Much Ado about Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-Percolation after Rapanos

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ABSTRACT

Conflicts created by concurrences and pluralities in court decisions create confusion in law and lower court interpretation. Rule-of-law values require that individuals be able to identify controlling legal principles. That task is complicated when pluralities and concurrences contribute to the vagueness or uncertainty that leaves us wondering what the controlling rule is or attempting to predict what it will evolve to become. The rule of law is at least handicapped when continuity or confidence or confusion infuse our understanding of the applicable rules. This Article uses the recent U.S. Supreme Court decision in Rapanos v. United States to explore this topic of concurrences, precedential complexities, and confusion. It addresses these issues by introducing the Marks doctrine’s ability to assist jurists and others who are wrangling with precedents latten by pluralities. Part of the precedential system is the signaling function to lower courts, and that signal can be disrupted by plurality opinions, and it analyzes lower courts’ reaction to the fractured nature of Rapanos. But plurality decisions may open the door to re-percolation in interpretations. Finally, this Article examines Marks and this situation in relation to judicial motives. The legal treatment of separate opinions may alter incentives to concur rather than join, thus creating the possibility that their nuance on the holding will have greater influence once a case must be applied in the lower courts. Rapanos provides an excellent case study of a fragmented decision in the era of many such decisions. The confusion that it has caused is serious and reflects the limitations of lower courts’ ability to apply the Marks doctrine as well as the limitations of the doctrine itself. Thus, while the Marks doctrine creates self-interested incentives to write separately, its limitations act as a check on these incentives. Whether that check is enough to control the pride, prejudice or prudence that causes the Court to issue a fractured decision is questionable. As a result, some plurality decisions are much ado about nothing, but others are a source of ongoing confusion and uncertainty that seriously undermines our system of precedent.

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INTRODUCTION

Plurality court opinions are often created and later applied as precedent with an eye toward pride, prejudice, prudence, or sometimes they are much ado about nothing.\(^1\) Conflicts created by concurrences and pluralities in court decisions may be the epitome of confusion in law and lower court interpretation. The Latin maxim \textit{misera est servitus ubi jus est aut vagum aut incognitum} means that “law performs miserably when it is vague and uncertain.”\(^2\) The judicial world of pluralities and concurrences often enslaves us to the misery of not finding any clarity. Yet, we must try.

In keeping with this Article’s literary play on words in its title for only a moment, consider Shakespeare’s infamous phrase: “The first thing we do, let’s kill all the lawyers.”\(^3\) Few recognize that this statement is widely read in the context of the play, \textit{Henry VI}, as a recognition of the legal profession’s role in preserving the rule of law.\(^4\) Without the rule of law and without attorneys as stewards and guardians of the same, despots could rule unfettered and unchecked.\(^5\) To effectuate

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\(^{1}\) The title of this article is, of course, a play on the words of William Shakespeare and Jane Austen. \textit{William Shakespeare, Much Ado About Nothing} (John F. Cox ed., 1997) (1600); \textit{Jane Austen, Pride and Prejudice} (Pat Rogers ed., 1995) (1813).


\(^{4}\) Discussing Shakspeare’s line, Justice John Paul Stevens wrote that “Dick’s statement (‘The first thing we do, let’s kill all the lawyers’) was spoken by a rebel, not a friend of liberty. . . . As a careful reading of that text will reveal, Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a totalitarian form of government.” Walters v. Nat’l Ass’n of Radiation Survivors, 473 U.S. 305, 371 n.24 (1985) (Stevens, J., dissenting); \textit{see also} Michael Herz, \textit{Washington, Patton, Schwarzkopf and . . . Ashcroft?}, 19 \textit{Const. Comment.} 663, 678 (2002) (discussing Stevens’ dissent).

\(^{5}\) \textit{See} John M. Cleland, \textit{Remembering the Real Role Lawyers Play in Our Society}, 27 \textit{Pa. Law.} 42, 43 (Oct. 2005) (Describing Shakespeare’s line as reminding us that “[l]awyers are skilled in the process of free government -- the process by which we enact the rules of society, question governmental power, test the respective rights of citizens, arbitrate the conflicts of the community and maintain stability and order.”); Stephen D. Easton, \textit{My Last Lecture: Unsolicited Advice for Future and Current Lawyers}, 56 \textit{S.C. L. Rev.} 229, 244 n.37 (2004) (“Indeed, when one studies the origins of one of the quotations most commonly used to deride attorneys - Shakespeare’s ‘[t]he first thing we do, let’s kill all the
rule-of-law values, however, lawyers and others must be able to identify the controlling legal principles. Both the regulators and the regulated must know what the law is, and the concept of precedent plays an enormously influential role in that process. Pluralities and concurrences complicate the task because the vagueness and uncertainty that occur leave us either wondering what the controlling rule is or attempting to predict what it will become.

Quite often (and increasingly), jurists and counselors must navigate the confusing cacophony that results to identify what constitutes controlling precedent.\(^6\) This Article examines some of the means by which they weather the noise, and studies the institutional incentives that might lead to the noise in the first place.

Throughout the historical development of the rule of law, there has been sensitivity to the law’s role in securing predictability, stability, confirmation of investment-backed expectations, as well as confidence in the enforceability of transactions, transferability, transparency, and trustworthiness. None of these things, however, could exist without confidence in precedent.\(^7\)

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\(^6\) See, for example, infra Part III for a discussion of the Marks doctrine as a means of deriving a holding from a fractured decision and infra Part IV to see how lower courts have dealt with the split in Rapanos. For an interesting recent discussion on judicial struggles with uncertainty, see generally ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF JUDICIAL INTERPRETATION 153 (2006).

Legal rules shape our interactions but precedent creates the rule of law; yet it is at least handicapped when confusion infuses our understanding of the applicable rules. When one doth know not the applicable rules, how can one comply? When one must guess in the face of courts providing only plurality guidance, what risks ensue? And perhaps most intriguing, when one is a member of the legal courts capable of creating confusion, what judicial incentives lie therein and how do precedent and the concomitant tribute to rule-of-law values weigh in? Pluralities, decisions where the rationale for a holding is not agreed upon by a complete majority, muddy the waters and leave both lawyers and lower courts struggling to define the existing rule of law.\footnote{The Supreme Court put it even more starkly: "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." Hutto v. Davis, 454 U.S. 370, 375 (1982). See Evan H. Caminker, \textit{Why Must Inferior Courts Obey Superior Court Precedents?}, 46 STAN. L. REV. 817 (1994); \textit{infra} Part III (discussing the \textit{Marks} doctrine as a means of deriving a holding from a fractured decision); \textit{infra} Part IV (recounting how lower courts have dealt with the split in \textit{Rapanos}).} It is, after all, the rationale that often provides the best guidance.\footnote{See \textit{infra} Part III for a discussion of the \textit{Marks} doctrine, which specifically focuses on rationales to create consensus on a point of law.} This Article explores these questions, hypothesizes on why pluralities emerge, and examines their consequences.\footnote{One of the authors of this article, Donald Kochan, engaged in a discourse on this general topic with the Hon. David Sentelle of the U.S. Court of Appeals for the D.C. Circuit, Professor Louis Michael Seidan of Georgetown University Law Center, and Gene C. Schaefer of Winston & Strawn LLP. An audio replay is available at \url{http://www.fed-soc.org/publications/pubID.328/pub_detail.asp}.}

In recent years many lawyers have been confused about the state of the law in certain areas as plurality opinions have proliferated in the Supreme Court. The Rehnquist Court was notorious for having split opinions – blended legal ingredients that even the best legal apothecary might not be able to decipher to identify the solution. This Article uses the recent Supreme Court decision in \textit{Rapanos}\footnote{Rapanos v. United States, 126 S. Ct. 2208 (2006). For popular discussion of the case, see generally Federico Cheever, \textit{Muddled Ruling on Wetlands Leaves Nation With Big Mess}, BAL'T. SUN, June 26, 2006, at A13; Richard A. Epstein, \textit{Trust Busters on the Supreme Court}, WALL ST. J., July 12, 2006, at A16; Linda Greenhouse, \textit{Justices Divided on Protections Over Wetlands}, N.Y. TIMES, June 20, 2006, at A1; Lucy Kafanov, \textit{Dem Takeover Could Mean Effort to Reform Clean Water Act}, EPA, Army Corps, ENV'T & ENERGY DAILY, Nov. 9, 2006, at Vol. 10 No. 9; Edward M. Kennedy, \textit{Roberts and Alito Misled Us}, WASH. POST, July 30, 2006, at B1; David G. Savage, \textit{How Much of an Umpire is the Chief}。”} as a springboard to
explore this topic of concurrences, precedential complexities, and confusion. *Rapanos* has been described by some as failing to provide “intelligible rules that [the regulators and the regulated] can live by,”\(^\text{12}\) as “open-mike night at the judges’ cafe,”\(^\text{13}\) as a court that “dodged the bullet,”\(^\text{14}\) and as providing “fractured decisions”\(^\text{15}\) among various Justices’ opinions. The Article discusses the benefits of uniformity in interpretation and the difficulties that arise when a uniform interpretation cannot be discerned. Thus, Part I explains the concept of precedent and its contribution to the rule of law.

Part II provides a general background on *Rapanos* and the controversy within the environmental community regarding its appropriate interpretation in light of the fact that there was no clear majority. *Rapanos* involves the definition of a wetland under the Clean Water Act (CWA).\(^\text{16}\) This Article explores the rationales behind the split and focuses on where the courts, the regulators, and the regulated go from here. In particular, it addresses how we view Justice Kennedy’s concurring opinion.

The environmental bar has extensively discussed the true precedential meaning of *Rapanos* and whether the “narrowest grounds” rule articulated in *Marks*\(^\text{17}\) dictates that a four-one-four decision means that judges and decision-makers should follow the “one” in the middle. The principal issue, beyond statutory interpretation, is the jurisprudential effect of *Marks* as we move forward in this area. Do we go forward, precedentially, with the test of “four” or the test of “one” or some hybrid? Part III begins to address these issues by introducing the *Marks* doctrine’s ability to assist jurists and others who are wrangling with precedents laden with pluralities. Part of the precedential system is the signaling function to lower courts, and plurality opinions disrupt that signal.

\(^{12}\) Cheever, *supra* note 11.

\(^{13}\) *Id.*

\(^{14}\) Greenhouse, *supra* note 11.

\(^{15}\) Kafanov, *supra* note 11.

\(^{16}\) *Rapanos*, 126 S. Ct. at 2216.

Part IV returns to *Rapanos* as exemplifying the difficult application of law when precedent must be identified by lower courts in the face of Supreme Court “guidance” riddled by the confusion of concurrences. It analyzes lower courts’ reaction to the fractured nature of *Rapanos* – the period we are describing as “re-percolation.” Somewhat surprisingly, courts thus far have not all agreed on a controlling rule, or even whether it is possible to derive a controlling rule from the various opinions. Using *Rapanos* as a case study, this Part explores the difficulties that pluralities create and the concomitant latitude, discretion, and independence such decisions grant to lower courts and future judicial opinions.

Part V provides a brief aside on the potential effect of pluralities on the percolation of legal issues. Indeterminacy may have a utility function in that lower courts are forced to deal with competing standards, allowing a controversy over interpretation to further percolate, providing wisdom to Congress, regulators, and the Supreme Court in a future case. Such a utility function must at least be acknowledged as cacophonies evolve toward clarification and resolution when courts experiment with competing tests. We discuss this phenomenon as “re-percolation,” where the lack of a definitive consensus or interpretation leaves lower courts and policymakers with some latitude to examine the Court’s opinion and further develop the details left unsettled. While the issue was previously sufficiently percolated to entitle it to receive initial review, the plurality result casts the issue back to lower courts, allowing the examination of the competing plurality interpretations, standards, and tests in the lower court laboratory to re-percolate.

Finally, Part VI examines the judicial motives associated with concurrences. Justices must decide whether to write separate opinions, and the legal treatment of the these separate opinions may create incentives to concur rather than join, thus creating the possibility that their nuances on the holding will have greater influence once a case is subsequently applied in the lower courts. Justice Powell’s concurrence in *Regents of University of California v. Bakke*18 is one of the best

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18 438 U.S. 265 (1978). Jeffries explains the influence of Powell’s *Bakke* concurrence:

What no one doubted was that Powell’s opinion was, as Scalia put it, “the law of the land.” Obviously the four-one-four split robbed the decision of a clear majority position, but courts and commentators focused on Powell’s fifth vote, as did admissions departments across the country . . . . . . . . . . . . . .

Even though no one shared Powell’s position, it nevertheless
examples of the “power of one” in the subsequent development and application of law. The first and most obvious consequence of pluralities is that they create uncertainty, unpredictability, and unclear guidance to administrators and those attempting to comply. A second, more cynical consequence is the political economy of judicial decisionmaking – *i.e.*, the idea that if a justice knows he can control the future by authoring a single concurrence and we follow *Marks* to make it controlling, would it not be rational for a judge to do so? He has an opportunity for disproportionate influence by writing separately. If this theory of judge self-interest is true, however, why we ever get majorities must be explored.

ended up defining the kind of affirmative action that a majority of the court was prepared to uphold.

