of the past. *See Court of Appeals*, STATE OF MISSISSIPPI JUDICIARY, https://courts.ms.gov/appellatecourts/coa/coa.php (last visited Aug. 31, 2023).

26. *See, e.g.*, Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 WM & MARY L. REV. 643, 646 (2002); GARNER ET AL., *supra* note 25, at 220.

27. *See, e.g.*, GARNER ET AL., *supra* note 25, at 220–21 ("As a general rule, when appellate judges are equally divided the result is to affirm the decision below, to bind the litigants under the principle of res judicata, and to be without precedential weight.").

28. *Id.* at 221.

29. *Id.* at 220–21.

30. *See infra* Section I.B.1.

31. GARNER ET AL., *supra* note 25, at 220.

### 2. No-Clear-Majority Decisions

On the other hand, scholars have heavily focused on no-clear-majority decisions; decisions which are presumably the subject of the *Marks* rule.[32] A no-clear-majority decision, by definition, consists of three separate opinions, none of which garner majority support from the court's members.[33] For the Supreme Court, a no-clear-majority decision might, for example, take the form of a four-to-one-to-four vote, a three-to-two-to-four vote, or a three-to-three-to-three vote.

But one unique aspect of no-clear-majority decisions is that they do, unlike affirmances by evenly divided courts, render a judgment. In other words, the court is able to take affirmative action, even without agreeing as to why it is taking such action.[34] This is so because whenever the court has a majority vote to do anything—even if a majority joins a single sentence in an opinion that as a whole garners less than a majority—it takes affirmative action as to that statement, much like a legislative body passing a one sentence statute.[35] However, the most important point in this comparison is how the two types of pluralities are alike; neither garners a majority vote in favor of the reasoning upon which the case might be decided. For that reason, as seen in Part II, there is no evidence that either type of plurality's reasoning has ever been afforded binding precedential authority until the adoption of the *Marks* rule.

## B. *The Parts of a Holding*

Understanding the two types of plurality decisions is important when considering their precedential weight, but the differences between affirmances by evenly divided courts and no-clear-majority decisions are only important in light of how they each affect the issuance of a holding. Thus, this section describes the several characteristics that might make up a court's holding.

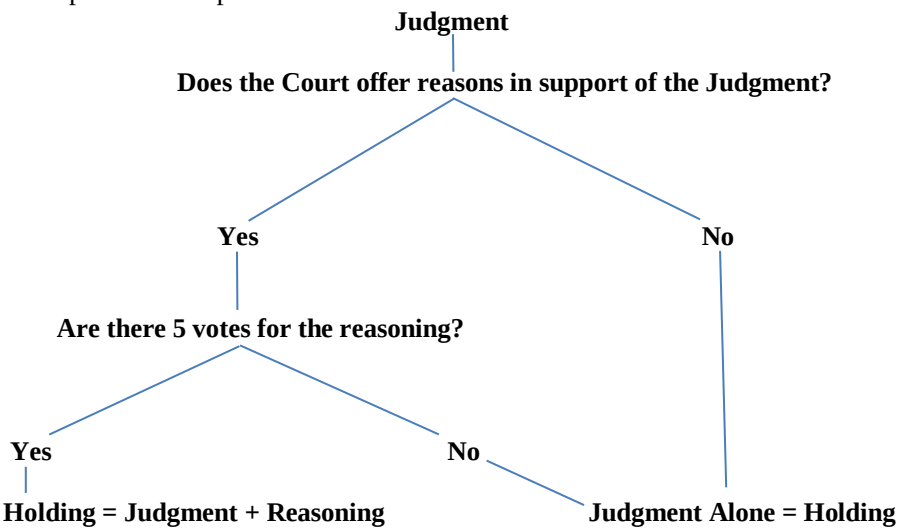
32. Presumably because the application of the *Marks* rule seems to be limited to no-clear-majority decisions, yet there may be other vote counts that warrant application of the *Marks* rule so long as it remains binding precedent.

33. Kimura, *supra* note 24, at 1594 (using "plurality decision" to mean no-clear-majority opinions and stating that "[a]t least three opinions, resting upon diverse legal theories, are present in a plurality decision").

34. *Cf.* Saul Levmore, *Fractured Majorities and Their Reasons*, 127 PENN. ST. L. REV. 331, 336 (2023) ("The majority inclines us to be confident about a group's decision as to an outcome, but it should make us less confident when there is no majority as to reasoning behind it.").

35. *See* GARNER ET AL., *supra* note 25, at 220–21.

In some real sense, a typical holding contains two sub-holdings: a judgment and a reasoning for that judgment.[36] A judgment is the legal decision that is made—the outcome of the case.[37] The reasoning, if it exists at all, is the rule of law that the court relied upon in rendering the judgment.[38] Judgments and reasonings can be precedential in their own respective way.[39] However, while judgments may be precedential without reasoning, the reasoning can only be precedential when accompanied by a judgment.[40] The following chart conceptualizes the point:




Thus, when conceptualizing plurality decisions as precedential authorities, it is important to keep in mind that every holding has two sub-holdings; referred to herein as "rule stare decisis" and "result stare decisis."[41] Rule stare decisis describes the precedential effect of a rule, or rationale, employed by the court in

36. *See* Bloom, *supra* note 6, at 1377 (posing the question of whether the results and rationale of no-clear-majority opinions are binding or merely persuasive).

37. James Hardisty, *Reflections on Stare Decisis*, 55 IND. L.J. 41, 53 n.54 (1979).

38. *See id.* at 43–44 (describing the relationship between rules of law and deductive reasoning).

39. *See generally id.* (discussing rule and result stare decisis).

40. Reasoning can be a binding precedent insofar as it sets out a legal rule or provides justification for a binding legal outcome. *See* Levmore, *supra* note 34, at 335. But the reasoning supporting an outcome can only be binding insofar as the outcome that it supports is itself binding. *See* Hardisty, *supra* note 37, at 55 (describing the value underlying stare decisis and its relationship with appellate courts).

41. Hardisty, *supra* note 37, 52–53.

deciding a case.[42] Result stare decisis refers to the precedential value afforded to the outcome, or the judgment, of the case in light of the facts present in that case.[43] Each must be independently precedential to bind lower courts and gain their precedential effect only from the majority assent of the court.[44] But for either the rule or the result to be afforded binding precedential value, they must first be present in the judicial decision—they must exist.[45] Perhaps more importantly, they must each garner the vote of a majority of the court.[46]

### 1. Majority Requirement

For any action of a court to be precedential, it must have the majority vote of the court's members.[47] Indeed, the regular court makeup of an odd number is "an unmistakable gesture towards the concept of majority rule."[48] Though several jurisdictions throughout history have thought differently,[49] the "simple

42. *Id.* at 53 ("Under rule stare decisis, a court follows stare decisis when it adheres to these rules of law expressly stated in 'binding' precedents.").

43. *Id.* ("[Jurists] sometimes embrace 'result stare decisis' by explicitly or implicitly assuming that 'decisis' denotes judgments or other judicial orders given in light of the material facts.").

44. *Cf. id.* at 53–54.

45. *See* Alan M. Trammell, *Precedent and Preclusion*, 93 NOTRE DAME L. REV. 565, 584 (2018) ("The Supreme Court, for example, has repeatedly held that lower courts should continue to apply precedent that directly governs the facts of a case, even when the precedent appears discredited.").

46. *See* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 357, 360 (2012) ("From its first day to the present day, the Court has routinely followed the majority-rule principle without even appearing to give the matter much thought.").

47. *See* Hartnett, *supra* note 26, at 646 (quoting Durant v. Essex Co., 74 U.S. (7 Wall.) 107, 111 (1868)) ("The traditional practice of the Supreme Court of the United States is that 'no affirmative action can be had in a cause where the judges are equally divided in opinion as to the judgment to be rendered or order to be made.'"); Williams, *Ambiguity of Precedential Authority*, *supra* note 5, at 36; AMAR, *supra* note 46, at 360. *Cf.* WAMBAUGH, *supra* note 7, § 47 ("If the court is divided at all, the force of the case is weakened even in the same jurisdiction.").

48. Jeffrey A. Mandell & Daniel J. Schneider, *Counting to Four: The History and Future of Wisconsin's Fractured Supreme Court*, MARQ. L. REV. (forthcoming 2023) (manuscript at 43), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4369676.

49. Basil Jones, *Stare Decisis*, *in* 26 THE AMERICAN AND ENGLISH ENCYCLOPAEDIA OF LAW 165 (David S. Garland & Lucius P. McGehee eds., 2d ed. 1904) ("In some jurisdictions the authority of a decision as a precedent in subsequent cases is also dependent upon the number of judges who concur therein.") (citing Gilbert v. State, 43 S.E. 47 (Ga. 1902); Hill v.

majority" both has traditionally been and is currently the most accepted rule that creates a binding precedent.[50] Scholars like Henry Campbell Black, the namesake of *Black's Law Dictionary*, and Professor Eugene Wambaugh have recognized the principle that only a majority of a court may set forward a binding rule of law.[51] "The principle of majoritarianism requires the identification of a 'majority rule'—a rule that a numerical majority of Justices explicitly adopt as the law of the land. Absent this majority agreement, a rule should have no binding precedential effect."[52] This view has large implications because, as Ken Kimura states, "[a]ny legal rule articulated in a plurality decision that is not a majority rule has been implicitly or explicitly rejected by a majority of the court,"[53] assuming that a full court decides the case. This requirement is largely grounded in an understanding of the difficulty in discerning a binding rule of law through interpretive methods like the *Marks* rule endorses.[54]

In other words, the widely accepted majoritarian principle is straightforward in that "only a majority of the court's members can speak for the court as a whole, and only the court *as a whole* has the authority to make legal decisions that are binding on subsequent adjudication."[55] Thus, a court's majority vote in favor of the judgment or the reasoning is necessary for either to be binding precedent.

### 2. Judgment

For a court decision to constitute a precedential holding, it must produce a judgment and, as stated above,[56] a judgment may only be issued with the assent of a majority of the court.[57] Judgments are readily determined; simply count the

State, 37 S.E. 441 (Ga. 1900); Dubuque v. Illinois Cent. R. Co., 39 Iowa 56 (1874); Whiting v. West Point, 14 S.E. 698 (Va. 1892); Bruff v. Thompson, 31 6 S.E. 352 (W. Va. 1888)). For example, the Georgia cases cited stand for the proposition that a precedent is only binding when rendered by a unanimous court. *See* Hill v. State, 37 S.E. 441, 442 (Ga. 1900) (stating that a nonunanimous decision is "not . . . binding as authority, because [it is] not rendered by a full bench"); *see also*, Levmore, *supra* note 34, at 332. (questioning majority reasoning).

50. AMAR, *supra* note 46, at 360.

51. *See* HENRY CAMPBELL BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS OR THE SCIENCE OF CASE LAW at 77, 135–37 (1912); WAMBAUGH, *supra* note 7, § 48 n.1; *see also* Kimura, *supra* note 24, at 1596–1600 (discussing precedential legitimacy, including the principle of majoritarianism).

52. Kimura, *supra* note 24, at 1596.

53. *Id.* at 1596–97.

54. *Id.* at 1597 ("A numerical test for precedential legitimacy is justified by the incoherence of any approach that does not incorporate a numerical component.").

