PLURALITY DECISIONS AND THE AMBIGUITY OF PRECEDENTIAL AUTHORITY

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Abstract

The Supreme Court sometimes decides cases without reaching a majority-supported agreement on a rule that explains the outcome. Determining the precedential effect of such plurality decisions is a task that has long confounded both the Supreme Court and the lower courts. But while academic commenters have proposed a variety of frameworks for addressing the problem of plurality precedent, little existing commentary has focused on a deeper and more fundamental question—namely, what makes plurality precedent so confusing? Answering this question is not only critical to developing a more coherent and administrable doctrine of plurality precedent but is also a useful prism through which to examine our shared understanding of precedential authority more generally.

This Article argues that plurality decisions are so confusing because they expose a latent ambiguity in our law of precedent. Looking to the debates surrounding plurality precedent reveals at least three distinct—and to some extent, mutually inconsistent—models of precedential authority. The first of these models, the "judgment model," is closely connected to the traditional common law view, which grounds the precedential authority of judicial statements in the ability of those statements to explain the particular judgment issued by the court in the case before it. The second model, the "prediction model," views the holding of a case as the rule that best predicts the future behavior of the court based on the expressed views of the participating judges. Finally, the "pronouncement model" focuses on the judiciary's law declaration function, viewing all majority-endorsed legal rules as entitled to precedential force regardless of their connectedness to the court's judgment or their capacity to predict the court's future behavior.

Exposing the ambiguities inherent in plurality precedent does not provide a clear answer to how the conflict among the competing models should be resolved. But doing so may help eliminate some of the conceptual confusion that has grown up around plurality precedent. In particular, focusing on the underlying theories of precedential authority that drive the various approaches to plurality precedent suggests that some of the most widely accepted approaches that have been embraced by lower court judges may lack a coherent justification in any plausible model of precedential authority. Recognizing the underlying ambiguity

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can also help to expose potential connections to other, seemingly unrelated doctrinal areas that may be affected by changes to the doctrine surrounding plurality precedent.

INTRODUCTION

Near the end of its 2017 Term, the Supreme Court handed down its decision in *Hughes v. United States*.[1] *Hughes* addressed an issue of federal sentencing law[2] that had been left in confusion by the Court's earlier fractured majority decision in *Freeman v. United States*.[3] In granting certiorari in *Hughes*, the Supreme Court signaled its willingness to consider a broader set of questions regarding the precedential significance of plurality decisions like *Freeman* in which a majority of the Justices agree on a judgment without reaching any agreement on a majority-supported rationale that explains that judgment.[4] The Court's last concrete guidance regarding plurality decisions had come in its 1977 opinion in *Marks v. United States*,[5] where the Court instructed that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[6] But despite its seeming simplicity, the *Marks* Court's instruction to seek the narrowest grounds of a fractured majority decision has produced mostly confusion and disagreement among the lower courts.[7]

Hughes presented the Court with a clear opportunity to revisit and clarify its holding in *Marks*. Two of the three questions on which the Supreme Court granted certiorari focused specifically on the proper application of *Marks* to the Court's holding in *Freeman*.[8] The petitioner's brief in support of his petition for certiorari focused centrally on the proper interpretation and application of the *Marks* doctrine as the principal reason for the Court to grant review.[9] And both the petitioners' brief and the government's brief, as well as extensive additional briefing

1. 138 S. Ct. 1765 (2018).
2. *Id.* at 1771.
3. 564 U.S. 522 (2011).
4. *See* Petition for a Writ of Certiorari at i, *Hughes*, 138 S. Ct. 1765 (No. 17-155).
5. 430 U.S. 188 (1977).
6. *Id.* at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)).
7. *See, e.g.*, Garland v. Roy, 615 F.3d 391, 402–03 (5th Cir. 2010) (quoting *Marks*, 430 U.S. at 193) (identifying a four-way circuit split regarding the application of *Marks* to *United States v. Santos*, 553 U.S. 507 (2008), and rejecting all four in favor of a fifth distinct approach); United States v. Robison, 505 F.3d 1208, 1219 (11th Cir. 2007) (noting that "[t]he circuits . . . are split on the question of which . . . opinion provides the holding" of *Rapanos v. United States*, 547 U.S. 715 (2006)); Byrom v. Epps, 817 F. Supp. 2d 868, 898 (N.D. Miss. 2011) (noting the existence of a "federal circuit split regarding" the controlling opinion in *Missouri v. Seibert*, 542 U.S. 600 (2004)).
8. *See Hughes*, 138 S. Ct. at 1771–72.
9. *See* Petition for a Writ of Certiorari, *supra* note 4, at i.

from third-party amici, urged the Court to clarify the meaning of *Marks*.[10] But the Court chose to punt on the *Marks* issue. Because "a majority of the Court" could "resolve the" underlying "sentencing issue on its merits," the Court deemed it "unnecessary to consider" the first two questions on which certiorari was granted "despite the extensive briefing and careful argument the parties presented to the Court concerning the proper application of *Marks*."[11]

During the 2018 Term that followed, 4 of the 73 merits cases the Court decided[12]—nearly 5.5% of the Court's overall merits docket—resulted in plurality decisions.[13] In the 2019 Term, the Court once again clashed over the precedential significance of plurality precedent—this time, in *Ramos v. Louisiana*,[14] which implicated a question regarding the continued precedential force of the Court's 1972 decision in *Apodaca v. Oregon.*[15] *Ramos* produced a somewhat ironic three-way division on the Court regarding the precedential status of its earlier plurality decision, with no single opinion of the Court able to garner a majority.[16]

What accounts for the Court's seeming inability to clarify the doctrine of plurality precedent? What is it about the existence of a majority-agreed-upon resolution of a case, without a corresponding agreement on the underlying rationale, that splinters intuitions about the decision's precedential significance in such diverse and contradictory directions? Answering these questions is critical to clearly thinking about the problem of plurality precedent. Such an understanding is also necessary to fully grasp the potential implications of any particular solution to the problem.

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10. *See, e.g.*, Brief of Petitioner at 37–59, *Hughes*, 138 S. Ct. 1765 (No. 17-155); Brief for the United States at 17–36, *Hughes*, 138 S. Ct. 1765 (No. 17-155); Brief of Professor Richard M. Re as Amicus Curiae in Support of Neither Party at 1–5, *Hughes*, 138 S. Ct. 1765 (No. 17-155); Brief of Law Professors as Amici Curiae in Support of Neither Party at 16–26, *Hughes*, 138 S. Ct. 1765 (No. 17-155).

11. *Hughes*, 138 S. Ct. at 1771–72.

12. *Opinions of the Court—2018*, U.S. SUP. CT., https://www.supremecourt.gov/opinions/slipopinion/18#list [https://perma.cc/77HY-4256].

13. *See* Mitchell v. Wisconsin, 139 S. Ct. 2525 (2019) (decision featuring a 4-1-(4) split—i.e., four Justices joining in the plurality opinion, one Justice concurring in the judgment, and four Justices in dissent—in a case involving a warrantless blood test of a suspected drunk driver); United States v. Haymond, 139 S. Ct. 2369 (2019) (decision featuring a 4-1-(4) split in a case involving the scope of Fifth and Sixth Amendment jury-trial rights); Va. Uranium v. Warren, 139 S. Ct. 1894 (2019) (decision featuring a 3-3-(3) split in a case involving federal preemption of state law); Wash. State Dep't of Licensing v. Cougar Den Inc., 139 S. Ct. 1000 (2019) (decision featuring a 3-2-(4) split in a case involving the scope of Native American treaty rights).

14. 140 S. Ct. 1390 (2020).

15. 406 U.S. 404 (1972), *abrogated by Ramos*, 140 S. Ct. 1390.

16. *See Ramos*, 140 S. Ct. 1390; *see also id.* at 1416–17 n.6 (Kavanaugh, J., concurring) ("As I read the Court's various opinions today, six Justices treat the result in *Apodaca* as a precedent for purposes of *stare decisis* analysis. A different group of six Justices concludes that *Apodaca* should be and is overruled.").

One commonplace view of the narrowest-grounds rule *Marks* prescribed, as well as its proposed alternatives, is that they reflect essentially arbitrary and second-best solutions to mitigate the confusion resulting from fractured majority precedent.[17] Because the rules for identifying the holdings of cases with a majority-supported rationale are seen as reasonably clear, the confusion surrounding plurality precedent can be made to seem a mere triviality, implicating, at most, a small fraction of the Supreme Court's decided cases.[18] But probing the sources of judicial and academic confusion regarding the nature and authority of plurality precedent reveals a deeper set of ambiguities regarding the nature of precedential authority in general.

Plurality decisions expose a rift between competing theories of precedential authority and obligation that are typically concealed by decisions that result in a single majority opinion for the Court. Ascribing precedential significance to plurality decisions thus requires choosing to prioritize one model of precedential authority over competing models.

Part I of this Article briefly surveys six of the most prominent approaches to plurality precedent reflected in existing lower court practices or in academic commentary on the subject: (1) the "implicit consensus" or "logical subset" approach; (2) the "shared agreement" approach; (3) the "fifth vote" or "median opinion" approach; (4) the "issue-by-issue" approach; (5) the "all opinions" approach; and (6) the "no precedent" approach.

Part II situates the ongoing jurisprudential and academic debate about the precedential status of plurality precedent within a broader set of debates about the nature of the Supreme Court's institutional function and the status of its institutional authority. For decades, judges and scholars have acknowledged an implicit tension between the Court's merged functions of adjudicating concrete disputes and issuing authoritative interpretations of federal law.[19] The tension between these two functions, in turn, informs different conceptual understandings of the appropriate theoretical foundations and functions of Supreme Court precedent.

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17. *See, e.g.*, Transcript of Oral Argument at 20, Hughes v. United States, 138 S. Ct. 1765 (2018) (No. 17-155) (Kagan, J.) ("I mean, the question is, what is the second best? We're in a world in which the first-best option, which is five people agreeing on the reasoning, that doesn't exist. And so everything else is going to be—is going to have some kind of problem attached to it, and we're really picking among problems."); NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 73 (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."); Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 684 (1995) (describing the *Marks* rule as "merely . . . a necessary convention for bringing clarity to the law").

18. *Cf.* James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 GEO. L.J. 515, 519 (2011) (observing that plurality decisions accounted for only 3.4% of the Supreme Court's decisions during the period from 1953 to 2006).

19. *See infra* note 54 and accompanying text.

Part II then highlights three distinct models of precedential authority. The first of these models, the "judgment model," emphasizes the connectedness of judicial statements to the resolution of the underlying dispute addressed in the precedent case as the touchstone of precedential authority. The second model, the "prediction model," takes a forward-looking perspective that views the critical task facing lower courts as accurately predicting the preferred disposition of the Court's current members, and sees prior precedent as useful, primarily as a basis for such prognostications. The third and final model, the "pronouncement model," emphasizes the Court's law-declaration function and views the bare existence of a majority-supported declaration of law to be intrinsically authoritative irrespective of its necessity to the underlying case judgment or its capacity to accurately predict the views and preferences of the Court's currently dominant majority. Although these three models will typically point to identical results in a broad swath of cases, they sometimes pull apart from one another in discrete corners of the law—revealing latent ambiguities in our legal system's notions of precedential authority.

Moreover, as Part II demonstrates, these three models carry different implications for the interpretation of precedential obligation, and strike different balances between competing values undergirding the law of precedent. They also have different implications for how institutional authority is allocated both within the Supreme Court and among the lower courts. Perhaps most strikingly, the three models of precedent recognize three distinct and differently constituted majorities of Justices as possessing the authority to issue binding precedential commands.[20]

Returning to the survey of extant approaches to plurality precedent described in Part I, Part III demonstrates that each of these approaches draws upon a set of intuitions that correspond to either the judgment model, the prediction model, or the pronouncement model of precedent and that are *inconsistent* with the intuitions underlying the competing models. This analysis suggests that certain conceptual divisions within our legal system regarding the precedential status of plurality decisions are more than skin deep and go to the very core of our contested conceptions of precedential authority.

At the same time, however, viewing the existing approaches to plurality precedent through the lens of our competing conceptions of precedential authority suggests that at least *some* of the most prominent existing approaches to the narrowest-grounds rule may lack a coherent home in *any* of the three models. In particular, it seems likely that both the logical-subset approach and the fifth-vote approach, as currently understood, reflect either a logical mistake regarding the nature of the

20. *See infra* Section II.C.4.

consensus reflected in particular plurality decisions or a deeply questionable set of assumptions regarding the unstated views and preferences of the deciding majority.[21]

A third prominent approach, the all-opinions approach, finds a natural theoretical home in the prediction model of precedent.[22] But the closely divided nature of plurality decisions, the infrequency of Supreme Court review, and the prospect of personnel changes on the Court significantly weaken the predictive value of plurality decisions, casting doubt on the prediction model's practical workability with respect to this particular category of judicial decisions.[23]

This leaves either the shared-agreement approach, which conforms to the theoretical premises of the judgment model, or the issue-by-issue or no-precedent approaches—both of which are methods of implementing the theoretical premises of the pronouncement model—as the most plausible remaining approaches for discerning the precedential effect of plurality decisions. And while the present study does not aim to resolve the ongoing debate among proponents of these distinct approaches, a clearer sense of the intuitions driving the debate should allow it to proceed with a clearer sense of the theoretical issues at stake.

Part IV briefly considers the potential consequences of clarifying the precedential status of plurality decisions for other doctrinal areas. Although the tension between the three models of precedential authority identified in Part II is perhaps most clearly visible in the plurality-precedent context, the choice to prioritize one of the models over others may affect other doctrinal areas as well, including doctrines addressing the distinction between "holdings" and "dicta," and the precedential status of the Supreme Court's unexplained dispositions.

I. EXISTING APPROACHES TO THE NARROWEST-GROUNDS DOCTRINE: AN OVERVIEW

The natural starting point for any discussion of current approaches to plurality precedent is, of course, the Supreme Court's instruction in *Marks* that the Court's holding is supplied by the position of the Justices "who concurred in the judgments on the narrowest grounds."[24] But the guidance offered by this instruction is far from complete. In the absence of more specific instruction from the Supreme Court regarding the proper application of *Marks*, lower courts and commentators have reached differing conclusions regarding the proper mechanism for extracting guidance from fractured Supreme Court decisions. This Section briefly

21. *See infra* notes 265–67 and accompanying text.

22. *See infra* note 270 and accompanying text.

23. *See infra* notes 271–71 and accompanying text.

24. Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)).

introduces six of the most prominent approaches that have been recognized and discussed in either the judicial decisions of lower courts interpreting *Marks* or in academic discussions of plurality precedent.

A. *The "Implicit Consensus" or "Logical Subset" Approach*

One prominent interpretation of *Marks* understands the Court's instruction as being limited to a relatively narrow category of fractured majority decisions in which the judgment-supportive opinions line up with one another to render one opinion a "logical subset" of other, broader opinions.[25] Where the opinions happen to align in this way, courts embracing this approach believe it is possible to identify an "implicit consensus" among the deciding majority even though the members of that majority disagree about the appropriate scope of the rule of decision.[26] The intuition underlying the logical-subset approach is premised on the notion that even where the members of the deciding majority disagree about how broadly or narrowly to frame their rule of decision, they will at least implicitly agree on the proper resolution of those cases that fall within the narrowest version of the articulated rule.[27]

Of course, not all fractured majority opinions align with one another in the relatively straightforward manner that the logical-subset approach envisions.[28] Where the opinions in the precedent case do not line up with one another in a simple continuum from narrowest to broadest, courts embracing the logical-subset approach typically view the *Marks* rule as inapplicable and either deny the precedential authority of the precedent case completely[29] or interpret it narrowly as limited to its specific facts.[30]

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25. *See, e.g.*, United States v. Davis, 825 F.3d 1014, 1024 (9th Cir. 2016) (en banc); King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc); *see also* Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 808 (2017) (describing the logical-subset approach).

26. *See, e.g.*, *King*, 950 F.2d at 781 ("In essence, the narrowest opinion [under *Marks*] must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment.").

27. *See* Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 428 (1992) ("The rationale underlying this justification is that 'it constitutes a least common denominator upon which all of the Justices in the majority agree, even though some would support the decision on broader grounds.'" (quoting State v. Novak, 318 N.W.2d 364, 368 (Wis. 1982))).

28. Williams, *supra* note 25, at 810–11.

29. *See, e.g.*, Anker Energy Corp. v. Consolidation Coal Co., 177 F.3d 161, 170 (3d Cir. 1999) ("[I]n cases where approaches differ, no particular standard is binding on an inferior court because none has received the support of a majority of the Supreme Court.").

30. *See, e.g.*, Lair v. Bullock, 697 F.3d 1200, 1205 (9th Cir. 2012) ("If there is no such narrow opinion [reflecting a common denominator of the deciding court's reasoning], 'the only binding aspect of a splintered decision is its specific result.'" (quoting United States v. Rodriguez-Preciado, 399 F.3d 1118, 1140 (9th Cir. 2005))).

B. *The "Shared Agreement" Approach*

In a 2017 article, I defended an alternative approach to the narrowest-grounds rule that builds from the intuitions underlying the logical-subset approach but that allows lower courts to extract meaningful precedential guidance from a broader range of fractured majority decisions than the logical-subset approach envisions.[31] The intuition underlying this alternative approach, which I dubbed the "shared agreement" approach, starts by recognizing that the majority's implicit agreement on the case outcome—the starting point of the logical-subset approach—is still relevant in decisions where the deciding majority's opinions do not align in the particular manner that the logical-subset approach envisions.[32] Rather, the explanations offered by the plurality and concurring opinions will inevitably point to consistent results in at least some cases—as demonstrated by the majority's ability to reach consensus on the specific outcome of the precedent-setting case itself.[33]

Unlike the logical-subset approach, the shared-agreement approach does not purport to single out a specific opinion from the precedent case as controlling. Rather, the approach recognizes a limited domain of discretion in which later courts are left free to follow the rationale they find most persuasive, provided that the rationale they select is capable of accounting for not only the specific result in the precedent case but in *all* other cases in which the judgment-supportive opinions from the precedent case would have reached the same result.[34] In most cases, later courts would be able to comply with this obligation by choosing to follow either the plurality opinion or any of the concurring opinions from the original fractured majority decision.[35]

C. *The "Fifth Vote" Approach*

A third interpretation of the narrowest-grounds rule seeks to identify the opinion that reflects the critical vote that was necessary to form the majority. This "fifth vote" or "median opinion" approach[36] is sometimes defended by reference to a predictive rationale. On this account, following the views of the median opinion is viewed as desirable because the views of the median Justice (or set of Justices) will most accurately predict how the Court would resolve a future case raising identical

31. Williams, *supra* note 25, at 801–02.

32. *Id.* at 822–23.

33. *See id.* at 836–37.

34. *See id.* at 853.

35. *See id.* at 836–37.