This Article concludes that while the Supreme Court as a whole has an incentive to speak in one voice through a majority opinion to assure clarity of the law, strong incentives exist for individual Justices to concur. Justices who concur—and they are increasingly doing so—recognize the power they hold in shaping the law where they cannot otherwise garner a majority in support of their view. This power, however, is limited in the sense that, under the Marks doctrine, if Justices stray too far from the rationale of the plurality, his or her opinion may not be followed. Thus, while the Marks doctrine creates self-interested incentives to write separately, its limitations act as a check on these incentives.

I. THE ROLE OF PRECEDENT IN LAW

“What’s past is prologue.”\(^{19}\) Precedent is a means of enforcing rule-of-law values such as continuity and predictability.\(^{20}\) Actions,

\(^{19}\) William Shakespeare, The Tempest act II, sc. 1. As Holmes stated, judges depend on an evolutionary progress of the law with adherence to past wisdom: Self-sufficient propositions . . . to understand the scope fully, to know how they will be dealt with by judges trained in the past which the law embodies, we must ourselves know something of the past. The history of what the law has been is necessary to the knowledge of what the law is . . . if old implements could not be adjusted to new uses, human progress would be slow. Oliver Wendell Holmes, Jr., The Common Law & Other Writings 37 (Legal Classics Library ed. 1982).

\(^{20}\) As the leading legal dictionary describes “precedent”: precedent . . . n. 1. The making of law by a court in recognizing and applying new rules while administering justice. . . . 2. A decided case that furnishes a basis for determining later cases involving similar facts or issues. . . . predecential, adj. “In law a precedent is an adjudged case or decision of a court of justice, considered as furnishing a rule or authority for the determination of an identical or similar case afterwards arising, or of a similar question of law. The only theory on which it is possible for one decision to be an authority for another is that the facts are alike, or, if the facts are different, that the principle which governed the first case is applicable to the variant facts.” William M. Lile et al., Brief Making and the Use of Law Books 288 (3d ed. 1914). “A precedent . . . is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the ratio decidiendi. The concrete decision is binding between the parties to it, but it is the abstract ratio decidiendi which alone has the force of law as regards the world at large.” John Salmond, Jurisprudence 191 (Glanville L. Williams ed., 10th ed. 1947). “One may say, roughly, that a case becomes a precedent only for such a general rule as is necessary to the actual decision reached, when shorn of unessential circumstances.” 1 James Parker Hall, Introduction, American Law and Procedure xlviii (1952). “One may often accord respect to a precedent not by
incentives, and investments depend on the identification of controlling legal principles and confidence in the idea that they are generally immutable. 21 In fact, precedents pervade many aspects of life even outside of law and serve as a means of predictability, continuity, and direction. 22 A consistent procession of legal rulemaking in the courts requires an adherence to the past, even when looking toward the future. 23


21 See, e.g., 21 C.J.S. Courts § 194 (“The rule is founded largely on considerations of expediency and sound principles of public policy, to preserve the harmony and stability of the law, and to make as steadfast as possible judicially declared principles affecting the rights of property.”); id. (“[Stare decisis] not only plays important role in orderly adjudication, but also serves the broader societal interests in evenhanded, consistent, and predictable application of legal rules.”); id. (“Doctrine of stare decisis is one of commanding importance, giving, as it does, firmness and stability to principles of law.”); id. (“The doctrine of stare decisis plays a significant role in the orderly administration of justice by assuring consistent, predictable, and balanced application of legal principles . . . .”).


The Supreme Court is particularly important, as our system of precedent revolves around a hierarchy in which inferior courts must follow the decisions of superior courts.24 Underscoring its importance, recent Supreme Court confirmation hearings often involved grilling nominees on their views on precedent and the power or propriety of overruling past decisions.25

Essentially coterminous with precedent is the phrase for its effect – *stare decisis et non quieta movere*, meaning “to stand by matters that have been decided and not to disturb what is tranquil.”26 Finding the balance between past wisdom and prospective application is one of the primary difficulties with courts’ application of and the public’s reliance on precedent.27 As Eastman has explained: "The doctrine of stare decisis as originally understood was grounded in humility – the idea that judges would not lightly reconsider or overturn the considered judgment of their


27 21 C.J.S. *Courts* § 194 (“Bases for rule of stare decisis are: desirability that law furnish a clear guide for conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; importance of furthering fair and expeditious adjudication by eliminating need to relitigate every relevant proposition in every case; and necessity of maintaining public faith in judiciary as source of impersonal and reasoned judgment . . . .”).
predecessors without strong and good reason. Part of what is furthered by the doctrine is efficiency." It is a means to draw on the wisdom of the past.

The essential elements to a legal regime based on the rule of law involve: (1) clear and understandable rules; (2) predictability and certainty; (3) procedural validity in the formation of rules; and (4) rules independent of individual whims of government officials and instead with a basis in established law. The rule of law is fundamental to the legal system. It is fundamentally tied with the concept of freedom,

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29 Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 661-62, 671 (1992) (While skeptical of judges selectively using precedent, the authors acknowledge that "[s]tare decisis is a decisional tool that allows judges to decide cases presenting similar fact patterns and analogous institutional arrangements in the same way as prior judges have decided those cases. . . . By using precedent, a judge can utilize the wisdom of other judges. . . ." Furthermore, "precedent allows judges to check their results against the answers generated by other judges deciding similar kinds of cases."); see also Jonathan R. Macey, *Originalism As An “Ism”*, 19 HARV. J. L. & PUB. POL’Y. 301, 307-308 (1996).


32 As Margaret Thatcher stated, "[t]he freedom of peoples depends fundamentally on the rule of law, a fair legal system. . . . Those who rely on freedom must uphold the rule of law and have a duty and a responsibility to do
and the bargaining between individuals qua individuals and the relations between individuals and their government.\textsuperscript{33} It facilitates exchange because it adds certainty and predictability.\textsuperscript{34} Adherence to precedent is inextricably tied with this goal of the legal structure.

The legal concepts of precedent and \textit{stare decisis} are also highly correlated with the economic theory of "path dependency" – a theory that relates to the importance of ideas and their effect on decisions made in the future and the predictability of legal outcomes.\textsuperscript{35} Prior decisions dictate the path to the future. Judges both adhere to precedent in part because of the path that others have paved, but also depend on a constant evolution of law where a jurisprudential process relies on and builds on its predecessors.\textsuperscript{36}

This task of identifying precedent is all the more complicated when the definition of precedent is indeterminate. Indeterminacy is inherent when pluralities prevail because a decision can become influential even when not binding precedent.\textsuperscript{37} Majority rules when it comes to precedential value (at least in concept),\textsuperscript{38} but the most complicated issues so and not try to substitute their own system for it.” Margaret Thatcher, WIKIQUOTE, http://en.wikiquote.org/wiki/Margaret_Thatcher.


\textsuperscript{34} Lawrence Solum, The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights, 9 U. PA. J. CONST. LAW 155 (2006) (arguing that stability, certainty, and predictability are fundamental values of the rule of law).


\textsuperscript{37} See 20 AM. JUR. 2D Courts § 138 (2007) (“If a majority of the court agreed on a decision in the case, but less than a majority could agree on the reasoning for that decision, the decision has no stare decisis effect.”); id. (“A plurality opinion is said not to be a binding precedent, or, by a related view, to be nonbinding, but of limited precedential value as to the holding but not as to the rationale.”).

\textsuperscript{38} See, e.g., 20 AM. JUR. 2D Courts § 138 (2007) (“For an opinion to have stare
arise when the majority cannot be identified. For now, we focus on the utility of precedent.

There is a strong foundation for the importance of precedent, from the Founding of the American Republic and forward. As Alexander Hamilton explained:

It has been frequently remarked with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them.\(^{39}\)

The constitutional foundation adopted this idea that judicial institutions should be guided by precedent in order to foster a rule of law.

In subsequent years, this did not go unnoticed, as Alexis de Tocqueville commended the American system for its adoption of the concept of precedent as critical to the maintenance of the rule of law:

The English and the Americans have retained the law of precedents; that is to say, they continue to found their legal opinions and the decisions of their courts upon the opinions and decisions of their predecessors. In the mind of an English or American lawyer a taste and a

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\(^{39}\) THE FEDERALIST NO. 78, at 529 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). See also 21 C.J.S. COURTS \$ 202 (“From the very beginnings of the Supreme Court, it has guarded the venerable doctrine of stare decisis.”)
reverence for what is old is almost always united with a
love of regular and lawful proceedings.\textsuperscript{40}

Tocqueville hit on the importance of continuity that manifests itself in an
adherence to precedent.

The doctrine of precedent is rather direct: precedents have
persuasive authority and mandatory authority for lower courts when
similar circumstances arise. Interrelated to this definition is the doctrine
of \textit{stare decisis}, which is the rule that:

\begin{quote}
[W]hen a point or principle of law has been once
officially decided or settled by the ruling of a competent
court in a case in which it is directly and necessarily
involved, it will no longer be considered as open to
examination or to a new ruling by the same tribunal, or
by those which are bound to follow its adjudications,
unless it be for urgent reasons and in exceptional cases.\textsuperscript{41}
\end{quote}

Judicial deviation from precedent is generally disfavored,\textsuperscript{42} "especially
where the precedent has been followed for a long period of years,"\textsuperscript{43} and
departures must be explained "carefully . . . to insure that the court is not
acting in an arbitrary or capricious manner."\textsuperscript{44} It serves a guidance
function for the courts, a predictability function for individuals, a
consistency function for the legal system, and a disciplinary function for
judges.\textsuperscript{45}

\textsuperscript{40} ALEXIS DE TOQUEVILLE, I DEMOCRACY IN AMERICA 276 (Phillips Bradley
\textsuperscript{41} WILLIAM M. LILE ET AL., BRIEF MAKING AND THE USE OF LAW BOOKS 321
(3d ed. 1921).
\textsuperscript{42} 20 AM. JUR. 2D Courts §§ 131-132 (2007).
\textsuperscript{43} 20 AM. JUR. 2D Courts § 131 (2007).
\textsuperscript{44} \textit{Id.}
\textsuperscript{45} As Frank Easterbrook has explained, precedent provides judicial discipline:

A question is debatable when it could be decided in different ways by
reasonable people; it is therefore predictable that debatable questions
will be decided different ways by different judges. Worse, once these
judges begin making inconsistent decisions, contradictions enter the
stock of precedents; and with contradictory premises one can "prove"
any conclusion. So the size of the judicial system plus a norm of
reasoning from premises found in judicial opinions provide powerful
reasons not to let judges make policy decisions - and this even without
The difficulty, of course, lies in the interpretation of precedent. A formal interpretation of “precedent” dictates that cases “officially decided or settled” must be followed in future controversies absent extreme changes in circumstance. However, facts matter and a judge can often rationalize an apparent deviation by emphasizing differences in the facts. Furthermore, *stare decisis* has not been described as an unalterable command, and it is not a binding legal rule “to be blindly followed.” Cross and Harris write that:

The general orthodox interpretation of *stare decisis* . . . is *stare rationibus decidendi* (‘keep to the rationes decidendi of past cases’), but a narrower and more literal interpretation is sometimes employed. To appreciate this narrower interpretation it is necessary to refer . . . to Lord Halsbury’s assertion that a case is only authority for what it actually decides. We saw that situations can arise in which all that is binding is the decision. According to Lord Reid, such a situation arises when the *ratio decidendi* of a previous case is obscure, out of accord with authority or established principle, or too broadly expressed.

Precedent’s power in the legal system relies on it carrying a weight “without the prospect that they will live an ‘indefinite while,’ at least beyond the life expectancy of the Justices deciding them.” Adherence to the rule of law is critical, but problems arise when subsequent inferior courts are confused. When trying to determine what exactly the superior

considering the voting paradoxes identified by Condorcet and his successors.


46 Id. § 131 (2007).

47 Id.

48 Id.

49 Id.


court has actually established, pluralities and concurrences are contributory factors in that confusion.

II. BACKGROUND ON RAPANOS AND THE CONTROVERSY IN ENVIRONMENTAL LAW

Rapanos stems from a long, convoluted history of the Supreme Court’s (and lower courts’) inability to clearly and consistently define “navigable waters” within the context of the Clean Water Act (“CWA”).

The CWA prohibits landowners from discharging pollutants and fill material into “navigable waters” without a permit from the Army Corps of Engineers (the “Corps”). The CWA defines “navigable waters” as “the waters of the United States,” but does not provide a definition for the latter phrase. Prior to the CWA, courts interpreted the term “navigable waters of the United States” to mean water “navigable-in-fact.” However, after the passage of the CWA, regulations promulgated by the Corps expanded and broadened this definition over time to encompass interstate waters and “[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce,” as well as “[t]ributaries of [such] waters” and “[w]etlands adjacent to [such] waters [and tributaries] (other than waters that are themselves wetlands).”