55. Varsava, *supra* note 12, at 306 (emphasis added).

56. *See supra* Section I.B.1.

57. *See* Hartnett, *supra* note 26 at 646.

votes in favor of affirmance regardless of reasoning, count those in favor of reversal, and the majority vote wins.[58] But the judgment can also be precedential in its own right.[59] Indeed, as Section II.B shows, courts have historically recognized that a judgment may stand alone as a binding precedent.[60] This may happen when courts are unsure of the appropriate rule of law to apply but are sure of the appropriate outcome of a particular case. In other words, the court might struggle to articulate its reasoning, and therefore refrain from doing so. But the outcome of a particular case can nonetheless be binding in a factually similar case.[61]

Allowing the judgment alone to stand as a precedent may seem odd to some. Though there is evidence of historical application of precedent in this way,[62] it is not clear how this might play out in practice. In any event, the judgment would stand alone as a precedent only considering the particular facts of that case,[63] thus leaving courts deciding subsequent cases to reason how they deem appropriate, so long as they reach the same result in a factually similar case.[64]

In some sense, this could be a useful mechanism for higher courts to leave their reasoning debates to lower courts, thereby allowing the lower courts to experiment with wording the rules or reasonings that might be adopted by a majority in a subsequent case. All the while, the lower court would be restricted to a similar outcome when presented with factual similarities.[65] In other words, where a higher court knows the outcome that seems fair or most just, but a majority cannot agree as to why that particular outcome is right, it may make sense to allow lower courts to assist in sorting out the "why."

As some scholars call it, this is "result stare decisis"—affording precedential weight to a judgment in factually similar cases with little to no binding precedent as to the reasoning of how the prior court arrived at the particular judgment.[66]

58. *Id.*

59. *See* Hardisty, *supra* note 37, at 52–57 (discussing the dichotomy of rule stare decisis and result stare decisis).

60. *See* BLACK, *supra* note 51, at 135–37.

61. *See* Commonwealth v. McClelland, 233 A.3d 717, 730–31 (Pa. 2020).

62. *See supra* Section I.A.2.

63. *Cf. infra* notes 136, 138 (commenting that a judgment is binding on the general result in subsequent cases).

64. *Cf.* Trammell, *supra* note 45.

65. This may be objectionable to some as a sort of end-justifying-means analysis that courts would be required to undertake. *See, e.g.*, Hardisty, *Reflections on Stare Decisis*, 54–55 (discussing general debate among scholars about "adhering . . . to judicial rules rather than judicial results"). While such objections may be based on valid policy concerns, it still stands to reason that such a rule of precedent would comport with historical U.S. precedential rules.

66. *See* Hardisty, *supra* note 37, at 56–57.

Result stare decisis thus permits "a court 'to adopt a new justifying rule so long as the result reached is consistent with the result in the earlier case.'"[67] Thus, a decision that benefits only from result stare decisis—meaning, for purposes of this Article, one with no binding opinion or reasoning—is the least restrictive precedent for lower and subsequent courts.[68]

### 3. Reasoning

While a court is not required to issue an opinion to support a judgment it renders,[69] it may issue an opinion to explain the reasoning by which the court arrived at a certain decision. These reasons, subject to any theory of holdings that one might subscribe,[70] can constitute binding rules of law.[71] Under rule stare decisis,[72] the rules of law put forward in judicial decisions stand alone as binding even if the facts differ materially.[73] Though this characterization is likely more in line with the legislative theory of holdings,[74] it can hold true in some situations regardless of strict adherence to any particular theory of holdings.[75] Predictably, exactly what constitutes the rule that forms rule stare decisis is the subject of much debate surrounding precedential value of opinions, especially plurality decisions.[76]

Though courts are not required to reason their way to the issuance of judgments, it is likely beneficial that they do to support interests such as reliance

67. William G. Peterson, Note, *Splintered Decisions, Implicit Reversals and Lower Federal Courts*: Planned Parenthood v. Casey, 1992 B.Y.U. L. REV. 289, 308 n.120 (1992) (quoting Novak, *supra* note 17, at 757–58).

68. *See* Hardisty, *supra* note 37, at 62 tbl. 2 (outlining different precedential types based on different forms of justifications and attached restrictions).

69. *See infra* Section IV.A (discussing this assumption).

70. *See infra* Part III (discussing theories of holdings).

71. *See* Hardisty, *supra* note 37, at 53.

72. For a clear explanation on the difference between rule and result stare decisis, see Butterworth v. Nat'l League of Pro. Baseball Clubs, 644 So. 2d 1021, 1024 n.7 (Fla. 1994).

73. *See* Hardisty, *supra* note 37, at 53.

74. The legislative theory of holdings considers court statements such as "we hold that . . ." to be as binding as statutory language, viewing the court as a sort of quasi-legislature. *See infra* Section III.C.

75. Levmore, *supra* note 35, at 336 ("[D]ecision-makers, including appellate judges, should be transparent about intra-group disagreements as to their reasoning."); *see also* Hardisty, *supra* note 37, at 54 (discussing particular cases).

76. Many scholars have debated this subject. *See generally* WAMBAUGH, *supra* note 7, § 47 (discussing the precedential value of cases decided by divided courts); Re, *supra* note 5, at 1968–70 (discussing the confusion surrounding plurality precedent and the *Marks* rule's ability to establish clear rules of law).

and the development of legal rules.[77] But the issue of reasoning in plurality decisions is that there cannot be total confidence in any reasoning. Even where a judgment is produced,[78] there is no reliance interest or predictability for litigants, which is likely a large reason why courts issue opinions in the first place. A lack of agreement amongst the court thus severely hurts its reasoning. Indeed, it renders it virtually non-existent. As Kimura states, "When two or more coalitions of concurring Justices reach the same outcome based upon mutually exclusive legal rules, then that particular outcome has not been justified: it is merely the result of a chance happenstance, the meaningless intersection of conclusions."[79] Therefore, by issuing plurality opinions, the court plays a dangerous game by giving the appearance, or tempting lower courts to find that the court has in some way or another issued a binding rule of law. Ultimately, since no rule of law has been settled, it may be "useless to give the opinions of the several judges."[80]

Proponents of the *Marks* rule would likely point to its collaborative analytical framework of finding the narrowest grounds to argue that courts should not necessarily refrain from issuing plurality decisions because, under the *Marks* rule, litigants and lower courts can decipher the court's holding. This, however, assumes that judges or justices implicitly agree upon some points of law, even if they do not join another opinion in part. Such a stance ignores the fact that judges or justices often join or do not join small parts of opinions with which they agree or disagree.[81] Disputes regarding the purpose or methods by which courts render holdings are further discussed in Part III. For now, simply understanding (1) that there are two types of plurality decisions and (2) that a holding consists of a judgment supported by the majority of the court that is sometimes accompanied by majority-supported reasoning provides sufficient background to understand the importance of past cases and the discussion taking place within them.

77. *Cf.* Kimura, *supra* note 24, at 1599 (discussing the nexus between outcome and reasoning).

78. *Id.* at 1598–99.

79. *Id.* at 1598.

80. Walter Clark, *Appeal and Error*, in 3 CYCLOPEDIA OF LAW AND PROCEDURE 405 n.89 (William Mack & Howard P. Nash eds., 1902) (citing Atchison & Nebraska R.R. Co. v. Hubbard, 16 Kan. 156 (1876)). As the Kansas Supreme Court has put it, "A majority of the court are of the opinion that the application should be refused, but they do not agree in the reasons therefor. It is useless therefore to give the separate reasons of the judges, for there is no point of law settled or decided by the judgment in this case." Atchison & N.R. Co. v. Hubbard, 16 Kan. 156, 156 (1876) (citing Foltz v. Merrill, 11 Kas. 479 (1873)).

81. *See* Biden v. Texas, 142 S.Ct 2528, 2563 (2022) (Barrett, J., dissenting) (noting Justice Barrett dissenting, with Justices Thomas, Alito, and Gorsuch joining except for the first sentence).

With this basic understanding in hand, this Article proceeds by discussing the historical treatment of the two types of plurality decisions. Part II shows that the reasoning of both affirmances by evenly divided courts and no-clear-majority decisions was historically treated similarly based upon similar justifications.

## II. THE HISTORICAL TREATMENT OF PLURALITY REASONING

In all the confusion that has resulted from the *Marks* rule, it is helpful to look at the prior rules of precedent governing pluralities. Because there are two types of plurality decisions,[82] Sections II.A and II.B discuss each plurality type as well as the precedential authority historically afforded to each. An examination of select federal and state cases as well as treatises from learned scholars helps to illuminate the issue of whether, under the *Marks* rule, no-clear-majority decisions should continue to hold more precedential weight than affirmances by evenly divided courts despite the reality of neither decision receiving a majority vote for its reasoning or rationale.

### A. *Affirmances by Evenly Divided Courts Have Never Been Precedential*

The general consensus has always been that where an appellate court is evenly divided, the decision below is affirmed and such an affirmance by an evenly divided court holds no binding precedential value other than upon the parties to the affirmed case.[83] This Section continues by highlighting the reasoning behind the firmly established and uncontroversial principle that affirmances by evenly divided courts carry no precedential value because there is no majority vote in favor of a single rationale or reasoning.[84] It is important to

82. *See supra* Section I.A.

83. *See* WAMBAUGH, *supra* note 7, § 47 ("If the court is divided equally, the case has no authority as a precedent."); BLACK, *supra* note 51, at 77–78 ("When the judges of an appellate court are equally divided in opinion as to the disposition to be made of a case before them, the judgment of the court below will be affirmed. . . . Such a judgment of affirmance is indeed as binding on the parties to the particular litigation as one rendered by the entire court. But it is not regarded as settling the questions of law involved for the purposes of any other or subsequent suit."); GARNER, ET AL., *supra* note 25, at 220–21 ("As a general rule, when appellate judges are equally divided the result is to affirm the decision below, to bind the litigants under the principle of res judicata, and to be without precedential weight."); Note, United States v. Mandel*: The Problem of Evenly Divided Votes in EN BANC Hearings in the United States Courts of Appeals*, 66 VA. L. REV. 919, 925 (1980); Lacy v. General Finance Corp., 651 F.2d 1026, 1028 (5th Cir. 1981) ("An affirmance by an evenly divided court, however, has no precedential value . . . .").

84. *See* sources cited *supra* note 83.

bear in mind, as has been stated above,[85] that at issue is the precedential weight of a plurality's *reasoning*; no one questions the authority of a judgment if the court issues one.

The Supreme Court has spoken authoritatively on the precedential value of plurality opinions in respect to an evenly divided court. Two cases are routinely cited in both early state court cases and treatises: *Etting v. Bank of United States*[86] and *Hertz v. Woodman*.[87] In *Etting*, decided in 1826, the Supreme Court stated that "[w]here the Court is equally divided in opinion upon a writ of error, the judgment of the Court below is to be affirmed."[88] And nearly a century later, the Supreme Court again discussed the precedential value of affirmances by evenly divided courts. In *Hertz*, the Court found that an affirmance by an evenly divided court served as a final judgment between the parties, such as to bar subsequent suits under res judicata,[89] but held that such a decision could not be used to bind the deciding court in future cases, stating:

> Under the precedents of this court, and, as seems justified by reason as well as by authority, an affirmance by an equally divided court is, as between the parties, a conclusive determination and adjudication of the matter adjudged; but *principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an authority for the determination of other cases*, either in this or in inferior courts.[90]

This language seems clear enough, but the Court's explanation for why an affirmance by an evenly divided court is not an authority is important. That is, such decisions are not authoritative because a majority of the Court has not explicitly supported the principles of law implicated in the case.