36. *See, e.g.*, John P. Neuenkirchen, *Plurality Decisions, Implicit Consensuses, and the Fifth-Vote Rule Under* Marks v. United States, 19 WIDENER L. REV. 387, 388 (2013) (describing the approach as the "fifth-vote" approach); Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. 1942, 1977 (2019) (referring to it as the "median opinion" approach).

issues.[37] A second justification for the fifth-vote approach is grounded in a constructive rationale, which posits that the median opinion reflects the position that a majority of the Court would most likely have selected had they been "forced to choose" a single, controlling opinion.[38]

D. *The "Issue-by-Issue" Approach*

A fourth approach to extracting precedential guidance from fractured majority opinions seeks to identify points of agreement between the various opinions—including both the judgment-supportive opinions and the dissents—on discrete legal issues that were assented to by a majority of the Justices.[39] Like the logical-subset approach, the "issue-by-issue" approach is workable only with respect to a subset of fractured majority decisions where the opinions of the Justices happen to align in a specific way. But unlike the simple continuum of judgment-supportive opinions required by the logical-subset approach, the issue-by-issue approach depends on the existence of a "dual majority" where "there are in effect two majorities: the plurality and concurrence agreeing on the result, and the concurrence and dissent agreeing on the fundamental legal principles involved."[40] In effect, the issue-by-issue approach treats the existence of an agreement among a majority of Justices on a particular legal rule or set of rules as more significant than the lack of a consensus among those same Justices regarding how the rule should apply to a particular case.[41] Indeed, in rare circumstances, the issue-by-issue approach can yield a set

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37. *See* Neuenkirchen, *supra* note 36, at 405 (contending that "the fifth Justice's position identifies the grounds in the decision that best predict what the Court would do in subsequent cases with similar factual scenarios"); Justin F. Marceau, *Lifting the Haze of* Baze: *Lethal Injection, the Eighth Amendment, and Plurality Opinions*, 41 ARIZ. ST. L.J. 159, 173–74 (2009); *see also infra* notes 200–09 and accompanying text (discussing the relationship between the fifth-vote approach and the prediction model of precedent).

38. United States v. Gerke Excavating, Inc., 464 F.3d 723, 724 (7th Cir. 2006) (per curiam) (interpreting *Marks* to require "lower-court judges . . . to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose"); *see also* MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 124–41 (2000) (defending the fifth-vote approach by reference to principles from social-choice theory); *infra* notes 241–41 and accompanying text (discussing the social-choice rationale for the fifth-vote approach).

39. *See* Williams, *supra* note 25, at 817 (describing the issue-by-issue approach); *see also, e.g.*, United States v. Donovan, 661 F.3d 174, 182 (3d Cir. 2011) ("[W]e have looked to the votes of dissenting Justices if they, combined with votes from plurality or concurring opinions, establish a majority view on the relevant issue."); Nina Varsava, *The Role of Dissents in the Formation of Precedent*, 14 DUKE J. CONST. L. & PUB. POL'Y 285, 288 (2019) (defending the issue-by-issue approach).

40. Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 767–69 (1980) (describing such "dual majority" cases).

41. *See, e.g.*, Varsava, *supra* note 39, at 332–36 (contending that judges should appropriately give more weight to principles they endorse than to the results they reach).

of controlling legal rules that are impossible to reconcile with the specific result reached by the original fractured majority decision.[42]

E. *The "All Opinions" Approach*

In an influential 2013 opinion concurring in a denial of a rehearing en banc by the U.S. Court of Appeals for the D.C. Circuit, then-Judge Brett Kavanaugh endorsed an alternative method for identifying the precedential effect of fractured majority decisions: the "all opinions" approach.[43] Judge Kavanaugh interpreted *Marks* as requiring "when one of the opinions in a splintered Supreme Court decision has adopted a legal standard that would produce results with which a majority of the Court in that case necessarily would agree, that opinion controls."[44] To discern whether any such majority agreement exists, Judge Kavanaugh proposed a simple test. According to Kavanaugh, the "easy way" for lower courts to identify the precedential effect of a fractured majority decision for which there is no single, unambiguously narrowest opinion is "to run the facts and circumstances of the current case through the tests articulated in the Justices' various opinions in the binding case and adopt the result that a majority of the Supreme Court would have reached."[45]

Like the shared-agreement approach, the all-opinions approach focuses on the set of agreed-upon results reached by a majority of the Court's members rather than upon any effort to identify or impute a single agreed-upon rule or rationale.[46] But unlike the shared-agreement approach, which focuses solely on identifying the scope of agreement among the plurality and concurring Justices, the all-opinions approach considers views reflected in dissenting opinions.[47] This feature makes the approach somewhat analogous to the issue-by-issue approach as well. But whereas the issue-by-issue approach focuses on identifying agreements on governing rules or rationales, the all-opinions approach focuses solely

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42. A well-known example of this phenomenon is provided by *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949). *See infra* notes 197–201 and accompanying text (discussing *Tidewater*); *see also* Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CALIF. L. REV. 1, 10–24 (1993) (discussing other cases involving such paradoxical voting alignments).

43. *See* United States v. Duvall, 740 F.3d 604, 607–09 (D.C. Cir. 2013) (Kavanaugh, J., concurring in the denial of rehearing en banc) (per curiam); *see also, e.g.*, Bormuth v. County of Jackson, 870 F.3d 494, 520–21 (6th Cir. 2017) (Rogers, J., concurring) (endorsing Justice Kavanaugh's approach to *Marks*); United States v. Davis, 825 F.3d 1014, 1036–39 (9th Cir. 2016) (en banc) (Bea, J., dissenting) (endorsing Justice Kavanaugh's approach to *Marks*).

44. *Duvall*, 740 F.3d at 608 (Kavanaugh, J., concurring in the denial of rehearing en banc).

45. *Id.* at 611.

46. *See, e.g.*, *Davis*, 825 F.3d at 1034–35 (emphasizing that the all-opinions approach focuses on identifying majority-supported results rather than majority-supported reasoning).

47. *See* Re, *supra* note 36, at 1990 (noting the all-opinions approach gives binding force to dissenting votes).

on result-level agreements, which may not involve any comprehensive agreement among a majority on a governing rule or rationale.[48]

F. *The "No Precedent" Approach*

A final alternative for dealing with plurality precedent is perhaps the most straightforward. Under this approach, plurality decisions should simply be viewed as establishing no binding precedent whatsoever. Although the Supreme Court's decision in *Marks* practically foreclosed that option for lower courts,[49] the proposal remains a viable conceptual possibility. The leading academic defender of the no-precedent approach to plurality precedent is Professor Richard Re, who submitted a provocative amicus brief in *Hughes* urging the Supreme Court to abandon the narrowest-grounds doctrine completely.[50] Re's argument against plurality precedent, which he elaborates on in an important scholarly article,[51] focuses on the absence of any clearly discernible majority-supported rule of decision in fractured majority decisions.[52] And given the confusion that has swirled around the proper application of *Marks* in the lower courts, Re concludes that "not much would be lost by abandoning" the narrowest-grounds rule.[53]

II. TWO MODELS OF THE SUPREME COURT'S FUNCTION AND THREE MODELS OF SUPREME COURT PRECEDENT

Both the Supreme Court's decisions addressing the *Marks* standard and the lower courts' jurisprudence engaging with the *Marks* standard lack an overarching theory of precedential authority within which to situate the *Marks* "narrowest grounds" inquiry. This Part aims to situate the *Marks* doctrine within two broader sets of theoretical debates regarding the proper function of Supreme Court opinions and the appropriate functional relationship between Supreme Court precedent and lower-court decisionmaking. Though each of these debates has received fairly extensive consideration in the academic literature, the

48. *See id.* at 1993 ("Under the all opinions approach, the precedential effect of a fractured opinion is the combination of all the rules advocated in various separate opinions. Yet not a single Justice would necessarily approve of the resulting combination of rules.").

49. *See* Williams, *supra* note 25, at 806 ("*Marks* foreclosed what may have been the easiest way for lower courts to deal with Supreme Court plurality decisions—that is, by simply denying their precedential force and treating the various opinions issued in those decisions as mere persuasive authorities.").

50. *See* Brief of Professor Richard M. Re as Amicus Curiae in Support of Neither Party, *supra* note 10, at 3.

51. *See generally* Re, *supra* note 36.

52. *Id.* at 1946 ("When the Justices do not express majority agreement, there is no logical or inevitable basis for inferring majority approval for any particular rule of decision. Thus, no precedent should be created.").

53. *Id.*

potential salience of these debates to the specific interpretive controversies surrounding the *Marks* doctrine has been underexplored.

Section II.A briefly summarizes a longstanding conceptual debate between two competing models of the Supreme Court's institutional function: the "dispute resolution" model and the "law declaration" model. Section II.B then describes three competing models of precedential authority that strike different balances between the Court's dispute-resolution and law-declaring functions—the "judgment model," the "prediction model," and the "pronouncement model." Section II.C then compares the three models with one another.

A. *Two Models of the Supreme Court's Function*

What is the proper function of a Supreme Court opinion? The conventional answer to this question is that the function of a Supreme Court opinion, like all judicial opinions, is to provide a reasoned explanation for the Court's resolution of a particular case.[54] But this seemingly uncontroversial answer conceals an important ambiguity in the Court's merged functions of resolving disputes and, in the process of doing so, declaring what the law requires.[55] Emphasizing one or the other of these merged functions yields two competing models of the Supreme Court's institutional role: the "dispute resolution" model and the "law declaration" model.[56]

The dispute-resolution model starts from the proposition that a central function of courts, and perhaps *the* central function, is to settle disputes between adverse parties.[57] This conception of the judicial function is hardly unreasonable. After all, "[t]he operative legal act performed by a court is the entry of a judgment" rather than the issuance of a written opinion, the purpose of which is merely to provide "an explanation of

54. *See, e.g.*, *Judicial Opinion*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "judicial opinion" as a "court's written statement explaining its decision in a given case"); DANIEL JOHN MEADOR & JORDANA SIMONE BERNSTEIN, APPELLATE COURTS IN THE UNITED STATES, 75–76 (1994) ("The opinion of an appellate court is the explanation of what the court is deciding . . . .").

55. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 72–75 (Robert C. Clark et al. eds., 6th ed. 2009) (describing both the "Dispute Resolution" and "Law Declaration" functions of the federal courts).

56. *Id.*; *see also* Henry Paul Monaghan, Essay, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 668 (2012) (observing that "legal scholars have long posited that, heuristically at least, two basic adjudicatory models—the case or dispute resolution model and the law declaration model—compete for the Court's affection along a wide spectrum of issues").

57. *See, e.g.*, Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191, 1218 (2011) ("Why do courts exist? The seemingly obvious answer is to settle disputes.").

reasons for that judgment."[58] The dispute-resolution model can also be viewed as having particular salience to the functions of Article III courts, which—by constitutional design—are limited to issuing judgments in connection with particularized "cases or controversies" and are foreclosed from opining more generally on legal issues that may arise outside the context of resolving such disputes.[59]

But it would be implausible to assert dispute resolution as the sole institutional function of Article III courts.[60] An equally prominent competing tradition holds that the central function of judicial opinions, particularly Supreme Court opinions, is not merely to resolve private disputes but rather to articulate governing legal principles grounded in the Constitution or other sources of controlling law.[61] Rare instances may exist where the Supreme Court's resolution of a particular dispute might be more consequential than its articulated reasons for that resolution. But the far more typical case is one in which the concrete resolution of the controversy will pale in significance when compared with the Court's resolution of the broader legal issues the case presents. This feature of Supreme Court decisionmaking has led some commentators to argue that law declaration, rather than dispute resolution, is at the center of the Court's institutional function.[62]

Any plausible account of Supreme Court decisionmaking will almost certainly occupy some intermediate point between the conceptual extremes to which either of these models might be pressed.[63] But it is

58. Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 126 (1999); *cf.* Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1328 (1996) ("[T]he issuance of opinions is not an essential aspect of the judicial power. . . . A judgment is no less a judgment, and no less final, if it is unaccompanied by a statement of reasons." (footnote omitted)).

59. U.S. CONST. art. III, § 2; *see also* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1260 (2006) ("[Federal] [c]ourts make law only as a consequence of the performance of their constitutional duty to decide cases. They have no constitutional authority to establish law otherwise.").

60. *See* Monaghan, *supra* note 56, at 719–20 ("[An] inflexible insistence upon an unyielding dispute resolution model is far too idiosyncratic to serve as a vehicle for thinking sensibly about our constitutional order, let alone about the [S]upreme Court's place in that order.").

61. *See, e.g.*, Muskrat v. United States, 219 U.S. 346, 362 (1911) (noting that the Constitution does not empower federal courts to issue advisory opinions to the legislature).

62. *See, e.g.*, Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 30 (1979) (contending that while "dispute resolution may be one *consequence* of the judicial decision," "the *function* of the judge . . . is not to resolve disputes, but to give the proper meaning to our public values"); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282–84 (1976) (arguing for a "public law" model of adjudication where "the object of litigation is the vindication of constitutional or statutory policies" rather than to "settl[e] disputes between private parties about private rights").

63. *See, e.g.*, Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 453–54 (2009) ("Any viable model of adjudication has to make room for both dispute resolution and law pronouncement, without sacrificing either function for the sake of the other.").

nonetheless the case that different plausible theories will strike different balances between the twin goals of resolving disputes, on the one hand, and declaring law on the other. And the balance struck between these two competing goals may have important implications for the proper understanding and interpretation of the Court's principal judicial outputs—namely, its official opinions.[64]

B. *Three Models of Precedential Authority*

Section II.A began with a question regarding the function of Supreme Court opinions. This Section begins with a separate but closely related question: why should lower courts care about what Supreme Court opinions say? Once again, this question is susceptible to a seemingly obvious and uncontroversial answer: Lower courts should care about the content of Supreme Court opinions because they are bound to follow controlling Supreme Court precedent.[65]

But probing beneath the surface of this answer exposes a range of subsidiary questions, the answers to which are often far from obvious. For example, which aspects of Supreme Court opinions deserve recognition as "controlling precedent" and which may be treated as non-binding dicta?[66] How should one determine whether such controlling aspects of prior decisions "apply" to some future case?[67] And assuming satisfactory answers to these first two questions can be arrived at, what forms of decisionmaking should be recognized as consistent with "following" the earlier precedent?[68] At least in the proverbial "hard cases," it seems difficult to arrive at satisfactory answers to these types of questions without guidance provided by some underlying theory of the function of Supreme Court precedent and the institutional relationship between the Justices of the Supreme Court and the inferior court judges who must implement and apply those precedents.

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64. *See* Lawson, *supra* note 57, at 1224–27 (discussing influence of the choice between dispute resolution and law declaration models of judicial decisionmaking on how precedent is conceived of and understood).

65. *See, e.g.*, Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 820 (1994) (observing that "the doctrine of hierarchical precedent appears deeply ingrained in judicial discourse—so much so that it constitutes a virtually undiscussed axiom of adjudication").

66. *See infra* notes 273–81 and accompanying text (discussing the holding/dicta distinction).

67. *Cf.* Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona), 99 GEO. L.J. 1, 8–13 (2010) (discussing the contested boundary between refusing to follow a prior precedent and distinguishing it on its facts).

68. *See, e.g.*, Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 3 (1989) ("[I]f one were to ask law students, lawyers, judges, or legal academics what following precedent entails, one would almost surely get a variety of inconsistent answers.").

This Section briefly describes three competing models of the interpretive approach lower courts might take toward Supreme Court precedent—(1) the judgment model, (2) the prediction model, and (3) the pronouncement model—and situates each of these models within the broader framework of the Court's merged functions of resolving disputes and declaring law.[69]

1. The Judgment Model

To understand the theoretical underpinnings of the judgment model, it is useful to focus on the dispute-resolution function of adjudication and consider what role might exist for precedent under a system that focused exclusively on resolving disputes. Assuming a system in which courts are formally denied any substantive lawmaking authority, why should a judge ever look to the decisions of other judges, or even to her own prior rulings, in deciding how to resolve a case?

One possible answer to this question is grounded in the basic rule-of-law principle that like cases should be treated alike.[70] A judge committed to this principle would not feel free to disregard her own prior ruling in case *A* when determining the rights and responsibilities of similarly situated litigants in case *B*. When combined with the closely related rule-of-law ideal that one's legal rights should not depend on the identity of the particular judge to whom one's case is assigned,[71] the principle requiring that like cases be treated alike can easily be extended to warrant giving at least some precedential significance to the decisions of other judges within the same judicial system.[72]

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69. The three conceptual models described in this Section reflect broad rubrics that group together diverse theories; the exercise in categorization reflected in this framing leans more to the side of "lumping" rather than "splitting." *Cf.* Kimberly Kessler Ferzan, *A Planet by Any Other Name . . .* , 108 MICH. L. REV. 1011, 1023 (2010) (reviewing NEIL DEGRASSE TYSON, THE PLUTO FILES: THE RISE AND FALL OF AMERICA'S FAVORITE PLANET (2009)) ("[A]t the end of the day, any classificatory system must lump and/or split."). In associating particular arguments or authors with one of the three models, this Author does not mean to obscure important differences between them nor to deny the possibility that some arguments might straddle the conceptual divisions the categorization assumes.

70. *See, e.g.*, Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982) (contending that "broad judicial review is necessary to preserve the most basic principle of jurisprudence that 'we must act alike in all cases of like nature'" (quoting Ward v. James [1966] 1 Q.B. 273, 294 (C.A.))).

71. *See, e.g.*, Jeremy Waldron, *Lucky in Your Judge*, 9 THEORETICAL INQUIRIES L. 185, 186–92 (2007) (examining the theoretical appeal of the principle that legal rights should not be made to turn on the identity of the deciding judge, while acknowledging practical limits on the principle in practice); Dorf, *supra* note 17, at 681–85 (describing impersonality and impartiality of judicial decisionmakers as central to the American rule-of-law ideal).

72. *See* Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 858 (1984) (describing consistency among decisionmakers as "the systematic analogue to the impartiality feature demanded of individual decisionmakers").

This brief sketch of the manner in which a practice of precedent-following might emerge in an adjudicatory system focused exclusively on dispute resolution is similar to the actual manner in which precedent seems to have emerged in the early common law courts of England.[73] Early common law courts typically delivered their opinions orally, and no system of official case reporting existed to record or promulgate their rulings.[74] The limited case reporting that did exist was done by private parties and was originally designed primarily for the education of aspiring lawyers.[75] Eventually, litigants found it useful to call judicial attention to the unofficial reports of earlier decisions and argue that present disputes should be decided consistently with past decisions, and judges themselves increasingly came to recognize that their own decisions would be treated as precedents in future cases.[76] But the persistence of oral rulings and the questionable reliability of private case reporting—both of which persisted in England well into the modern era[77]—severely limited the practical ability of common law opinions to function as broad declarations of law in the manner that is often associated with modern Supreme Court decisionmaking.[78]

This history informed the development of one traditional common law view of precedent, which views the "holding" of a case as consisting solely of the facts of the earlier case and the court's ultimate disposition. Under this "facts-plus-outcome" approach, the task of a precedent-following court is merely "to identify a theory that can explain the results of previous cases, regardless of whether the precedent-setting courts themselves adopted the superimposed theory."[79] The precedent-setting court's own explanation of the legal reasoning on which it based its decision, though perhaps entitled to some persuasive force, is not considered part of the controlling "*ratio decidendi*" that a subsequent

73. *See* Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1192–222 (2007) (discussing development and evolution of precedent in English common law courts).

74. *See id.* at 1192–93.

75. *See id.* at 1193–95.

76. *See id.* at 1195–96.

77. *See id.* at 1203–04.

78. *See id.* at 1247–49 (discussing the increasing "textualization" of American legal precedent); *see also* Frederick Schauer, *Opinions as Rules*, 53 U. CHI. L. REV. 682, 683 (1986) (reviewing BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT (1985)) (observing that when considering Supreme Court opinions "we now must be interested in the way that the language of the opinion operates like a statute").

79. Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1045 (2005).

court was bound to follow, but rather was considered mere non-binding dicta.[80]

One key difficulty with this facts-plus-outcome approach is its inability to specify precisely which facts should matter to the precedent-following court in determining the scope of an earlier precedent.[81] Because no two cases are ever precisely identical, it will always be possible to identify *some* factual distinction between a present case and some earlier case asserted as a potential precedent.[82] Nor is this difficulty obviously remedied by disregarding "immaterial" or "unessential" factual differences between the two cases.[83] Without some reference to the precedent-setting court's reasoning process, there is simply no principled way of singling out particular facts as "material" to the prior judgment.[84]

Though traces of the facts-plus-outcome approach to precedent can still be glimpsed at times,[85] the more common practice among modern courts is to give precedential effect to at least some aspects of the reasoning process through which the precedent-setting court arrived at its holding.[86]

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80. *See, e.g.*, Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 502 (1948) ("Where case law is considered," the common law judge "is not bound by the statement of the rule of law made by the prior judge even in the controlling case. The statement is mere dictum . . . ."); Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 162 (1930) ("[T]he reason which the judge gives for his decision is never the binding part of the precedent.").

81. For more extended critiques of the facts-plus-outcome approach to precedent, see, for example, MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW 52–55 (1988); Abramowicz & Stearns, *supra* note 79, at 1045–52; Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2009–40 (1994); and Julius Stone, *The Ratio of the Ratio Decidendi*, 22 MOD. L. REV. 597, 600–10 (1959).

82. *See, e.g.*, EUGENE WAMBAUGH, THE STUDY OF CASES: A COURSE OF INSTRUCTION IN READING AND STATING REPORTED CASES, COMPOSING HEAD-NOTES AND BRIEFS, CRITICISING AND COMPARING AUTHORITIES, AND COMPILING DIGESTS 4 (1892) ("No two cases are precisely alike. However similar they may be, there is at least a difference as to the persons interested or as to the times of the events upon which the cases are based.").

83. *Cf. id.* at 4–5 (acknowledging inevitability of factual dissimilarities between cases but observing that "the obvious suggestion" to this difficulty "is that the differences may be immaterial").

84. *See, e.g.*, Abramowicz & Stearns, *supra* note 79, at 1055 (observing that "facts, material or otherwise, do not speak for themselves" and that a "satisfactory definition of holding and dicta must therefore examine the reasoning that connects the material facts to the result, rather than relying solely upon the selected material facts").

85. *See* Dorf, *supra* note 81, at 2009–24 (critically surveying the manner in which the Supreme Court has applied this method to distinguish earlier precedents addressing the scope of the President's removal authority).

86. *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."); KENT GREENAWALT, STATUTORY AND COMMON LAW

The recognition that at least some portions of a court's articulated reasons for its judgment can exert precedential force in later cases connects the judgment model to the Supreme Court's law declaration function. Knowing that lower courts will look to its reasons for guidance in later cases, the Court is encouraged to look beyond the specific facts of the case before it and consider the potential implications of its ruling for a broader set of factually analogous disputes.[87] This forward-looking perspective can encourage the Court to frame its explanations in more general and rule-like terms.[88] And because courts will often possess a degree of discretion in how they structure their opinions and explain the bases for their rulings,[89] the judgment model leaves ample space for law declaration to proceed.

However, the judgment model only accords binding force to propositions that make some meaningful contribution to the court's judgment. Law declaration, in this model, is secondary to the Court's primary obligation to resolve disputes between adverse parties.[90] The Supreme Court itself has, at times, endorsed this conception of its own precedential authority, asserting that its well-recognized power to "[s]ay what the law is"[91] is merely a byproduct of its more fundamental duty to adjudicate actual disputes.[92]

INTERPRETATION 185 (2013) ("Although the standard formulation [of the holding/dicta distinction] is in terms of 'necessary to the resolution of the case,' in the United States at least 'important in' is substantially more accurate." (footnote omitted)); Dorf, *supra* note 81, at 2037 (observing that "when they are not busy circumventing precedent by abusing the holding/dictum distinction, judges typically pay a great deal of attention to the words as well as the results of judicial decisions").

87. *See, e.g.*, Alan M. Trammell, *Precedent and Preclusion*, 93 NOTRE DAME L. REV. 565, 604 (2017) ("When a court discerns, announces, and applies a rule of law, by definition it is not just looking backward but is also engaged in a forward-looking enterprise.").

88. *See* Waldron, *supra* note 71, at 197 (emphasizing the significance of generality in judicial decisionmaking as consistent with rule-of-law values).

89. *See, e.g.*, Lawrence B. Solum, *How* NFIB v. Sebelius *Affects the Constitutional Gestalt*, 91 WASH. U. L. REV. 1, 27 (2013) ("Few reasons are absolutely necessary to a decision; in many cases the outcome could have been reached on the basis of many different reasons—and hence no single reason is necessary."); Abramowicz & Stearns, *supra* note 79, at 1066 ("[W]hen a case admits of more than one path to a particular resolution, or a broad or narrow arc in forming the path from facts to judgment, . . . judges should be afforded appropriate flexibility in crafting holdings when selecting the governing path or paths.").

90. *See* United States v. Windsor, 570 U.S. 744, 781 (2013) (Scalia, J., dissenting) ("[D]eclaring the compatibility of state or federal laws with the Constitution is not only not the 'primary role' of this Court, it is not a separate, free-standing role at all. We perform that role incidentally—by accident, as it were—when that is necessary to resolve the dispute before us." (emphasis omitted)).

91. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to [s]ay what the law is.").

92. As the Court explained in one nineteenth-century decision:

2. The Prediction Model

As summarized above, the judgment model focuses on ensuring consistency between the resolution of some current dispute and the resolution of some factually analogous dispute or set of disputes in the past. The "prediction" or "proxy" model, by contrast, 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 (or some factually analogous future dispute) *will be* resolved if and when it is considered by the Supreme Court.

The prediction model bears some affinity with the legal realist view that all law can be viewed as an effort to predict the actions of legal officials.[93] Some commentators hypothesize that something like the predictive approach is nearly unavoidable for lower court judges because such judges will inevitably strive to avoid reversal by predicting the views of their hierarchical superiors.[94] But the force of this descriptive

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> The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.

California v. San Pablo & Tulare R.R. Co., 149 U.S. 308, 314 (1893); *see also, e.g.*, Carroll v. Carroll's Lessee, 57 U.S. (1 How.) 275, 287 (1853) ("[T]his court and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties.").

93. *See, e.g.*, Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 29–30 (1994) (describing parallels between the predictive theory of judging and legal realist theories); NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE, 128–32 (1995) (describing the role of prediction in legal realist thought); Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."); *cf.* Spector Motor Serv., Inc. v. Walsh, 139 F.2d 809, 823 (2d Cir. 1943) (Hand, J., dissenting) (arguing that "the 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"), *vacated*, 323 U.S. 101 (1944).

94. Chief Justice Roberts seemed to endorse a version of this descriptive assumption during the oral argument in *Hughes*, posing the following question during a colloquy with the petitioner's counsel:

> 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

assumption is open to question. Although it is doubtful that many judges hope to be reversed, reversal is a relatively weak sanction for circuit court judges, both because the practical consequences of reversal are relatively minor and because the Supreme Court can only review a small fraction of their decisions.[95] Empirical studies attempting to assess the extent to which fear of reversal accounts for lower-court decisionmaking have failed to identify any clear and robust connection.[96]

Furthermore, even if it could be established that some meaningful number of lower court judges do, in fact, engage in prediction in order to avoid reversal, the prevalence of such a practice would not establish that they *should* do so. Nor would it provide a reason for judges not already engaged in prediction to commence doing so or for the Supreme Court to instruct the lower courts to embrace prediction. The Supreme Court has delivered a contrary message in at least one domain, instructing lower courts not to attempt to anticipate the overruling of a controlling Supreme Court precedent but rather to wait until such time as the Supreme Court itself chooses to revisit them.[97]

Dean Evan Caminker provides the leading academic defense of the prediction model.[98] Caminker's defense of prediction starts from a "top down" conception of the federal judicial system, with the Supreme Court

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> best way to do that is through the—whatever you want to call it, . . . 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 subject to reversal because, by definition, a majority of the Court here would . . . reach a different result.

Transcript of Oral Argument, *supra* note 17, at 9–10; *see also, e.g.*, RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 224 (1990) ("Most judges try to avoid being reversed, and this commits them to the prediction theory."); Caminker, *supra* note 93, at 78 ("The understandable desire to avoid . . . psychological and professional costs [of reversal] might well influence inferior court judges to decide cases in accord with their expectations about appellate court behavior.").

95. *See, e.g.*, Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CALIF. L. REV. 1457, 1484–85 (2003) (suggesting reasons to doubt that appellate judges are strongly affected by reversal); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 14–15 (1993) (observing that the effect of reversal aversion is likely to be "fairly unimportant in the case of court of appeals judges because reversals of appellate decisions by the Supreme Court have become rare and most reflect differences in judicial philosophy or legal policy rather than mistake or incompetence by the appellate judges" (footnote omitted)).

96. *See* Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 402 (2007) ("The handful of relevant empirical studies generally do not support the theory that fear of reversal motivates lower court compliance with precedent.").

97. *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 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.").

98. *See generally* Caminker, *supra* note 93.

at the pinnacle, functioning as "the oracle that authoritatively divines and articulates the meaning of federal law."[99] Because the Supreme Court is uniquely situated to perform this "oracular" function, Caminker argues, lower court judges should not strive to emulate the Supreme Court's own approach to decisionmaking.[100] Instead, "[t]he lower court" applying the prediction model

> would say to itself, "The correct understanding of the law today is what the Supreme Court would say today if I asked it; unfortunately I cannot directly communicate with the Court right now, but I can confidently predict that the Court's answer would be *X*, and therefore *X* is the law."[101]

Certain arguments that Dean Caminker marshals in support of the prediction model speak to the federal courts' dispute-resolution function, particularly the argument that lower courts' use of prediction may conserve scarce judicial resources by convincing disappointed litigants that any potential appeal would yield identical results.[102] But most of his arguments, and particularly those most relevant to the use of precedent by the federal courts of appeals,[103] emphasize the Supreme Court's law declaration function. For instance, he argues that various features of the Court's institutional structure are likely to render the Supreme Court more proficient at legal reasoning, and thus more likely to arrive at correct legal results, than lower courts.[104] Dean Caminker also emphasizes the value of uniform interpretation of federal law, both for pragmatic reasons and to enhance the perceived legitimacy of judicial decisionmaking.[105] He expresses concern that allowing lower courts to act on their own best understanding of federal law, rather than their best prediction of how the Supreme Court would resolve the issue, tends to "minimize the Supreme Court's oracular function by decentralizing or

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99. *Id.* at 16.

100. *See id.*

101. *Id.* at 27.

102. *See id.* at 36–37.

103. Dean Caminker acknowledges that, due to the infrequency with which the Supreme Court examines lower court decisions, the argument from efficiency "has far less force at the" apex of the federal judicial hierarchy. *Id.* at 37.

104. *Id.* at 41–43. Professor Caminker emphasizes the Court's focus on legal issues rather than fact-finding and its larger size (nine members, as opposed to single judges for district courts or a three-judge panel for most intermediate appellate decisions) as key indicators of its presumptive proficiency advantage. *Id*. Professor Tara Leigh Grove identifies several additional advantages the Court might possess over inferior courts, including its substantially lighter caseload, its ability to determine the issues it considers, and its ability to draw upon a broad range of lower court decisions and amicus briefings to inform its decisionmaking. Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 22–23 (2009).

105. Caminker, *supra* note 93, at 38–40.

otherwise diffusing the judicial system's lawmaking authority."[106] Instead, Dean Caminker urges lower courts to act merely as conduits whose role is "to facilitate universal access to the Court's edicts" by "emulating" those edicts to the best of their abilities.[107]

Of course, as Dean Caminker acknowledges, "inferior courts have no crystal ball to consult as a means of predicting perfectly" what "the Supreme Court's ruling on a given legal question" will be.[108] And the same institutional features that might render lower courts less proficient decisionmaking institutions than the Supreme Court may hamper their ability to accurately predict the Court's future resolution of any unresolved legal question.[109] For this reason, Caminker suggests that the practical value of the prediction model for lower courts is likely limited to a relatively narrow category of cases in which "highly probative predictive data" of the Court's likely rulings are available.[110]

One of the most significant sources of such predictive data, in Caminker's view, consists of cases in which the Court produces "a fragmented-majority dispositional rule, meaning a majority of the Court has embraced the same rule but in separate opinions," as sometimes (though not always) occurs in plurality decisions.[111] Because such majority-supported rules have "essentially the same predictive value as would a unified-majority dispositional rule," Caminker contends that a lower court applying such rules can be confident that its rulings will match the rulings that would issue from the Supreme Court.[112]

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106. *Id.* at 16.

107. *Id.* at 16–17. Other authorities have made similar normative arguments in support of predictive decisionmaking by lower courts. *See* POSNER, *supra* note 94, at 28 (suggesting that the predictive approach "really can . . . be normative for lower-court judges" because it tends to "concentrate judicial discretion" in the judges of the highest courts who, for structural reasons, might "be expected to exercise discretion more responsibly"); Michael L. Eber, Comment, *When the Dissent Creates the Law: Cross-Cutting Majorities and the Prediction Model of Precedent*, 58 EMORY L.J. 207, 232–33 (2008) (discussing asserted advantages of prediction).

108. Caminker, *supra* note 93, at 17.

109. *See* Kim, *supra* note 96, at 438 ("If, as Caminker suggests, lower court judges lack the Supreme Court's higher proficiency in discerning the 'better' answer from primary legal materials, then they are also likely to have difficulty anticipating what the Supreme Court's 'better' answer will be."); *cf.* Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1171 (2004) (reporting results of an empirical study showing that a statistical model incorporating a handful of observable case characteristics did a better job of predicting the resolution of undecided Supreme Court cases more accurately than did a group of legal experts).

110. Caminker, *supra* note 93, at 73.

111. *Id.* at 45–46; *see also id.* at 69 (identifying the Supreme Court's fractured decision in *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949) as a case that produced such a highly probative, fragmented majority rule).

112. *Id.* at 46.

3. The Pronouncement Model

While the judgment model and the prediction model are the two most prominent theories of vertical stare decisis,[113] they do not exhaust the conceptual possibilities available to lower court judges. A third model of vertical stare decisis is illustrated by the decision of the U.S. Court of Appeals for the Sixth Circuit in *Powers v. Hamilton County Public Defender Commission*.[114] In *Powers*, the Sixth Circuit discerned from the Supreme Court's decision in *Spencer v. Kemna*[115] an implicit but nonetheless binding conclusion of law endorsed by five Justices, and did so by identifying points of agreement between Justice Souter's concurring opinion—joined by Justices O'Connor, Ginsburg, and Breyer—and Justice Stevens's sole dissent.[116]

The Sixth Circuit's interpretation of *Spencer* is obviously problematic under the judgment model because a dissent, by definition, makes no contribution to the judgment rendered by the precedent-setting court.[117] And though consideration of dissenters' views in fractured-majority cases may sometimes be recommended by the prediction model of precedent,[118] it seems difficult to view the Sixth Circuit's decision in *Powers* as an attempt at prediction. Critically, by the time the Sixth Circuit decided the case in 2007, Justice O'Connor—one of the four Justices who had joined in Justice Souter's plurality opinion in *Spencer*

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113. *See, e.g.*, Solum, *supra* note 89, at 22 (identifying the "formalist version of [stare decisis] that is rooted in the idea of the ratio decidendi" and the realist view that "the holding of a case [is] the rule that best predicts the future behavior of a court" as the two principal approaches to stare decisis).

114. 501 F.3d 592 (6th Cir. 2007).

115. 523 U.S. 1 (1998). *Spencer* was not a plurality decision, but rather was a 7–2 majority decision. The majority opinion, authored by Justice Scalia, concluded that the petition for a writ of habeas corpus had been mooted by his release from custody. *Id.* at 17–18. Four Justices who joined in the majority opinion also joined Justice Souter's separate concurrence (counting Justice Souter himself), which endorsed "an added reason" for the Court's judgment that the majority opinion did not reach—namely, the presumed availability of a potential damages action under 42 U.S.C. § 1983. *Id.* at 18, 20–21 (Souter, J., concurring). Justice Stevens's dissenting opinion disagreed with the majority's mootness conclusion but agreed with the four concurring Justices that the petitioner would have a potential damages claim under § 1983. *Id.* at 24–25, 25 n.8 (Stevens, J., dissenting).

116. *Powers*, 501 F.3d at 601, 603 ("[T]he only way to side with those circuits that have enforced the favorable-termination requirement against habeas-ineligible plaintiffs is to altogether ignore *Spencer*, in which five justices (four in concurrence and one in dissent) [rejected that view]. Casting *Spencer* aside is something we decline to do.").

117. *See, e.g.*, Jonathan H. Adler, *Once More, with Feeling: Reaffirming the Limits of Clean Water Act Jurisdiction*, *in* THE SUPREME COURT AND THE CLEAN WATER ACT: FIVE ESSAYS 81, 93–94 (L. Kinvin Wroth ed., 2007) (arguing that a "dissent, like dicta from a majority opinion, . . . does not—indeed cannot—form part of the holding of the Court" (emphasis omitted)).

118. *See, e.g.*, Eber, *supra* note 107, at 211–12 (discussing predictive value of dissenting opinions).

and whose vote was thus necessary to the implicit five-Justice majority the Sixth Circuit relied upon—had retired from the bench and been replaced by Justice Samuel Alito.[119]

It seems doubtful that the Sixth Circuit judges who decided *Powers* either overlooked this significant change in Supreme Court membership or assumed that Justice Alito's views on the relevant issue would perfectly mirror those of Justice O'Connor.[120] Rather, it is much more plausible that the judges of the Sixth Circuit viewed the correspondence of views between five Justices in *Spencer* as significant for the simple reason that those views were shared by a majority of the Justices who considered the case.

The approach suggested by the *Powers* decision makes the most sense under a conception of Supreme Court precedent that strongly emphasizes the Court's law declaration function. Under this conception, the precedential significance of the legal rule announced in the case derives from neither the need to ensure consistency with the resolution of some prior dispute nor a desire to predict the outcome of some future adjudication. Instead, the pronouncement is deemed significant due to the Supreme Court's unique institutional capacity, combined with its recognized authority to "[s]ay what the law is."[121] On this conception, the Court is viewed as a lawmaking institution similar in important respects to a legislature.[122] The function of its opinions is not solely—or even primarily—to explain its resolution of particular private disputes, nor to facilitate prediction of future rulings. Rather, the opinion's principal

119. Justice O'Connor announced her retirement, effective upon the confirmation of her successor, on July 1, 2005. William Branigin et al., *Supreme Court Justice O'Connor Resigns*, WASH. POST (July 1, 2005, 7:11 PM), https://www.washingtonpost.com/wp-dyn/content/article/2005/07/01/AR2005070100653_pf.html [https://perma.cc/2PNM-C38Y]. Justice Alito, her successor, was confirmed by the Senate and assumed office on January 31, 2006. David D. Kirkpatrick, *Alito Sworn in as Justice After Senate Gives Approval*, N.Y. TIMES (Feb. 1, 2006), https://www.nytimes.com/2006/02/01/politics/politicsspecial1/alito-sworn-in-as-justice-after-senate-gives.html [https://perma.cc/ZG33-ZDTU].