A. PRE-RAPANOS PRECEDENT

Supreme Court precedent on this definition has been a bit schizophrenic as well. In United States v. Riverside Bayview Homes, the Supreme Court held that the Corps did not act unreasonably when it interpreted “navigable waters” as including non-navigable wetlands that were adjacent or connected to navigable-in-fact waters. This decision seemed to support a broader definition for the controversial term.

53 Id. at §§ 1311(a) and 1344(a), (d).
54 Id. at § 1362(7).
55 Rapanos, 126 S. Ct. at 2200 (citing The Daniel Ball, 77 U.S. 557, 557 (10 Wall. 557) (1870)).
56 Id. at 2216 (citing 33 C.F.R. §§ 328.3(a)(2), (3), (5), and (7)) (internal quotations omitted). There were several short articles published in the journal Natural Resources & Environment focused on very practical applications of Rapanos. See generally 22 NAT. RES. & ENV. 3-45 (2007).
Sixteen years later, however, the Supreme Court seemed to tailor such an expansive view in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* (“SWANCC”).\(^{58}\) In *SWANCC*, the Supreme Court invalidated the Migratory Bird Rule, which extended the Corps’ jurisdiction under the CWA to include intrastate wetlands that were not connected to navigable waters if they were used by migratory birds.\(^{59}\) After endeavoring in a statutory analysis, the Supreme Court held that Congress’ definition clearly required that such wetlands would need to be adjacent or connected to navigable waters and that the Migratory Bird Rule would expand the Corps’ jurisdiction under the CWA beyond the scope that Congress permitted.\(^{60}\) Courts have nevertheless tended to favor a broader definition of “navigable waters” perhaps due to the lack of clear guidance from the Supreme Court on the parameters of this term. Unfortunately, the *Rapanos* case may have done little to bring clarity to this jurisprudential mess.

This history set the stage for the *Rapanos* decision, which represents the Supreme Court’s consolidation of two cases that addressed the same issue: whether the terms “navigable waters” and “waters of the United States” in the CWA encompass wetlands which are not navigable themselves and are not adjacent to waters that are navigable, but which are connected to man-made ditches or drains that eventually empty into traditional navigable waters.

The first case, *United States v. Rapanos*, involved John Rapanos filling fifty-four acres of wetlands on three sites he owned in Michigan in order to build a shopping center, but without the appropriate permits and approvals from state officials and the Environmental Protection Agency.\(^{61}\) Before the filling, each of Rapanos’ properties connected remotely to traditional navigable waters, such as the Huron Lake and Tittabawassee River, through ditches or man-made drains and other bodies of water.\(^{62}\) The federal government filed charges against Rapanos.

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\(^{59}\) *Id.* at 163-65.

\(^{60}\) *Id.* at 167-68.

\(^{61}\) *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004) (hereinafter *Rapanos I*); see also *Rapanos*, 126 S. Ct. at 2219 (4-1-4 decision).

\(^{62}\) *Rapanos*, 126 S. Ct. at 2219. Rapanos’ land would become saturated from time to time, but the closest navigable waterway was between eleven and twenty miles away.
claiming civil violations of the CWA. The district court held Rapanos liable for the alleged violations, finding that the wetlands were subject to the CWA because “they were adjacent to other waters of the United States.” The Sixth Circuit Court of Appeals affirmed the district court’s judgment because “there were hydrological connections between all three sites and corresponding tributaries of navigable waters.”

In the other case, Carabell v. United States Army Corps of Engineers, Keith and June Carabell sought to build a 130-unit apartment complex on their nearly twenty acre property, sixteen acres of which were wooded wetlands. Though the Michigan Department of Environmental Quality issued a state permit for an alternative 112-unit condominium development, the Corps denied the Carabells’ permit application to fill their wetlands because of the damage the proposed development would have on the water quality, wildlife, and overall ecology of the area. The Carabells sued claiming that the Corps lacked jurisdiction over their property because their isolated wetlands were not connected to navigable waters of the United States. The district court rejected the Carabells’ assertion, finding that the man-made berm adjacent to the property did not always block overflow from the wetlands from entering a man-made ditch that emptied into a drain that connected to a creek, which eventually emptied into Lake St. Clair. The district court held, and the Sixth Circuit affirmed, that the Carabells’ property was under the jurisdiction of the Corps pursuant to the CWA because this remote connectedness constituted the “significant nexus to the waters of the United States” and the Carabells’ property.

The Supreme Court considered the consolidated cases and concluded with a four-one-four fragmented decision, consisting of a plurality opinion, two concurring opinions, and two dissenting opinions. Justice

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63 Id. at 2219. The federal government also charged Rapanos with criminal violations, and he was convicted on two counts, sentenced to three years probation, and order to pay a $185,000 fine. Rapanos I, 376 F.3d at 633.
64 Rapanos, 126 S. Ct. at 2219.
65 Rapanos I, 376 F.3d at 634; Rapanos, 126 S. Ct. at 2219.
66 Carabell v. U.S. Army Corps of Eng’rs, 391 F.3d 704, 704-06 (6th Cir. 2004). While the case involved a number of petitioners, their claims were nearly identical. We will thus focus on the Carabell’s circumstances for efficiency’s sake.
67 Id. at 706.
69 Rapanos, 126 S. Ct. at 2239.
70 Carabell I, 257 F. Supp. 2d at 931-32; see also Rapanos, 126 S. Ct. at 2240.
Scalia authored the plurality opinion, joined by Chief Justice Roberts and Justices Thomas and Alito. Chief Justice Roberts also wrote a separate concurring opinion. Justice Kennedy concurred with the plurality in the judgment, but did not join the plurality’s opinion and wrote a separate concurring opinion. Justice Stevens wrote a dissenting opinion, joined by Justices Souter, Ginsburg, and Breyer. Finally, Justice Breyer wrote a separate dissenting opinion.

B. JUSTICE SCALIA’S PLURALITY OPINION

Justice Scalia’s plurality opinion (the “Plurality”) took issue with the Corps’ expansive interpretation of the term “navigable waters,” finding that it exceeded the CWA’s scope.71 In response, the Plurality proposed a two-part test in determining the Corps’ jurisdiction over wetlands. The first prong addressed the permanency, or lack thereof, of the waterway. The Plurality concluded that the phrase “the waters of the United States” referred to relatively permanent and continuous bodies of water and did not include channels that intermittently, periodically, or ephemerally allow water to flow or drain to navigable waterways.72 Citing a dictionary definition for water, the Plurality explained that by using “the” and “waters” instead of “water” in the text of the CWA, Congress meant to grant jurisdiction not to water in general, but rather to certain types of waters “found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes.”73 Therefore, for the first prong, the Plurality suggested that “that the adjacent channel contains a “wate[r] of the United States,” ( i.e., a relatively permanent body of water connected to traditional interstate navigable waters).”74

In crafting the second prong, the Plurality acknowledged the inherent ambiguity as to when a body of water begins and ends. Nevertheless, the Plurality relied on Riverside Bayview Homes and SWANCC in explaining that wetlands with only a “physically remote hydrologic connection to ‘waters of the United States’” cannot, by definition, constitute being adjacent to such waters and are thus not subject to the CWA.75 Accordingly, for the second prong, the Plurality limited the Corps’ jurisdiction over wetlands under the CWA to only

71 Rapanos, 126 S. Ct. at 2225.
72 Id.
73 Id. at 2220-21 (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954)) (internal quotation marks omitted).
74 Id. at 2227.
75 Id. at 2226.
those wetlands that had a continuous surface water connection to navigable waters.\textsuperscript{76}

The Plurality justified this two-prong test, in part, based on the express policy of Congress – embodied in the CWA – "to recognize, preserve, and protect the primary responsibilities and rights of the States to present, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . ."\textsuperscript{77} The Plurality noted that adopting the broader definition of "waters of the United States" as proposed by the Corps would render nearly all land use decisions subject to the CWA and thus undermine, if not severely restrict, state and local government autonomy in one of their most significant areas of policymaking.\textsuperscript{78}

C. JUSTICE KENNEDY’S CONCURRENCE

Justice Kennedy concurred in the judgment with the Plurality and agreed that the Corps’ interpretation was overbroad. However, Justice Kennedy advanced a different test, the "significant nexus" test set forth in \textit{SWANCC}: in order for the Corps to have jurisdiction over the wetlands pursuant to the CWA: there must be a significant nexus between the wetlands and the navigable waters.\textsuperscript{79} A wetland meets this significant nexus requirement if "either alone or in combination with similarly situated lands in the region, [it] significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’"\textsuperscript{80} The Corps can also establish jurisdiction if the wetlands are adjacent to navigable-in-fact water.\textsuperscript{81} In this regard, while he agreed with the Plurality that the word "navigable" in the CWA implies some form of limitation on the Corps’ jurisdiction over wetlands, Justice Kennedy rejected the Plurality’s two-part test in favor of the significant nexus test. Justice Kennedy’s concurrence in the judgment and his agreement with the Plurality that the Sixth Circuit incorrectly interpreted the breadth of the term “waters of the United

\textsuperscript{76} Id. at 2225-26.
\textsuperscript{77} Id. at 2223 (quoting 33 U.S.C. § 1251(b)) (2000) (internal quotation marks omitted).
\textsuperscript{78} Id. at 2223; see also Richard Briffault, The Role of Local Control in School Finance Reform, 24 CONN. L. REV. 773, 784 n.48 (1992) (describing land use as “the most important local regulatory power”).
\textsuperscript{79} \textit{Rapanos}, 126 S. Ct. at 2241 (Kennedy, J., concurring).
\textsuperscript{80} Id. at 2248.
\textsuperscript{81} Id. at 2249.
States,” led to the Sixth Circuit’s decisions in *Rapanos* and *Carabell* being vacated and remanded for further proceedings.  

**D. CHIEF JUSTICE ROBERTS’ CONCURRENCE**

Chief Justice Roberts wrote separately to provide guidance to lower courts as to how to interpret the *Rapanos* decision. Specifically, Chief Justice Roberts noted that the challenge for lower courts in interpreting a non-majority decision was not without precedent.  

Chief Justice Roberts suggested that lower courts apply the *Marks* doctrine to the *Rapanos* case based on the non-majority opinion.

**E. JUSTICE STEVENS’ DISSENT**

Justice Stevens’ dissent argued that because the CWA is not clear, the Supreme Court, and by extension lower courts, should defer to the Corps’ reasonable statutory interpretation. Justice Stevens also claimed that *Riverside Bayview Homes* controlled the cases before the Court. Finally, and perhaps most interestingly, Justice Stevens also suggested some guidance for the lower courts: that a court should find that the Corps has jurisdiction if *either* the plurality test or Justice Kennedy’s test is met. Justice Stevens supported this contention by pointing to the fact that he and the other three Justices who joined his dissenting opinion — Justices Souter, Ginsburg, and Breyer — would uphold the Corps’ jurisdiction under either of these two tests:

> Given that all four Justices who have joined this opinion would upholds the Corps’ jurisdiction in both of these cases—and in all other cases in which either the plurality’s or Justice Kennedy’s test is satisfied—on

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82 *Rapanos*, 126 S. Ct. at 2214.
83 *Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring) (noting that none of the opinions “command[ed] a majority of the Court on precisely how to read Congress’ limits on the reach” of the CWA).
84 *Id.*
85 *Rapanos*, 126 S. Ct. at 2265 (Stevens, J., dissenting); see also *id.* at 2253 (citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 47 U.S. 121 (1985)). The dissenters in *Rapanos* would apply the well-known *Chevron* doctrine, which requires judicial deference to an administrative agency’s reasonable interpretation of ambiguous statutory language. *Id.*
86 *Rapanos*, 126 S. Ct. at 2255.
87 *Id.* at 2265.
remand each of the judgments should be reinstated if
either of those test is met.88

III. THE MARKS DOCTRINE AND ITS IMPLICATIONS FOR PRECEDENT

Many jurists, commentators, and lawyers recognize that the
precedential value of nonmajority opinions is often uncertain.89 A
plurality decision generally cannot overrule prior precedent.90 In a
fractured decision such as Rapanos, the plurality opinion does not
necessarily even state the holding of the case, a fact sometimes

88 Id.
89 See, e.g., John F. Davis & William L. Reynolds, Juridical Cripples: Plurality
Opinions in the Supreme Court, 1974 DUKE L.J. 59 (1974); Ken Kimura, A
Legitimacy Model for the Interpretation of Plurality Decisions, 77 CORNELL L.
REV. 1593 (1992); G.P.J. McGinley, The Search for Unity: The Impact of
Consensus Seeking Procedures in Appellate Courts, 11 ADEL. L. REV. 203
(1987); Burt Neuborne, The Binding Quality of Supreme Court Precedent, 61
TUL. L. REV. 991 (1987); Laura Krugman Ray, The Justices Write Separately:
Uses of the Concurrency by the Rehnquist Court, 23 U.C. DAVIS L. REV. 777
(1990); David C. Bratz, Comment, Stare Decisis in Lower Courts: Predicting
the Demise of Supreme Court Precedent, 60 WASH. L. REV. 87 (1984); Adam
S. Hochschild, Note, The Modern Problem of Supreme Court Plurality
Decisions: Interpretation in Historical Perspective, 4 WASH. U. J. L. & POL’Y
261 (2000); Igor Kirman, Note, Standing Apart To Be a Part: The Precedential
Value of Supreme Court Concurring Opinions, 95 COLUM. L. REV. 2083 (1995);
Linda Novak, Note, The Precedential Value of Supreme Court Plurality
Decisions, 80 COLUM. L. REV. 756 (1980); William G. Peterson, Note,
Splintered Decisions, Implicit Reversal and Lower Federal Courts: Planned
and Judicial Decisionmaking, 94 HARV. L. REV. 1127 (1981); Comment,
Supreme Court No-Clear-Majority Decisions: A Study in Stare Decisis, 24 U.
CHI. L. REV. 99 (1956); Mark Alan Thurmon, Note, When the Court Divides:
Reconsidering the Precedential Value of Supreme Court Plurality Decisions, 42
DUKE L.J. 419 (1992); cf. Erwin Chemerinsky & Barry Friedman, The
in the context of civil procedure).
90 See Stanley K. Laughlin, Jr., Cultural Preservation in Pacific Islands: Still a
may choose, however, to adopt plurality or other minority positions at a later
point in time. For example, in Regents of the University of California v. Bakke,
438 U.S. 265 (1978), lower courts had divided over whether, under the Marks
rule, Justice Powell’s solo opinion was controlling as the holding of that case.
Recently, in Grutter v. Bollinger, 539 U.S. 306 (2003), the majority of the Court
decided to adopt Justice Powell’s position in Bakke without resolving the
controversial question of whether it had been the law in the interim between the
two cases. See also supra note 18.
overlooked, perhaps out of desire for a rule of law or simply to resolve the case before the court. Although the plurality opinion could represent the holding of the case under the Marks doctrine, that is not automatically so.