Fifty years later, in 1960, the Court issued a per curiam opinion, again "affirm[ing] by an equally divided Court."[91] Because Justice Potter Stewart took no part in the consideration of the case and the other four justices dissented from the affirmance, "[t]he judgment . . . in th[at] case [was] affirmed ex necessitate, by an equally divided Court" and thus the judgment had no precedential force.[92]

85. *See supra* Section I.B.

86. 24 U.S. (1 Wheat.) 59 (1826).

87. 218 U.S. 205 (1910).

88. *Etting*, 24 U.S. (1 Wheat.) at 73.

89. *Res Judicata*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An issue that has been definitively settled judicial decision.").

90. *Hertz*, 218 U.S. at 213–214 (emphasis added).

91. Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 263 (1960).

92. *Id.* at 263–64.

Today, the Supreme Court continues the practice of affirming the decision below when evenly divided.[93]

The Supreme Court justices are not alone in arguing that affirmances by evenly divided courts hold no precedential authority. As the late scholar and Harvard Law Professor John Chipman Gray put it in an 1895 article, "It has been said in the United States that a judgment made by an equally divided court, though conclusive in the particular case, should have no weight attached to it as a precedent."[94] Indeed, throughout American jurisprudential history, rarely has a court described itself as bound by a prior affirmance by an equally divided court.[95] Commentators and courts instead have stood firmly by the proposition that such decisions only decided the case before the court at the time and served no binding purpose as precedent for subsequent cases. As Professor Wambaugh wrote more than 125 years ago in simple terms, "If the court is divided equally, the case has no authority as a precedent."[96] And Black in 1912, expanding upon Wambaugh's theory, wrote:

> Such a judgment of affirmance is indeed as binding on the parties to the particular litigation as one rendered by the entire court. But it is not regarded as settling the questions of law involved for the purposes of any other or subsequent suit. It is not to be cited or relied on as a judicial precedent, and does not preclude a fresh examination and decision of the same court or in any court subject to its judicial authority.[97]

Notably, *The American and English Encyclopaedia of Law* states the same:

> A decision rendered by a court equally divided in opinion, while binding in the particular case as fully as a decision rendered by a unanimous court, is not binding as a precedent in subsequent cases. The rule that where the court is divided the judgment below is affirmed, is one of convenience rather, in order that an end may be made to the particular litigation. When the same question arises in a subsequent case between

93. *E.g.*, LeDure v. Union Pac. R.R. Co., 142 S. Ct. 1582 (2022).

94. John Chipman Gray, *Judicial Precedents.–A Short Study in Comparative Jurisprudence*, 9 HARV. L. REV. 27, 41 (1895).

95. *But see* Robertson v. Mississippi Valley Co., 81 So. 799, 802–803 (Miss. 1919) (Stevens, J., dissenting) (describing the majority's "grievous error" in "tak[ing] and announc[ing] to the effect that a previous decision by an equally divided court 'is a judicial precedent and should be followed.'").

96. WAMBAUGH, *supra* note 7, at § 47.

97. BLACK, *supra* note 51, at 78.

> other parties, it is treated as an open one and the former decision is not to be invoked as stare decisis.[98]

This belief in the limited value of affirmances by evenly divided courts extended beyond scholarship to state courts as well.[99] As far back as the mid-nineteenth century, state supreme courts took the position that an affirmance by an evenly divided court resolved the case before the court but served no precedential purpose in binding courts deciding subsequent cases.[100] All held, save one, that because affirmances by evenly divided courts do not garner five votes in favor of any particular rule of law or reasoning, they do not carry the force of law and therefore cannot be binding.[101]

One early example from an 1840 decision issued by the Court for the Correction of Errors of New York shows another similar historical stance on affirmances by evenly divided courts:

> The fact that the judgment of affirmance in this case was entered upon an equal division of the members of this court, cannot alter the law in this respect, or authorize the court to reverse its own decision, any more than if the judgment of affirmance had been unanimous. The effect of such a judgment of affirmance is as conclusive upon the rights of the parties to the judgment as any other; although it is not considered as

98. *Stare Decisis*, 23 THE AMERICAN AND ENGLISH ENCYCLOPAEDIA OF LAW 23–24 (Charles F. Williams ed. 1893).

99. *See, e.g.*, Whiting v. Town of West Point, 14 S.E. 698, 700 (Va. 1892); Morse v. Goold, 11 N.Y. 281, 285 (1854) ("[Y]et, as the judges were equally divided in opinion, the determination cannot be considered as a precedent, but the question must be regarded as entirely open."); *In re* Griel's Estate, 33 A. 375, 377 (Pa. 1895) ("[T]he decree of the court below stood as affirmed by a divided court. That is not a decree or judgment of this court in support of which the rule of stare decisis can be successfully invoked."). Interestingly, some courts, like the Georgia Supreme Court, required, at least for a time, a unanimous bench for prior cases to be absolutely binding; *see* Hill v. State, 112 Ga. 32 (1900); Hardin v. Reynolds, 6 S.E.2d 913, 914 (Ga. 1940); Comments, *A Study in Stare Decisis*, *supra* note 7, at 101 n.10.

100. *See* Morse, 11 N.Y. at 285 ("[Y]et, as the judges were equally divided in opinion, the determination cannot be considered as a precedent, but the question must be regarded as entirely open.").

101. *See* Town of Lovell v. Menhall, 386 P.2d 109, 110 (Wyo. 1963) (Gray, J., concurring and announcing the judgment of the court) ("This is for the reason that other than Mississippi, none of those courts regard disposition by an equally divided court of a pending case as establishing precedent or settling any principles of law.").

> settling the question of law in this court as to cases which may arise between other parties.[102]

This example shows the idea of a lack of majority requiring non-action by the court, as discussed by Bryan Garner and his esteemed panel of appellate judges.[103]

But not all states reason their way to a non-precedential treatment of affirmances by evenly divided courts in the exact same way. Indeed, one outlier state supreme court took a different approach in reasoning that pluralities should be afforded no binding precedential value. As Justice John Morgan Stevens of the Mississippi State Supreme Court commented in his dissent in 1919, the reasoning of the Supreme Court of Pennsylvania "goes a step further than most courts."[104] Rooting their standard for affirming equally divided courts in a prohibition of lower courts setting binding precedent, the Pennsylvania Supreme Court stated:

> In other words, as to the question of construction now before us, the decree of the court below stood as affirmed by a divided court. That is not a decree or judgment of this court in support of which the rule of stare decisis can be successfully invoked. That principle applies only to actual judgments or decrees of this court, and not to judgments or decrees of inferior tribunals, which are necessarily allowed to stand as final because of an equally divided appellate court.[105]

But this idea, having taken no root in other state courts' reasoning, is now seemingly rejected. Indeed, most courts have followed a different line of

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102. People v. City of New York, 25 Wend. 252, 256 (Ct. Corr. Err. N.Y. 1840) (citing Bridge v. Johnson, 5 Wend. Rep. 342, 342 (Ct. Corr. Err. N.Y. 1830)) ("Where the members of the court for the correction of errors are *equally divided* as to the judgment to be pronounced, the judgment of the court below is of course *affirmed*; but such *formal* affirmance does not settle the question of law."); *see also Bridge*, 5 Wend. Rep. at 372 ("But such a formal affirmance, although it leaves the law of the supreme court undisturbed, cannot be considered as settling the law in this court, except so far as relates to the particular cause in which the decision is made. The maxim *stare decisis, et non quieta movere*, cannot be applicable to such a case, where the question never has in fact been decided by this court.").

103. GARNER ET AL., *supra* note 25, at 220–21. *See infra* Part III (discussing legislative theory of holdings wherein this idea may become more important).

104. Robertson v. Miss. Valley Co., 81 So. 799, 804 (Miss. 1919) (Stevens, J., dissenting).

105. *In re* Griel's Estate, 33 A. 375, 377 (Pa. 1895). Indeed, it appears that Pennsylvania courts have gone even further in this regard, holding that when the Pennsylvania Supreme Court is evenly divided, its affirmance both holds no precedential value and strips the lower court decision of its precedential value. *See* GARNER ET AL., *supra* note 25, at 224–25 n.20.

reasoning from the Pennsylvania Supreme Court, falling more in line with the Supreme Court of Florida when it wrote in 1904:

> [A]s no matters of law are decided so far as the question upon which the court is equally divided is concerned, the judgment possesses no dignity as a judicial precedent. It carries upon its face a badge which precludes any application of it in future under the doctrine of stare decisis. "The judges simply agree that it is expedient to finish the litigation. It is a public expediency, and is often expedient, also, with respect to the interests of the parties."[106]

The Supreme Court of Michigan in 1908 thought it inconceivable that an affirmance by an evenly divided court could be a binding precedent, stating that "'[a] judgment of this court, based on diverse views of the law held by the judges, who do not concur in the reasons and principles upon which it should be founded, is not binding as a precedent,' a proposition so obvious that there is little excuse for questioning it."[107] And in the same year, the Supreme Court of the Territory of Arizona held, "It is true that the judgment there affirmed determined, among other matters, the precise point now before us; but, the affirmance being by a divided court, it does not have the force of a cogent precedent."[108] In 1911, the Supreme Court of Appeals of West Virginia held the same, distinguishing a prior case by stating that its decision "was by an equally divided court" and "[t]herefore it is not a binding precedent."[109]

One of the most fervent defenses of the limited valuation of affirmances by evenly divided courts came out of the Mississippi Supreme Court's 1919 decision in *Robertson v. Mississippi Valley Co*.[110] There, Justice Stevens also argued that such decisions do not bind the court in rendering subsequent, conflicting decisions.[111] In his dissent in *Robertson*, Justice Stevens chastised the majority for effecting a prior "decision by an equally divided court" as binding

106. State v. McClung, 37 So. 51, 52 (Fla. 1904) (quoting Luco v. De Toro, 88 Cal. 26, 28–29 (1891)); *see also* Santa Rosa City R. Co. v. Central St. Ry. Co., 112 Cal. 436 (1896) (explaining that when the court is evenly divided in opinion and it would unreasonably delay resolution of the case "the judgement of the lower court must be affirmed"). This idea that an affirmance by an evenly divided court results from a sense of expediency is reiterated by Henry Campbell Black. BLACK, *supra* note 51, at 78.

107. City of Kalamazoo v. Crawford, 117 N.W. 572, 573 (Mich. 1908) (quoting City of Dubuque v. Illinois Cent. R.R. Co., 39 Iowa 56 (1874)) ("It has been held by many courts that a decision by a divided court does not settle the law for other cases.").

108. Territory *ex rel* Clark v. Gaines, 93 P. 281, 282 (Ariz. 1908).

109. Bratt v. Cornwell, 70 S.E. 271, 273 (W. Va. 1911).

110. *See* Robertson v. Miss. Valley Co., 81 So. 799, 801 (1919) (Stevens, J., dissenting).

