Construing Precedent

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Richard Re, *Beyond the* Marks *Rule*, **132 Harv. L. Rev.** __ (forthcoming 2019), available at SSRN.

What is the nature of precedent? How is it made and how can it eventually be unmade? If anyone knows, it is Richard Re at UCLA School of Law. Re has been doing the academy and the judiciary a service in recent years by writing several articles and a scholarly amicus brief on the foundational question of how certain opinions come to bind others. *Beyond the* Marks *Rule* is his latest offering in this rich area, and it does not disappoint.

Beyond Marks begins with what one might call the "less-than-five problem." Generally, the Supreme Court creates binding precedent when a majority of the Justices supports a single rule of decision. Under the "majority rule," if five Justices sign on to Rule A and four Justices sign on to Rule B, Rule A becomes the holding of the Court and binds the lower courts thereafter. But occasionally the Supreme Court does not merely split but fractures, leaving us in a world of, say, 4-1-4 (in which five Justices agree on an outcome, but only four agree on a rule explaining the outcome and one relies on alternative reasoning). What to do in such a situation? One could imagine concluding that an opinion without a majority is an opinion without precedential effect. But at the moment we are bound to conclude otherwise, thanks to Marks v. United States.

Marks tells us that "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices," then "'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .'" (or, as I tell my students, if four Justices want to order vegetarian fare for dinner, and a lone Justice will only have cheese pizza, then cheese pizza it is for everyone). Though the rule may have some initial intuitive appeal, Re convincingly argues that its adoption was not well thought out then and is beyond problematic today.

The costs of the *Marks* rule are several. First, the rule can lead to troubling results. Consider Freeman v. United States, a recent federal sentencing case, in which the Court divided 4-1-4. The majority of lower courts to subsequently apply *Marks* to *Freeman* decided that Justice Sotomayor's concurrence—the lone 1—should control. And yet the other Justices had squarely rejected Sotomayor's position, calling it "erroneous" and "arbitrary." As Re points out, "the Court's least popular view became law." Even where the Justices do not directly criticize what will become the controlling opinion, the fact remains that a majority of the Court chose notto endorse that opinion. In this way, *Marks* makes precedent out of minority views.

Second, there can be a significant lack of clarity—and therefore lack of efficiency—in applying the *Marks* rule. At the level of the rule itself, it is not pellucidly clear how lower courts should understand "that positon taken by those Members who concurred in the judgments on the narrowest grounds." It could mean the "logical subset" approach, which considers an opinion from a fractured Court binding only if it "necessarily approves all the results reached under another concurrence in the judgment" (as in the culinary example above). It could mean that lower courts should look to the "median opinion"—the concurring opinion that represents the views of the median Justice. Or it could mean the "all opinions" approach, which considers how a given case would be resolved under the Court's various opinions (including dissents) and follows whatever route would have gained the support of a majority. Re reveals the flaws in each of these methods and underscores how challenging it is to apply what might at first blush seem to be a straightforward rule.

Given the varied possibilities for understanding *Marks*, it is not surprising that there is confusion over what precisely

counts as precedent in many individual cases. Returning to *Freeman*, most lower courts to apply *Marks* to the case concluded that the Sotomayor concurrence controlled. But the D.C. and Ninth Circuits concluded that *Freeman* failed to create any precedent at all (aside from the result). In short, these fractured decisions impose significant interpretive costs.

Re then demonstrates those costs with a comprehensive empirical study of how the Supreme Court, the federal courts of appeals, and even state courts have applied *Marks*. The findings show that the rule is dysfunctional in application. With respect to the federal courts of appeals, for example, Re finds that they "only sometimes reach convergent results," and that, often, "repeated *Marks* analysis generates lasting disagreement."

Re does not stop there—he concludes with an elegant solution to the problem. Rather than try to forge precedent when the Court has fractured, Re argues that only the majority rule should rule—a decision provides a binding rule of decision only if at least five Justices support it. The Justices should continue to feel free to form compromise majorities, following the logic of Screws v. United States (which maintains that a Justice may decide to vote for a particular rule precisely so as to create a majority precedent). But they must create that majority.

And Re does not even stop there. Tying *Marks* to his earlier work on precedent, he considers how a "*Screws* rule" could come about. It could come from the Court, either by overruling *Marks* in favor of a majority-rule rule or by reducing the number of fractured opinions over time. Alternatively, it could come from lower courts narrowly construing *Marks*, thereby incentivizing a would-be lone Justice, no longer able to create a binding rule herself, to find an opinion to join. Whatever the case, with *Beyond the* Marks *Rule*, Re has made a substantial contribution to the growing field of Judicial Administration/Judicial Process. And there can be no fractured opinion here—judges and academics alike should pay close attention to Re's invaluable scholarship.

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