120. The presumed ideological and jurisprudential differences between Justice O'Connor and her replacement were the subject of a great deal of academic and public commentary during the period surrounding Justice O'Connor's retirement. *See, e.g.*, Erwin Chemerinsky, *The Future of Constitutional Law*, 34 CAP. U. L. REV. 647, 650 (2006) (predicting that Justice Alito's appointment would result in changes to constitutional law across a range of doctrinal areas); Joan Biskupic, *Contrast Obvious Between O'Connor, Would-Be Successor*, USA TODAY, Nov. 1, 2005 (highlighting potential differences between Justices Alito and O'Connor on issues such as abortion, sex discrimination, and the Family and Medical Leave Act).

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

122. *See, e.g.*, Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 188 (2006) (observing that "[r]ealist courts are inclined to view their power as legislative in nature"); Geoffrey C. Hazard, Jr., *The Supreme Court as a Legislature*, 64 CORNELL L. REV. 1, 1 (1978) (opining that, while "[t]he Supreme Court is at least nominally a court," it is also "in some respects . . . certainly a legislative body").

function is to "guid[e] lower courts and legally advised actors" regarding the content of the governing substantive law.[123]

This "pronouncement model" of precedent has received recognition in the academic literature. For example, Professor Larry Alexander has suggested a somewhat analogous "rule model" of precedent under which "the precedent court has authority . . . to promulgate a general rule binding on courts of subordinate and equal rank" that would, "like a statute, have a canonical formulation."[124] Professor Melvin Eisenberg has similarly suggested an approach under which "the rule of a precedent consists of the rule it states, provided that rule is relevant to the issues raised by the dispute before the court."[125] And Professor Adam Steinman has argued that "the lawmaking content of a judicial decision" should "be limited to those decisional rules that the court states explicitly in its opinion."[126] Most recently, Professor Charles Tyler has documented the emergence in various lower courts of a rule-focused model that rejects the traditional approach's focus on judgment-necessity as the touchstone of precedential legitimacy.[127]

Those who advocate such rule-based theories tend to claim many of the same benefits that proponents of the prediction model claim for their own preferred approach—including fostering the uniformity and predictability of federal law and drawing upon the unique institutional capacities of the Supreme Court.[128] The similar justifications for the two models is hardly surprising. The prediction model and the

123. Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1469 (1995); *cf.* Fiss, *supra* note 62, at 29 ("To my mind courts exist to give meaning to our public values, not to resolve disputes.").

124. Alexander, *supra* note 68, at 17–18.

125. EISENBERG, *supra* note 81, at 54–55; *see also, e.g.*, Shawn J. Bayern, *Case Interpretation*, 36 FLA. ST. U. L. REV. 125, 132, 137–38 (2009) (endorsing an elaborated view of Professor Eisenberg's "announcement approach").

126. Adam N. Steinman, *Case Law*, 97 B.U. L. REV. 1947, 1971 (2017) [hereinafter Steinman, *Case Law*]; *see also* Adam N. Steinman, *To Say What the Law Is: Rules, Results, and the Dangers of Inferential Stare Decisis*, 99 VA. L. REV. 1737, 1790 (2013) [hereinafter Steinman, *What the Law Is*] (contending that "our system should dispense with the idea that results, in and of themselves, generate binding precedent via stare decisis" and that "[o]nly explicitly stated rules" should "create prospectively binding law").

127. *See* Charles W. Tyler, *The Adjudicative Model of Precedent*, 87 U. CHI. L. REV. 1551, 1566–74 (2020).

128. *See, e.g.*, Steinman, *What the Law Is*, *supra* note 126, at 1777 (contending that "[r]ule-based stare decisis allows a precedent-setting court to identify 'the applicable rule of law,' making it more predictable how future courts will handle cases"); Alexander, *supra* note 68, at 26 (contending that "[t]he most important advantage" of a rule-based approach to precedent "is that lower courts (and people in general) derive much more guidance from constraining general rules than they do from constraining particular decisions"); *cf.* James Hardisty, *Reflections on Stare Decisis*, 55 IND. L.J. 41, 55 (1979) (contending that authoritative law declaration by appellate courts "increase[s] predictability" and judicial efficiency and "serves to increase the uniformity, deliberateness, correctness, impersonality, and objectivity of judicial decisions").

pronouncement model share a great deal of conceptual overlap. Both start from a similar set of intuitions regarding the respective significance of law declaration versus dispute resolution to the Court's institutional function. And both models tend to situate themselves as alternatives to the more traditional results-centered approach reflected in the judgment model.[129]

But the two models are not identical in all respects. For one thing, insofar as the pronouncement model would limit the precedential effect of a decision to rules that are either explicitly stated by the deciding court or clearly inferable from its opinions,[130] it may produce a narrower scope of precedential obligation than the prediction model might suggest. Even an opinion that provides no clearly expressed or inferable rule may carry at least *some* predictive value—and perhaps even substantial predictive value—regarding the Court's likely future rulings.[131] At the same time, the backward-looking nature of the pronouncement model tethers the precedential significance of the holding in a more permanent and enduring way than might be true of the prediction model. By its nature, the prediction model keys a decision's precedential significance to the decision's ability to accurately forecast the Court's likely future rulings. Changes in Court membership may thus affect the precedential value of a decision under the prediction model in a way that would not be true under the pronouncement model.[132]

C. *Comparing the Three Models of Supreme Court Precedent*

1. Binding Authority Versus Persuasive Authority

In comparing the three above-described models of Supreme Court precedent, it is useful to keep in mind a distinction between two possible ways in which a Supreme Court opinion might inform lower-court

129. *See, e.g.*, Tyler, *supra* note 127, at 1553–54 (contrasting the "adjudicative model," which "embraces" prospective judicial lawmaking, with the more traditional approach's focus on identifying propositions necessary to the precedent court's judgment); Caminker, *supra* note 93, at 8–22 (contrasting the "predictive" or "proxy" approach with the more traditional judgment-focused model).

130. *See, e.g.*, Re, *supra* note 36, at 1975 (suggesting that unexplained dispositions should lack precedential effect); Steinman, *What the Law Is*, *supra* note 126, at 1790.

131. Many early- and mid-twentieth century legal realists contended that careful attention to the facts of particular disputes and the courts' dispositions of particular concrete cases would provide a more reliable guide to prediction than would the articulated legal explanations reflected in those courts' opinions. *See* Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1148 (1999) (reviewing ANTHONY SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE (1998)) (noting the realists' general embrace of the descriptive claim that "judges react primarily to the underlying facts of the case, rather than to [the] applicable legal rules and reasons" reflected in their written opinions).

132. *See infra* notes 221–21 and accompanying text (noting significance of personnel changes for predictive value of plurality decisions).

decisionmaking. The first is through the mechanisms commonly associated with the idea of "persuasive authority."[133] The distinctive feature of this kind of authority is that the decisionmaker has an option as to whether to use it.[134] Lower courts might look to non-binding statements in Supreme Court opinions for a variety of reasons, such as to defer to the Court's presumed decisional competence, to facilitate coordination with other lower courts, or to minimize their own decision costs.[135] But they are not required to do so. The second, and, for present purposes, more salient use of Supreme Court opinions is their use as "mandatory" or "binding" authority—those that a lower court judge *must* follow regardless of whether she believes the decision to be correct or desirable.[136]

The three models of Supreme Court precedent are best understood to reflect competing theories of what makes a Supreme Court opinion binding on the lower courts. When such opinions are viewed as merely persuasive, the three models do not necessarily reflect competing or mutually exclusive alternatives; a single judge might easily employ modes of decisionmaking associated with all three to inform his decision in a particular case.

For example, imagine a lower court judge who believes the judgment model provides the best account of what makes Supreme Court precedent binding. Such a judge will view the binding force of a Supreme Court decision as limited to the Court's judgment and those portions of its opinion that explain why the Court issued that particular judgment. But if this information is not sufficient to determine the result in the case before her, the judge might be willing to consider other aspects of the Court's opinion as persuasive authority to inform her ruling. For example, although she would not view herself as bound to follow what she perceives to be dicta in the majority's ruling, the judge might nonetheless pay close attention to majority-supported dicta out of respect for the Justices' presumed expertise, or because she finds it persuasive.[137]

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133. Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1940 (2008) (discussing the conventional distinction between "*mandatory* (or *binding*) authorities," which bind later courts, and "*persuasive* authorities," which a court may choose (but is not obligated) to follow).

134. *See id.* at 1946 (identifying the optional nature of persuasive authority as its essential characteristic and suggesting that "*optional* authorit[y]" might be a more appropriate designation).

135. *See, e.g.*, Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433, 480–82 (2012) (describing reasons that lower courts might willingly follow non-binding Supreme Court dicta).

136. *See* FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 68 (2009) (describing mandatory authority as authority a judge is "obliged to obey . . . regardless of what he thinks of its soundness").

137. *See, e.g.*, Leval, *supra* note 59, at 1253 (arguing that judicial dicta can serve beneficial purposes when used as persuasive rather than binding authority).

Likewise, such a judge might find it useful to take into account any information revealed by the opinion—or by other opinions or information emanating from the Court—regarding the views of the Court's current members and the probable way in which the majority would resolve the relevant issue.[138]

But when viewed as competing theories of binding precedent, the stakes at issue in the choice between the three models become more apparent. When a Supreme Court opinion is determined to be binding, that opinion becomes a conclusive reason for the lower court's judgment.[139] No matter how persuasive competing considerations or authorities might be, the lower court judge would not be free to decide the issue in a manner that conflicts with the binding authority.

A lower court judge who accepts the judgment model, for example, might feel a strong inclination to follow a view reflected in majority-supported dicta from a recent Supreme Court decision, either because she finds such dicta persuasive in its own right or because she views it as strongly probative of the Court's likely future ruling.[140] But no matter how inclined such a judge might otherwise be to conform his decision to the view reflected in that majority-supported dicta, he will be unable to do so if that dicta is contrary to statements in some earlier Supreme Court ruling that led the Court to its judgment in an indistinguishable case.[141] Likewise, a lower court judge who embraces the pronouncement model may find himself compelled to follow broad majority-supported dicta in a very old Supreme Court case with which he strongly disagrees, notwithstanding the fact that such statements might not be viewed as binding under either the judgment model or the prediction model of precedent.

2. Three Dimensions of Comparison: Scope, Time, and Particularity

Although there are many dimensions along which the three models of Supreme Court precedent might be compared, focusing on three such dimensions—scope, time, and particularity—reveals certain commonalities and distinctions among the three that can shed useful light on the practical significance of the choice between them.

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138. Such attentiveness might be motivated by purely self-interested considerations, such as the lower court judge's own desire to avoid being overruled, or from more public-spirited concerns, such as a desire to ensure the parties appearing before her are treated consistently with the parties whose cases may be resolved after the Supreme Court speaks to the issue. *See supra* notes 98–101, 106–11, and accompanying text (discussing arguments for prediction).

139. *See* Schauer, *supra* note 133, at 1940.

140. *See, e.g.*, Leval, *supra* note 59, at 1253–54 (arguing that dicta can be useful even if they are not treated as binding).

141. *Id.* at 1252.

The first dimension along which the three models might be compared involves the issue of scope—that is, the range of cases to which the precedent might plausibly apply.[142] A precedent that is broader in scope will determine the outcome in a broader range of future cases, while comparatively narrow decisions will determine fewer future cases, resulting in greater decisionmaking freedom for lower courts.[143] The precedential scope of a particular decision can be influenced, in part, by the precedent-setting court itself.[144] But the particular theory of precedent that later courts apply when interpreting the decision can also affect the resulting scope of the precedent significantly.[145]

As a general matter, the judgment model of precedent tends to yield precedents that are narrower in scope than either the prediction model or the pronouncement model. The facts-plus-outcome version in particular imposes extremely narrow obligations on later courts, effectively allowing those courts to disregard the actual reasoning relied upon by the precedent court so long as the later court is able to articulate some theory that can reconcile the precedent court's judgment with the facts before it.[146] Versions of the judgment model that are more broadly accepted enable the precedent court to exert greater control over the scope of its precedents by requiring later courts to adhere to both the result and the actual reasoning that led the court to its judgment. But even these approaches insist that binding effect be limited to those portions of the precedent court's opinion that were either necessary to the court's judgment or that contributed to its judgment in some reasonably direct fashion.[147]

By contrast, neither the prediction model nor the pronouncement model imposes such strict limitations on the precedent court's authority to create binding precedent. The prediction model accords full precedential force to any statement in the precedent court's opinion that

142. *See* Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 181 (2014) (describing "scope" as involving the question of "whether a given precedent applies to a newly arising dispute"); *see also, e.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 16 (1999) (describing a similar concept using the terminology of "width").

143. *See* Grove, *supra* note 104, at 28 (stating that, "When the Court issues a minimalist decision, it leaves much to be decided by the lower federal and state courts," whereas maximalist opinions "create broad and binding precedents that concentrate decisionmaking responsibility in the Supreme Court").

144. *See, e.g.*, Randy J. Kozel & Jeffrey A. Pojanowski, *Discretionary Dockets*, 31 CONST. COMMENT. 221, 241–44 (2016) (discussing the tendency of broad Supreme Court rulings to provide guidance to lower courts in a broader range of cases).

145. *See* Kozel, *supra* note 142, at 182–83 (describing how an "inclusive" theory of precedent can yield decisions of broader precedential scope).

146. *See supra* notes 79–85 and accompanying text (describing the facts-plus-outcome approach).

147. *See supra* notes 86–92 and accompanying text.

provides sufficiently reliable predictive evidence of that court's likely future judgment, whether or not those statements led the court directly to its judgment or contributed to the judgment in any way.[148] Likewise, the pronouncement model accords binding effect to any considered statements in the precedent-setting opinion so long as such statements were, in some loose sense, "relevant" or "germane" to the legal issues presented by the case.[149]

When compared across the dimension of time, a different pattern of similarities and differences can be observed across the three models. Both the judgment model and the pronouncement model locate the binding authority of precedent in some authoritative declaration in the past. Under both models, the authority of that declaration persists unchanged until the precedent is reversed or revised by some equally authoritative statement by the court that rendered the original decision. The prediction model, by contrast, is inherently forward looking, focusing on how a majority of the Supreme Court's currently serving members *would decide* the relevant issue were it to reach them.[150] Of course, such predictions must necessarily rely on predictive evidence that was generated in the past. But the model assumes that where the views of a majority of the Supreme Court's current members can be reliably determined, those views should control the outcome regardless of any rule or decision handed down in the past.[151]

A third dimension along which the three models of vertical stare decisis might be compared is that of particularity—that is, the extent to which the relevant model is sensitive to the particular facts and

148. *See, e.g.*, Caminker, *supra* note 93, at 18 (arguing that judicial dicta that do not lead the court to its decision provide reliable predictive evidence of the court's future rulings).

149. *See* United States v. Johnson, 256 F.3d 895, 914 (9th Cir. 2001) (en banc) (per curiam) ("[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense."); EISENBERG, *supra* note 81, at 54–55 (stating that a rule announced by a court should be regarded as precedential "provided that rule is relevant to the issues raised by the dispute before the court").

150. *See* Caminker, *supra* note 93, at 63 (observing that precedential constraints under the prediction model are forward-looking).

151. A "pure" version of the prediction model might even allow lower courts to explicitly reject even a very clear holding of the Supreme Court if they are convinced that a current majority of the Supreme Court would be willing to overrule that holding. *See* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 941 (2016) ("The prediction model is closely associated with 'anticipatory overruling,' or disregarding a higher court precedent because the higher court will predictably overrule the precedent."); *see also, e.g.*, C. Steven Bradford, *Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling*, 59 FORDHAM L. REV. 39, 90 (1990) (defending anticipatory overruling). *But see* Caminker, *supra* note 93, at 71–72 (arguing against anticipatory overruling to preserve national uniformity and to "assuage any concerns that inferior courts might abuse the proxy model by stretching to circumvent disfavored Supreme Court precedents").

circumstances of the specific dispute that was presented to the court in the precedent case. By insisting upon a traceable link between the actual judgment issued by the precedent-setting court and the binding precedential effect of its decision, the judgment model ensures a reasonably high degree of particularity. Although the resulting precedent need not be narrowly circumscribed by each particular fact that happens to have been present in the precedent case, the judgment model does require some reasonably close connection between the precedential effect of a decision and the actual reasons that led the precedent-setting court to issue the particular judgment it did.[152]

The prediction model too is consistent with at least some reasonable degree of particularity. Although the prediction model—unlike the judgment model—accords significance to statements that do not lead directly to the court's judgment, it allows for the actual disposition to carry predictive weight as well.[153] The prediction model thus allows—and might even require—later courts to accord careful and close attention to the specific facts and disposition of the precedent-setting case, as well as the rules and rationales the original court invoked to explain its decision.

The pronouncement model, by contrast, is much less attentive to the particular facts and disposition of the precedent-setting case. Because the pronouncement model focuses on the Supreme Court's law-declaration function, the rules and principles articulated in the Justices' opinions are accorded far more weight and significance than the resolution of the underlying dispute. Although the particular factual context in which the Court articulated a particular rule might be relevant to understanding its intended meaning and scope,[154] the fact of the disposition itself need not carry any intrinsic precedential significance.[155]

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152. *See supra* Section II.B.1 (describing the judgment model).

153. Several early-twentieth-century Legal Realists argued that the way in which judges respond to the specific facts of the cases before them provided more reliable guides to prediction than the explanations those judges offered in their written opinions. *See* Leiter, *supra* note 131, at 1148; *cf.* Frederick Schauer, *Prediction and Particularity*, 78 B.U. L. REV. 773, 781–85 (1998) (arguing that attentiveness to the particularized facts of a case may sometimes provide firmer grounds for prediction than more abstract legal categorizations).

154. *See* Bayern, *supra* note 125, at 137 (contending that precedential force should attach to any pronouncement that the deciding court intended to announce but that knowledge of the factual context in which the rule was announced may be relevant to assessing the judges' intent).

155. *See, e.g.*, Steinman, *What the Law Is*, *supra* note 126, at 1789–92 (arguing that later judges should be free to disregard the results reached in a prior precedent-setting case if those results are not directly compelled by the collective set of legal rules announced in the decision); *see also infra* note 285 and accompanying text (discussing criticisms of the Court's doctrine according precedential status to unexplained dispositions).

3. Underlying Values

Proponents of all three models of vertical stare decisis tend to point to similar values in support of their preferred theories, such as accuracy, constraint, legitimacy, uniformity, predictability, efficiency, and fairness.[156] But the theories strike markedly different balances between these, at times, conflicting values.