111. *Id.* at 801.

precedent.[112] In support of his view, he compiled secondary authorities and case law from other states, all standing for the proposition that plurality decisions are not binding precedent[113] and rejected the only authority stating that plurality decisions can be binding precedent.[114] Quoting the *Corpus Juris*, Justice Stevens wrote:

> Where the judgement of a lower court is affirmed by reason of an equal division of opinion in the appellate court, the judgment, while binding in the particular case as fully as a decision rendered by a unanimous court, is not binding as a precedent, and when the same question arises in a subsequent case between other parties, it is treated as an open one, and the former decision is not to be invoked as stare decisis . . . .[115]

Justice Stevens also quoted *The Encyclopedia of Pleadings and Practice*, stating, "Where the judgment of the lower court is affirmed upon an equal division of opinion in the appellate court, such judgment stands only as a decision in the case in question, and not as an obligatory precedent."[116] As well as the *Cyclopedia of Law and Procedure*, stating:

> A judgment rendered by an equally divided court is as binding and conclusive on the rights of the parties as if rendered upon the full concurrence of all the judges, and bars another suit for the same cause. But such judgment stands only as a decision in that particular case, and not as a precedent.[117]

Justice Stevens continued by quoting the *Cyclopedia of Law and Procedure*: "A decision rendered by a divided court is not generally considered an obligatory

112. *Id.* at 801 (Stevens, J., dissenting) (noting that, at the time, only South Carolina's Supreme Court recognized plurality decisions as precedent, but that conclusion was reached "based solely upon the special provisions of the Constitution of South Carolina, and not by reason and precedent").

113. *Id.* at 803–06.

114. *Id.* at 803 ("This court is neither the House of Lords nor the Constitution of South Carolina, and accordingly the reason underlying the only two authorities relied upon has no application in the case at bar.").

115. *Id.* (quoting 15 WILLIAM MACK & HOWARD BENJAMIN HALE, CORPUS JURIS 938, at § 326 (1918).

116. *Id.* (quoting 7 THE ENCYCLOPEDIA OF PLEADINGS & PRACTICE 47 (William M. McKinney, ed., 1897)).

117. *Id.* (quoting 3 CYCLOPEDIA OF LAW AND PROCEDURE 407 (William Mack & Howard P. Nash eds., 1902)).

precedent."[118] Much to his chagrin, the Mississippi Supreme Court held in 1919 that because the court at the time was:

> [C]omposed of an even number of judges, who are constantly liable to be equally divided in their opinions upon questions of law presented to the court for decision, the disregard by [the court] . . . of former decisions of the court solely because they were rendered on an equal division of the judges would bring so much inconvenience and uncertainty into the administration of justice that we do not think we have the right to do so; but, in order that such consequences may be avoided, we think it is incumbent upon us to treat such decisions as being within the rule of judicial precedents.[119]

Notably, discussing the Mississippi Supreme Court's decision in *Robertson*, the Wyoming Supreme Court found that no state other than Mississippi followed such a rule and held that an equally divided court cannot establish a precedent.[120]

Throughout the twentieth century, courts continued to find no binding precedential value in prior decisions without a clear majority voting in favor of

118. *Id.* (quoting 11 CYCLOPEDIA OF LAW AND PROCEDURE 746 (William Mack ed., 1904)).

119. Robertson v. Mississippi Valley Co., 81 So. 799, 801 (Miss. 1919) (Stevens J., dissenting); *see also* Montgomery Ward & Co. v. Harland, 38 So. 2d 771, 773 (Miss. 1949) ("An affirmance by an evenly divided Court is a binding judicial precedent unless and until the same is overruled."); Hughes v. Gully, 153 So. 528, 528 (1934) ("[W]here a decision was rendered by a divided court, it was a precedent and binding until it should be overruled."); Jefferson Standard Life Ins. Co. v. Ham, 173 So. 672, 672 (Miss. 1937) ("[T]hat decision, although rendered by an equally divided court, is binding upon us under the rule of stare decisis."). Notably, while Mississippi followed a different line of reasoning; affording binding precedential value to pluralities; it first did so in 1919 and cited the court's composition at the time. From 1916 to 1950, the Mississippi Supreme Court was comprised of six justices, an even number which made evenly divided decisions a more realistic fear and more frequent occurrence. *See* William L. Waller, Jr. & Chad Byrd, *A Bicentennial Review of Mississippi Supreme Court Practice and Procedure*, 86 MISS. L.J. 689, 701–04 (2017). In more recent years, the Mississippi Supreme Court has stated that it requires "a majority of all sitting judges to create a precedent." Garrett Enterprises Consol., Inc. v. Allen Utilities, LLC, 176 So. 3d 800, 807 n.5 (Miss. Ct. App. 2015) (quoting Buffington v. State, 824 So. 2d 576, 580 (Miss. 2002)); Blackwell v. Lucas, 271 So. 3d 638, 641 (Miss. Ct. App. 2018). However, research for this Article did not locate a Mississippi Supreme Court majority opinion explicitly abrogating the rule that an affirmance by an evenly divided court is nonprecedential.

120. *See* Town of Lovell v. Menhall, 386 P.2d 109, 110 (Wyo. 1963) ("This is for the reason that other than Mississippi, none of those courts regard disposition by an equally divided court of a pending case as establishing precedent or settling any principles of law.").

a particular line of reasoning.[121] And the principle has survived for now; "[a]s a general rule, when appellate judges are equally divided the result is to affirm the decision below, to bind the litigants under the principle of res judicata, and to be without precedential value."[122] The rule seems to be a good one due to both furthering the interest of settling sound precedent, i.e., only developing legal principles and rules when the court can agree upon the right way to do so, while still resolving the dispute between the current parties before the court with a sense of finality.[123]

Thus, it is well established, both today and throughout American legal history, that affirmances by evenly divided courts are not binding precedents for the simple reason that a majority did not vote in favor the reasoning or rationale by which the case could have been decided. The following Section demonstrates that, at least historically, no-clear-majority decisions were treated similarly to affirmances by evenly divided courts, creating no binding precedent as to the reasoning or rationale and only creating a binding precedent insofar as a majority of the court supported the judgment. Importantly, the *Marks* rule only seeks to recognize the *reasoning* of pluralities as authority.[124] No one disputes the authority of a *judgment* rendered by no-clear-majority decisions.[125]

### B. *Prior to 1977, No-Clear-Majority Opinions Were Binding Only as to the Judgment*

No-clear-majority decisions have their roots in the seriatim opinion of early American and English courts, where each case was decided by every judge or justice writing their own opinion with no single opinion being *the opinion of the court*.[126] However, the use of the seriatim opinion virtually ended in 1801 with

121. *See generally* Comment, *A Study in Stare Decisis*, *supra* note 7 (examining treatment of no-clear-majority decisions).

122. *See* GARNER ET AL., *supra* note 25, at 220–221.

123. *See* Hardisty, *supra* note 37, at 56 ("Since one of the main reasons for articulating a rule is future guidance, judges are sometimes reluctant to articulate a rule: they may instead choose to keep future decisions open and to prevent others from relying on an unreliable standard.").

124. *See* Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) ("When a fragmented Court decided 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 judgements on the narrowest grounds.'").

125. *See infra* Section II.B.

126. *See* Douglas J. Whaley, *A Suggestion for the Prevention of No-Clear-Majority Judicial Decisions*, 46 TEX. L. REV. 370, 370 (1968).

"[t]he advent of John Marshall as Chief Justice of the United States Supreme Court."[127] Yet as one phenomena ends, another begins. Indeed, the seriatim opinion's "stepchild, . . . the no-clear-majority decision, sprang up, growing stronger through the years."[128] Though no-clear-majority decisions appear to have historically been a rare occurrence, they have grown in frequency over time.[129]

It is likely that the infrequency of no-clear-majority decisions provides the reason for the late bloom of the *Marks* rule. In 1956, just twenty-one years prior to the first appearance of the *Marks* rule, one student commented that "[t]he Supreme Court ha[d] never discussed the value of no-clear-majority decisions, although members of the Court have often indicated that such cases lack authority."[130] For example, Justice Robert H. Jackson's dissent in *Saia v. New York*[131] explained that without five votes for any opinion, a decision of the Supreme Court lacks authority to bind the Court in subsequent cases.[132] There, Justice Jackson wrote, "The case . . . cannot properly be quoted in this connection, for no opinion therein was adhered to by a majority of the Court. . . . The failure of six or seven Justices to subscribe to those views would seem to fatally impair the standing of that quotation as an authority."[133] This thought extended beyond the Supreme Court bench; *The American and English Encyclopaedia of Law* states that, "if a majority of the judges do not agree upon the principle on which the decision is based the decision is not authority."[134]

Often, "textbooks on judicial precedent indicate that theoretically the no-clear-majority decision stands only for its general result."[135] As set forth by

127. *Id.*

128. *Id.*

129. *Id.*

130. Comment, *A Study in Stare Decisis*, *supra* note 7, at 100 (citing South v. Peters, 339 U.S. 276 (1949) (Douglas, J., dissenting)). Research for this Article did not result in finding any authority since where the Supreme Court, or any of its members, addressed the precedential weight of no-clear-majority decisions until *Gregg* and *Marks*. But that does not mean no-clear-majority decisions were infrequent, *See* Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127, 1128 (1981).

131. 334 U.S. 558 (1948).

132. *Id.* at 568 n.1 (Jackson, J., dissenting).

133. *Id.*

134. Jones, *supra* note 49, at 165.

135. Comment, *A Study in Stare Decisis*, *supra* note 7, at 100. But while some scholars say that such a decision stands only for the general result—almost wholly diminishing the decision's precedential value—more recent scholars have called this point into question. *See* GARNER, ET AL., *supra* note 25, at 199 ("In the absence of a unified rationale to support a

Wambaugh and other notable scholars, "even if a court's judges agree on the result, the value of a case as a precedential authority is diminished and almost wholly destroyed by the fact that the judges differ materially in their reasoning as to prevent a majority opinion."[136] Black, writing eighteen years later, agreed, stating that "[i]f all or a majority of the judges concur in the result . . . but differ as to the reasons which lead them to this conclusion, the case is not an authority except upon the general result."[137]

This distinction that these scholars have all made—that no-clear-majority decisions are binding as to the judgment yet non-binding as to the reasoning—supports this Article's contention that the judgment and reasoning of a decision are separate and distinct, meaning that each can serve as a precedent independently if they exist in a decision and if they garner the support of a majority of the court.[138] Moreover, the idea that the reasoning of no-clear-majority decisions is not binding precedent permeated not only academia, but courts as well.

Indeed, one landmark case on the issue, seemingly historically relied upon by the above treatises, was decided by the Supreme Court of Iowa in 1874, where it stated:

> None of the opinions considered alone has the force of a decision of the court, because no one of them is concurred in by a majority of the Justices; taken collectively, they cannot be regarded as binding upon us in the character of a precedent. . . . It has always been held that a decision of a court concurred in by less than a majority of the judges, has not the force of a precedent. . . . If the court be equally divided *or less than a majority concur in a rule*, no one will claim that it has the force of the authority of the court.[139]

Of particular note is the specificity in the language of the state supreme court: "[If] less than a majority concur in rule, no one will claim that is has the force of the authority of the court."[140] This suggests that courts did not believe a

decision, its precedential value may be called into question and, in the view of some, is substantially diminished."); Novak, *supra* note 17, at 757–58 (stating that the general result is binding on subsequent, identical cases).