Chief Justice Roberts’ lament that the Court did not reach a majority in Rapanos reflects both his desire for more agreement within the Court, one of the goals he mentioned during his confirmation hearings, and his acknowledgement that lower courts will have to deal with the repercussions of the Court’s fractured opinion. His citation to Marks v. United States in Rapanos certainly suggests that he believes the Marks doctrine applies to the case.

In Marks, the Supreme Court directed 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.” The controlling precedent, therefore, is not necessarily the plurality opinion, but the opinion that “represent[s] a common denominator of the Court’s reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment.”

While relatively straightforward in theory, in application this doctrine has proven troublesome to both the lower courts and the Supreme Court itself. The origins and rationales of the doctrine thus require closer examination.

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92 See Rapanos, 126 S. Ct. at 2236 (Roberts, C.J., concurring). Although Justice Stevens does not cite to Marks, he suggests in his dissent that either the plurality’s or Justice Kennedy’s test is now the law because a majority of five justices would assent to jurisdiction. See infra Part IV. This suggestion has been accepted by the Department of Justice, the Environmental Protection Agency, and the Army Corps of Engineers as well as several lower courts. See infra Part IV.B.
93 See Marks, 430 U.S. at 193 (citing Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)).
A. GENESIS OF THE MARKS DOCTRINE

The Marks doctrine was born out of a series of obscenity cases. In Marks, the petitioners challenged their obscenity conviction on the grounds that they had been punished retroactively by jury instructions that were modeled on a case decided after petitioners’ conduct occurred. Petitioners maintained that the later decision relaxed the relevant legal standard for evaluating their conduct as compared with the most recent Supreme Court decision issued before their conduct, which had failed to garner a majority. In resolving the case in the petitioners’ favor, the Court clarified the rule for identifying the holding in a fractured decision.

Before Marks, the Court issued three relevant decisions concerning the definition of punishable obscenity: Roth v. United States in 1957, Memoirs v. Massachusetts in 1966, and Miller v. California in 1973. Petitioners had distributed obscene materials between the time that the Supreme Court issued Memoirs, a plurality decision that articulated a relatively strict standard for state prosecutions, and the time it issued Miller, a majority decision that embraced a more relaxed

easily stated than applied.”); Tyson Snow, Adding Marks to the Mix of an Already Muddled Decision Regarding Public Forums and Freedom of Speech on the Internet, 19 BYU J. PUB. L. 299, 304 (2004); see also Hopwood v. Texas, 236 F.3d 256, 275 n.66 (5th Cir. 2000) (criticizing the Ninth Circuit Court of Appeals’ application of Marks in Smith v. University of Washington, 233 F.3d 1188 (9th Cir. 2000)).

96 Marks, 430 U.S. at 189-91.
97 Id.
98 Id. at 193. Justice Powell wrote for a majority of five. Even though Justice Brennan, writing for three, and Justice Stevens, writing for himself, filed separate opinions concurring in part and dissenting in part, neither expressed disagreement with the narrowest grounds rule. Thus, the Court suggested unanimous agreement on this point. See Maxwell L. Stearns, The Case for Including Marks v. United States in the Canon of Constitutional Law, 17 CONST. COMMENT. 321, 330-31 (2000); see also MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 323 n.4 (2000). In their separate opinions, the Justices wrote that they would have reversed on First Amendment grounds rather than remanded with a new standard. See Marks, 430 U.S. at 197 (Brennan, J., concurring in part and dissenting in part); id. at 198 (Stevens, J., concurring in part and dissenting in part).
100 383 U.S. 413 (1966).
standard for punishable obscenity. To better understand the Court’s analysis in *Marks*, it is useful to consider these cases in the order in which they were decided.

In *Roth*, the Court announced a three-part test for obscenity prosecutions: “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest.” Subsequently, in *Memoirs*, a plurality of three Justices, Justices Brennan, Fortas and Chief Justice Warren, articulated a stricter standard for obscenity prosecutions. In their view, the “three elements must coalesce” before materials can be deemed punishable obscenity that lies beyond the protection of the First Amendment:

It must be established that (a) the dominant theme of the material taken as a whole appeals to the prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

This opinion added two elements, prongs (b) and (c), to the existing *Roth* standard. The third element, prong (c), requiring that the material be “utterly without redeeming social value,” proved to be problematic and was later rejected by the Court in *Miller*.

In *Memoirs*, the concurring opinions of Justices Black and Douglas adhered to the Justices’ “well-known position that the First Amendment provides an absolute shield against governmental action aimed at suppressing obscenity.” In his brief concurring opinion, Justice Stewart reasserted his belief that only “hard-core pornography” may be constitutionally suppressed as obscene. In three separate dissents,
Justices Clark and White adhered to the statement of obscenity articulated in Roth,\(^{109}\) and Justice Harlan reasserted the view he had previously articulated in Roth, that the First Amendment requires only a rational basis test for states.\(^{110}\)

In Miller, the Court finally reached a majority decision, redefining the standard for punishable obscenity as:

(a) whether the “average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically, defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.\(^{111}\)

In doing so, the Miller Court explicitly rejected the third prong of the plurality’s test in Memoirs, that the material be “utterly without redeeming social value.”\(^{112}\)

In Marks, the Court was faced with determining the precedential value of Memoirs. Petitioners argued that the jury instruction modeled on Miller violated their due process rights not to be convicted based on a rule announced after the conduct giving rise to their prosecution and that it cast a “wider net than Memoirs” by which “petitioners charted their course of conduct.”\(^{113}\) Both the district court and the Sixth Circuit rejected this argument. First, they rejected the argument that Miller “unforeseeably expanded the reach of the federal obscenity statutes beyond what was punishable under Memoirs.”\(^{114}\) Second, because the

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\(^{109}\) Id. at 441-42 (Clark, J., dissenting); id. at 461 (White, J., dissenting).

\(^{110}\) Id. at 456 (Harlan, J., dissenting) (“My premise is that in the area of obscenity the Constitution does not bind the States and the Federal government in precisely the same fashion.”).

\(^{111}\) Miller, 413 U.S. at 24 (internal citations omitted).

\(^{112}\) Id. at 24 (internal citations omitted).

\(^{113}\) Marks, 430 U.S. at 191. Petitioners’ argument was analogous to one arising under the ex post facto clause, U.S. Const. Art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”), which, although only applying to legislation, prohibits the retroactive criminalization of conduct. See Bouie v. City of Columbia, 378 U.S. 347 (1964) (extending protection under the Fourteenth Amendment’s Due Process Clause to strike down a conviction based on a court’s retroactive application of an expanded statute).

\(^{114}\) Marks, 430 U.S. at 192.
standard announced by the Memoirs plurality did not command the support of more than a minority of three Justices at one time, the Sixth Circuit concluded that “Memoirs never became the law.”

The Supreme Court disagreed. Writing for the Court, Justice Powell explained that for the petitioners to succeed with their due process challenge, they had to demonstrate both that the Memoirs plurality decision was announced as the Court’s holding and that following Memoirs, Miller stated a new rule of law. Justice Powell determined that, because the lower courts erroneously found that Memoirs never became the law, they incorrectly viewed the issue as whether Miller significantly altered the obscenity standard articulated in Roth. According to Justice Powell, such reasoning was faulty because “[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 the Members who concurred in the judgments on the narrowest grounds.’”

Once articulated, the Marks Court found it fairly easy to apply this “narrowest grounds” rule to Memoirs. In Memoirs, Justices Black and Douglas would have prevented criminalizing any conduct on the grounds that the material in question was proscribable obscenity and Justice Stewart would have only permitted hard-core pornography to be proscribed as obscene. The Brennan plurality opinion, in contrast, struck down the conviction but would have permitted a broader range of state and federal statutes proscribing materials as obscene to be upheld. Consequently, while the plurality struck down the conviction, it did so on the narrowest grounds.

The Court further bolstered its interpretation of the holding in Memoirs by observing that every federal court of appeals, except the Sixth Circuit, had read Memoirs in this way when considering the

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115 Id. Ironically, the Sixth Circuit itself was split 2-1 in Marks.
116 See id. at 188, 190.
117 Id. at 192. The Court agreed Miller did not substantially change Roth’s standard. Id.
118 Id. at 194.
120 The converse proposition also holds true. For example, in cases upholding a law from a constitutional challenge, the opinion that resolves the case on the narrowest grounds is the opinion that would uphold the fewest laws.
issue. The Court then made several conclusions. First, it held that "Memoirs therefore was the law." Second, it held that "Miller did not simply clarify Roth; it marked a significant departure from Memoirs," by "expand[ing] criminal liability relative to the Memoirs' 'utterly without redeeming social value' standard for proscribable obscenity." Thus, it ultimately found that the petitioners were entitled to jury instructions based on the Memoirs plurality opinion because it was the "narrowest grounds" for the judgment in Memoirs.

Interestingly, the "narrowest grounds" language used by the Court in Marks is itself a quotation from Gregg v. Georgia, an Eighth Amendment case decided one year earlier in 1976. In Gregg, the Court analyzed Furman v. Georgia, which examined the constitutionality of the death penalty as imposed under a Georgia statute. In Furman, five Justices agreed that the death penalty was unconstitutional as imposed in the case. Two of these Justices, however, took the position that capital punishment was unconstitutional per se. The other three Justices did not agree that the death penalty was unconstitutional per se, but found it was unconstitutional as applied in that case. The Gregg Court therefore concluded that "[s]ince five Justices wrote separately in support of the judgments in Furman, the holding of the Court may be viewed as that position taken by those Members who concurred in judgments on the narrowest grounds." Despite this earlier use in Gregg, the "doctrine" is named for the Marks case.

B. JUSTIFICATIONS FOR THE DOCTRINE

Both the Gregg and the Marks Courts stated and applied the narrowest grounds rule without elaborating on the rationale underlying the rule. Rather, they treated the situation as fairly straightforward. Yet the justifications for the rule are critical to evaluating the doctrine’s advantages and disadvantages, as many cases are not so straightforward.

