Legal Sidebar

What Happens When Five Supreme Court Justices Can't Agree?

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UPDATE, 6/4/2018: On June 4, 2018, the Supreme Court issued its decision in Hughes*. The Court ultimately deemed it "unnecessary" to decide which opinion governs when no single opinion enjoys a majority and instead decided the case on alternative grounds. Thus, the underlying circuit split concerning the* Marks *rule remains unresolved, and guidance from the Supreme Court regarding "the proper application of* Marks*" will have to await a future case.*

The original post from April 5, 2018, is below.

The Supreme Court generally adjudicates by majority rule; whatever legal position garners a majority of votes in favor of its legal position prevails, and the majority's ruling in that case becomes binding precedent in subsequent cases. But what happens when a majority of Justices agree that a party should win, but cannot agree as to *why* that party should win? Which Justice's opinion, if any, becomes the law when no single opinion enjoys a majority vote?

The Supreme Court has stated that "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" That seemingly simple rule, however, is not always so simple to apply in practice. For example, it is not self-evident how should courts identify which Justice's opinion rests on the "narrowest grounds." If the opinion resting on the "narrowest grounds" only garnered a single Justice's vote, does that opinion have precedential effect even when every other Justice on the Court disagrees with it?

The Supreme Court recently heard oral argument in *Hughes v. United States*, a case that presents an opportunity to explore these questions. Because split Supreme Court decisions have become increasingly common in the past several decades, and because the Supreme Court is frequently unable to reach a majority consensus "in cases involving especially difficult and highly salient legal issues on which public opinion is sharply divided"—such as abortion, capital punishment, and environmental law—the Court's ultimate decision in *Hughes* could have significant implications in a variety of different fields.

This Sidebar begins by discussing the current doctrinal framework for determining what opinion should govern when no opinion commands a majority vote. The Sidebar then explores the facts and issues involved in *Hughes* before examining *Hughes*'s potential impact.

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Current Doctrine: The *Marks* Rule and "Reasoning" Versus "Results"

The Supreme Court held in *Marks v. United States* in 1977 that "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" This principle, known as the "*Marks* rule," is frequently, as the Court itself has recognized, "more easily stated than applied." Lower courts have often disagreed regarding how to determine the "narrowest ground" on which a judgment rests. In particular, courts disagree regarding whether the "narrowest ground" is measured by "the *reasoning* of the various opinions" in the case or by "the ultimate *results*" of those opinions.

Under the former approach, a particular opinion of a splintered Court constitutes binding precedent if and only if that opinion "represent[s] a common denominator of the Court's reasoning." Put another way, an opinion binds the lower courts only if it "embod[ies] a position implicitly approved by at least five Justices who support the judgment." If, instead, the rationale advanced by the plurality opinion does not overlap with that advanced by the concurring opinion, such that no opinion serves as "a logical subset of other, broader opinions," the various opinions lack precedential effect and "only the specific result [of the case] is binding on lower federal courts."

Other courts, by contrast, focus on the "results" reached by each opinion rather than the reasoning therein. These courts determine which opinion "provide[s] the narrowest, most case-specific basis for deciding" the case in question and then accord that opinion "full precedential effect," "even when that opinion does not share common reasoning with the other opinions necessary to support the judgment," and even when a majority of the other Justices disagree with that opinion's reasoning.

The practical difference between these two approaches toward the *Marks* rule can be stark. In a significant number of split Supreme Court decisions, the plurality and concurring opinions do not share a clear "common denominator," in that the opinions rest upon rationales that do not neatly overlap logically or conceptually. Because courts that have adopted the "reasoning" approach to *Marks* treat such decisions "as wholly nonprecedential, or, at most, limited to their 'specific results,'" one scholar argues that the "reasoning" approach undesirably "threatens to leave lower courts without meaningful precedential guidance with respect to many—perhaps most—plurality decisions." On the other hand, because the "results" approach to the *Marks* rule grants "full precedential effect" to opinions that have not commanded a full majority of the Court, some have argued that the "results" approach can improperly accord binding effect to opinions with which the majority of the Justices disagree.

Hughes, *Freeman*, and the *Marks* Rule

As explained below, *Hughes* presents the Court with an opportunity to clarify whether, and to what extent, a Supreme Court opinion that does not garner a majority vote may nonetheless constitute binding precedent. *Hughes* specifically presents the question of how the *Marks* rule applies to the Supreme Court's prior split decision in *Freeman v. United States*. *Freeman* involved a specific type of criminal plea agreement, pursuant to which the prosecution and the defendant "agree that a specific sentence or sentencing range is the appropriate disposition of the case." *Freeman* presented the question of whether criminal defendants who enter into those types of plea agreements—and thereby effectively concede that a particular sentence would be appropriate—may nonetheless be entitled to a lower sentence if the United States Sentencing Commission later amends the federal Sentencing Guidelines in a manner that favors the defendant.