Proponents of the judgment model tend to emphasize the limited structural role of courts in our constitutional system, and to connect the legitimacy of those courts' decisions to judges' willingness to work within that constrained role.[157] Some also contend that requiring a close connection between the specific resolution of a case and the precedential rules that emerge from the case tends to minimize the risk of error by ensuring that judges confine their rulings to the specific facts and arguments that are brought to their attention.[158] To address such concerns about constraint, legitimacy, and accuracy, proponents of the judgment model typically favor methods yielding narrower and more fact-bound precedents than alternatives, thereby sacrificing some degree of uniformity, predictability, and efficiency.[159]

The prediction model and pronouncement model, by contrast, strike a different balance: accepting the legitimacy of a more declaratory conception of the judicial function that would enable courts to achieve the perceived benefits of settlement across a broader range of future

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156. *See, e.g.*, Re, *supra* note 36, at 1966–71 (identifying accuracy, efficiency, and settlement as among the values that should inform the selection of a plurality precedent rule); Varsava, *supra* note 39, at 328–31 (discussing guidance, constraint, predictability, legitimacy, and efficiency as relevant considerations); Williams, *supra* note 25, at 856–58 (discussing tradeoffs between uniformity and accuracy); *cf.* Kozel, *supra* note 142, at 204–05 (emphasizing uniformity, efficiency, constraint, and predictability as among the values furthered by vertical stare decisis in general).

157. *See, e.g.*, Williams, *supra* note 25, at 846–47 (discussing judgment supportiveness as a traditional criterion of precedential legitimacy); Leval, *supra* note 59, at 1259–60 (connecting the distinction between holdings and dicta to the federal courts' limited constitutional role); Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 225 (2010) (identifying the "three most persuasive rationales for maintaining the distinction" between holdings and dicta as accuracy, judicial authority, and legitimacy); *cf.* Dorf, *supra* note 81, at 2001 (describing the argument that "dicta have no precedential effect because courts have legitimate authority only to decide cases, not to make law in the abstract").

158. *See, e.g.*, Leval, *supra* note 59, at 1255 (contending that "courts are more likely to . . . overlook . . . contraindications, more likely to pronounce flawed rules, when uttering dicta than when deciding their cases"); *see also, e.g.*, Stinson, *supra* note 157, at 226 (contending that "the court has less incentive to ensure the 'correct' decision because it is not binding on the parties before the court"); Abramowicz & Stearns, *supra* note 79, at 1021–23 (contending that attentiveness to the holding-dicta distinction can enhance the consideration courts give to their rulings).

159. *See, e.g.*, Leval, *supra* note 59, at 1253, n.17 (acknowledging the usefulness of considering non-binding dicta for various purposes).

cases.[160] Proponents of the prediction and pronouncement models tend to emphasize the benefits of uniformity, predictability, and efficiency, along with the Supreme Court's presumedly superior expertise in pronouncing legal rules.[161] By contrast, such proponents tend to minimize the concerns about constraint, legitimacy, and accuracy that underlie the traditional conception of precedential authority, contending that such concerns are either overstated[162] or are outweighed by other, more important systemic values.[163]

The prediction and pronouncement models are both typically juxtaposed to the historical, common-law approach to precedent, which is broadly reflective of the judgment model.[164] It is thus somewhat more challenging to identify the value tradeoffs between these two more recent approaches. In some decisionmaking contexts, the prediction model might arguably claim an efficiency advantage by discouraging disappointed litigants from pursuing appeals that will inevitably end in failure.[165] But even the model's proponents acknowledge that this argument carries little weight in the context of Supreme Court review given the sheer improbability of any particular lower court decision being taken up by the Supreme Court.[166] Proponents of the pronouncement model might counter that adherence to the clearly expressed views of past majorities is more likely to yield benefits associated with predictability, stability, and uniformity than reliance on the lower courts' ability to predict the views and preferences of the Court's current members.[167] Prediction may also implicate distinct legitimacy concerns by "over-

160. *See supra* notes 142–49 and accompanying text (comparing the three models across the dimension of precedential scope).

161. *See, e.g.*, Caminker, *supra* note 93, at 36–43 (identifying efficiency, uniformity, and judicial expertise as among the values that might be furthered by the predictive approach); Steinman, *What the Law Is*, *supra* note 126, at 1779–80 (emphasizing "clarity and predictability" as key values furthered by a rule-based approach to stare decisis); Alexander, *supra* note 68, at 52 (emphasizing "determinateness and predictability" as reasons to prefer a rule-based approach to precedent over a results-based approach).

162. *See, e.g.*, Varsava, *supra* note 39, at 311–12 (contending that constraint and legitimacy do not support denying precedential weight to dissenting votes).

163. *See* Caminker, *supra* note 93, at 64–66 (acknowledging potential legitimacy concerns but arguing that such concerns are not sufficient to warrant rejection of prediction model).

164. *See* Schauer, *supra* note 133, at 1940.

165. *See* Caminker, *supra* note 93, at 36–37 (contending that when lower courts apply the rule it predicts will be applied by the superior court, the lower court can minimize the resources expended on appeals).

166. *Id.* at 37 (conceding that these particular efficiency benefits are "much more speculative with respect to Supreme Court review" and that the argument has "far less force" in that context).

167. *See, e.g.*, Steinman, *Case Law*, *supra* note 126, at 1990 (contending that the prediction model "carries with it significant risks of error or misattribution").

emphasizing the role of individual judges," thereby threatening norms of judicial impartiality.[168]

All three models reflect concern for fairness and equal treatment of similarly situated litigants. But each balances these concerns in slightly different ways. As discussed above, the judgment model reflects a concern with preserving equivalence between the specific outcomes of past cases and the outcomes accorded similarly situated litigants in the present.[169] The intuition that such consistency is desirable, or perhaps even morally compelled, provides one of the core theoretical foundations for the theory of precedent in general.[170]

The prediction model does not deny the significance of such fairness concerns; instead, it insists that what matters most is not the equivalent treatment of past and current litigants but rather the consistent treatment of similarly situated litigants today.[171] The prediction model claims to address this concern by guiding lower courts' decisionmaking toward a single, identifiable target—namely, the predicted views of the current Supreme Court majority—thereby contributing to the uniformity of lower court decisions.[172]

Likewise, the pronouncement model is willing to tolerate some degree of inconsistency between temporally distant litigants to attain the perceived consistency benefits of broadly framed rules.[173] Future cases governed by such rules might plausibly result in more consistent adjudicative outcomes.[174]

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168. *See* Dorf, *supra* note 17, at 715; *see also id.* at 689 (contending that the prediction model should be rejected because it departs from the ideal of judicial impersonality and threatens to "undermine the public's confidence in . . . the rule of law").

169. *See supra* notes 70–72 and accompanying text.

170. *See, e.g.*, Steinman, *What the Law Is*, *supra* note 126, at 1784 (observing that "the idea that like cases should be treated alike" is "often invoked as a conceptual driver for stare decisis generally"); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595 (1987) (identifying this "argument from fairness" as being "[a]mong the most common justifications for treating precedent as relevant").

171. *See* Caminker, *supra* note 93, at 39 (acknowledging concern with consistent treatment of litigants over time but contending that "equal treatment in a spatial sense seems an equally compelling goal").

172. *See id.*

173. *See, e.g.*, Varsava, *supra* note 39, at 331–32 (arguing that fairness might be better understood to require consistent application of majority-supported principles rather than consistent adjudicative outcomes); Steinman, *What the Law Is*, *supra* note 126, at 1784–85 (suggesting that fairness to past litigants does not necessarily compel according significance to the outcome of a prior case, at least where that outcome is not compelled by the articulated rules).

174. *See* Varsava, *supra* note 39, at 331–32; Steinman, *What the Law Is*, *supra* note 126, at 1784–85.

4. The Locus of Decisionmaking Authority

Finally, comparing the three models of Supreme Court precedent reveals important insights about the allocation of decisionmaking authority within the Supreme Court itself. The Supreme Court, like virtually all multi-member courts, decides questions by majority vote.[175] This commitment to majoritarian decisionmaking is among the most deeply rooted features of the Court's institutional practices.[176] But focusing on the distinctions between the judgment model, the prediction model, and the pronouncement model reveals the limits of majoritarianism as a guiding principle. Each of the three models respects the majority-rule principle as a guide for determining the precedential effect of Supreme Court rulings. But the three models direct lower courts' attention toward three differently constituted Supreme Court majorities.

As discussed above, the judgment model focuses on maintaining consistency with the Supreme Court's past resolutions of factually analogous disputes. As such, the judgment model focuses on the particular majority of Justices whose votes were necessary to the judgment in the precedent-setting case. The prediction model, by contrast, seeks to maintain consistency between the lower courts' decisions and the Supreme Court's likely future decisions. Thus, what matters most for the prediction model is the views of a majority of the Court's currently serving members—regardless of whether those Justices cast votes that were necessary to the judgment in the precedent-setting case. Finally, the pronouncement model grounds the authority of precedent in the clearly articulated rules and rationales laid down in the Court's prior rulings. Like the judgment model, the pronouncement model looks to the majority who participated in the precedent-setting case, regardless of whether those Justices have the practical ability to affect the outcome of some future Supreme Court decision.[177] But unlike the judgment model, which excludes from the majoritarian calculation those Justices whose votes were not necessary to the judgment in the precedent-setting case, the

175. *See* Jeremy Waldron, *Five to Four: Why Do Bare Majorities Rule on Courts?*, 123 YALE L.J. 1692, 1694 (2014).

176. *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.").

177. *See, e.g.*, United States v. Duvall, 740 F.3d 604, 611 n.1 (D.C. Cir. 2013) (Kavanaugh, J., concurring in the denial of rehearing en banc) (per curiam) ("[T]he goal for a lower court under *Marks* is not to speculate or predict how a *future* Supreme Court might decide a case" but rather "to determine how the principles set forth by the Supreme Court in a *prior* decision would apply to the current case facing the lower court."); Dorf, *supra* note 17, at 684–85 (noting that "in ascertaining whose votes were necessary to the judgment" in a prior decision governed by the *Marks* framework, lower courts routinely "look to the Court as it existed at the time of the plurality decision" and "not at the time the lower court must apply the plurality decision").

pronouncement model accords equal significance to all of the opinions in the precedent-setting case, regardless of whether those opinions supported or opposed the judgment the Court actually reached.[178]

* * *

Bringing the different conceptions of precedential authority reflected in these three models into clearer view renders the puzzling nature of plurality precedent a bit less puzzling. After all, one should hardly be surprised to find differences in interpretive results where the relevant interpretive community lacks a consensus regarding the appropriate target of interpretation.[179]

Of course, most Supreme Court decisions will not produce disagreements of this sort. Consider, for example, a recently decided Supreme Court case in which a majority of the Justices agree on both the specific result of the case (i.e., which party should win and which should lose) and on the broader rationale that supports that result. In cases involving such clear majority decisions—by far the bulk of the Supreme Court's output [180] —the three models usually point to consistent interpretations. This is so because the majority's agreed-upon rationale will typically satisfy the requirements of all three models. Namely, such a rationale will usually: (1) explain the Court's result (as required by the judgment model), (2) provide strong evidence of the participating Justices' likely future rulings (as required by the prediction model), and (3) reflect the majority's considered views regarding the proper interpretation and application of the relevant legal rules (as required by the pronouncement model).[181]

But in cases that result in plurality decisions, the three models tend to diverge. Because plurality decisions involve a majority agreement on a result without any corresponding agreement on a rationale, such decisions typically lack the close connection between result and rationale that the judgment model envisions. At the same time, the absence of any need for the deciding majority to agree upon a single rationale complicates efforts to extract the type of determinate, rule-like guidance that both the prediction model and the pronouncement model aspire to identify. The

178. *See supra* notes 125–27 and accompanying text.

179. Such disagreements over interpretive objectives are a familiar source of conflict over interpretation of other types of legal writings. *See, e.g.*, Ronald J. Gilson et al., *Text and Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23, 25–26 (2014) (contrasting "textualist" theories of contract interpretation, which forbid reviewing courts from considering contextual evidence of drafters' intent with "contextualist" theories, which require courts to consider such evidence).

180. *See* Spriggs & Stras, *supra* note 18, at 519 (noting that plurality decisions accounted for only around 3.4% of the 5,711 total cases decided by the Supreme Court during the period from 1953 to 2006).

181. *See supra* Sections II.B.1–3 (describing the three models).

practical implications of this divergence for the interpretation of plurality precedent are explored in the following section.

III. PLURALITY PRECEDENT UNDER THE THREE MODELS OF PRECEDENTIAL AUTHORITY

A deeper understanding of the three competing models of precedential authority described in Section II can shed useful light on existing lower-court doctrine addressing the narrowest-grounds rule and the leading proposals for doctrinal reform. This Section examines the implications of the three competing models of precedential authority for each of the six approaches to the narrowest-grounds doctrine summarized in Section I.

A. *Plurality Precedent Under the Judgment Model*

Under the judgment model, a Supreme Court decision's precedential force derives from the result agreed to by the majority and the reason or reasons that led the majority to its result.[182] But while every fractured majority decision necessarily involves a majority-supported agreement on the appropriate outcome, no single majority-supported opinion explains why the result was chosen.

The desire to identify a single opinion that reflects the rationale of the deciding majority explains some of the intuitive appeal of the logical-subset approach to fractured majority precedent. Courts that have embraced this approach tend to emphasize that, given the particular alignment of majority-supporting opinions the approach envisions, those Justices who concur on broader grounds must necessarily agree with the narrowest opinion as a "logical consequence of" their own preferred rationale.[183]

But as critics of the logical-subset approach have observed, the appearance of majority support for the narrowest articulated rule in such cases is more illusory than real.[184] Re illustrates the logical fallacy lying

182. *See supra* Section II.B.1.

183. *See, e.g.*, United States v. Epps, 707 F.3d 337, 348 (D.C. Cir. 2013) (describing *Marks* as applying only where "the concurrence posits a narrow test to which the plurality must necessarily agree as a logical consequence of its own, broader position" (emphasis omitted) (quoting King v. Palmer, 950 F.2d 771, 782 (D.C. Cir. 1991) (en banc))); *see also* United States v. Davis, 825 F.3d 1014, 1021–22 (9th Cir. 2016) (en banc) ("A fractured Supreme Court decision should only bind the federal courts of appeal when a majority of the Justices agree upon a single underlying rationale and one opinion can reasonably be described as a logical subset of the other.").

184. *See, e.g.*, *Davis*, 825 F.3d at 1035 (Bea, J., dissenting) (arguing that "requir[ing] complete overlap between both the result and the reasoning of Justices in the majority before a binding rule can be discerned renders *Marks* a virtual nullity" because "[a]greement as to both the Court's reasoning and its result does not produce a concurring opinion—it produces a 'join'" (emphasis omitted)); Re, *supra* note 36, at 1983 ("[E]ndorsement of a 'broader' proposition does not necessarily or logically entail an implicit endorsement of any 'narrower' proposition.").

at the core of the logical-subset approach through a hypothetical pair of rules involving capital punishment—one of which would prohibit capital punishment entirely and one of which would prohibit it only as applied to Christian defendants.[185] Re correctly observes that a decisionmaker who endorsed the categorical ban would not, as a matter of logical necessity, commit herself to agreeing with the narrower rule; to the contrary, such a person might well find the continuation of capital punishment on a broader scale preferable to the narrower, religiously discriminatory rule.[186]

Nor need one posit an alignment of rules as extreme as Re's hypothetical to illustrate the fallacy of the logical-subset approach, at least in its strongest form. Imagine a choice that instead involves three options: (1) a rule that categorically bans capital punishment; (2) a rule that allows capital punishment only for persons convicted of murdering police officers; or (3) a rule that allows such punishment for any defendant convicted of murder. A judge who prefers the categorical ban may agree that restricting the punishment to those who murder police officers is preferable to the third option; thus, agreeing with proponents of the second rule that capital punishment should never be used against any defendant who has not murdered a police officer. But such a judge would not logically commit himself to agreeing with the "narrower" rule in all of its future applications. To the contrary, logical consistency requires him to *reject* the narrower rule in any instance where it would allow capital punishment (i.e., any case in which the defendant murdered a police officer). In other words, the appearance of an "implicit consensus" on a governing rule that the logical-subset approach promises is merely an illusion created by the convergence of two different rules on a particular set of results.

The shared-agreement approach avoids the fallacy at the core of the logical-subset approach by disclaiming any attempt to identify a majority-supported rule or rationale. Instead, the shared-agreement approach focuses solely on identifying the set of results implicitly assented to by the deciding majority. Where the judgment-supportive opinions in a particular case happen to line up with one another in the particular manner the logical-subset approach envisions—that is, in a simple continuum from narrowest to broadest—the binding results identified by the shared-agreement approach will overlap significantly

185. Re, *supra* note 36, at 1983.

186. *Id.* As Professor Re observes, to the extent proponents of the logical-subset approach purport to identify a majority-supported rule, they commit a version of the logical fallacy of division. *Id.*; *see also, e.g.*, Michael Herz, *Justice Byron White and the Argument That the Greater Includes the Lesser*, 1994 BYU L. REV. 227, 243–49 (1994) (discussing the fallacy of division in connection with similar arguments premised on the idea that the "greater includes the lesser").

with the results produced by the logical-subset approach.[187] But unlike the logical-subset approach, the shared-agreement approach does not insist that the narrowest opinion must control in all circumstances. Where the narrowest opinion would produce results that would be inconsistent with the broader concurring opinions, the shared-agreement approach usually allows later courts to follow either the "narrower" or the "broader" opinion.[188] Likewise, the shared-agreement approach prescribes an equivalent level of precedential effect for those cases in which it is not possible to identify any single unambiguously "narrowest" opinion. Here, too, the universe of binding results consists of those results produced by each of the judgment-necessary opinions.[189]

None of the remaining approaches to the narrowest-grounds rule provides a particularly close fit with the interpretive premises underlying the judgment model. For example, the fifth-vote approach departs from the judgment model by according controlling force to an opinion that did not receive a majority of the Court's votes and thus could not, by itself, explain the Court's judgment.[190] Moreover, because the identification of a "median" opinion necessarily hinges on consideration of the dissenting Justices' views,[191] the approach violates the judgment model's core

187. *See* Williams, *supra* note 25, at 837–38. The principal difference between the two approaches in this setting is that the shared-agreement approach, unlike the logical-subset approach, would not bind later courts to follow those aspects of the "narrowest" opinion that were not actually assented to by a majority of the Justices whose votes were necessary to the precedent-case judgment. *Cf.* Adam Steinman, *Nonmajority Opinions and Biconditional Rules*, 128 YALE L.J. F. 1, 9–19 (2018) (explaining that the putatively "narrowest" opinion will often articulate a standard that specifies conditions for both the success and failure on a given legal issue but that "broader" opinions in the case typically do not agree on all aspects of such biconditional rules).

188. Williams, *supra* note 25, at 836–37. The principal limitation on this decisional freedom for lower courts results from the binding effect of prior precedential decisions. *See id.* Where the reasoning of some, but not all, of the opinions that contributed to the judgment in a plurality decision would require overruling prior precedent, that reasoning is not practically available to lower courts because only the Supreme Court may overrule its own prior decisions and overruling requires the assent of a majority of the Court's members. *See id.* at 859–64. In such circumstances, the shared-agreement approach would cause lower courts to be bound by the judgment of the plurality decision and the opinion (or opinions) supporting that judgment that can be reconciled with the Court's prior precedent. *Id.* at 862–63.

189. *Id.* at 836–37.

190. *See id.* at 850 (explaining that the fifth-vote approach removes power the judgment-supportive majority and "places the power to establish precedent in the hands of the median Justice").