121 Marks, 430 U.S. at 194.
122 Id.
123 Id.
124 Id. at 196-97. The Court also noted that "any constitutional principle enunciated in Miller which would serve to benefit petitioners must be applied in their case." Id. (quoting Hamling v. United States, 418 U.S. 87, 102 (1974)).
126 408 U.S. 238 (1972).
127 Id.
128 Id.
129 Gregg, 428 U.S. at 169 n.15.
When the Supreme Court delivers a majority opinion, it approximates the single judge model of precedent, and the clarity and predictability of law that accompanies that model.\textsuperscript{130} But when the Supreme Court fails to garner a majority, particularly a majority behind the judgment, it moves away from this model and consequently significantly increases the burden on lower courts that are required to follow its decision.\textsuperscript{131} At bottom, the \textit{Marks} doctrine represents an effort to reconcile the problems created by a fragmented Court by deriving a majority opinion on one or more points of law.\textsuperscript{132}

Two justifications for the \textit{Marks} doctrine are frequently put forth: “implicit consensus” and predictive value. The first justification, “implicit consensus,” looks for implicit agreement or logical connection between the reasoning contained in the opinions of the concurring Justices.\textsuperscript{133} This justification assumes that a common thread runs through the reasoning of the various opinions in a plurality decision. 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.”\textsuperscript{134} This “least common denominator” approach ascribes agreement to the Justices on the reasoning for the result. By imputing consensus in this way, it lends the imprimatur of a holding, as though from a majority opinion, to the narrowest grounds of a fractured opinion.\textsuperscript{135} Lower courts seek such imprimatur when determining the controlling rule from a case. But this justification has a major flaw: in some cases, no consensus, implicit or otherwise, exists. Implicit consensus can only be realized when the least common denominator –

\textsuperscript{130} See Thurmon, \textit{supra} note 89, at 427.
\textsuperscript{131} See \textit{id.}
\textsuperscript{132} See \textit{id.}
\textsuperscript{133} See \textit{id.} at 428.
\textsuperscript{135} \textit{See, e.g.,} King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc) (collecting cases that have followed Justice O’Connor’s opinion from \textit{Delaware Valley II} and noting that “[i]n our prior opinions interpreting \textit{Delaware Valley II}, we, like other circuit courts, have assumed that Justice O’Connor’s concurrence controls”). The D.C. Circuit found the \textit{Marks} rule inapplicable “[b]ecause [Justice O’Connor’s] answer to that question [of how to calculate an enhancement award] is so clearly at odds with that of the plurality, however we are left without a controlling opinion or a governing test. . . .” \textit{Id.} at 783; \textit{see also} Thurmon, \textit{supra} note 89, at 434. \textit{But see} Islamic Center of Miss. v. City of Starkville, 876 F.2d 465, 471 (5th Cir. 1989) (following Justice O’Connor’s concurrence).
the “narrowest grounds” – is logically enveloped by broader positions. While this may have been true in *Marks*, it is not always the case.\(^{136}\)

When genuine agreement on the reasoning is lacking, the search for implicit consensus devolves into a search that may associate Justices with propositions they expressly rejected.\(^{137}\) In these cases, the implicit consensus justification fails. As explored in the next Part, at least some lower courts and commentators view the opinions in *Rapanos* as not reconcilable with the narrowest grounds approach; in other words, no implicit consensus can be garnered from the opinions because the Justices’ reasoning is simply too divergent.

A second justification for the *Marks* doctrine, predictive value, is based on the idea that “[t]he principle objective of this *Marks* rule is to promote predictability in the law by ensuring lower court adherence to Supreme Court precedent.”\(^{138}\) For some, this “predictive model” offers a more sustainable justification for the *Marks* doctrine.\(^{139}\) Essentially, this justification is based on the idea that “the controlling opinion in a splintered decision is that of the Justice or Justices who concur on the ‘narrowest grounds’” because this narrowest ground represents a legal standard that may accurately predict what the Supreme Court would do when faced with a similar factual situation.\(^{140}\) While this model is attractive as a justification and views the *Marks* doctrine as simply an application of *stare decisis*, it has been criticized as failing to accurately predict the outcome of future Supreme Court decisions.\(^{141}\) For instance,

\(^{136}\) Commentators disagree on whether the *Marks* Court successfully applied the narrowest grounds rule. See, e.g., Thurman, *supra* note 89, at 434-35 (arguing that the *Marks* Court misread the opinions in *Memoirs*).

\(^{137}\) See Thurman, *supra* note 89, at 430.


\(^{139}\) See Thurmon, *supra* note 89, at 435.

\(^{140}\) *Casey*, 947 F.2d at 693; see also Thurmon, *supra* note 89, at 435-42. For example, in *Marks*, the Court interpreted *Memoirs* in the following manner: any material that fails to satisfy the plurality’s stringent three-part obscenity test will be held protected by the First Amendment because the more absolute positions of the concurring Justices would necessarily protect such matter, thereby comprising a majority. If, on the other hand, material is determined to be obscene under the plurality’s test, the dissenters would likely agree, thereby comprising a majority. Therefore, although the plurality’s test in *Memoirs* was rejected by six Members of the Court, it was decisive, because it was the narrowest position necessary to form a majority, and thus should reliably forecast future results. *Marks*, 430 U.S. at 193-94.

\(^{141}\) See Thurman, *supra* note 89, at 435-42 (examining a line of cases in which the *Marks* doctrine has failed to accurately predict the outcome of future
Justices may retire or reconsider their position when confronted with a new set of facts.

Moreover, the predictive justification is controversial because it may afford full precedential weight to reasoning that did not enjoy majority assent.\footnote{See Thurmon, supra note 90, at 436; W. Jesse Weins, Problematic Plurality Precedent: Why the Supreme Court Should Leave Marks Over Van Orden v. Perry, 85 NEB. L. REV. 830, 836-37 (2007). While this is troubling in the fractured opinion settling, we do not tend to draw distinctions between a close majority (5-4) and a stronger majority (8-1) in terms of ascribing precedential weight. Even unanimous decisions are not necessarily valued any differently as precedent.} Using the narrowest ground rule to require lower courts to consult the views of dissenting Justices who do not even agree with the result in the case is a questionable but common practice.\footnote{See Earl M. Maltz, The Function of Supreme Court Opinions, 37 HOUSTON L. REV. 1395, 1411 (2000).} For example, lower courts may derive a “holding” from the narrowest ground on which a concurring Justice and dissenting Justices agree in order to comprise a majority.\footnote{This problem arose in the context of lower court’s interpretation of Rapanos. See infra Part IV.} Whether the Marks doctrine should operate in this way is certainly debatable.\footnote{This debate has arisen in the context of Rapanos. See Bradford C. Mank, Implementing Rapanos—Will Justice Kennedy’s Significant Nexus Test Provide a Workable Standard for Lower Courts, Regulators and Developers?, 40 IND. L. REV. 291, 294-95, 343-44 (2007) (noting this debate and discussing statements to Senate subcommittee in Aug. 2006). Compare Jonathan H. Adler, Reckoning With Rapanos: Revisiting “Waters of the United States” and the Limits of Federal Wetland Regulation, 14 MO. ENVTL. L & POL’Y REV. 1 (2006) (interpreting Marks as forbidding consideration of the dissent as a “holding” of the Court and stating that “[n]othing in the dissent constitutes a portion of the judgment of the Court, so nothing in the dissent is part of the actually holding of the case”) with Recent Supreme Court Decisions Regarding the Clean Water Act.”} It is clear, however, that in such Supreme Court cases. But see Stearns, supra note 98 (arguing that the Marks doctrine is essential to understanding major parts of the Supreme Court’s jurisprudence and illustrating its usefulness with examples). Whether lower courts should engage in prediction has been debated more broadly in other contexts. See, e.g., Evan H. Caminker, Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking, 73 TEX. L. REV. 1 (1994) (arguing in favor of lower courts using prediction in some circumstances); Michael C. Dorf, Prediction and the Rule of Law, 42 UCLA L. REV. 651 (1995) (arguing that the prediction model undermines the rule of law by overemphasizing individual judges and thus lower courts should not engage in prediction).
situations, the predictive ability of the model fails, yet the reasoning of this “majority” comprised of primarily dissenters continues to be applied as a governing rule of law.  


In the United States juridical system, five aligned votes by Supreme Court justices make a binding precedent. As indicated by the brief concurring opinion of Chief Justice Roberts, if the Court is splintered, the narrowest opinion, here Justice Kennedy’s, would be the key. As the Chief Justice states through his citation to Marks v. United States, the question is whether a “single rationale explaining the result enjoys the asset of five Justices.” Here, Justice Kennedy’s concurring Rapanos opinion shares substantial overlap with the dissenters’ approaches. The dissenters would have deferred even more than Justice Kennedy to regulators’ judgments, but in all parts of their opinion, the dissenters would protect waters at least to the extent set forth by Justice Kennedy. They repeatedly and explicitly agree with the rationales for federal protection set forth in the Justice Kennedy concurrence. Whether taken by itself as the “narrowest opinion,” or as an opinion with underlying rationales agreed upon by five justices, Justice Kennedy’s opinion is the key.

Buzbee Statement (cited in Mank, supra note 145, at 345). Professor Mank agrees with Professor Buzbee’s interpretation of Marks. See Mank, supra note 145, at 345. This Article does not take a position on this practice. One of the authors plans to address this issue in a future article examining the Marks doctrine in greater detail.

146 See, e.g., Santillanes v. United States Parole Comm’n, 754 F.2d 887 (10th Cir. 1985) (applying dissenting rationale to find narrowest grounds).
Such failure of predictability results in uncertainty regarding legal standards, particularly in the period between lower courts interpretations of fractured opinions and the Supreme Court’s later, conflicting resolution.\(^{147}\) In addition, the Court’s own failure to apply the *Marks* doctrine regularly contributes to the very uncertainty that the predictive model justification seeks to avoid.\(^{148}\) Unlike lower courts, though, the Supreme Court is not absolutely bound by its own precedent.\(^{149}\) Yet the Court frequently even fails to cite *Marks* in situations where it may apply.

For example, the Court seldom reconsiders the merits of the narrowest grounds position in a prior plurality decision.\(^{150}\) This is understandable; perhaps, if many of the same Justices are still on the Court because they will likely adhere to their earlier positions.\(^{151}\) If the Court, however, has experienced turnover since its prior plurality decision, new Justices may adopt new positions which could not be predicted.\(^{152}\) In either situation, the Court’s failure to apply *Marks* tends to perpetuate the confusion caused by its fractured decisions.

\(^{147}\) See Thurmon, *supra* note 89, at 435.

\(^{148}\) See id. at 436. For example, the Court missed an opportunity to apply the *Marks* doctrine in *Casey*, 947 F.2d at 693. The Third Circuit Court of Appeals relied heavily on *Marks* to determine the governing standard for reviewing abortion regulations under Webster v. Reproductive Health Services, 492 U.S. 490 (1989). *Casey*, 947 F.2d at 693 (finding Justice O’Connor’s “undue burden” standard the “narrowest grounds” in *Webster*). The dissenters in the Supreme Court’s decision in the case cited *Marks*. *Casey*, 505 U.S. at 944 (Rehnquist, C.J., dissenting, joined by White, Scalia and Thomas, J.J.). Ironically, *Casey* is also a plurality decision that was recently revisited by the Court in the 2006-07 Term abortion case. See Gonzales v. Carhart, 127 S. Ct. 1610 (2007).

\(^{149}\) This reflects what is termed “horizontal” *stare decisis*, the precedential weight the Supreme Court ascribes to its own prior decisions, which do not absolutely bind the Court. Lower courts are also bound by vertical *stare decisis*; they must follow all Supreme Court decisions. See also infra Part I for a discussion of *stare decisis*.

\(^{150}\) See Thurmon, *supra* note 89, at 437.

\(^{151}\) See infra Part IV.

\(^{152}\) Miller v. California, 413 U.S. 15 (1973) provides an excellent example of this result. A five-Judge turnover had occurred since *Memoirs* was decided: Justices Warren, Clark, Fortas, Black and Harlan left the Court and were replaced by Justices Burger, Marshall, Blackmun, Powell and Rehnquist. Four of the five new Justices (all but Justice Marshall), rejected the *Memoirs* plurality’s obscenity test. *Miller*, 413 U.S. at 23. Interestingly, the *Miller* majority claimed reliance on the *Roth* standards, just as the plurality had in
Despite its apparent difficulties, the principle established in Marks is arguably justified as important to judicial lawmaker.\textsuperscript{153} Where it applies, the Marks doctrine supports the rule of law and provides clarity, predictability and guidance for lower courts. One of the biggest practical shortcomings of the doctrine, however, is that it is not universally applicable.\textsuperscript{154} Although the Court has not elaborated on the meaning of “narrowest grounds,” it has been interpreted to refer to “the ground that is most nearly confined to the precise fact situation before the Court”\textsuperscript{155} or “the rationale offered in support of the result that would affect or control the fewest cases in the future.”\textsuperscript{156} Consequently, Marks fails to provide useful guidance in those cases in which different Justices take different approaches to the issues that do not fall into a broader-narrower continuum. Courts unable to find any logical connection between the opinions of the concurring Justices in the most fragmented decisions have taken a haphazard approach to plurality decisions that produce widely varying results.\textsuperscript{157}

This very real problem has manifested in the wake of Rapanos and is the subject of the next Part of this Article. In Rapanos and other fractured cases, if the plurality opinion represents the holding of the case, it is so because it is the narrowest ground upon which the case was decided, not because it is the opinion which has the most justices adhering to it. But it appears that some lawyers and other legal writers, even judges, “are simply unaware of the [narrowest grounds] rule.”\textsuperscript{158} These lawyers, and in some cases judges, may erroneously conclude that a plurality opinion is the law of the case without applying the Marks doctrine.\textsuperscript{159} Others misapply the Marks rule and find controlling precedent where none exists.