136. WAMBAUGH, *supra* note 7, at § 48 n.1 (quoting City of Dubuque v. Cent. R.R. Co., 39 Iowa 56, 80–81 (1984)).

137. BLACK, *supra* note 51, at 135–137.

138. *See supra* Section I.B.

139. City of Dubuque v. Illinois Cent. R.R. Co., 39 Iowa 56, 79–80 (1874) (emphasis added).

140. *Id.* at 80.

rule like the *Marks* rule could ever seriously be proposed, much less adopted. Further, the reasoning given for recognizing only the journal result—or judgment—as a precedent, without regard for any opinions issued by the judges, seems extremely similar to the reasons given for withholding precedential weight from affirmances by evenly divided courts.[141]

The Iowa Supreme Court was not the first to express that view. In 1857, the Supreme Court of Illinois held that, "In a solitary case, and by a divided court, upon a disputed or doubtful point, the maxim should not and does not apply, but courts are left free to revise and reverse a former ruling, if found, on more critical examination and more mature deliberation, to be erroneous."[142] The language of this decision seems to comport with the idea that courts might issue these divided or fractured opinions in the interest of expediency, reserving the ability to set a binding rule of law in the future upon more deliberation. This, again, mirrors the language of cases and treatises discussing the precedential value of affirmances by evenly divided courts.[143]

More than a century later, in 1966, Justice John Musmanno of the Pennsylvania Supreme Court cited the above treatises, stating:

> Under our system of case law a decision becomes a precedent for controlling other cases when the Opinion of the Court, accepted by a majority of the judges, announces a definitive principle of law. If the decision commands no majority protection of law it is rated as a 'no-clear-majority' decision which is binding only for its journal result.[144]

Similarly, in 1969, despite their eventual reversal, the Court of Appeals of Kentucky rejected the argument that two Supreme Court decisions were controlling by noting that neither decision garnered a majority of the Court, stating that the rules announced in those opinions "ha[d] not become the law on th[e] subject."[145] The Court of Appeals of Arizona held the same later that

141. *See supra* Section II.A.

142. Hopkins v. McCann, 19 Ill. 113, 115 (1857) (notably using the term divided court, rather than *equally* or *evenly* divided court).

143. *See*, *e.g.*, State v. McClung, 47 Fla. 224, 226–27 (1904) (quoting Luco v. De Toro, 88 Cal. 26, 28–29 (1891)) (discussing the expediency interest in affirming evenly divided courts, that the deciding judges leave the question open for future debate, and that such a "judgment possesses no dignity as a judicial precedent"); BLACK, *supra* note 51, at 78.

144. Commonwealth v. Robin, 218 A.2d 546, 558 (Pa. 1966) (Musmanno, J., dissenting).

145. Cain v. Commonwealth, 437 S.W.2d 769, 771 (Ky. Ct. App. 1969), *rev'd on other grounds*, 397 U.S. 319 (1970) (discussing Redrup v. New York, 386 U.S. 767 (1967); 'A Book Named John Cleland's Memoirs of A Woman of Pleasure' v. Massachusetts, 383 U.S. 413

year.[146] And the Supreme Court of South Carolina held that a no-clear-majority decision by the Supreme Court could not bind them, before having their decision vacated.[147]

Other oddities have also led to no-clear-majority decisions. The Supreme Court of Arizona, sitting in banc, held that the Supreme Court's decision in *Fuentes v. Shevin*,[148] decided four-to-three with two judges recused, was not a clear majority that bound the Arizona Supreme Court to declare Arizona law unconstitutional.[149] According to the Supreme Court of Arizona, the decision was not controlling because the reasoning and judgment constituted a "decision by less than a clear majority."[150]

Scholars did not even think to argue for such no-clear-majority decisions to be binding as to their reasoning.[151] Instead, scholarly analysis suggested solutions that would preclude no-clear-majority decisions from ever being issued.[152] Though judicial and scholarly opinions demonstrate that it was abundantly clear that no-clear-majority decisions were binding only for the judgment issued, that proposition is now blurred.[153] But a comparison of the cited reasons for why opinions in an affirmance by an evenly divided court are non-precedential to that of no-clear-majority opinions shows similarities as to why neither were historically considered binding precedent.[154] Nonetheless, no-clear-

(1966)). *But see* Oliver v. State, 293 N.E.2d 515, 515–16 (Ind. Ct. App. 1973) (discussing *Cain* and its subsequent reversal by the Supreme Court).

146. *See* Barbone v. Superior Court of Pima County, 462 P.2d 845, 848–49 (Ariz. Ct. App. 1969).

147. *See* State v. Watkins, 191 S.E.2d 135, 142 (S.C. 1972), *vacated*, 413 U.S. 905 (1973).

148. Fuentes v. Shevin, 407 U.S. 67 (1972).

149. Roofing Wholesale Co., Inc. v. Palmer, 502 P.2d 1327, 1329–30 (Ariz. 1972) (in banc).

150. *Id.*

151. *See, e.g.*, Comment, *A Study in Stare Decisis*, *supra* note 7, at 100 (1956).

152. *See, e.g.*, Whaley, *supra* note 126, at 370 ("[T]he author will suggest a solution aimed primarily at preventing these decisions and eliminating the havoc they create in the judicial system.").

153. *See* Re, *supra* note 5, at 1943–44; Williams, *Plurality Decisions*, *supra* note 5 (discussing and debating precedential value of no-clear-majority decisions); Williams, *Questioning* Marks, *supra* note 5 (same); Williams, *Ambiguity of Precedential Authority*, *supra* note 5 (same).

154. *Compare* City of Dubuque v. Illinois Cent. R.R. Co., 39 Iowa 56, 79–80 (1874) *and* WAMBAUGH, *supra* note 7, at § 48 *and* BLACK, *supra* note 51, at 135–137 *with* State v. McClung, 47 Fla. 224, 227 (1904) (quoting Luco v. De Toro, 88 Cal. 26, 28–29 (1891)) *and* JAMES H. FLINT, THE AMERICAN AND ENGLISH ENCYCLOPAEDIA OF LAW, 23–24 (Charles F. Williams ed. 1893).

majority opinions persisted. And in 1977, the Supreme Court offered up the *Marks* rule—a confusing, complicated, and ill-advised rule—to purportedly resolve any open questions surrounding no-clear-majority decisions.[155]

### C. *In 1977, the Supreme Court Shifted to the* Marks *Rule, and Confusion Ensued*

Any modern importance of plurality precedent is deeply entrenched in the *Marks* rule. In 1977, the Supreme Court stated, "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.'"[156] Notably, the *Marks* rule's birth is as interesting as the rule itself.

The particular language of the *Marks* rule did not originate in the *Marks* decision. Rather, the rule that governs the interpretation of no-clear-majority decisions originates in a no-clear-majority decision itself, *Gregg v. Georgia*,[157] decided one year earlier.[158] As Professor Richard Re stated, "That origin is noteworthy because *Gregg* was itself a fragmented decision. . . . [T]he *Gregg* plurality announced a rule of precedent that — surprise — afforded precedential weight to plurality opinions."[159]

Perhaps even more interesting is the author of each of those opinions. As Re comments, Justice Lewis F. Powell, a member of the plurality in *Gregg*, authored the opinion in *Marks*.[160] And "[b]y including the *Marks* rule in his majority opinion in *Marks*, Justice Powell retroactively suggested that his own preferred resolution in *Gregg* was the governing precedent."[161] Nevertheless, the Supreme Court adopted the *Marks* rule in a majority decision.[162] The subsequent

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

156. *Id.* (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).

157. 428 U.S. 153 (1976).

158. *Id.* at 169 n.15.

159. Re, *supra* note 5, at 1948 (describing the *Gregg* plurality's rule as "self-justifying"). The rule in *Gregg*, while seeming partial to its own opinion, seems even more partial in light of the plurality decision in Furman v. Georgia, 408 U.S. 238 (1972). Professor Richard Re sufficiently covers the historical drama leading to the *Marks* rule, such that any further discussion here would be duplicative. *See id.* at 1948–49.

160. *Id.* at 1951.

161. *Id.*

162. Marks v. United States, 430 U.S. 188, 193; *see also* Re, *supra* note 5.

jurisprudence has been a whirlwind of confusion.[163] This Article leaves the discussion of such confusion to the important works of Re and Professor Ryan C. Williams.[164] With new historical evidence in hand, Part III discusses why the *Marks* rule does not hold up under various theories of holdings.

## III. PLURALITY DECISIONS UNDER THEORIES OF HOLDINGS

Perhaps the answer to any confusion resulting from the *Marks* rule is to abandon the rule,[165] or at least to modify it in some way.[166] The *Marks* rule establishes a new principle of stare decisis, or holdings, which, as seen above,[167] has no historical application.[168] Positioning the *Marks* rule within theories of holdings allows a clear analytical framework to determine whether the rule should be maintained or abandoned. This Part recognizes three[169] theories of holdings and discusses how the *Marks* rule arguably operates under each, including the (A) salient legal factual characteristics theory, (B) *ratio decidendi* theory, and (C) legislative or predictive theory.[170] These theories have largely

163. *See, e.g.*, Re, *supra* note 5, at 1959 (discussing numerous cases in both federal and state courts, different approaches to the *Marks* rule, and the general confusion on the issue); Williams, *Ambiguity of Precedential Authority*, *supra* note 5, at 36 (reflecting the general confusion of the *Marks* rule); *see also* United States v. Fischer, 64 F.4th 329, 341 n.5 (D.C. Cir. 2023) (panel split 1-1-1) (highlighting a debate between the lead opinion and the concurring opinion over which is controlling as precedent); *id.* at 362 n.10 (Walker, J., concurring).

164. *See generally* Re, *supra* note 5 (discussing the *Marks* rule and arguing for its abandonment); Williams, *Plurality Decisions*, *supra* note 5, at 79; Williams, *Questioning* Marks, *supra* note 5, at 798–99; Williams, *Ambiguity of Precedential Authority*, *supra* note 5, at 1, 3.

165. Re, *supra* note 5, at 1945.

166. *E.g.*, Davis, *supra* note 5, at 717 ("The Supreme Court should end the inconsistent application of the *Marks* rule across the lower federal courts by adopting a consistent, uniform application of the *Marks* rule for all federal courts to follow.").

167. *See supra* Part II.

168. Adam N. Steinman, *To Say What the Law Is: Rules, Results, and the Dangers of Inferential Stare Decisis*, 99 VA. L. REV. 1737, 1745–46 (2013) (discussing the *Marks* rule's connection with deeper questions such as what creates a rule of law or whether law is simply created by "five Justices support[ing] a particular proposition").

169. *See infra* Section III.C.