191. *Id.* at 815 (noting that the fifth-vote approach "implicitly accords weight to the views of dissenting Justices by allowing their views to influence the identification of the median Justice's opinion"); *see* Neuenkirchen, *supra* note 36, at 404; Maxwell L. Stearns, *Should Supreme Court Justices Ever Switch Votes?:* Miller v. Albright *in Social Choice Perspective*, 7 SUP. CT. ECON. REV. 87, 116 (1999) (explaining that the median approach depends upon an "implicit ordinal ranking" of all Justices' preferences (including dissenters) "over a minimum of

premise that only those Justices whose votes were necessary to the judgment in the precedent case should be considered when determining the decision's precedential effect. Likewise, both the issue-by-issue approach and the all-opinions approach are inconsistent with the judgment model due to the dependence of each approach on counting the views of dissenters to determine an opinion's precedential effect.[192]

Finally, the no-precedent approach departs from the judgment model's interpretive premises by denying that the Supreme Court's judgments are sufficient, in and of themselves, to create binding precedent. Instead, the no-precedent approach presumes that precedential force should be reserved for Supreme Court decisions reflecting a majority-supported rule or rationale.[193]

B. *Plurality Precedent Under the Prediction Model*

The prediction model of precedent focuses on the capacity of prior decisions to accurately forecast the future decisions of the Supreme Court.[194] As such, the predictive approach assigns weight to plurality decisions insofar as they cast meaningful light on the Court's likely resolution of the relevant issue in a future case.[195]

For this reason, both the logical-subset approach and the shared-agreement approach are relatively poor fits for the prediction model of precedent. Although the logical-subset approach may sometimes point to a controlling opinion that also reflects the Court's likely future resolution of a particular issue,[196] there is no guarantee that it will do so.

Consider, for example, a hypothetical case in which a defendant appeals his conviction for possession of criminally proscribed forms of obscene material that were discovered through a warrantless search of his vehicle. Imagine that five Justices vote to affirm the conviction but divide between two competing rationales. Four of the Justices join a plurality

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three alternative[s]"); *see also, e.g.*, United States v. Gerke Excavating, Inc., 464 F.3d 723, 724–25 (7th Cir. 2006) (per curiam) (looking to dissenters' views to determine whether the plurality or concurrence reflected the "narrowest" opinion).

192. *See, e.g.*, United States v. Duvall, 740 F.3d 604, 623 (D.C. Cir. 2013) (Williams, J., concurring in the denial of rehearing en banc) (per curiam) (noting that the all-opinions approach "explicitly contemplates including the opinions of dissenting justices in the" determination of "majority"-supported results); Varsava, *supra* note 39, at 288 (emphasizing the "dissent-inclusive" nature of the issue-by-issue approach).

193. *See supra* Section I.F.

194. *See* Neuenkirchen, *supra* note 36, at 405.

195. *See id.*

196. For example, in *Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*—the plurality decision at issue in *Marks*—the three-Justice plurality opinion produced a set of results that would be a logically entailed subset of the results produced by the broader concurring opinions in the case; and because those opinions collectively constituted a majority, the plurality opinion likely points to how the Court may rule on a similar issue in the future. 383 U.S. 413, 421 (1966).

opinion endorsing a categorical rule that would permit warrantless searches of automobiles in all traffic stop cases. The lone concurrence endorses a narrower rule that allows for such searches only if the police have probable cause to believe the vehicle contains contraband material. Imagine further that the four dissenters agree with the plurality's proposed categorical rule allowing warrantless searches in traffic stops but would overturn the conviction because they believe the underlying obscenity conviction violates the First Amendment. The concurring Justice's opinion seems objectively "narrower" than the plurality opinion—because it would allow some of the warrantless searches authorized by the plurality but not all—and would thus likely be controlling under the logical-subset approach. But if the Supreme Court does not consider itself bound to follow that opinion in a future case, it seems doubtful that the Justices would adopt the concurrence's preferred rule in the future. To the contrary, if the question recurred before the same collection of Justices in a case that did not implicate the First Amendment concerns raised by the original conviction, it seems probable that the Court would endorse the categorical rule by an 8–1 vote.

Likewise, the shared-agreement approach makes no claim to predictive power and the domain of agreed-upon results to which it points need not align with the Court's most likely future resolution of the relevant issue. Consider, for example, the well-known *Tidewater* case in which a majority of the Supreme Court concluded that Congress could confer federal diversity jurisdiction on residents of the District of Columbia. However, the Court's two conflicting rationales were rejected by a numerical majority of the Justices participating in the case.[197] If, in the immediate aftermath of the decision, the Court had been presented with a case calling into question either of the two theories supported by various members of the *Tidewater* majority on a standalone basis, it is almost certain that a majority of the Justices would have rejected that theory.[198] But even if a lower court judge correctly predicted this likely future resolution, the shared-agreement approach would not allow her to reach a similar resolution because to do so would, in effect, deny precedential force to the shared reasoning that was necessary to the judgment in *Tidewater* itself.[199]

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197. Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 604 (1949); *see also* David Post & Steven C. Salop, *Rowing Against the* Tidewater*: A Theory of Voting by Multijudge Panels*, 80 GEO. L.J. 743, 748–50 (1992) (describing the paradoxical alignment of voting positions in the *Tidewater* case).

198. *Cf.* Caminker, *supra* note 93, at 69 (arguing that "[a]fter *Tidewater*, lower courts should have employed the proxy model by embracing each of these legal propositions in cases in which it was relevant").

199. *See* Williams, *supra* note 25, at 837 (under the shared-agreement approach, a lower court "would not be free to choose a rationale that would lead to a different result" in the precedent case nor to ignore the actual reasons that led the precedent court to its judgment).

The fifth-vote approach is closely associated in academic literature with the prediction model of precedent—so much so that some authors describe the approach as the "predictive" approach.[200] The connection between the fifth-vote approach and the prediction model draws on the intuition that "the fifth Justice's position identifies the grounds in the decision that best predict what the Court would do in subsequent cases with similar factual scenarios."[201] But not every fractured majority decision for which it might be possible to identify a single "median" opinion will justify this intuition.

The Supreme Court's 2006 decision in *Rapanos v. United States*[202] supplies an example. *Rapanos* addressed a challenge to the scope of the regulatory authority conferred on the U.S. Army Corps of Engineers (the Corps) by the Clean Water Act.[203] A four-Justice plurality opinion, authored by Justice Scalia, narrowly construed the Corps' regulatory jurisdiction to exclude wetlands that were not directly connected to navigable waters.[204] Justice Kennedy's lone concurrence would have recognized regulatory jurisdiction over any wetlands that possessed a "significant nexus" to such navigable waters, including those that had the potential to "significantly affect the chemical, physical, and biological integrity of" such navigable waters.[205] Finally, four dissenting Justices joined an opinion proposing a broader test that recognized jurisdiction under either of the tests endorsed by the Justices in the majority.[206]

Because Justice Kennedy's test was more permissive of regulation than the result endorsed by the plurality, but not as permissive as the standard preferred by the dissenters, his is recognized by some courts as the controlling median opinion.[207] But Justice Kennedy's test was not the best evidence of how the Justices participating in the case would likely rule on the question if it were presented to them again. Because the dissenting Justices would have recognized jurisdiction in any case where

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200. *See, e.g.*, Neuenkirchen, *supra* note 36, at 399; Marceau, *supra* note 37, at 170, 173–74; *see also* Thurmon, *supra* note 27, at 435 (referring to the fifth-vote approach as the "predictive model").

201. Neuenkirchen, *supra* note 36, at 405; *see also, e.g.*, Thurmon, *supra* note 27, at 436 (arguing that the "'narrowest grounds doctrine accurately predicts the results in future cases"); Frank B. Cross, *The Justices of Strategy*, 48 DUKE L.J. 511, 548 (1998) (reviewing LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998)) (asserting that "[a] rational lower court" seeking to predict the Supreme Court's likely future rulings "will simply find the position of the fifth Justice and treat this as the law").

202. 547 U.S. 715 (2006).

203. *Id.* at 721–22 (plurality opinion).

204. *Id.* at 739.

205. *Id.* at 779–80 (Kennedy, J., concurring in the judgment).

206. *Id.* at 787–88, 810 (Stevens, J., dissenting).

207. *See, e.g.*, United States v. Gerke Excavating, Inc., 464 F.3d 723, 724 (7th Cir. 2006) (per curiam) (identifying Justice Kennedy's opinion as the narrowest grounds of the Court's decision).

either the plurality's proposed test or Justice Kennedy's test was satisfied—creating an eight-vote majority in favor of recognizing jurisdiction in any case covered by the plurality's test and a five-vote majority for recognizing jurisdiction in any case covered by Justice Kennedy's test—courts that followed only Justice Kennedy's opinion diverge from the predicted majority-supported approach in a large category of future cases.[208] As Professor Re observes: "The median opinion approach thus defies the 'prediction model' of precedent, which dictates that lower courts should aim to decide cases in the way that they expect higher courts to rule."[209]

Rapanos also suggests that both the issue-by-issue approach and the all-opinions approach are likely to fit far more comfortably with the premises of the prediction model than the other approaches surveyed to this point. The consistency between the issue-by-issue approach and the prediction model is relatively straightforward. If one concedes that the dispositional rules that particular Justices support in a litigated case are good evidence of the dispositional rules those same Justices will support in a factually analogous future case,[210] it seems reasonably likely that a dispositional rule with majority support will be supported by that same majority in the future.[211] But as noted above, not every fractured majority decision will involve the particular "dual majority" alignment that is necessary to identify the majority-supported dispositional rules on which the issue-by-issue approach depends.[212]

The all-opinions approach avoids the need for a dual majority by focusing on majority-supported results rather than dispositional rules or reasoning.[213] By running the facts of a new case through the rationales endorsed by each of the opinions in the precedent case—including the plurality opinion and all concurring and dissenting opinions—a judge applying the all-opinions approach can obtain a reasonably confident prediction about how those same Justices would likely resolve a future

208. *See, e.g.*, Re, *supra* note 36, at 1979 (using *Rapanos* to illustrate a similar point about the predictive value of the median opinion).

209. *Id.* at 1979 n.188.

210. *See* Caminker, *supra* note 93, at 45 ("Dispositional rules endorsed by individual Justices are very strong indicators of future behavior.").

211. *See id.* at 45–46.

212. *See supra* notes 39–40 and accompanying text.

213. *See supra* Section I.E.

case that presents the exact same issue.[214] The prediction model thus provides "a natural theoretical home" for the all-opinions approach.[215]

While the issue-by-issue approach and the all-opinions approach seem best calibrated to identify the types of evidence on which the prediction model depends, the predictive value of that evidence in any particular case is subject to an additional important caveat. The prediction model is inherently personal in nature. Rather than focusing on the past decisions of "the Court" as a collective institution, the prediction model explicitly envisions that lower courts will "count heads" of presently serving Justices to predict how they—as individuals—are likely to vote in the future.[216] As such, the predictive value of a decision is likely to depend on two important assumptions.

First, the predictive value of the original decision depends on the assumption that the Justices will continue to adhere to the views they articulated in their prior opinions.[217] Although this assumption is hardly unreasonable, Justices both can and do sometimes change their minds.[218] For example, Justice Sotomayor, who authored the critical concurring opinion that created the fractured majority decision in *Freeman*, later joined the majority decision in *Hughes*, which adopted the position endorsed by the *Freeman* plurality.[219] This switch, along with the replacement of Justice Scalia (who had voted with the dissenters in *Freeman* and thus endorsed a view opposed to the defendant-petitioner

214. *See* United States v. Duvall, 740 F.3d 604, 611 (D.C. Cir. 2013) (Kavanaugh, J., concurring in the denial of rehearing en banc) (per curiam) (describing the all-opinions approach as a "foolproof way" to identify the result that a majority of the participating Justices would have supported).

215. Re, *supra* note 36, at 1991. The final approach to plurality precedent considered in this Article—the no-precedent approach—would disregard the predictive information that could be obtained by the issue-by-issue approach, the all-opinions approach, or a combination of the two. *See supra* Section I.F (describing the no-precedent approach). As such, the no-precedent approach seems to provide a relatively poor fit with the prediction model. *Cf.* Re, *supra* note 36, at 1992–93 (criticizing the prediction model in the course of defending the no-precedent approach).

216. Caminker, *supra* note 93, at 65 ("While the precedent model typically envisions lower courts extracting rules from the Supreme Court's majority opinions, the proxy model envisions lower courts 'counting heads' on the Supreme Court in order to predict the latter's future rulings."); *see also, e.g.*, Earl M. Maltz, *The Concept of the Doctrine of the Court in Constitutional Law*, 16 GA. L. REV. 357, 368–74 (1982) (contrasting "monolithic" approaches that conceive of the Supreme Court as an institution with "atomistic" approaches that emphasize views of individual Justices and suggesting that the latter may have greater predictive power).

217. *See* Kornhauser & Sager, *supra* note 42, at 47 (noting that the capacity of the predictive approach "to deliver an outcome that will enjoy the support of a majority of the Justices depends on the Justices holding fast to the views that have placed them in a state of dissensus" in the original case).

218. *See, e.g.*, L.A. Powe, Jr., *Intragenerational Constitutional Overruling*, 89 NOTRE DAME L. REV. 2093, 2115–19 (2014) (describing occasions when a Justice's change of view contributed to the overruling of a prior decision).

219. *See* Re, *supra* note 36, at 1991 n.251.

in *Hughes*) by Justice Gorsuch (who voted with the defendant-supportive majority in *Hughes*), had the effect of transforming what would have been a predicted 5–4 vote in favor of the government into a 6–3 vote in favor of the defendant.[220]

The replacement of Justice Scalia by Justice Gorsuch illustrates the second, and perhaps more significant, assumption underlying the predictive value of plurality precedent—namely, that the composition of the Court will remain stable over time. Even if one grants that the Justices' own prior opinions are likely to provide a reasonably strong indication of those same Justices' likely future rulings, there is no reason to believe that such rulings are indicative of their successors' future rulings.[221] In other words, the precedential value of each plurality decision under the prediction model comes with a built-in expiration date. And because plurality decisions, by definition, involve issues on which the Court is closely divided, the change of even a single Justice will often be sufficient to deprive the original decision of meaningful predictive value.[222]

Proponents of the prediction model might respond that, even if the predictive value of a particular plurality decision is time-limited in the manner suggested above, lower courts should nonetheless follow the predicted outcome to which the decision points until such time that changes in the Court's membership or in the Justices' expressed views deprive the decision of predictive value.[223] This approach would provide at least some guidance to lower courts in the immediate aftermath of the Supreme Court's ruling while freeing such courts to reach different resolutions once the decision's predictive value expires.

It is important to recognize, however, that the period for which the decision is likely to serve as a reliable source of prediction may not be particularly long. The Supreme Court has never gone more than eleven

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220. *Id.* at 1991.

221. *See, e.g.*, Ruger et al., *supra* note 109, at 1181 (noting the problem of personnel change as a "clear limitation" facing any attempt to predict future Supreme Court decisionmaking based on past voting behavior).

222. *See* Re, *supra* note 36, at 1992 (noting that "a single Justice's departure could eliminate the precedential value of a fragmented ruling" under the prediction model); *see also, e.g.*, Kornhauser & Sager, *supra* note 42, at 45 ("Given the doctrinal disarray that leads to plurality opinions . . . predictions about future doctrinal equilibria are dicey at best . . . ."). Regarding the effect of judicial appointments as a mechanism of doctrinal change more generally, see, for example, Charles Cameron et al., *Shaping Supreme Court Policy Through Appointments: The Impact of a New Justice*, 93 MINN. L. REV. 1820, 1856–64 (2009) (examining the effects of Justice Sandra Day O'Connor's replacement of Justice Potter Stewart); and Bruce Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1170–79 (1988) (discussing the influence of "transformative" judicial appointments on the development of constitutional doctrine).

223. *See* Re, *supra* note 36, at 1992 (noting that "the prediction model may simply call for modifying the all-opinions approach to allow consideration of relevant changes in either the Court's composition or the Justices' expected votes").

years without at least one change in membership.[224] And the average length of time between vacancies on the Court since 1970 has been only about three years.[225] Given the Court's limited capacity to review lower court decisions and its virtually plenary control over its own appellate docket, there are substantial reasons to doubt that the Court will revisit the issue that divided the Court in the original decision before such a change in membership occurs.

Perhaps recognizing these practical obstacles, certain proponents of seemingly predictive approaches have sought to formulate methods that are impervious to changes in Supreme Court membership. For example, then-Judge Kavanaugh explained that lower courts applying his preferred version of the all-opinions approach should not try "to speculate or predict how a *future* Supreme Court might decide a case" but rather should seek "to determine how the principles set forth by the Supreme Court in a *prior* decision would apply to the current case facing the lower court."[226] But as so understood, the all-opinions approach no longer fits with the assumptions that make the prediction model a distinctive theory of precedential obligation. Most importantly, this backward-looking version can no longer lay any claim to align lower-court decisionmaking with the Supreme Court's *current* view of governing law—the prediction model's central objective.[227] Rather, such purely retrospective theories must find their justification, if any, within some other conceptual framework, such as the pronouncement model.[228]

C. *Plurality Precedent Under the Pronouncement Model*

As discussed above, the pronouncement model focuses on a rule-centered conception of precedent that accords binding force to broad, prospective statements of legal rules, even when those rules are not directly connected to the deciding court's judgment or predictive of its likely future rulings.[229] If the Court's opinions are conceived of as

224. Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 770–71 n.1 (2006) (identifying the eleven-year and nine-month gap between the vacancies filled by Justice Gabriel Duvall in 1811 and by Justice Smith Thompson in 1823 as the longest such gap in U.S. history).

225. *See id.* at 786 (noting the average gap between vacancies since 1970 has been approximately 3.1 years and was even shorter during earlier periods).

226. United States v. Duvall, 740 F.3d 604, 611 n.1 (Kavanaugh, J., concurring in the denial of rehearing en banc) (per curiam); *see also, e.g.*, Varsava, *supra* note 39, at 321 n.137 (explaining that the predictive model can be understood either retroactively or contemporaneously).

227. *See, e.g.*, Caminker, *supra* note 93, at 27 (connecting the prediction model to the idea that the "correct understanding of the law today is what the Supreme Court would say today if . . . asked").

228. *See infra* notes 232–37 and accompanying text (discussing the all-opinions approach in relation to the pronouncement model of precedent).

229. *See supra* Section II.B.3.

performing this type of quasi-legislative function, it might seem reasonable to view the Court's decisionmaking outputs as similar to legislative outputs. But the absence of a clear majority rationale in cases involving plurality decisions presents a challenge to this pronouncement model of vertical stare decisis. How should lower courts go about extracting a controlling rule, or set of controlling rules, from cases that failed to produce a controlling majority rationale?

Neither the logical-subset approach nor the shared-agreement approach seems particularly well-suited to this task. For reasons already discussed, the opinion to which the logical-subset approach points need not reflect any genuine majority-supported consensus on the underlying legal rule or set of rules reflected in that opinion.[230] And though the shared-agreement approach does aim to identify a set of future *results* that are implicitly supported by an actual majority of Justices, it makes no claim to identify a majority-supported *rule* or rationale.[231]

The all-opinions approach seems similarly deficient from the perspective of the pronouncement model for the similar reason that it explicitly focuses on identifying majority-supported results rather than majority-supported reasons.[232] In some contexts, the all-opinions approach can lead to the seemingly paradoxical attribution of precedential force to opinions which contain reasoning that not only failed to attract majority support but were actively opposed by all of the other participating Justices.[233] In *Freeman*, for example, many observers assumed that Justice Sotomayor's opinion would produce *results* that a majority of the Justices in that case would necessarily agree with in future cases.[234] But these results were not the product of any majority-supported rule or rationale. To the contrary, the four Justices who joined in the *Freeman* plurality explicitly criticized Justice Sotomayor's opinion as reflecting an "erroneous rule" that "would permit the very disparities the

230. *See supra* notes 184–85 and accompanying text.