\textit{Memoirs. See Miller, 413 U.S. at 36-37; A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Attorney Gen. of Mass., 383 U.S. 413, 418 (1966).}\\\textsuperscript{153} See Maltz, supra note 143, at 1413.\\\textsuperscript{154} See Thurman, supra note 89, at 442.\\\textsuperscript{155} Snow, supra note 95, at 304 (citing United Sates v. Martino, 664 F.2d 860, 872-73 (2d Cir. 1981)).\\\textsuperscript{156} Id. (quoting Linda Novak, Note, The Precedential Value of Supreme Court Plurality Opinions, 80 COLUM. L. REV. 756, 764 (1980)).\\\textsuperscript{157} See Thurman, supra note 89, at 442 (citing examples).\\\textsuperscript{158} Laughlin, supra note 90, at 362.\\\textsuperscript{159} Before Marks, this was a relatively common practice, but it is no longer recognized as valid. See Adam Hochschild, The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective, 4 WASH. U. J. L. & POL’Y 261, 279 (2000).
Where the *Marks* rule does easily apply, in those opinions written along a continuum of broad to narrow reasoning, it is an enormously useful doctrine that provides guidance for lower courts deciphering fractured decisions. Where the opinions are too divergent, however, it fails to provide either implicit consensus or predictive value, leaving lower courts without a clear legal standard to apply.

IV. *Rapanos* as a Case Study of the Application of *Marks* and the Jurisprudential Difficulties Presented by Pluralities: The Burden of Fragmentation on Lower Courts and Regulators

*Rapanos v. United States* is the latest example of both the usefulness and the limitations of the *Marks* doctrine. As Chief Justice Roberts observed in his concurrence in that case, the Court’s failure to issue a majority opinion means that “[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis.” Since the Supreme Court issued its fractured decision, the lower courts have had difficulty interpreting *Rapanos*, and they have not reached a consensus as to whether the plurality’s or Justice Kennedy’s test is controlling. Most of the courts tasked with the challenge of determining which *Rapanos* test, if any, is controlling have applied, or better put, attempted to apply, the *Marks* doctrine. Somewhat surprisingly given the predictions that Justice Kennedy’s opinion constitutes the holding, out of the courts that recognized the *Marks* doctrine, only half of the courts applied it and concluded that Justice Kennedy’s test is the controlling rule of law. The other half concluded that the *Marks* doctrine is inapplicable to *Rapanos*.  

160 *Rapanos*, 126 S. Ct. at 2208.
162 Most commentators assumed that lower courts would accept Justice Kennedy’s significant nexus test as the law. *See, e.g.*, Adler, *Reckoning With Rapanos*, supra note 145, at 14; Mank, supra note 145, at 337-38.
163 *See* United States v. Robison, 505 F.3d 1208 (11th Cir. 2007); N. Cal. River Watch v. City of Healdsburg, 457 F.3d 1023, 1029 (9th Cir. 2006) (*River Watch I*); N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 1000-01 (9th Cir. 2007) (*River Watch II*); United States v. Gerke Excavating, Inc., 464 F.3d 723, 725 (7th Cir. 2006); *see also* S.F. Baykeeper v. Cargill Salt Division, Nos. 04-17554 and 05-15051, 2679 (9th Cir. 2007) (following *Healdsburg* and noting in passing that Justice Kennedy’s opinion is the controlling opinion). District courts in these jurisdictions have followed their circuit precedent established by these decisions. *See, e.g.*, Env’tl Prot. Info. Ct. v. Pac. Lumber Co., 469 F. Supp. 2d 803, 822 (N.D. Ca., 2007); United States v. Fabian, 522 F. Supp. 2d
Regulators have similarly struggled with discerning the appropriate legal standard from the fractured Rapanos decision. They took almost a year to issue guidance on this very topic, leaving the regulated subject to uncertainty and inconsistency in the meantime. Significantly, the regulators agree with the majority of courts considering the issue thus far: the recently released guidance documents essentially provide that the regulators may assert jurisdiction under the CWA if either the plurality’s or Justice Kennedy’s test is satisfied. All of this might be considered evidence of the re-percolation of the issues presented in Rapanos and the interpretation of the CWA.

A. LIFE IN THE LOWER COURTS: “FEEL[ING] THEIR WAY”

Taking three divergent approaches, courts indeed have been “feel[ing] their way” in the post-Rapanos world.\(^{165}\) Under the first approach, which is perhaps the most predictable given Justice Roberts’ Marks reference in his concurring opinion,\(^{166}\) courts have utilized the doctrine to discern the controlling test.\(^{167}\) Somewhat surprisingly, however, half of the courts to consider the issue so far have found that the nature of the opinions in Rapanos prevents the application of the Marks doctrine. These courts have followed a second approach, one suggested by Justice Stevens in his dissent: they concluded that CWA jurisdiction is met when either the plurality’s or Justice Kennedy’s test is


\(^{166}\) Rapanos, 126 S. Ct. at 2236.

\(^{167}\) River Watch I, 457 F.3d 1023; Gerke Excavating, 464 F.3d 723.
satisfied. The third, rarely used, approach is to essentially ignore the Marks doctrine and instead turn to circuit precedent. Each of these approaches is discussed in turn below.

1. Applying Marks

Three circuits have applied the Marks doctrine to determine which Rapanos test should be followed and all have concluded that Justice Kennedy’s test is controlling. Although these courts reached the same conclusion, each court reached its conclusion for a different reason and did so without a clear explanation about its choice. Perhaps this lack of a persuasive analysis for the application of the Marks doctrine to Rapanos will lead other courts to examine the doctrine and the Rapanos opinions more carefully.


In United States v. Gerke Excavating, Inc., the United States filed suit against Gerke Excavating alleging that the defendant discharged pollutants into “navigable waters” without a permit. The district court granted summary judgment for the government and the Seventh Circuit Court of Appeals affirmed. The defendant subsequently filed a petition for certiorari, and the Supreme Court granted the petition and remanded the case back to the Seventh Circuit for further consideration in light of Rapanos.

After reviewing Rapanos, the Seventh Circuit remanded the case with instructions for the district court to follow Justice Kennedy’s test. The court concluded that his test is controlling because it is the “narrowest ground to which a majority of the Justices would have assented if forced to choose.” The court reasoned that Justice Kennedy’s test was controlling because the Seventh Circuit interpreted the plurality’s statement: “Justice Kennedy tips a wink at the agency [the

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170 Gerke Excavating, 464 F.3d 723.
171 Id. at 723.
172 Id. at 723-24.
173 Id. at 724.
174 Id. at 725.
175 Id. at 724 (citing Marks, 430 U.S. at 193).
Corps], inviting it to try its same expansive reading again,”176 as the plurality believing that Justice Kennedy’s test is “narrower than their own.”177 Accordingly, the court found that Justice Kennedy’s test was “narrower (so far in reining in federal authority is concerned) . . . in most cases, though not in all . . . .”178

The Gerke court noted that in some wetlands cases, Justice Kennedy may vote against finding jurisdiction because of a lack of significant nexus even though the plurality and dissenting Justices would find jurisdiction because of a surface-water connection between “wetlands (however remote)” and “a continuously flowing stream (however small).”179 But the court ultimately dismissed these instances as “rare,” concluding that, “as a practical matter,” Justice Kennedy’s test was the governing rule because it provided the “least common denominator.”180

b. Northern California River Watch v. City of Healdsburg

The Ninth Circuit Court of Appeals was the next to attempt to untangle the Rapanos opinions. In Northern California River Watch v. City of Healdsburg,181 plaintiffs sued the city of Healdsburg for discharging sewage from its waste treatment plant into federally regulated waters in violation of the CWA.182 The central issue was whether a pond was subject to the CWA because the pond contained

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176 Id. at 724 (quoting Rapanos, 126 S. Ct. at 2234 n.15). The plurality’s comment is meant to show that the Army Corps will have greater jurisdiction and the opportunity to more broadly construe their jurisdiction under Justice Kennedy’s test than their own. See Rapanos, 126 S. Ct. at 2234.
177 Gerke Excavating, 464 F.3d at 724.
178 Id. at 724-25.
179 Id. at 725.
180 Id.
181 River Watch I, 457 F.3d 1023; River Watch II, 496 F.3d 993. This Ninth Circuit case resulted in two opinions. In August 2007, the Ninth Circuit withdrew its original opinion, River Watch I, and substituted an opinion providing additional rationale for its conclusion that Justice Kennedy’s test was controlling. River Watch II, 496 F.3d at 999-1000. Since River Watch II was issued, two Ninth Circuit courts, one circuit and one district, have followed its precedent finding Justice Kennedy’s test to be controlling. See S.F. Baykeeper v. Cargill Salt Div., 481 F.3d 700, 707 (9th Cir. 2007); Envtl. Prot. Info. Ctr. v. Pac. Lumber Co., 468 F. Supp. 2d 803, 823 (Cal. Dist. 2007). Interestingly, in Environmental Protection Information Center, the court noted “there is some argument that the plurality and concurring opinions provide two alternative standards for CWA jurisdiction.” 469 F. Supp. 2d at 823.
182 River Watch II, 496 F.3d at 995.
wetlands adjacent to a navigable river. The district court ruled in favor of the plaintiffs finding that the pond was covered by the CWA. The Ninth Circuit affirmed the district court’s order, concluding that the pond and its wetlands met the requirements of Justice Kennedy’s test—that the pond possessed the requisite “significant nexus” to the navigable river. In deciding whether to apply the plurality’s test or Justice Kennedy’s test, the Ninth Circuit applied Marks and concluded that Justice Kennedy’s test was “controlling . . . for [the River Watch] case” and for “almost all cases.” The court reached this conclusion without any explanation of how Marks applies to Rapanos. The court’s reason for choosing Justice Kennedy’s test was simple: Justice Kennedy constituted the fifth vote for reversal and concurred only in the judgment. The court viewed these two facts as determinative without any discussion of Marks’ “narrowest grounds” language.

c. United States v. Robison

Most recently, the Eleventh Circuit Court of Appeals followed the lead set by the Seventh and the Ninth Circuits in overturning a criminal conviction in a case involving repeated violations of section 402 of the CWA. In United States v. Robison, the Eleventh Circuit held that Justice Kennedy’s significant nexus test was the controlling rule of Rapanos. Because the district court had failed to instruct the jury on this test as part of the definition of “navigable waters,” the Eleventh Circuit reversed the defendants’ convictions and remanded the case for a new trial.

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183 Id.
184 Id.
185 Id.
186 The Ninth Circuit did not entertain the idea of applying both tests as Justice Stevens’ suggested in his dissenting opinion or what other courts later did. See River Watch II, 496 F.3d at 999-1000.
187 Id. at 999-1000. The court appears to have misread Justice Kennedy’s concurrence as requiring that a significant nexus to traditional navigable water be established in every case. See Johnson, supra note 165, at 30. Justice Kennedy’s opinion, however, notes that the Corps’ regulation of wetlands adjacent to navigable waters does not require the parties to further establish a significant nexus to those waters. Id.; Rapanos, 126 S. Ct. at 2248 (Kennedy, J., concurring).
188 River Watch II, 496 F.3d at 999.
189 United States v. Robison, 505 F.3d 1208, 1221 (11th Cir. 2007).
190 Id. at 1222, 1229. The court also held that the government had not demonstrated that the jury instruction error was harmless. Id. at 1222-23. In a
In crafting the jury instructions, the district court had relied on pre-
*Rapanos* circuit precedent that expansively defined “tributaries.”191 The
Eleventh Circuit noted that the *Rapanos* plurality had indicated that
definition was “no longer good law.”192 After considering *Rapanos* in
detail, the court joined the Seventh and Ninth Circuit’s conclusion that
Justice Kennedy’s significant nexus test was the “narrowest grounds”
under *Marks* and thus the governing rule.193 While acknowledging that
in some cases the plurality’s test may be less restrictive of CWA
jurisdiction, in most cases, including *Rapanos*, Justice Kennedy’s test
will find jurisdiction more often than the plurality’s test.194

The court explicitly rejected Justice Stevens’ suggestion that either
the plurality’s or Justice Kennedy’s test could be met to satisfy CWA
jurisdiction.195 The court reasoned that *Marks*’ language includes only
those who “concurred in the judgment[,]” which means only the plurality
and concurring Justices opinions may constitute the governing rule.196
Dissents, by contrast, are not part of the judgment and therefore should
not be considered when determining a governing rule under *Marks*.197
The court concluded that it would be “inconsistent with *Marks*” for
courts to employ an “either/or” test to meet jurisdiction.198

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191 See *Robison*, 505 F.3d at 1216.
192 Id. at 1216.
193 Id. at 1221.
194 Id. at 1221. The court noted that “in determining the governing holding in
*Rapanos*, we cannot disconnect the facts in the case from the various opinions
and determine which opinion is narrower in the abstract.” Id. at 1222. Like the
Ninth Circuit, the Eleventh Circuit seems to misread Justice Kennedy’s
significant nexus requirement.
195 See *Robison*, 505 F.3d at 1221.
196 Id. at 1221.
197 Id. at 1221 (citing *King v. Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991) (en
banc)); *Adler, Once More, supra* note 145, at 93-94.
198 *Robison*, 505 F.3d at 1221. The court rejected the “either/or” approach
adopted by the First Circuit Court of Appeals in United States v. Johnson, 467
F.3d 56 (1st Cir. 2006).
2. Rejecting Marks

Yet the “either/or” approach is exactly what three other federal courts concluded was appropriate for applying Rapanos’ fractured decision. While these courts looked to the Marks doctrine to help them with the task of discerning the controlling test of Rapanos, they concluded that the Marks doctrine cannot be successfully applied to Rapanos. If Marks does not apply, a fractured decision like Rapanos results in the lack of controlling law. These courts therefore followed Justice Stevens’ suggestion and held that the CWA’s jurisdiction is met if either the plurality’s or Justice Kennedy’s test is satisfied.

a. United States v. Johnson

In United States v. Johnson, the federal government filed a civil action against a group of cranberry farmers who over the course of a few decades discharged dredged and fill material into the wetlands located on their property to maintain cranberry bogs. The action alleged that these farmers had impermissibly discharged pollutants into federally regulated waters because their wetlands drained into the Weweantic River, a “navigable-in-fact” waterway. The farmers contended that the government lacked jurisdiction because the wetlands on their property were not covered by the CWA.