170. Lawrence Solum, *Legal Theory Lexicon*: *Holdings*, LEGAL THEORY BLOG (March 14, 2021, 9:00 AM), https://lsolum.typepad.com/legaltheory/2021/03/legal-theory-lexicon-holdings.html [hereinafter Solum, *Legal Theory Lexicon: Holdings*].

been recognized by Professor Lawrence Solum, but they are otherwise underdiscussed.[171] As Solum notes:

> [T]he current state of the doctrine of stare decisis is radically disordered. Many judges cannot even articulate their own theory of stare decisis, adopting an eclectic approach that uses different theories on different occasions. Worse, some judges may use more than one theory on a single occasion. Sadly, many in the legal academy are equally confused, reflecting decades of neglect of this important topic.[172]

While this Article does not seek to clarify or challenge the theoretical framework that Solum suggests, it seeks to apply these theories of holdings to the *Marks* rule, one of the most confusing and debated rules of precedent in modern jurisprudence.[173]

In his analysis, Williams applied three models of precedential authority to plurality precedent.[174] His models of precedential authority can readily be coupled with Solum's theories of holdings. For instance, Williams's "judgment model" fits within Solum's *ratio decidendi* theory of holdings.[175] Likewise, his "pronouncement model" and "prediction model" seem to comport with Solum's predictive, or legislative, theory of holdings.[176] Thus, Williams's important analytical framework will be discussed where appropriate and within the respective subsection that are based around Solum's named theories. While Williams's models of precedent couple nicely with theories of holdings, they are not entirely the same. The ensuing discussion of theories of holdings purports to reduce the questions surrounding the *Marks* rule to their most fundamental form.

### A. *The Salient Legal Factual Characteristics Theory of Holdings*

Because holdings are dependent upon the specific circumstances of the case being decided, such a case is only binding in the sense that it is very similar to a subsequent case.[177] The maxim of "deciding like cases alike" is derived from this

171. Research for this Article showed no other law review articles that have explicitly accepted or expanded discussion of Professor Solum's three theories of holdings.

172. Solum, *Originalists Theory and Precedent*, *supra* note 20, at 459–60.

173. *See* Re, *supra* note 5, at 1943.

174. Williams, *Ambiguity of Precedential Authority*, *supra* note 5, at 1.

175. *Compare* Solum, *Legal Theory Lexicon: Holdings*, *supra* note 170, *with* Williams, *with* Williams, *Ambiguity of Precedential Authority*, *supra* note 5, at 16–17.

176. *Compare* Solum, *Legal Theory Lexicon: Holdings*, *supra* note 170, *with* Williams, *Ambiguity of Precedential Authority*, *supra* note 5, at 20–27.

177. *See* GARNER ET AL., *supra* note 25, at 22.

thought.[178] But followers of the salient legal factual characteristic theory of holdings take this proposition to the extremes, viewing the nature of holdings in a very narrow sense that is based entirely upon factual similarities.[179]

While factual characteristics are always a limiting factor under the traditional theory of *ratio decidendi*,[180] legal realists might give more weight to the factual characteristics which are considered by the court under the salient legal factual characteristics theory.[181] Solum notes that "[u]nder the legally-salient facts approach, overruling a single case would have very little effect; given the fact that almost every case involves numerous legally salient factual characteristics the holding of [a case] itself would be very narrow."[182] Additionally, "[t]he legally salient facts account results in very narrow holdings, because in almost all cases there are numerous facts that are legally salient: broad rules only emerge from a series of decisions."[183]

Taking the salient legal factual characteristics theory to the end of the extreme, it devolves beyond a theory of holdings altogether. Virtually every case is factually different, and therefore, virtually every case is unbound by prior cases.[184] But no one seriously advocates for such a strict reading of this theory. Instead, as proponents argue, the precedential value that courts impart to cases is simply heavily contingent on factual similarities.[185] As Professor Arthur Goodhart explains:

178. *Id.* at 21.

179. *See generally* Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930) (focusing almost exclusively on the factual characteristics of decided cases).

180. *See* BLACK, *supra* note 51, at 37 ("But it is not alone the concrete decision in the particular case which measures its scope as a precedent, but the legal reason for the decision, the "ratio decidendi," that is, the underlying rule of principle of law which, *applied to the facts*, caused the particular judgment to be given.") (emphasis added).

181. Solum, *Legal Theory Blog: Holdings*, *supra* note 170; Lawrence Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 J. OF CONST. L., 155 189 (2006) [hereinafter Solum, *The Supreme Court in Bondage*] (describing the factual limitations on the *ratio decidendi* theory of holdings and stating ". . . case law is slow moving. It takes many decisions to create a general rule, and many more to change one").

182. Lawrence Solum, *Disaggregating* Chevron, 82 OHIO STATE L.J. 251, 294 (2021) [hereinafter Solum, *Disaggregating* Chevron].

183. Solum, *Originalist Theory and Precedent*, *supra* note 20, at 459.

184. *See* Goodhart, *supra* note 179, at 181 ("Of course a court can always avoid a precedent by finding that an additional fact is material, but if it does so without reasons the result leads to confusion in the law.").

185. *Id.*

> If . . . [the facts in Case A and the facts in Case B] are identical, then the first case is a binding precedent for the second, and the court must reach the same conclusion as it did in the first one. If the first case lacks any material fact or contains any additional ones not found in the second, then it is not a direct precedent.[186]

Additionally, Goodhart refuted a notable criticism of the consideration of specific factual characteristics as the determinative factor in whether a case is binding; where "[i]t may be said that a doctrine which finds the principles of a case in its material facts leaves us with hardly any general legal principles, for facts are infinitely various," it is important to view facts in the general sense.[187] For example, "the fact that there must be consideration in a simple contract is a single material fact although the kinds of consideration are unlimited."[188] In other words, while needing consideration is a factual question for any sort of contract analysis, there are numerous different forms of consideration which might satisfy "consideration" more generally. Consideration could consist of monetary payment, an exchange of tangible goods, exchanging services, or even abstaining from certain actions. Following this brief example, Goodhart would reject the idea that a judge following a legally salient factual characteristics theory of holdings could distinguish and wholly subvert a precedent by stating that there needs to be identical consideration.

Another criticism of giving too much weight to factual similarities is that precedent may easily be subverted by judges who prefer a different outcome.[189] But, "[s]uch an argument assumes, moreover, that courts are disingenuous and arbitrary. Whatever may have been true in the past, it is clear that at the present day English Courts do not attempt to circumvent the law in this way."[190]

Applying the salient legal factual characteristics theory of holdings to the *Marks* rule seems to remove all importance from the rule. By viewing holdings in a very narrow sense, the negative consequences of the *Marks* rule are non-existent. Instead of interpreting a prior plurality decision to extract a rule of law, lower courts could simply decide subsequent cases anew based upon the particular set of facts before them. Indeed, if every case is factually distinguishable, then the *Marks* rule's value as precedent is diminished almost entirely. While the justices may disagree about Case A, Case B that raises very similar legal issues will have entirely different factual circumstances, thus

186. *Id.* at 180.
187. *Id.* at 181.
188. *Id.*
189. *Id.*
190. *Id.*

allowing the justices to shift their reasoning more easily. And lower courts that subscribe to this theory of stare decisis would view any case coming before them as factually distinguishable from a plurality decision by the Supreme Court, thus rendering the *Marks* analysis useless. Therefore, it seems clear that the *Marks* rule cannot find a strong justification in the salient legal factual characteristics theory of holdings.

### B. *The Ratio Decidendi Theory of Holdings*

The *ratio decidendi* theory of holdings is the most traditional theory of holdings.[191] As defined by Solum, this theory stands for the proposition that "[t]he holding of a case is the legal norm that follows from the reasoning necessary to the outcome of the case, given the legally salient facts and the issues raised by the parties or the court."[192] It is the process of determining the *ratio decidendi* that arguably sheds light on an exact definition of the theory itself.

Wambaugh's method of determining the *ratio decidendi* of a case revolves around four principles of judicial restraint: (1) "the court making the decision is under a duty to decide the very case presented and has no authority to decide any other"; (2) "[t]he doctrine of a case is 'a proposition which strips away the unessential circumstances and declares a rule as to the essential ones[]'"; (3) "the words of the court are not themselves the doctrine of the case and are, therefore, not authority of the highest order[]"; and (4) "a case is not a precedent for any proposition that was not in the mind of the court."[193] So, according to Wambaugh, "[w]hatever individual judges do in particular cases, the true 'doctrine' of their decisions is what survives scrutiny in light of these general principles of judicial restraint; the unconstrained residue is dictum."[194]

From Wambaugh's perspective, holdings are arguably not binding in subsequent cases simply because of the court's *power* in issuing a holding.[195] Instead, holdings derive their authority from the fact that the deciding court only answered questions and pronounced rules of law where it was necessary to decide the case. Thus, Wambaugh's theory of the *ratio decidendi* of a case is the foundation for the traditional distinction between dicta and holdings. Notably,

191. *See* Solum, *The Supreme Court in Bondage*, *supra* note 181, at 189; Charles W. Collier, *Precedent and Legal Authority: A Critical History*, 1988 WIS. L. REV. 771, 794 (1988).

192. Solum, *Disaggregating* Chevron, *supra* note 182, at 294.

193. *See* Collier, *supra* note 191, at 773–77.

194. *Id.* at 773.

195. *See id.*

the theory first focuses on identifying the dicta, and then the focus shifts to whatever is left in its identification of the holding.[196]

Of course, many have discussed the *ratio decidendi* of a case and methods by which it may be discovered.[197] Judicial restraint is thus not the only reason that court holdings are binding under a *ratio decidendi* theory of holdings.[198] Notably, holdings are only binding principles when they are announced by a majority of the court.[199] For without majority approval of the outcome and the reasons for reaching that outcome, there is no *ratio decidendi* to be extracted from the decision of the court.[200] As seen above, the historical application of this doctrine only considered the reasoning that garnered a majority vote from a court's members.[201]

As a theory, *ratio decidendi* is arguably the best fit for the practical application of the *Marks* rule. Despite deficiencies in a single opinion garnering a majority's support, the *Marks* rule embraces the work required to decipher a binding rule of law from a prior case.[202] However, recent objections, including those mentioned above, still remain.

The *Marks* rule could, and likely should, be replaced with a historical rule affording precedential authority only to the judgment of a no-clear-majority decision. In large part, this might be accomplished by adopting the *Screws* rule, which has been proposed by Re.[203] In *Screws v. United States*,[204] Justice Wiley B. Rutledge voted against his own preferred reasoning in the case in order to

196. *Id.*

197. *See, e.g.*, WAMBAUGH, *supra* note 7, at §§ 12, 14, 15 (explaining how to find the holding of a case by utilizing the *ratio decidendi* approach); Goodhart, *supra* note 179, at 182–83 (same).

198. *See* BRYAN GARNER ET AL., *supra* note 25, at 2–3 (discussing the various approaches to finding the holding of a case).

199. *Cf.* Williams, *Ambiguity of Precedential Authority*, *supra* note 5, at 36 (citing AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 357, 360 (2012)); *see supra* Section II.B.

200. Of course, there can be extracted some very broad principles where the court agrees upon the outcome without providing reasons for doing so. *E.g.*, Goodhart, *supra* note 179, at 164–65 ("So also a case may be a precedent, involving an important principle of law, although the court has given judgment without delivering an opinion."). This is likely why judgments have always been precedential, even where the splintered reasoning of the court was not.

201. *See supra* Section II.B.

202. *See* WAMBAUGH, *supra* note 7, at § 21 (discussing the *ratio decidendi* method of determining the holding and the work that method requires from the reader).