231. *See supra* notes 187–88 and accompanying text.

232. *See, e.g.*, United States v. Davis, 825 F.3d 1014, 1020–21 (9th Cir. 2016) (en banc) (explaining that the all-opinions approach focuses on identifying majority-supported results rather than majority-supported reasoning).

233. *See* Re, *supra* note 36, at 1978 (making similar observations about the median-opinion approach).

234. *See, e.g.*, United States v. Hughes, 849 F.3d 1008, 1015 (11th Cir. 2017) ("As we see it, Justice Sotomayor's opinion provides a legal standard that produces results with which a majority of the Court in *Freeman* would agree . . . ."), *rev'd*, 138 S. Ct. 1765 (2018); United States v. Duvall, 740 F.3d 604, 612 (D.C. Cir. 2013) (Kavanaugh, J., concurring in the denial of rehearing en banc) (per curiam) ("Following Justice Sotomayor's opinion . . . would produce results with which a majority of the Supreme Court in *Freeman* would agree because—to put it in simple terms—'sometimes' is a middle ground between 'always' and 'never.'").

Sentencing Reform Act seeks to eliminate."[235] The four dissenting Justices likewise rejected Justice Sotomayor's rationale, agreeing with the plurality's conclusion that her preferred approach would be "arbitrary and unworkable."[236] Courts that followed the all-opinions approach would thus accord binding force to the views of a single Justice that were explicitly rejected by every other member of the Court.[237] Ascribing such precedential force to a minority-supported rule based solely on the fortuitous alignment of majority-supported results seems difficult to square with the theoretical underpinnings of the pronouncement model.[238]

At first glance, the fifth-vote approach might seem similarly unpromising as a method of extracting majority-supported precedential rules from fractured-majority decisions.[239] But Professor Maxwell Stearns has articulated a sophisticated defense of the approach that might render the approach consistent with the pronouncement model on certain assumptions.[240] Drawing on social-choice theory, Stearns contends that the narrowest-grounds rule of *Marks* is best interpreted as reflecting an implicit voting rule designed to select the opinion that would win out if the various opinions in the case were subjected to a series of pairwise comparisons.[241] In essence, Stearns interprets *Marks* as a command to identify the precedential rule that a majority of the Court's members likely would have settled on had they been "forced to choose" a single

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235. Freeman v. United States, 564 U.S. 522, 533 (2011) (plurality opinion); *see also* United States v. Rivera-Martínez, 665 F.3d 344, 348 (1st Cir. 2011) (observing that "*Freeman*'s plurality and concurrence agree on very little"), *abrogated by Hughes*, 138 S. Ct. 1765.

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

237. *See, e.g.*, United States v. Dixon, 687 F.3d 356, 359 (7th Cir. 2012) (concluding that "[e]ven though eight Justices disagreed with Justice Sotomayor's approach and believed it would produce arbitrary and unworkable results, her reasoning" nonetheless provided the precedential holding of *Freeman* (citation omitted)), *abrogated by Hughes*, 138 S. Ct. 1765; Re, *supra* note 36, at 1944 (explaining that "[b]izarrely, the Court's least popular view became law" in those circuits that identified Justice Sotomayor's *Freeman* concurrence as controlling).

238. *See, e.g.*, King v. Palmer, 950 F.2d 771, 782 (D.C. Cir. 1991) (en banc) ("When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be."); Re, *supra* note 36, at 1968 ("If anything, a view that eight Justices have rejected would seem uniquely questionable—and so undeserving of precedential status.").

239. *See* Re, *supra* note 36, at 1978 (noting that the median opinion approach may sometimes single out as precedential an opinion that was rejected by a majority of the Court).

240. *See, e.g.*, Maxwell L. Stearns, *Modeling Narrowest Grounds*, 89 GEO. WASH. L. REV. 461, 471, 480–81, 483–84 (2021) (modeling the narrowest-grounds doctrine and discussing it in relation to two recent Supreme Court cases, *Ramos v. Louisiana* and *Hughes v. United States*). *See generally* STEARNS, *supra* note 38 (discussing the narrowest-grounds doctrine in terms of social choice and focusing on two Supreme Court cases, *Marks v. United States* and *Planned Parenthood v. Casey*).

241. STEARNS, *supra* note 38, at 124–26.

rationale from among the various candidate options reflected in the separate opinions.[242]

Although Stearn's approach provides an elegant method of choosing a "Condorcet winner" from among the various opinions in a case,[243] the implicit voting rule he ascribes to the Court is not the one the Court itself has chosen to embrace explicitly. Indeed, plurality opinions are only possible because the Court does not view itself as required to choose a single "winning" opinion in each case.[244] Justices who find themselves in disagreement with the median position might well prefer to refrain from establishing a clear precedent, thereby keeping open the possibility of revisiting the issue at some future point unencumbered by the precedential effect of a rule they find suboptimal.[245] Moreover, as Professor Re observes, Professor Stearns' theory is heavily dependent on the ability of lower courts to accurately identify the Justices' ordinal preference ranking from among the various opinions in a case and the

242. United States v. Gerke Excavating, Inc., 464 F.3d 723, 724 (7th Cir. 2006) (per curiam) (interpreting *Marks* to require "lower-court judges . . . to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose"); *see also* STEARNS, *supra* note 38, at 128–29 (arguing that, where the various opinions in a case align in a simple continuum from narrowest to broadest, those Justices at the outer edge of the continuum would, "if forced to choose among each of the remaining opinions, those writing or joining the opinions at the outer edge" of this continuum would presumably "most prefer the one closest to them and least prefer the one farthest from them").

243. STEARNS, *supra* note 38, at 129.

244. Though Professor Stearns argues that the Court's decision in *Marks* is best understood as having implicitly adopted the social-choice methodology he describes, he points to no direct evidence that this theory was present in the minds of any of the Justices who participated in that case. *See id.* at 128–29; *cf.* Asher Steinberg, *What Justice Powell's Papers on His Opinion in* Marks *Tell Us About the* Marks *Rule*, NARROWEST GROUNDS (July 22, 2017), http://narrowestgrounds.blogspot.com/2017/07/what-justice-powells-papers-on-his.html [https://perma.cc/V92M-RJUW] (discussing evidence from Justice Powell's case file on *Marks* and noting that his papers "don't tell us a great deal about what he understood his famous narrowest-grounds rule to mean"). Nor do subsequent decisions by the Court reflect any clear agreement among the Justices regarding the proper interpretation of the *Marks* rule. *Compare, e.g.*, Glossip v. Gross, 576 U.S. 863, 876–77 (2015) (majority opinion of five Justices identifying the plurality opinion in *Baze v. Rees*, 553 U.S. 55 (2008), as the "controlling opinion" in that case), *with, e.g.*, *id.* at 971 (Sotomayor, J., dissenting) (dissenting opinion of four Justices concluding that the plurality opinion in *Baze* was not controlling under *Marks* because it did not represent the views of an actual majority of the Court). The Court had an opportunity in *Hughes* to explicitly endorse the fifth-vote approach as the correct understanding of *Marks* and Professor Stearns submitted an amicus brief expressly urging them to do so. *See* Brief of Law Professors as Amici Curiae in Support of Neither Party, *supra* note 10, at 29–30. But the Court declined the opportunity. *See supra* note 11 and accompanying text (discussing the Court's holding in *Hughes*). Against this backdrop, it seems implausible that the Justices share a common understanding that the median opinion in a plurality decision is always controlling.

245. *See* Williams, *supra* note 25, at 851 ("[A]cknowledging that the Justices could converge on the median Justice's position if they were forced to do so does not justify the conclusion that lower courts must act as if the majority actually did so." (emphasis omitted)).

ability of those opinions to accurately convey all of the relevant options considered by the Justices during their deliberations.[246] If lower courts either misperceive the ordinal rankings of the Justices' preferred legal rules or fail to identify all of the potentially relevant options, such deficiencies would hamper their ability to correctly identify the Condorcet winning rationale, even if one were convinced that such identification was the appropriate target of those courts' interpretive efforts.[247]

The issue-by-issue approach, by contrast, seems fully consistent with the theoretical premises underlying the pronouncement model. Unlike the approaches surveyed thus far, the issue-by-issue approach can point to an actual majority-supported rule or rationale—not just a majority-supported result—that met with the explicit assent of the Justices who participated in the Court's decision.[248]

As noted above, the issue-by-issue approach is only workable with respect to a subset of Supreme Court plurality opinions reflecting a dual majority alignment.[249] And those who resist according precedential weight to dissenting votes may find the approach objectionable. But neither of these criticisms provides a decisive counterargument to the theory under the pronouncement model. The fact that the issue-by-issue approach may fail to derive a clear, majority-supported rule of decision from all fractured-majority decisions does not justify disregarding those decisions in which it does produce such a rule.[250] And given the pronouncement model's focus on prospective guidance as the principal goal of precedent, the Justices' failure to agree on the proper application of their agreed-upon rule to the particular facts presented by the case before them need not be given decisive significance.

But embracing the theoretical premises of the pronouncement model need not compel one to embrace the issue-by-issue approach. For example, Re argues that the method "is somewhat inefficient insofar as it requires interpreters to pore over multiple opinions rather than one."[251]

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246. Re, *supra* note 36, at 1979–80.

247. *Id.*

248. *See, e.g.*, Varsava, *supra* note 39, at 307 (explaining that the dissent-inclusive view is consistent with the principle of majoritarianism because "rationales or legal theories elaborated in a judicial decision are precedential if and only if a majority of the court agrees on them").

249. *See supra* note 40 and accompanying text.

250. *See* Varsava, *supra* note 39, at 291–93 (arguing that, though plurality decisions constitute a fraction of all Supreme Court decisions and that not all plurality decisions are dual-majority decisions, it is nonetheless worthwhile to look for principled agreement on rationale or reasoning where such agreement exists).

251. Re, *supra* note 36, at 2004. *But see* Varsava, *supra* note 39, at 330 (noting approaches that "deny or severely restrict the precedential effect of plurality decisions" carry efficiency costs of their own in the form of squandered decisional resources expended by the Justices, which do not result in any meaningful precedential guidance).

Re also contends that the issue-by-issue approach is in some tension with the Supreme Court's established voting protocol, which focuses on case-level outcomes rather than the specific legal issues within a case.[252] He expresses concern that precedential effect to rule agreement between concurring and dissenting Justices could "paradoxically create a precedent that contradict[s] the judgment" in some cases, and this "incongruity" could "distort[] advocates' incentives," thereby adversely affecting the Court's deliberations.[253]

Rather than embracing the issue-by-issue approach, Re urges adoption of the no-precedent approach to plurality decisions.[254] Re contends that denying precedential effect to fractured majority decisions "would vest the power to make Court precedent with the most efficient precedent creators: the Justices themselves at the time of decision."[255] By depriving all plurality decisions of precedential force, Re contends that the Court's decisionmaking could be improved in two ways. First, the Justices could avoid the prospect of inadvertently producing a binding precedential "rule" that failed to garner majority support.[256]

Second, Re posits that a no-precedent approach might facilitate greater deliberation and cooperation among the Justices that would lead to a higher likelihood of producing majority-supported rules.[257] Re derives inspiration for this speculation from the so-called "*Screws* rule"—a longstanding but informal practice through which some Justices have, on rare occasions, voted against their own preferred disposition of a case to produce a majority-supported disposition.[258] If the Court were to abandon its present practice of treating plurality precedent as binding on lower courts, Re suggests that the Justices might have somewhat greater incentives to compromise to achieve a clear, majority-supported

252. *See* Re, *supra* note 36, at 2005–06 (comparing outcome voting to issue voting); *see also* John M. Rogers, *"Issue Voting" by Multimember Appellate Courts: A Response to Some Radical Proposals*, 49 VAND. L. REV. 997, 1025–37 (1996) (defending outcome voting).

253. Re, *supra* note 36, at 2005–06.

254. *See supra* note 215 and accompanying text. (discussing Re's argument for the no-precedent approach).

255. Re, *supra* note 36, at 2008.

256. For instance, Re observes that a consequence of adopting the shared-agreement approach would be to endorse "a hybrid principle that *zero* Justices [have] expressly or necessarily endorsed." *Id.* at 1987.

257. *See id.* at 2003–04 ("[T]here is good reason to think that the Justices would reach a compromise, despite their disagreements.").

258. *See id.* at 1998 ("[A] Justice may vote against her own preferred judgment in order to allow the Court to reach a majority disposition."). The name derives from Justice Rutledge's concurring opinion in *Screws v. United States*, which forthrightly acknowledged that the Justice's dispositional vote was contrary to his own preferred view of the law but was necessary to avoid the stalemate that would result in view of the dispositional votes cast by the other Justices in the case. 325 U.S. 91, 134 (1945) (Rutledge, J., concurring).

precedential rule that would avoid the uncertainties and confusion that presently plague plurality precedent.[259]

D. *Taking Stock*

One commonplace view of the *Marks* rule and its proposed alternatives is that they reflect essentially arbitrary and second-best solutions to the special problem posed by plurality decisions.[260] But, as the analysis in this Section suggests, the conceptual divisions regarding plurality precedent implicate a much deeper set of unresolved ambiguities regarding the nature of precedential obligation more generally. These ambiguities, in turn, speak to a deeper set of ambiguities regarding the nature and legitimacy of judicial lawmaking in the U.S. legal system.[261] The latent tension between the Supreme Court's traditional role as a resolver of concrete disputes and the practical reality that its decisions carry broad, prospective lawmaking effects creates deep and persisting tensions in our law of precedent.

To some extent, these tensions may be inevitable and perhaps even desirable.[262] One should thus neither expect nor insist upon comprehensive agreement on all aspects of an underlying theory of precedent as a necessary precondition to doctrinal clarification regarding the precedential status of plurality decisions. But such tensions do suggest that no single doctrinal solution is likely to satisfy all observers. Those inclined toward the judgment model, for example, are likely to find greater intuitive appeal in the shared-agreement approach, while those inclined toward the prediction model or the pronouncement model are more likely to incline toward some alternative approach, such as the issue-by-issue approach, the all-opinions approach, or even the no-precedent approach. At the same time, however, the foregoing analysis suggests some of the most prominent approaches to the *Marks* narrowest-grounds rule may lack a coherent grounding in *any* plausible model of precedential authority. In particular, the logical-subset approach and the fifth-vote approach—two of the most widely accepted interpretations of the *Marks* rule in the lower courts[263]—seem difficult to reconcile with the

259. *See* Re, *supra* note 36, at 2003–04 ("[I]n the absence of the *Marks* rule, the Justices would often form compromise majorities rather than issue fragmented decisions.").

260. *See supra* note 17 and accompanying text.

261. *Cf.* Jeremy Waldron, *Who Needs Rules of Recognition?*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 327, 335 (Matthew D. Adler & Kenneth Einar Himma eds., 2009) ("We are, as a society, profoundly ambivalent about judges' making and changing law.").

262. *See id.* at 337 (contending that historical experience in the common-law tradition suggests "that things work better if we leave" the rules for determining the precedential effect of judicial decisions "unsettled and reasonably flexible").

263. *See, e.g.*, Neuenkirchen, *supra* note 36, at 394–95 (identifying the implicit consensus approach and the fifth-vote approach as the two leading lower-court interpretations of *Marks*); Marceau, *supra* note 37, at 170–74 (same).

theoretical premises underlying *any* of the models of precedential authority described above in Part II.[264]

The logical-subset approach seems to draw upon intuitions similar to those that undergird the judgment model of precedent, insisting upon a close connection between the case-specific judgment and the majority consensus necessary to support that judgment.[265] But it departs from the judgment model by according binding precedential weight to aspects of the putatively "narrowest" opinion that were not actually assented to by the judgment-supportive majority.[266]

The fifth-vote approach, by contrast, seems to draw upon intuitions similar to those that support either the prediction model or the pronouncement model of precedent.[267] But the approach fails to deliver results that truly predict the Court's likely future rulings.[268] And though a version of the approach can be reconciled with the pronouncement model in the manner suggested by Professor Stearns' social-choice theory, this approach requires attributing to the Court's decisionsan implicit voting rule that the Court itself has not chosen to embrace explicitly.[269]

A third prominent approach to plurality precedent, the all-opinions approach, seems questionable for different reasons. Unlike either the implicit-consensus approach or the fifth-vote approach, the all-opinions approach finds a coherent theoretical home in a particular model of precedential authority—namely, the prediction model.[270] But for reasons discussed above, the prediction model may be a relatively poor fit for the particular problem of plurality precedent. [271] Given the relative infrequency of Supreme Court review and the closely divided nature of plurality decisions, the voting alignment in a particular plurality case may be of limited value in trying to predict the Court's likely disposition of the relevant issue at some future point. Indeed, some of the most prominent supporters of the all-opinions approach have explicitly disclaimed any reliance on a predictive rationale.[272]

Each of the remaining three approaches to plurality precedent—the shared-agreement approach, the issue-by-issue approach, and the no-

264. *See supra* Part II.

265. *See supra* notes 29–35, 182–83 and accompanying text.

266. *See supra* notes 184–85 and accompanying text.

267. *See* Neuenkirchen, *supra* note 36, at 405 (identifying the predictive rationale and Professor Stearns' social-choice argument as the two principal justifications for the fifth-vote approach).

268. *See supra* notes 200–09 and accompanying text (discussing the fifth-vote approach's inconsistency with the prediction model).

269. *See supra* notes 240–46 and accompanying text (discussing Professor Stearns' social-choice defense of the fifth-vote approach).

270. *See supra* notes 43–48, 213–14 and accompanying text.

271. *See supra* notes 216–24 and accompanying text.

272. *See supra* note 226 and accompanying text.

precedent approach—fits with a coherent theoretical model of precedential authority. The shared-agreement approach accords with the theoretical premises of the judgment model by aligning the precedential obligations of later courts with the judgment in the precedent case and the collective set of opinions that were necessary to explain that judgment.[273] And both the issue-by-issue approach and the no-precedent approach fit comfortably with the theoretical premises of the pronouncement model, though they disagree on the best way to implement that model in the specific context of plurality decisions.

In short, attempting to connect existing approaches to plurality precedent to a coherent theory of precedential authority may bring some analytic clarity to the presently confused state of the doctrine by identifying approaches that lack a coherent theoretical foundation. But this strategy is unlikely to yield determinate guidance regarding a single path forward because our shared conceptions of precedential authority are, themselves, ambiguous. In the end, a clear prescription for plurality precedent—if one is to be had—will require a choice between different accounts of precedential authority that share roughly similar levels of descriptive plausibility and theoretical coherence.

IV. BEYOND PLURALITY PRECEDENT

Although the focus of the present discussion is on plurality precedent, the conceptual ambiguity that plurality decisions expose can be glimpsed across a broader range of judicial doctrines. It is important, therefore, to consider how the doctrine of plurality precedent fits within the broader framework of judicial doctrine, and how any potential shift in the law governing the precedential effect of plurality decisions might influence other doctrinal areas.