In a thoughtful and well reasoned decision, the First Circuit Court of Appeals vacated and remanded their previous decision in United States v. Johnson, holding that the federal government could establish jurisdiction over the respondents’ wetland sites if either the plurality’s test or Justice Kennedy’s test are met. The court concluded Justice Stevens’ instruction that CWA jurisdiction is met if either test is satisfied.

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200 United States v. Johnson, 467 F.3d 56 (1st Cir. 2006).
202 United States v. Johnson, 437 F.3d 157, 162 (1st Cir. 2006) (overruled by United States v. Johnson, 467 F.3d 56 (1st Cir. 2006)).
203 Id. at 161-62; see Johnson, 467 F.3d at 58.
204 See Johnson, 467 F.3d at 58.
205 437 F.3d 157 (1st Cir. 2006).
206 Johnson, 467 F.3d at 66.
is the correct solution because the *Marks* doctrine is inapplicable in discerning *Rapanos*’ controlling test. The court reasoned that *Marks* is inapplicable to *Rapanos* because, as the Seventh Circuit noted in *United States v. Gerke Excavating, Inc.*, the following anomaly could occur: “If Justice Kennedy finds federal jurisdiction over a particular site using the ‘significant nexus’ test the four dissenters would also find jurisdiction. However, if Justice Kennedy does not find federal jurisdiction, there could be instances where both the plurality and the dissent disagree with his conclusion.”

The court also reasoned that either test should apply because of the instructions in Justice Stevens’ dissenting opinion. By following Justice Stevens’ instructions and allowing the government to prove jurisdiction under either test, the court reasoned that the anomaly of following only Justice Kennedy’s test is circumvented: “If Justice Kennedy’s test is satisfied, then at least Justice Kennedy plus the four dissenters would support jurisdiction. If the plurality’s test is satisfied, then at least the four plurality members plus the four dissenters would support jurisdiction.” Accordingly, Justice Stevens’ approach “ensures that lower courts will find jurisdiction in all cases where a majority of the Court would support such a finding.”

Finally, in remanding the case for fact-finding, the court acknowledged that it was following the Supreme Court’s movement away from applying the *Marks* doctrine. For example, in *Nichols v. United States*, the Supreme Court noted that “[*Marks*] is more easily stated than applied,” and “[w]e think it not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it.”

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207 See *id.* at 63–64 (“Even if we take this more sensible approach to *Marks*, however, the case still poses problems in the situation before us . . . . This understanding of ‘narrowest grounds’ as used in *Marks* does not translate easily to the present situation . . . . This possibility demonstrates the shortcomings of the *Marks* formulation in applying *Rapanos*.”).

208 *Johnson*, 467 F.3d at 62 (citing *Gerke Excavating*, 464 F.3d at 724–25). The court in *Gerke Excavating*, however, wrote this off as a “rare case.” *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006).

209 *Johnson*, 467 F.3d at 64.

210 *Id.*

211 *Id.* at 65 (citing *Nichols v. United States*, 511 U.S. 738 (1994)).


In Simsbury-Avon Preservation Soc., LLC v. Metacon Gun Club, Inc., the defendant was sued by a group of homeowners alleging that the lead shot discharged from its gun range was in violation of the CWA. Directly behind defendant’s gun range was a pond bordered by wetlands, which the government contended were “navigable waters.”

The United States District Court for the District of Connecticut granted the defendant’s summary judgment motion finding that the wetlands on defendant’s property were not covered by the CWA. The court reasoned that the wetlands failed both the plurality’s test and Justice Kennedy’s test.

The court thoroughly analyzed how other courts had applied or rejected Marks in this context. After contrasting the First Circuit’s “common-sense” approach with the Seventh and Ninth Circuits’ applications of Marks and their decisions to follow Justice Kennedy’s test, the district court held that the correct solution was to apply both Justice Kennedy’s and the plurality’s tests. The court detailed the First Circuit’s commentary on Marks’s inadequacies and ultimately reached the same conclusion as the First Circuit: that Marks is inapplicable to Rapanos. The court implicitly reached this conclusion because it decided that jurisdiction is established whenever either test is satisfied; under a Marks analysis, only one test can be controlling. The parties in this case assumed the plurality’s test was controlling, and they therefore failed to address Justice Kennedy’s test in their arguments.

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215 Id. at 221.
216 Id.
217 Id. at 230.
218 Id. at 228–30.
219 Id. at 225–27.
220 See id. (discussing United States v. Johnson, 437 F.3d 56 (1st Cir. 2006)).
221 Id.
222 Id. at 229.
c. United States v. Evans

In *United States v. Evans*, the federal government brought civil and criminal actions against defendants for a myriad of violations, one of which was for the discharge of pollutants violation of the CWA. Although in this slip opinion the court only decided on a motion to sever and a motion in limine, the court interpreted *Rapanos* to guide the reviewing judge in establishing CWA jurisdiction over the defendant’s property.

The United States District Court for the Middle District of Florida held that jurisdiction under the CWA is met when either the plurality’s test or Justice Kennedy’s test is satisfied. The court reasoned that the *Marks* doctrine could not be followed because “the only common ground between Justice Scalia’s plurality opinion and Justice Kennedy’s concurrence is that the Sixth Circuit erred in merely applying the ‘hydrological connection’ test to determine whether the CWA’s jurisdiction extended to the wetland at issue.” The district court then implicitly found that the *Marks* doctrine is inapplicable to *Rapanos* based on the Supreme Court’s recognition that “there will be situations where no binding ‘rule’ may be taken from a fractured decision.” The court followed Justice Stevens’ suggestion and considered the jurisdictional requirement met if either the plurality’s test or Justice Kennedy’s test is satisfied.

The two approaches followed by these courts reflect two different interpretations of *Rapanos* and, to some extent, of *Marks* itself. These divergent approaches have significantly differing results. Courts that applied *Marks* all concluded that Justice Kennedy’s test is controlling. These courts, however, were somewhat perfunctory in the application of *Marks* to *Rapanos*. Courts that analyzed *Marks* and *Rapanos* more deeply were left without guidance and thus added to the confusion by allowing either the plurality’s test or Justice Kennedy’s test to satisfy the CWA’s jurisdictional requirements. One way to avoid this confusion is to ignore *Marks* completely, which is just what one court did.

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224 Id. at *3–4.
225 Id. at *1–2, *16–19.
226 Id. at *19.
227 Id. (citing *Rapanos*, 126 S. Ct. at 2250–51).
228 Id. (quoting Nichols v. United States, 511 U.S. 738, 745–46 (1994)).
229 Id. (citing *Rapanos*, 126 S. Ct. 2208 at 2265 n.14).
230 See Johnson, 437 F.3d at 61.
3. Ignoring Marks

Interestingly, the third approach, ignoring *Marks*, was followed by the first court faced with interpreting *Rapanos*. In *United States v. Chevron Pipe Line*, the United States District Court for the Northern District of Texas concluded that precedent in the Fifth Circuit Court of Appeals should be followed instead because *Rapanos* commanded no majority and because Justice Kennedy failed to elaborate on what the "significant nexus" required.  

*Chevron Pipe Line* involved an action by the federal government against defendant after a pipeline failed from external corrosion and discharged approximately 126,000 gallons of crude oil into an unnamed channel/tributary and Ennis Creek bed.  

Chevron contended that the CWA did not apply to these locations because the unnamed channel/tributary and Ennis Creek bed are not "navigable waters." The district court agreed. Finding that the oil spill did not reach "navigable waters," the court granted summary judgment in favor of Chevron. Despite having stayed arguments until *Rapanos* was decided, the district court nonetheless chose not to apply any of the tests laid out by the Supreme Court. The district court instead followed Fifth Circuit precedent to interpret the CWA’s definition of "navigable waters."

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232 *Id.* at 613.
233 *Id.* at 607. Suit was filed not because Chevron failed to clean up the spill, but because the government wanted to impose civil fines. *Id.* at 608.
234 *Id.* at 610.
235 *Id.* at 615.
236 *Id.* at 606.
237 *Id.* at 611–15. The Texas district court recognized *Rapanos* and attempted to follow Justice Kennedy’s test and the precedent established in *Rapanos*, but ultimately relied on Fifth Circuit precedent to determine the outcome of the case. *See id.* at 611–15. Although it can be argued the district court relied more heavily on *Rapanos* than as suggested here, this is not true because the district court only borrows language from the Supreme Court’s decision. For example, the district court continually borrows the “significant nexus” language and concludes that the waters in question do not meet this requirement, but the court only uses the language from Justice Kennedy’s test and not the actual test itself. *See id.*
238 The court relied on *In re Needham*, 354 F.3d 340 (5th Cir. 2003). *Id.* at 611.
Unlike later courts, the Texas district court did not raise the *Marks* doctrine, not even to reject its application. But the court did criticize Justice Kennedy’s test, noting that his “test leaves no guidance on how to implement its vague, subjective centerpiece. That is, exactly what is ‘significant’ and how is a ‘nexus’ determined?”239 Because of its frustration with Justice Kennedy’s test and, by contrast, the clarity of circuit precedent, the court applied the latter.

Although the court did not specifically discuss *Marks*, its criticism of Justice Kennedy’s test is interesting. The court apparently did not view Justice Kennedy’s test as controlling; it rejected it on the merits and appeared to view the plurality’s test as more appropriate.240 Another early decision by a district court took a similar approach. Without discussing the fractured nature of the *Rapanos* decision or the divergence of rationales between the plurality and Justice Kennedy’s approaches, the court in *United States v. Kincaid* attributed the plurality’s test to “[t]he Court” and treated it as controlling.241 These approaches, both of which ignore *Marks* entirely, are unusual and are unlikely to be followed by other courts, particularly now that circuit courts have provided more analysis.

In sum, the Court’s fractured opinion in *Rapanos* has resulted in confusion and division among the lower courts. While some courts found the *Marks* doctrine useful in discerning a holding from Justice Kennedy’s opinion, only slightly more courts found the doctrine inapplicable based on the justices’ divergent rationales.

Regulators have been similarly challenged as they attempt to revise regulations and clarify guidelines. The resulting uncertainty demonstrates the malleability of the *Marks* doctrine and the vulnerability of a plurality decision to being overtaken by a single justice’s proposed rule.

B. THE REGULATORS’ APPROACH: MARKS DOES NOT DictATE A SINGLE GOVERNING RULE

Like the lower courts, the regulators have struggled to interpret *Rapanos*. Initially stating that the agencies would issue guidance “in the

239 *Chevron Pipe Line*, 437 F. Supp. 2d at 613.
240 *See id.* at 611–15.
near future,”242 almost a year passed before the EPA and the Army Corps of Engineers released a joint guidance document addressing the Rapanos decision.243 Citing Marks and Justice Stevens’ dissent, the agencies concluded that they have regulatory jurisdiction under the CWA “if either the plurality’s or Justice Kennedy’s standard is satisfied.”244 The agencies did not offer much explanation for this choice, other than stating that they have “evaluated the Rapanos opinions to identify those waters that are subject to CWA jurisdiction under a reasoning of a majority of the justices.”245 The agencies did note that the United States Department of Justice has followed this interpretation in a number of cases since the Rapanos decision was issued.246 Finally, the agencies announced that their current approach “is appropriate for a guidance

242 Mank, supra note 145, at 340-41 n.428 (citing Memorandum from Mark Sudol to Various Army Corps Staff, Interim Guidance on the Rapanos and Carabell Supreme Court Decision (July 5, 2006)); see also Amena H. Saiyid, Corps of Engineers, EPA Preparing Guidance in Wake of U.S. Supreme Court Decision, 37 ENV’T REP. (BNA) 1520 (2006). Agency officials made other reassurances to Congress in August 2006 that the agencies were “working quickly” to issue guidance. Mank, supra note 145, at 341 n.434-35. The agencies made a deliberate choice to proceed with non-binding guidance documents rather than regulations because the process for issuing guidance would be quicker than a notice-and-comment rulemaking and thus provide regulatory clarity sooner. Id. at 341 n.437.

243 The guidance was issued in the form of a memorandum, Clean Water Act Jurisdiction following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States (June 5, 2007) [hereinafter Guidance], available at http://www.epa.gov/owow/wetlands/guidance/CWAwaters.html.