Although five Justices agreed that a defendant is potentially entitled to a sentence reduction under 18 U.S.C. § 3582(c)(2) in such circumstances, they "differ[ed] as to the reason why." A four-Justice plurality led by Justice Kennedy concluded that "there is no reason to deny" a sentence reduction "to defendants

who linger in prison pursuant to sentences that would not have been imposed but for a since-rejected, excessive range." Justice Sotomayor agreed with the plurality that such defendants may potentially be "eligible for sentence reduction." Unlike the plurality, however, Justice Sotomayor interpreted the text and history of 18 U.S.C. § 3582(c)(2) to mean that such defendants are eligible for a sentence reduction only when their plea agreement "expressly uses a Guidelines sentencing range to establish the term of imprisonment." As a result, Justice Sotomayor's approach would often result in fewer defendants becoming eligible for sentence reductions than the plurality's approach. Notably, however, "eight Justices"—namely, the four Justices in the plurality and four dissenting Justices—"disagreed with Judge Sotomayor's approach and believed it would produce arbitrary and unworkable results."

Because no single opinion in *Freeman* commanded a majority of the Court, the Supreme Court left the lower courts to determine which Justice's opinion (if any) constituted binding precedent under the *Marks* rule. The majority of the federal Courts of Appeals, applying the "results" approach described above, have concluded that, because Justice Sotomayor's "reasoning provided the narrowest, most case-specific basis for deciding *Freeman*," her concurring opinion binds the lower courts, "even though eight Justices disagreed with Justice Sotomayor's approach." However, a few other courts, applying the "reasoning" approach to the *Marks* rule, have instead concluded that "there is no controlling opinion in *Freeman*" whatsoever "because the plurality and concurring opinions do not share common reasoning whereby one analysis is a 'logical subset' of the other."

The *Hughes* Case

Amidst this confusion, the United States Court of Appeals for the Eleventh Circuit (Eleventh Circuit) decided whether Erik Hughes was eligible for a sentence reduction under 18 U.S.C. § 3582(c)(2). Hughes pleaded guilty to drug and firearm offenses, and the district court sentenced him to 180 months of imprisonment. Soon thereafter, however, the United States Sentencing Commission amended the Sentencing Guidelines to retroactively reduce the offense levels for certain drug offenses. Hughes thereafter sought a reduction of his sentence.

The Eleventh Circuit, applying the "results" approach to *Marks*, concluded that Hughes was "ineligible for a sentence reduction." The Eleventh Circuit, applying the *Marks* rule, first determined that "Justice Sotomayor's concurring opinion [wa]s the holding of *Freeman*" because it "establishe[d] the 'le[ast] far-reaching' rule" of all the opinions in the case. Because, according to Justice Sotomayor, a sentence reduction is available only when the plea agreement "calls for a 'defendant to be sentenced within a particular Guidelines sentencing range'" or otherwise "makes clear that the basis for the specified term" of the sentence "is a Guidelines sentencing range applicable to the offense to which the defendant pleaded guilty," and because "Hughes's agreement d[id] neither" of those things, the Eleventh Circuit ruled that Hughes was "not eligible for a sentence modification."

The Supreme Court granted Hughes's petition for certiorari to determine whether the Eleventh Circuit properly applied the *Marks* rule. Hughes urges the Court to adopt the "reasoning" conception of *Marks*—that is, to hold that "an opinion constitutes the 'narrowest grounds' under *Marks*" only when that opinion "represents a logical subset of reasoning embraced by a majority of the Court." Hughes maintains that, when faced with a decision rendered by a fractured Court, a lower court should "only ask whether the rationale of one opinion is fully subsumed by that of another. If so, the narrower opinion controls; if not, there is no controlling precedent." According to Hughes, "there is something seriously wrong with an approach that would give controlling effect to reasoning with which eight Justices disagreed," as the Eleventh Circuit's approach arguably does with respect to Justice Sotomayor's concurrence in *Freeman*. The United States, by contrast, claims that Hughes's conception of *Marks* would "strip th[e] Court of the ability to create nationwide uniformity when Members of th[e] Court reach common results through different rationales." Notably, some *amici* have urged the Supreme Court to abrogate the *Marks* rule

altogether and instead hold that a Supreme Court decision has precedential value only when a majority of Justices "expressly agree on a rule of decision."

A decision in *Hughes* that either restricts or expands the precedential effect of splintered Supreme Court decisions could have important implications in a variety of fields. As noted above, the Supreme Court is frequently unable to reach a majority consensus in cases that involve divisive issues, such as abortion, capital punishment, or the reach of environmental law.

The Supreme Court will likely issue its decision in *Hughes* this summer. While prognostication about how the Supreme Court will rule in any given case is often hazardous, at least some of the Justices appear to believe that the "reasoning" approach to *Marks* advocated by Hughes may sometimes produce "illogical" results. Specifically, at oral argument, Justice Alito doubted whether, if a group of friends is "deciding which movie to go and see, and four of them want to see a romantic comedy, and two of them want to see a romantic comedy in French, and four of them want to see a mystery," "the two who want to see the romantic comedy in French" can be accurately characterized as "a logical subset of those who want to see a romantic comedy" as the "reasoning" approach to *Marks* might suggest. Other Justices, such as Justice Breyer, suggested that, rather than adopting either of the "reasoning" or "results" approaches to *Marks*, the best course of action might be to "leave [the *Marks* rule] alone" and admonish lower courts to simply "interpret it with common sense."

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