Consider, for example, theoretical and jurisprudential debates surrounding the distinction between holdings and dicta. Although the distinction is a foundational feature of our law of precedent,[274] the line between holdings and dicta is notoriously elusive and contested.[275] Legal scholars have proposed numerous tests to separate holdings from dicta.[276]

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273. *See supra* notes 187–88 and accompanying text.

274. *See, e.g.*, David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021, 2027 (2013) ("The distinction between holding and dictum reflects fundamental norms of American law . . . .").

275. *See, e.g.*, Kozel, *supra* note 142, at 182 (noting the "the well-chronicled difficulty of sorting dicta from holdings in particular cases"); Dorf, *supra* note 81, at 2005 ("As currently understood, the distinction [between holdings and dicta] is almost entirely malleable.").

276. *See, e.g.*, WAMBAUGH, *supra* note 82, at 6–7 (defining dicta as anything in an opinion that "goes beyond a statement of the proposition necessarily involved in the case . . . "); *see also* EISENBERG, *supra* note 81, at 54–55 (proposing a standard that would treat all rules pronounced in an opinion as part of the holding so long as they are relevant to the case disposition);

In earlier generations, these debates tended to focus on methods for implementing the theoretical premises of the judgment model, with disagreements focusing principally on whether anything other than the specific judgment itself was entitled to precedential weight and, if so, the degree of necessity between the judgment and any supporting rationale that should be required.[277]

In more recent years, scholars have urged the courts to adopt a broader conception of precedential authority grounded in either the prediction or the pronouncement model of precedent.[278] This broader conception of precedent has found a receptive audience among lower court judges, many of whom have embraced the idea that statements in judicial opinions that have no direct or necessary connection to the court's judgment are nonetheless entitled to binding precedential effect.[279]

The Supreme Court, however, has adhered to a narrow conception of its own holdings that is broadly consistent with the theoretical premises of the judgment model.[280] The Court has, for example, repeatedly insisted that its own dicta in prior opinions do not bind its own subsequent

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Abramowicz & Stearns, *supra* note 79, at 1065 (defending an alternative formulation under which classification as a "holding" would be reserved for "those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment"); Goodhart, *supra* note 80, at 169 (proposing a definition that focuses on the "material facts" discussed in the opinion and the court's disposition of the underlying case).

277. *See supra* notes 79–84 and accompanying text (discussing the facts-plus-outcome theory of precedent and critiques of that position); *see also* Abramowicz & Stearns, *supra* note 79, at 1045–61 (discussing various proposed definitions suggested by scholars in earlier decades).

278. *See, e.g.*, Bayern, *supra* note 125, at 156 ("[I]t is neither necessarily the case nor even . . . apparently true in many instances that holdings are more carefully reasoned than dicta. Instead, to the extent we care how much a court considered the wisdom of its pronouncements, we would do better to focus on that question squarely, using all available contextual information."); Caminker, *supra* note 93, at 46–50 (arguing that dicta provide highly probative information for lower courts following the predictive model of precedent).

279. *See* Kozel, *supra* note 142, at 203 ("Inferior courts commonly treat the Supreme Court's statements as binding even when those statements are unmistakable dicta."); *see also, e.g.*, Harbury v. Deutch, 233 F.3d 596, 604 (D.C. Cir. 2000) ("[F]irm and considered dicta [of the Supreme Court] . . . binds this court."), *vacated*, 2002 WL 1905342 (D.C. Cir. Aug. 19, 2002); United States v. Marlow, 278 F.3d 581, 588 n.7 (6th Cir. 2002) (noting that lower courts "are obligated to follow Supreme Court *dicta*, particularly when there is no substantial reason for disregarding it, such as age or subsequent statements undermining its rationale" (citing Gaylor v. United States, 74 F.3d 214, 217 (10th Cir. 1996))); Doughty v. Underwriters at Lloyd's, London, 6 F.3d 856, 861 n.3 (1st Cir. 1993) ("Carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." (citing United States v. Santana, 6 F.3d 1, 9 (1st Cir. 1993))), *abrogated by* Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996).

280. *See, e.g.*, Kozel, *supra* note 142, at 187–88 (identifying support for the "classic account of precedential scope," which "revolves around a stark dichotomy" between holdings and dicta in more than two centuries of Supreme Court case law).

decisionmaking.[281] The Court has likewise signaled to lower courts that they are permitted to disregard those portions of its opinions that the Court itself regards as dicta.[282]

Another illustration of the Supreme Court's seeming commitment to the judgment model of precedent can be seen in its treatment of unexplained dispositions—i.e., decisions on the merits that do not explain the basis for the Court's ruling.[283] The Supreme Court has instructed lower courts that they are bound by its unexplained dispositions "until such time as the Court informs [them] that [they] are not."[284] Critics of this approach have argued that such decisions should not be entitled to precedential weight because they do not supply any reasoned explanation for the Court's decision.[285] Critiques of this type fit comfortably with the

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281. *See, e.g.*, Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 548 (2013) ("[W]e are not necessarily bound by dicta should more complete argument demonstrate that the dicta is not correct." (citing Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 363 (2006))); Jama v. Immigr. & Customs Enf't., 543 U.S. 335, 351 n.12 (2005) ("Dictum settles nothing, even in the court that utters it."); Cent. Green Co. v. United States, 531 U.S. 425, 431 (2001) (noting that "dicta 'may be followed if sufficiently persuasive' but are not binding" (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 627 (1935))).

282. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 426–31 (2008) (observing that the majority of lower courts had correctly determined that they were not bound by overbroad dicta in a prior Supreme Court opinion), *modified on reh'g*, 554 U.S. 945 (2008); *cf.* Williams v. Taylor, 529 U.S. 362, 412 (2000) (O'Connor, J., concurring in part) (declaring that only "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions" can constitute "clearly established" federal law for purposes of federal habeas relief).

283. At one time, such dispositions were a fairly common feature of the Court's decisionmaking, providing an expeditious mechanism for disposing of insignificant cases on the Court's mandatory appellate docket. Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81, 91 (1988) (observing that the Supreme Court determined "that a substantial number of appeals," from its mandatory docket "did not involve issues sufficiently important to warrant setting the case for oral argument" and "developed summary techniques for avoiding full plenary review of such cases"). The shift away from mandatory appeals and toward more discretionary docket control has diminished the importance of unexplained dispositions, though the Court continues to issue at least a few such decisions with some regularity. *See, e.g.*, Joshua A. Douglas & Michael E. Solimine, *Precedent, Three-Judge District Courts, and the Law of Democracy*, 107 GEO. L.J. 413, 416–17 (2019) (noting continuing significance of unexplained dispositions in election law cases); William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 18–19 (2015) (noting continuing use of summary reversals of lower court decisions in other categories of cases).

284. Hicks v. Miranda, 422 U.S. 332, 344–45 (1975) (alterations in original) (quoting Doe v. Hodgson, 478 F.2d 537, 539 (2d Cir. 1973)). The Court has cautioned that such dispositions do not necessarily constitute an endorsement of the lower court's rationale and "should not be understood as breaking new ground" but should be construed instead "as applying principles established by prior decisions to the particular facts involved." Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam).

285. *See, e.g.*, Douglas & Solimine, *supra* note 283, at 431–36 (arguing that the Court should either refrain from issuing summary dispositions or make clear that such dispositions lack precedential authority); Re, *supra* note 36, at 1975–76 (arguing that courts should treat unexplained results as nonbinding).

theoretical premises of the pronouncement model, which views the articulation of prospective rules as central to the formation of precedent.[286] And though the prediction model might accord some meaningful weight to recently decided dispositions even in the absence of an explanation,[287] such dispositions are likely to maintain their predictive value only so long as the Court maintains roughly the same membership.[288]

The Supreme Court, however, has never wavered from its view that unexplained dispositions are fully precedential decisions that bar lower courts from reaching "opposite conclusions on the precise issues presented and necessarily decided" in those cases.[289] For example, in *Obergefell v. Hodges*,[290] the Court considered the precedential significance of its four-decade-old decision in *Baker v. Nelson*, which had summarily affirmed a state court decision rejecting a constitutional challenge to a state law limiting marriage to opposite sex couples.[291] Although multiple lower courts had questioned the continued precedential significance of *Baker*, given the trajectory of the Court's equal protection and fundamental rights doctrine in later cases,[292] the

286. *See supra* Section II.B.3; *see also* Re, *supra* note 36, at 1947 (contending that "[w]hen most Justices cannot agree on a legal principle, later courts should feel free to arrive at their own conclusions").

287. *See, e.g.*, Steinman, *What the Law Is*, *supra* note 126, at 1742 (acknowledging that "prior results may help predict how particular judges might decide future cases").

288. *Cf. supra* notes 221–23 and accompanying text (discussing effect of membership change on the predictive value of plurality decisions).

289. *Mandel*, 432 U.S. at 176. For purposes of its own decisionmaking, the Court has sometimes regarded summary dispositions as entitled to "considerably less precedential value than an opinion on the merits." Ill. Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 180–81 (1979) (citing Edelman v. Jordan, 415 U.S. 651, 671 (1974)).

290. 576 U.S. 644 (2015).

291. *Id.* at 665 (discussing that there are "other, more instructive precedents" than *Baker*).

292. *See, e.g.*, Latta v. Otter, 771 F.3d 456, 466–67 (9th Cir. 2014) (refusing to follow *Baker* and concluding that "any observer of the Supreme Court cannot help but realize" that the Court's view of the underlying issue had changed over the intervening period); *see also* Baskin v. Bogan, 766 F.3d 648, 660 (7th Cir. 2014); Bostic v. Schaefer, 760 F.3d 352, 373–75 (4th Cir. 2014); Kitchen v. Herbert, 755 F.3d 1193, 1204–08 (10th Cir. 2014). This approach was facilitated by a quotation of a lower court opinion that appeared in the Supreme Court's 1975 opinion in *Hicks v. Miranda* declaring: "[I]f the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise . . . ." 422 U.S. 332, 344 (1975) (quoting Port Auth. Bondholders Protective Comm. v. Port of N.Y. Auth., 387 F.2d 259, 263 n.3 (2d. Cir. 1967)); *see also, e.g.*, *Kitchen*, 755 F.3d at 1205–06 (quoting the "doctrinal developments" language from *Hicks*, as well as subsequent Supreme Court case law as suggesting that *Baker* was no longer binding). *But see* DeBoer v. Snyder, 772 F.3d 388, 400–01 (6th Cir. 2014) (rejecting this reading of *Hicks* and insisting that summary dispositions are entitled to the same precedential weight as more fully reasoned cases), *rev'd sub nom. Obergefell*, 576 U.S. 644.

Court itself did not view the decision as non-precedential. Rather, the Court chose to formally overrule *Baker* on its merits.[293]

The Supreme Court's apparent commitment to the judgment model can also be glimpsed in other doctrinal areas, such as its repudiation of "prospective overruling"[294] in its own opinions, and its prohibition on "anticipatory overruling" in the lower courts.[295] To be sure, this commitment is not necessarily monolithic and arguable deviations might plausibly be identified in discrete doctrinal areas.[296] But at least with respect to a broad swath of its decisions, the Supreme Court's treatment

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293. *Obergefell*, 576 U.S. at 675–76.

294. The Court's short-lived experiment with prospective overruling commenced in *Linkletter v. Walker*, where the Court claimed the authority to overrule prior precedent while continuing to apply the repudiated decision as a rule for pending cases. 381 U.S. 618, 628–29 (1965). By the 1990's, the Court had repudiated this doctrine, insisting that

> [w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Harper v. Va. Dep't. of Tax'n, 509 U.S. 86, 97 (1993); *see also* Samuel Beswick, *Retroactive Adjudication*, 130 YALE L.J. 276, 293–97 (2020) (discussing the development and decline of the doctrine of prospective overruling). One commonly voiced objection to prospective overruling involved the charge that empowering courts to change governing law without applying that law to pending cases would reflect a legislative function inappropriate for the Article III judiciary. *See, e.g.*, Mackey v. United States, 401 US 667, 679 (1971) (Harlan, J., dissenting) ("[T]he Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation.").

295. *See, e.g.*, State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents."), *vacated*, 93 F.3d 1358 (1996); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) (explaining that where a Supreme Court precedent "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions"), *aff'd*, 845 F.2d 1296 (1988). This prohibition has been criticized by commentators who urge that lower courts should be free to follow their best prediction of how the Supreme Court itself would decide the relevant issues in light of more recent jurisprudential trends. *See, e.g.*, John M. Rogers, *Lower Court Application of the "Overruling Law" of Higher Courts*, 1 LEGAL THEORY 179, 181 (1995); C. Steven Bradford, *Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling*, 59 FORDHAM L. REV. 39, 72 (1990).

296. *See, e.g.*, Re, *supra* note 36, at 1991–92 n.244 (citing the Court's holding in *Camreta v. Greene*, 563 U.S. 692 (2011), in which the Court allowed a prevailing party to appeal from a lower court judgment in his favor based on the potential issue preclusive effect of particular determinations made in the proceedings below); *see also* Tyler, *supra* note 127, at 1563–64 (citing *Camreta*, along with decisions in cases involving claims of harmless error as "carveouts" from the prevailing "necessity" model of precedent in the Supreme Court).

of the precedential effect of its own prior decisions seem broadly consistent with the judgment model's theoretical premises.[297]

Given the similarities between the interpretive questions surrounding plurality precedent and those surrounding the Supreme Court's other institutional practices, it seems plausible that a more definitive shift toward one of the available approaches to plurality precedent might influence other doctrinal areas as well.

For example, a common objection to the issue-by-issue approach, as well as other approaches that depend upon counting dissenters' votes, is that the resulting rules are too analogous to dicta because they hinge on the views of Justices whose votes were not necessary to the Court's judgment.[298] But if the Supreme Court were to officially endorse the proposition that dissenters' views can contribute to the holding of a plurality decision,[299] this endorsement might undermine the traditional view of the holding/dicta distinction and support the emergent lower-court practice of according full precedential force to all "considered" statements in majority opinions.[300] By contrast, if the Court were to firmly reject the consideration of dissenters' views in determining the Court's holding, it might thereby reinforce its existing practice of insisting on a sharp theoretical distinction between binding holdings and non-binding dicta.

Were the Court to clarify the law surrounding plurality precedent, such a change may also have implications for the precedential status of the Court's unexplained dispositions.[301] If the Court were to adopt the no-

297. *See, e.g.*, Williams, *supra* note 25, at 846–47 (discussing Supreme Court's commitment to judgment-supportiveness as a criteria of precedential validity).

298. *See, e.g.*, Varsava, *supra* note 39, at 306 (attributing "resistance to the idea of treating principles or rationales from dissenting opinions as binding precedent" to "assumptions that have been extrapolated from the distinction between holdings and dicta"); Adler, *supra* note 117, at 94 (analogizing dissenting opinions to dicta, as neither "form part of the holding of the Court" (emphasis omitted)); *cf. In re* Aggrenox Antitrust Litig., No. 3:14-md-2516, 2016 WL 4204478, at *6 (D. Conn. Aug. 9, 2016) ("[T]he common denominator of a concurrence and a dissent does not support the judgment. It is, in effect, *Marks*-doctrine dicta rather than *Marks* doctrine holding.").

299. A majority of the Supreme Court hinted at this view in one prior case, *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, in which a unanimous Court signaled that a lower court had "correctly recognized" the existence of majority support for a particular proposition by looking to points of agreement between a lone concurrence and a four-Justice dissenting opinion in an earlier plurality decision. 460 U.S. 1, 17 (1983); *see also* Varsava, *supra* note 39, at 313–16 (discussing *Moses H. Cone*).

300. *Cf.* Tyler, *supra* note 127, at 1600 n.241 (noting a connection between the issue-by-issue approach to plurality precedent and the scope of the holding/dicta distinction).

301. The similarity between the precedential issues at stake with respect to the two doctrinal areas were expressly recognized by two of the opinions in *Ramos*. Justice Gorsuch's plurality opinion invoked the principle that "'unexplicated' decisions . . . '[are] not to be read as a

precedent approach to plurality precedent, for example, it would be difficult to accord any meaningful precedential effect to unexplained dispositions.[302] By contrast, if the Court adopted a method like the shared-agreement approach, the Court might buttress its current practice of according at least some meaningful precedential force to its unexplained dispositions.[303]

CONCLUSION

The law is a seamless web, or so some would have us believe.[304] A more cynical view might see law as something more like a tattered cloth, filled with patchwork, gaps, and fraying edges. But under either conception, pulling at a loose thread can reveal a deeper structure that might not be obvious at first glance. At the same time, pulling too hard can threaten to unravel unseen connections that lend the garment its cohesion.

Plurality decisions reflect one such loose thread in our law of stare decisis. By forcing decisionmakers to grapple with the disconnect between majority-supported case outcomes and the lack of majority-supported rationales to explain those outcomes, plurality decisions reveal latent ambiguities that often go unnoticed and unmentioned in our discussions of precedent. Looking closely at the conceptual debates surrounding the precedential status of plurality decisions reveals at least three distinct, and, to some extent, mutually inconsistent models of precedential authority: the judgment model, the prediction model, and the pronouncement model. Plurality decisions highlight the tensions between these three models, which typically remain submerged in our discussions of judicial authority and precedential legitimacy.

And though recognizing these tensions does not necessarily yield clear guidance for their resolution, understanding the conceptual roots of our confusion surrounding plurality precedent can yield certain benefits. In particular, a deeper understanding of the conflicting intuitions that

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renunciation by this Court of doctrines previously announced in our opinions,'" as a basis for construing plurality precedent narrowly. Ramos v. Louisiana, 140 S. Ct. 1390, 1404 (2020) (plurality opinion) (alteration in original) (quoting Mandel v. Bradley, 432 U.S. 173, 176 (1977)). Justice Alito, in dissent, emphasized that even unexplained dispositions "are precedents for 'the precise issues presented and necessarily decided' by the judgment below" and that plurality decisions should thus receive no lesser degree of precedential deference. *Id.* at 1429–30 (Alito, J., dissenting) (quoting *Mandel*, 432 U.S. at 176).

302. *Cf.* Re, *supra* note 36, at 1975 n.173 (analogizing plurality decisions to unexplained dispositions and suggesting that neither should carry precedential force for later decisionmaking).

303. *Cf.* notes 187–88 and accompanying text (discussing connections between the shared-agreement approach and the judgment model).

304. *See* Lawrence B. Solum, *Legal Theory Lexicon: The Law Is a Seamless Web*, LEGAL THEORY BLOG (Oct.1, 2006, 2:54 PM), https://lsolum.typepad.com/legaltheory/2006/10/legal_theory_le.html [https://perma.cc/AU56-R2XW] (describing the "seamless web" metaphor).

swirl around plurality precedent might help us to see that some of the most prominent approaches to the narrowest-grounds rule of *Marks* fail to accord with any plausible account of what makes judicial precedent authoritative. A deeper understanding of the theoretical stakes of the debate may also help us to see how the debates surrounding plurality precedent fit within a broader set of debates regarding the nature and scope of precedential authority. Moreover, such deeper understanding may reveal how changes in the judicial treatment of plurality precedent might reverberate through other doctrinal areas that shape the nature and authority of Supreme Court precedent.