203. Re, *supra* note 5, at 1997–98.

204. 325 U.S. 91 (1945).

preserve a majority vote in favor of the judgment.[205] The *Screws* rule, in effect, forces judges and justices to make concessions in order to create a binding rule of law.[206] This arguably also creates a system where judges and justices join parts of opinions with which they agree. Or it might incentivize, at least where the court is facing fierce disagreement, the issuance of per curiam opinions that lay out the general principles of law upon which a majority agrees while leaving room for judges or justices to write separately to express their views on the intricacies of the issue(s).

As Re puts it, "[r]ather than forcing later courts to struggle with fragmented decisions, the Justices themselves should sort out their differences where appropriate, or else forgo the power to create binding precedential rules."[207] Of course there are other compromise theories that might adequately replace the *Marks* rule, but that is an issue best left to those who have devoted more space to the question.[208] So while the *ratio decidendi* theory of holdings is likely the strongest theory under which the *Marks* rule might be applied, it is by no means clear that, based on an acceptance of the *ratio decidendi* theory of holdings, the *Marks* rule should not be abandoned.

### C. *The Legislative and Predictive Theories of Holdings*

Finally, Solum has put forward the predictive theory or legislative theory of holdings.[209] Under this theory, "[t]he holding of a case is the legal norm stated by the court that decided the case, even if that legal norm goes beyond the reasoning, legally salient facts, or issues raised by the court or the parties."[210] As Solum writes on his *Legal Theory Blog*, "[s]ome Legal realists view holdings as predictions of what future courts will do. The holding of the case is simply the best prediction that we can extract from the opinion as to what rule the court would apply in future cases."[211] Legal realists, according to Solum, pay close attention "when a court introduces a statement of the rule with the statement: 'We hold that . . .' No matter how broad this statement might be, the fact that the

205. *Id.* at 134 (Rutledge, J., concurring).

206. Re, *supra* note 5, at 1998 ("Aptly enough, the '*Screws* rule' puts the Justices to a hard choice: reach majority agreement on the judgment or forgo the power to decide the case.").

207. *Id.* at 2000.

208. *See id.* at 1998–2008 (discussing the alternative theories of the *Screws* Rule: "compromise majorities," "rule agreement," and "judgment agreement").

209. Solum, *Legal Theory Blog: Holdings*, *supra* note 170.

210. Solum, *Disaggregating* Chevron, *supra* note 182, at 294.

211. Solum, *Legal Theory Blog: Holdings*, *supra* note 170.

court pronounced it, legislatively, as a *holding* is strong evidence that the court regards what follows 'We hold that . . .' as its own prediction as to what it will do in the future."[212]

While Solum uses the terms predictive and legislative interchangeably, there are slight differences in those terms that justify two sub-theories of holdings. A legislative theory of holdings means that courts, acting as a sort of quasi-legislature, set out concrete rules of law to be followed by lower courts.[213] On the other hand, a predictive theory of holdings is arguably vaguer by only hinting or alluding to what the court might do in a future situation.[214] Due to particular objections one might pose to each sub-theory independently, it is important to flesh out and distinguish between these two sub-theories.

### 1. Legislative Theory of Holdings

Under a legislative theory of holdings, a legal realist might look to a court's opinion and, much like a statute, give weight to the words therein.[215] The *ratio decidendi* theory traditionally rejects this method.[216] Under such a line of thinking, the court acts like a legislature, promulgating rules as it sees fit and stepping into the role of policymakers.[217] To a legal realist, this arguably comports with the role of courts to "say what the law is," thus applying the directive of *Marbury v. Madison*[218] in a very literal sense.[219]

This theory, however, overlooks the case or controversy requirement in Article III of the U.S. Constitution[220] by allowing a court to issue rules not required to dispose of the case before it. Indeed, because courts do not have the

212. *Id.*

213. *See infra* Section III.C.1.

214. *See infra* Section III.C.2.

215. Helen Scott & Daniel Visser, *The Impact of Legal Culture on the Law of Unjustified Enrichment: The Role of Reasons*, *in* EXPLORING PRIVATE LAW 153, 163 (Elise Bant & Matthew Harding eds., 2010) (quoting A.W.B. Simpson, *The Ratio Decidendi of a Case and the Doctrine of Binding Precedent*, *in* OXFORD ESSAYS IN JURISPRUDENCE 148, 166 (A.G. Guest ed., 1961)) ("[T]he formulation of the rule by the judge is not, and cannot be, treated as precisely the same as a statutory rule, where every word is sacred.").

216. *Id.*

217. In the context of the *Marks* rule, it seems that the U.S. Supreme Court is, in a very real sense, acting as a policymaker for lower courts. The *Marks* rule itself is not a substantive rule which alone affects the rights or obligations of parties. Instead, it could be characterized as a judicial policy, such that its application to substantive law can be outcome determinative.

218. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

219. *Id.* at 177.

220. U.S. CONST. art. III. § 2.

power to literally legislate, holdings of court decisions are not binding merely because the court says so.

Courts do, however, promulgate rules of law in responding to cases or controversies. Their voluntary issuance of opinions "better allows the appellate court to shape future decisions by citizens, attorneys, government officials, and lower court judges."[221] And while a court's opinion should not be read as literally as a statute, the legislative theory of holdings views the reasoning of court decisions as a form of judicial legislation—the words of the court become law and should be treated as such.

The recent and well-publicized order by the U.S. District Court for the District of Columbia arguably illustrates an application of the legislative theory of holdings.[222] There the issue was whether the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*[223] held, as the Supreme Court stated, "the Constitution does not confer a right to abortion,"[224] or whether the District Court should read the holding more narrowly in light of the question presented in *Dobbs*. That is, whether the Constitution confers a right to abortion *under the Fourteenth Amendment*.[225]

Under this theory, the *Marks* rule again causes issues. If appellate courts are viewed as quasi-legislative bodies, albeit restricted to legislating within cases or controversies, then under traditional legislative rules, a majority is needed to create a rule of law—much like a majority is needed in a political body to take affirmative action like passing a statute. Because no-clear-majority decisions, like affirmances by evenly divided courts, do not garner a majority in favor of the legal reasoning for the legal rule that results in the ultimate judgment, such a decision cannot create a binding rule of law.

The dilemma that the legislative theory of holdings presents regarding the *Marks* rule's application can arguably be compared to legislative non-action as discussed by Bryan Garner.[226] This legislative analogy, or perhaps origin, that Garner endorses is useful as a primary level comparison, specifically regarding the historical application of plurality precedent. While this analogy may not be foolproof, it may help support an understanding of how the historical treatment of no-clear-majority decisions can be harmonized with the treatment of the outcomes of other deliberative bodies in government.

221. Hardisty, *supra* note 37, at 55.
222. United States v. Handy, No. 22-096, 2023 WL 1777534 *1 (D.D.C. Feb. 6, 2023).
223. 142 S. Ct. 2228 (2022).
224. *Id.* at 2279.
225. *Handy*, 2023 WL 1777534, at *2.
226. *See* GARNER ET AL., *supra* note 25, at 221.

As a starting point, all courts review legislative actions regularly. While statutes are the result of the legislative process, there are often judicial disputes over what the legislature meant by the words of a statute or what the legislature intended in writing a statute.[227] From the perspective of a textualist judge,[228] the purpose or intent of the legislature is only relevant insofar as it sheds light on the meaning of the text. All the textualist judge is generally concerned with is the text of the statute—the outcome, or output, of the legislature's deliberations.[229] But a textualist judge will become concerned with the legislature's intention in passing a statute if the legislature codifies that purpose or intent by a majority vote in favor of both the statute *and* the purpose or intent thereof. Accordingly, the purpose of the statute is a part of the statute itself, and because the textualist judge need not go beyond the text of the statute to find the legislature's purpose or intent, the textualist judge would faithfully apply the statute with that purpose or intent.

But, as much as courts review legislative action, they also view actions of their own—judicial precedents—on a day-to-day basis. If, as Garner maintains, an affirmance by an evenly divided court is akin to a legislative non-action,[230] a majority opinion might be akin to a statute paired with a codified purpose statement whereas a no-clear-majority decision might be akin to a regular statute that is not accompanied by a codified purpose statement. This equates court judgments (the output of a judicial deliberation) to statutes (the output of legislative deliberations) and equates purpose statements (legislative reasoning) to judicial opinions (judicial reasoning). If courts considered their opinions as statements of the law issued by vote of their deliberative body in a manner akin to a legislative body, it would harmonize the way that we traditionally think of group or legislative action. Just as a bill does not become law without a majority of the legislature, so too a case's resolution cannot become a judgment without a majority of the court. Moreover, a legislature's intent cannot absolutely bind courts where the legislature has not also codified that intent by majority vote.

227. *Cf., e.g.*, ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 3–4 (2012) (discussing generally different approaches to interpreting statutory text).

228. This is not to say that there cannot be variations of textualists who do or do not look at legislative history in varying scenarios. The use of a textualist judge in this example is simply to show a preference for looking at the text of a statute over the purposes or reasons given for passing that statute, which are not codified. *See* Jonathon T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 66 (2006) ("Moderate textualists would accept textualism's core teachings about the pitfalls of trying to glean Congress's true intent and leave it to Congress to remedy the problem, or not, as it deemed fit.").

229. *Cf., e.g.*, SCALIA & GARNER, *supra* note 227, at 3–4 (2012).

230. *See* GARNER ET AL., *supra* note 25, at 220–221.

Treating the reasoning of a court in the same manner as the intent of a legislature would harmonize the American idea of majoritarianism and the methods by which law becomes law.

It follows that under a similar theory of vote counting, a legislative theory of holding does not support the *Marks* rule. No legislature tells its population to follow the narrowest grounds of legislation when the legislative process breaks down and fails to pass laws. Rather, the public is only bound by laws promulgated by a majority of the body that is authorized to issue them.

This legislative theory of holdings is a more appropriate subpart of a much broader predictive theory of holdings to which some subscribe.[231] Though the legislative theory provides some slight form of prediction, the predictive theory in the broadest sense devolves beyond a theory of holdings altogether.

### 2. Predictive Theory of Holdings

The more robust and accepted of these two sub-theories is the predictive theory of holdings. The central difference between this theory and the legislative theory is that courts may not always lay down a distinct principle in explicit terms. Instead, courts might issue decisions which allude to a future ruling.[232] In this sense, the court might stop short of establishing a particular principle but take significant strides towards an ultimate principle of law, which litigants and lower courts are able to foresee. Thus, the predictive theory enables litigants to discern a rule of law when the court does not make use of its quasi-legislative power to "say what the law is."[233]

Under this theory, holdings are binding for legal realist reasons. Lower court judges do not want to be reversed; thus, they rule in a manner that attempts to predict the result should their ruling be appealed.[234] As Williams says:

231. *See infra* Section III.C.2.

232. There are varying views as to what the predictive theory is and how legal realists disagree with traditional jurists. *See generally* WILFRID E. RUMBLE, JR., AMERICAN LEGAL REALISM 137–182 (Cornell Univ. Press 1968).

233. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

234. *See, e.g.*, RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 224 (1990) ("Yet most judges are highly sensitive to being reversed, and for them, the prediction theory makes good sense to follow. Weak sanctions can operate powerfully on judges. One is criticism, and reversal is a form of criticism. . . . Most judges try to avoid being reversed, and this commits them to the prediction theory."). The predictive theory of holdings has largely been advanced by Professor Evan Caminker. *See* Evan Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1 (1994); *see also* Earl

> The 'prediction' or 'proxy' model . . . deemphasizes the significance of consistency with past decisions. Instead, the prediction model seeks to guide lower-court decisionmaking toward an attempted forecast of how the present dispute . . . *will be* resolved if and when it is considered by the Supreme Court.[235]

This legal realist view does have at least some historical application in American legal history.[236] But it is largely not the traditional role of courts to predict the decisions of higher courts and to adjust their rulings accordingly.[237]

Indeed, while the predictive theory stretches back to Justice Oliver Wendell Holmes, who stated, "law consists of '[t]he prophecies of what the court will do in fact, and nothing more pretentious,'"[238] the predictive theory was intended as a "tool for lawyers" who were assessing litigation strategies.[239] And more recently, as the Seventh Circuit put it:

> [P]arties may . . .adopt the prediction model in making decisions about their conduct or in deciding how to litigate disputes. The prediction model has a distinguished pedigree[.] . . . But in a hierarchical court system, lower courts do not arrogate to themselves the task of overruling precedents of higher courts.[240]

In other words, "[courts] simply do not survey non-majority opinions to count likely votes and boldly anticipate overruling of Supreme Court

M. Maltz, *The Concept of the Doctrine of the Court in Constitutional Law*, 16 GA. L. REV. 357, 399 (1982) (stating that lower courts should "replicate the result that would be reached if the Supreme Court were faced with the same set of facts and allegations").

235. Williams, *Ambiguity of Precedential* Authority, *supra* note 5, at 20.

236. *Id.* at 20 n.93; NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 128–32 (1995); Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897); Spector Motor Serv., Inc. v. Walsh, 139 F.2d 809, 823 (2d Cir. 1943) (Hand, J., dissenting), *vacated*, 323 U.S. 101 (1944) ("[T]he measure of [a lower court's] duty is to divine, as best it can, what would be the event of an appeal in the case before it.").

237. *See* Michael C. Dorf, *Prediction and the Rule of Law*, 42 U.C.L.A. L. REV. 651, 653 (1995) ("Holmes and his followers intended the prediction model to serve primarily as a tool for lawyers.").

238. *Id.* (quoting OLIVER W. HOLMES, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167, 173 (1920)).

239. *Id.*

240. Planned Parenthood of Ind. and Ky., Inc. v. Box, 991 F.3d 740, 746 n.4 (7th Cir. 2021), *vacated*, 142 S. Ct. 2893 (2022).

precedents."[241] More succinctly, "the judicial prerogative involves applying precedent, not making predictions."[242]

Despite this theory's seeming conflict with vertical stare decisis and cases like *Rodriguez de Quijas v. Shearson/American Express, Inc.*,[243] commentators note that the predictive theory pervades the minds of lower court judges who wish to avoid higher court reversal of their decisions.[244] Indeed, Chief Justice John Roberts of the Supreme Court articulated such thoughts during oral argument in *Hughes v. United States*,[245] stating:

> I wonder if I'm a court of appeals judge, it seems to me the most important thing in deciding the case is to make sure that I'm not reversed. And it seems to me the best way to do that is through the—whatever you want to call it, the walking through, sort of counting out what would happen if you count where the different votes are. And it seems to me if you take any other approach, you're—you're subject to reversal because, by definition, a majority of the Court here would—would reach a different result.[246]

The predictive theory has received a fair amount of objection from scholars and courts alike,[247] arguably fearing thought processes similar to Chief Justice Roberts's illustrative statement above. Indeed, Re has noted that the use of the predictive theory in relation to the *Marks* rule has yielded "bad predictions" and that the predictive theory is both controversial and routinely rejected by courts.[248] Thus, the predictive theory alone is likely grounds for rejecting at least certain applications of the *Marks* rule.[249]

241. *Id.* at 746.

242. Ala. State Conf. of NAACP v. State, 264 F. Supp. 3d 1280, 1287 (M.D. Ala. 2017), *vacated*, 141 S. Ct. 2618 (2021).

243. 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

244. *See* POSNER, *supra* note 234, at 224.

245. 138 S. Ct. 1765 (2018).

246. Transcript of Oral Argument at 9–10, Hughes v. United States, 138 S. Ct. 1765 (2018) (No. 17-155).

247. *Cf.* Re, *supra* note 5, at 1992 (observing that the "all opinions approach" is "objectionable" because it is based in the prediction model, which is "a controversial approach to precedent that the Court itself generally rejects").

248. *Id.*

249. *Id.*

## IV. CRITIQUES AND ASSUMPTIONS

This Article relies upon two assumptions. The first assumption or possible critique is that courts are not required to issue opinions and most courts of last resort are not required to issue decisions. This assumption arguably shows that no-clear-majority decision are especially important because the court is issuing an opinion that it knows is not clear, rather than simply dismissing an appeal as improvidently granted or issuing only a judgment with no reasoning. The second assumption is that courts actually adhere to stare decisis. Theories of holdings depend on the application of stare decisis,[250] and thus, it is important to note that courts are not legally bound to follow the doctrine,[251] although there are some exceptions.[252]

### A. *Courts Are Not Required to Issue Decisions or Opinions*

Perhaps one reason the *Marks* rule is important is that courts are taking the step of issuing the no-clear-majority decision. At least in instances where appellate courts exercise discretionary review power, they could always dismiss an appeal as "improvidently granted."[253] The Supreme Court does so from time to time.[254] Thus, a possible argument is the fact that the Court is issuing an opinion *at all* leaves the *Marks* rule with a leg to stand on. Presumably, if the Supreme Court decides to issue opinions, rather than a summary affirmance or reversal through a per curiam opinion, the Court wants litigants and lower courts to derive some rule from its statements, even if there is conflict between the justices.

However, the purported logic of this argument is unconvincing. Although courts could dismiss appeals as improvidently granted, history shows and scholars note that while divided courts could deliberate longer on a hard question of law to find some rule upon which they could all agree, to do so would lengthen litigation, drive up costs, and deprive litigants of an outcome.[255] It is out of

250. Solum, *Legal Theory Blog: Holdings*, *supra* note 170.

251. *See* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1713 (2013).

252. *See* Channing J. Curtis, *State Court Structure and Precedent*, 45 N.C. CENT. L. REV. 164, 170–71 n.28 (2023) (gathering jurisdictions that codify or constitutionalize vertical stare decisis).

253. *See, e.g.*, L. Bradfield Hughes, *Can you DIG it? The Dismissal of Appeals as Improvidently Granted*, OHIO LAWYER, Sept.–Oct. 2013, at 34, https://www.porterwright.com/content/uploads/2017/11/bhugesohiolawyerfall2013.pdf.

254. *See* Arizona v. City and County of San Francisco, 142 S. Ct. 1926, 1926 (2022).

255. *See* State v. McClung, 37 So. 51, 52 (Fla. 1904).

expediency that courts issue both affirmances by evenly divided courts and no-clear-majority decisions.[256] And while expediency justifies retaining the case and issuing a divided decision to solve the dispute between the two parties,[257] expediency does not justify the establishment of new rules of precedent. The law will not devolve should a court issue non-binding opinions on the rare occasion that they are badly divided. Instead, it would be more beneficial for continuity in the law to hold such decisions as having no precedential authority and to answer the question definitively another day when the proper case presents itself.[258]

Another reason that might support this assumption—that courts are not bound to issue opinions along with their decisions—is that a court's primary purpose is to resolve disputes among litigants.[259] Secondary to that purpose, although certainly complimentary, is the purpose of "say[ing] what the law is"[260] or providing reasons for the court's decisions through written opinions. While there is no requirement for courts to issue written opinions, they are often required to decide the cases or controversies that come before them.[261] This distinction is important to the separation of judgments from opinions in the above discussion.[262]

### B. *Courts Are Not Technically Bound to Adhere to Stare Decisis*

To a legal realist, it might seem that precedent derives its significance only by subsequent court enforcement of that rule of law; a court's decision is not precedential simply because the deciding court says so. Indeed, court decisions are binding in subsequent cases only to the extent that courts afford weight to those decisions. As some see it, "[j]udicial lawmaking and the following of precedent are correlative acts. They are like proposal and acceptance of marriage.

256. *Id.*

257. *Id.*

258. *See* Hardisty, *supra* note 37, at 56 ("Since one of the main reasons for articulating a rule is future guidance, judges are sometimes reluctant to articulate a rule: they may instead choose to keep future decisions open and to prevent others from relying on an unreliable standard.").

259. Williams, *Ambiguity of Precedential Authority*, *supra* note 5, at 13 ("[A] central function of courts, and perhaps *the* central function, is to settle disputes between adverse parties.").

260. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

261. *Cf.* Levmore, *supra* note 34, at 334 ("Many countries, especially in Europe, do not publicize concurring and dissenting opinions."). *But see id.* at 332 ("[D]ecision-makers, including appellate judges, should be transparent about intra-group disagreements as to their reasoning.").

262. *See supra* Section I.B.2–3.

The judges who lay down a precedent offer it as a guide for subsequent decision; the judges who follow the precedent accept it as a guide."[263]

The fundamental proposition in a claim like this is a critique of stare decisis itself. The judge-made doctrine is not legally binding. And while some states codify or constitutionalize the principle of vertical stare decisis,[264] most courts are not technically bound by their prior decisions or higher courts' decisions, except in the sense that a higher court might reverse them.[265] In other words, there are no real, legal consequences to courts abandoning stare decisis when they wish, other than creating chaos in the legal system. Thus, the only reply to such a critique is that unless one seeks to dismantle stare decisis altogether, courts are bound by precedent, even if they do not agree with it. And should courts not apply stare decisis, then the *Marks* rule is not binding, thus resolving the issue of its existence and application.

## CONCLUSION

Discussing the nature of plurality precedent is difficult. Doing so implicates fundamental questions of what law is, or at least what a judicial decision is insofar as it is binding law. But the discussion surrounding the *Marks* rule has ignored the historical principles of plurality precedent applied by state and federal courts, and recognized by scholars. Even further, the discussion has occurred without addressing theories of holdings through which critiques of the *Marks* rule might be considered.

The future of the *Marks* rule is uncertain. Perhaps this Article's comparison of the precedential value of no-clear-majority decisions and affirmances by evenly divided courts will provide a new and dynamic objection that is grounded in tradition and history. And perhaps suggesting, as at least one scholar has,[266] that fundamental theories of what the law is—theories of holdings or models of precedent—can significantly further the development of plurality precedent law. But as long as the Supreme Court continues under the *Marks* rule, it is simply adding twists to an already useless piece of iron. Historical applications and theories of holdings are two helpful ways to straighten out plurality precedent moving forward.

263. BURKE SHARTEL, OUR LEGAL SYSTEM AND HOW IT OPERATES 416–17 (William S. Hein & Co. reprt. ed. 1986).

264. *See* Curtis, *supra* note 252, at 170 n. 28.

265. *See* Barrett, *supra* note 251, at 1713.

266. *See* Williams, *Ambiguity of Precedential Authority*, *supra* note 5, at 5.