244 Id. at 3 (citing Marks v. United States, 430 U.S. 188, 193-194 (1977); Rapanos, 126, S. Ct. at 2265 (Stevens, J., dissenting) (“Given that all four justices who have joined this opinion would uphold the Corps’ jurisdiction in both of these cases—and in all other cases in which either the plurality’s or Justice Kennedy’s test is satisfied—on remand each of the judgments should be reinstated if either of those tests is met.”) (emphasis in original). The agencies also cited as support: Waters v. Churchill, 511 U.S. 661, 685 (1994) (Souter, J., concurring) (analyzing points of agreement between plurality, concurring and dissenting opinions to identify the legal “test . . . that lower courts should apply,” under Marks); cf. League of United Latin American Citizens v. Perry, 126 S. Ct. 2594, 2607 (2006) (analyzing concurring and dissenting opinions in a prior case to identify a legal conclusion of a majority of Members of the Court); Alexandar v. Sandoval, 532 U.S. 275, 281-82 (2001) (same).

245 Guidance, supra note 243, at 3.

246 Id.; see also Mank, supra note 145, at 342, 345-46 (discussing DOJ’s position in its Motion for Remand in Rapanos that jurisdiction may be asserted when either the plurality’s or Justice Kennedy’s test is met).
document,” and that they intend to consider broader jurisdictional issues through rulemaking or other policy process.\textsuperscript{247}

Consequently, the agencies’ approach to guidance for the regulated is a hybrid of the plurality’s and Justice Kennedy’s tests. The guidance document divides the agencies’ likely action into three categories: (1) when the agencies will assert jurisdiction,\textsuperscript{248} (2) when the agencies will decide jurisdiction on a fact-specific analysis to determine whether the waters at issue have a significant nexus with traditional navigable water,\textsuperscript{249} and (3) when the agencies will not assert jurisdiction.\textsuperscript{250} The middle category represents those cases in which jurisdiction is uncertain, and thus it is there where Justice Kennedy’s significant nexus test will have the most impact.

In this middle category, the agencies will decide jurisdiction over non-navigable tributaries that are not relatively permanent, wetlands adjacent to non-navigable tributaries that are not relatively permanent, and wetlands adjacent to but not directly abutting a relatively permanent non-navigable tributary.\textsuperscript{251} Such waters would not meet the plurality’s test, but would be supported by five justices, including the four dissenter, if they meet Justice Kennedy’s test.\textsuperscript{252} Accordingly, the agencies will assess these waters on a case-by-case basis rather than categorically assert or reject jurisdiction. In doing so, the agencies will

\textsuperscript{247} Guidance, \textit{supra} note 243, at 3. The question of whether a guidance approach is the best one is discussed in detail in Johnson, \textit{supra} note 106, at 31-38 (advocating for notice-and-comment rulemaking rather than guidance documents).

\textsuperscript{248} The agencies indicated that they will assert jurisdiction categorically over the following waters: “traditional navigable waters; wetlands adjacent to traditional navigable waters; non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally; wetlands that directly abut such tributaries.” Guidance, \textit{supra} note 243, at 4.

\textsuperscript{249} See Guidance, \textit{supra} note 243, at 7.

\textsuperscript{250} \textit{ld.} at 4. The agencies indicated that they will not assert jurisdiction over the following features: “swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent or short duration flow)”; “ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.” \textit{ld.} at 11.

\textsuperscript{251} \textit{ld.} at 7.

\textsuperscript{252} See \textit{id.} at 7-8 (noting that “[t]he agencies’ assertion of jurisdiction over non-navigable tributaries and adjacent wetlands that have a significant nexus to traditional navigable waters is supported by five justices.”). While the agencies do not acknowledge that four of the five justices would be those justices that dissented in \textit{Rapanos}, this is the only logical conclusion.
apply a significant nexus standard that is consistent with Justice Kennedy’s instruction: “The required nexus must be assessed in terms of the statute’s goals and purposes. Congress enacted the [CWA] to ‘restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’”

The guidance offers some clarity and certainty to this otherwise confusing issue. Yet the agencies recognized that, for close cases, applying Justice Kennedy’s significant nexus will be fact-intensive, requiring substantial documentation and time for evaluation. Accordingly, while the regulated now have some guidance, delay in the issuance of CWA 404 permits is likely. Moreover, the predictability that the guidance offers by taking immediate effect will be called into question within nine months; the agencies are providing a six-month public comment period on the guidance and intend to reissue, revise or suspend the guidance within nine months. In the meantime, it remains to be seen whether courts note the agencies’ current approach, which is not entitled to Chevron deference but is entitled to deference to the extent it has the “power to persuade” the court.

These various approaches demonstrate the struggle to resolve the confusion caused by plurality decisions with competing tests and illustrates that this confusion, absent legislative action, necessitates a

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253 Id. at 9 n.32 (quoting Rapanos, 126 S. Ct. at 2248 (Kennedy, J., concurring)).
254 Id.
255 See Mead v. United States, 533 U.S. 218, 230-33 (2000) (holding that only Skidmore deference, not Chevron deference is available for guidance documents that do not have the force of law).
256 While Congress could, it has not acted quickly to resolve this interpretive issue. On May 22, 2007, Representatives James Oberstar (D-Minn.) and John Dingell (D-Mich.) introduced legislation to clarify the term “navigable waters” in the Clean Water Restoration Act. Clean Water Restoration Act, H.R. 2421, 110th Cong. (2007). The House Transportation and Infrastructure Committee plans to hold hearings at which the Corps and the EPA would testify regarding the proposed legislation. 38 Env’t Rep. (BNA) 1183. For more discussion of this and other potential legislation, see Kim Diana Connolly, Any Hope for Happily Ever After? Reflections on Rapanos and the Future of the Clean Water Act Section 404 Program, in THE SUPREME COURT AND THE CLEAN WATER ACT: FIVE ESSAYS 56 (L. Kinvin Wroth ed., Vt. Law Sch. Land Use Institute 2006), available at http://www.vjel.org/books/pdf/PUBS10004.pdf (advocating for a legislation solution). Even if the proposed or similar legislation is enacted, the Corps and EPA will still need to promulgate regulations to administer the legislation and provide the level of detail that regulators will need to make day-to-day decisions about wetlands jurisdiction.
period of re-percolation of interpretive issues. The next Part explores that concept.

V. PRECEDENT AND RE-PERCULATION

The alternative interpretive approaches – applied by lower courts, regulators, and others – described above regarding Rapanos actually may illustrate that pluralities allow for post-decision determination of the better legal rules. We dub this concept “re-percolation,” where the lack of a clear majority rule sends a signal that courts and policy-makers must reevaluate existing rules and laws when there is no definitive interpretation from the Supreme Court. The post-Rapanos developments are evidence of such judicial and regulatory re-percolation that may lead to a more definitive rule.

The Supreme Court Rules have long been interpreted as endorsing the concept of percolation: cases involving constitutional or statutory interpretation are generally granted certiorari only when they have been sufficiently vetted in the lower courts and have risen to the level of a dispute or split.257 Given the limited number of cases that the Supreme Court can review,258 and given the utility of the information-serving role of allowing lower courts to first explore legal disputes, percolation allows the Supreme Court to filter through its docket to agree to decide the cases truly ready for review.259 The goal is to sharpen and focus the legal discussion, harnessing the experimentation and wisdom of the lower courts.260

257 See generally SUP. CT. R. 10.
258 See Barry Friedman, The Politics of Judicial Review, 84 TEX. L. REV. 257, 306 (2005) (“Under the most optimistic of views . . . there are going to be many cases that lower courts resolve with limited guidance.”).
260 J. Clifford Wallace, The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill, 71 CAL. L. REV. 913, 929 (1983) (“When circuits differ, they provide reasoned alternatives from which the resolver of the conflict can derive a more informed analysis. The many circuit courts act as the ‘laboratories’ of new or refined legal principles (much as the state courts may do in our federal system.”).
But even if the Court decides that a case is ready for review, the existence of a plurality outcome may indicate that a full resolution of the issue is either premature or beyond capacity as currently written. Thus, it is necessary to recognize that pluralities might indicate that the full Court was not yet ready or capable to fully resolve an interpretation, thereby signaling to the lower courts and other branches that they should make attempts to clarify the state of the law. Perhaps the issue was accepted for deliberation but full resolution can be described as premature or insufficiently percolated. As with the post-\textit{Rapanos} administrative and judicial response, we see that Supreme Court opinions may lead to re-percolation, with the issues perhaps more narrowed after an initial decision but not yet settled. A plurality opinion might actually serve as a catalyst for re-percolation for an issue yet lacking a definitive response from the Court.

Because so many stakeholders do not know the controlling interpretation when there is a lack of a controlling majority in a Supreme Court decision, they are forced to attempt or demand clarification. The lack of clarity resulting from pluralities thus may incentivize interested parties – the regulators and the regulated – to explore alternative approaches that may in fact lead to the optimal regulatory outcome, involving either judicial clarification or legislative or regulatory alteration. Indeterminacy may have a utility function in that lower courts are forced to deal with competing standards allowing a controversy over interpretation to re-percolate, lending further wisdom for examination by Congress, regulators, or the Supreme Court in a future case. Such a possible utility function must at least acknowledge that cacophonies may evolve toward clarification as courts experiment with competing tests.\footnote{See, e.g., Margaret Meriwether Cordray & Richard Cordray, \textit{The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection}, 82 WASH. U. L.Q. 389, 435-41 (2004) (describing percolation conceptions by the Supreme Court).}

Non-concrete precedential resolution may or may not be inefficient in the production of legal rules. Indeterminacy may create confusion, but such indeterminacy may allow for experimentation and the percolation of legal rules – leaving the door open to revisit approach that allows lower courts to play with the ambiguity of precedent to attempt resolutions that can lead to later judicial reconsideration or legislative clarification.
VI. POWER GRABS AND GRAPPLING: DISPROPORTIONATE IMPACT OF CONCURRENCES: THE LAW AND ECONOMICS OF MARKS FOR JUDICIAL DECISION-MAKING

One potential problem with Marks is the incentive structure it creates for judges to attempt to obtain a disproportionate influence from their decisions. In other words, the rational judge may have an incentive to concur rather than join the majority if he believes that his opinion will garner authoritative weight by creating a split decision and triggering Marks' narrowest grounds rule. By concurring, he can dilute the influence of the plurality and concentrate the focus on his individual opinion.262 Writing separately with a divergent standard can motivate re-percolation, and Marks can ensure that the divergent standard from a Justice concurring becomes influential in the re-percolation period. This Part examines the political economy of judicial decision making.

This Article does not attempt an exhaustive analysis of the literature of the strategic behavior of judicial officials or a resolution of the theoretical debate on judicial behavior. Many scholars have done that analysis quite well, but the particular analysis of Marks in this potential reality has yet to be discussed.263 Part of the debate of the prudence of the Marks doctrine, however, requires an introduction of the question of whether it alters judicial behavior. The strategic judicial decision

262 As stated earlier, Justice Powell’s concurrence in Bakke v. University of California Regents is an excellent example of the power of a single justice in the subsequent development and application of law. See supra note 18 and accompanying text.
making model is indeed a cynical view of judges who have pledged their neutrality to maintain that they would not be self-motivated to concur simply because it could increase their influence against the opinions of their brethren.\footnote{264} Agnostic on the operational truth of these incentive-based theories, we argue that it is useful to recognize that Marks itself could substantially change such self-interested choices and options for influence should they exist in judicial behavior.

A. THE THEORY OF JUDICIAL SELF-INTEREST: STRATEGIC DECISION MAKING AND INFLUENCE ENHANCEMENT

Positive political theory has emerged as a significant part of political science, law, and economics literature (with hints of sociology, psychology, and other disciplines), leading to some positing that judges are rational economic actors and wealth/influence maximizers.\footnote{265} If this influence maximization theory is true, the Marks doctrine may create a propensity to concur.

For example, in their groundbreaking work on the independent judiciary, Landes and Posner posit that judges (or at least the judiciary as an institution) are motivated by self-interest.\footnote{266} They test empirically the responsive nature of the judiciary to outside controls.\footnote{267} Similarly, McNollgast argues that control mechanisms from the elected branches tend to influence judicial behaviors.\footnote{268} Others have examined similar


\footnote{265} See supra note 263.


\footnote{267} Id.

types of evidence of judicial entities being motivated by self-interest.269

Accepting the assumption that judges make decisions just like rational economic actors in the marketplace seeking to maximize wealth, it would not then be a stretch to believe that judges will want to maximize the wealth (influence, power, prestige, and effect) of their influence.270 This should be particularly acute in plurality contexts, as, “[u]nder the strategic view, the fifth Justice clearly carries most of the power within the Court.”271 Sometimes that power can be exercised as a “swing vote” but after Marks and its progeny including Rapanos, it could create an incentive to concur to create a plurality in which the narrowest grounds test raises the influential value of the concurrence.

B. MARKS AND STRATEGIC JUDICIAL BEHAVIOR

Depending on the interpretation of Marks, but certainly as it appears to relate to Rapanos, positive political theoretical conceptions of judicial strategy suggest that the Marks doctrine should incentivize separate opinions. Theories of strategic judicial behavior should raise the possibility that a judge who knows he can control interpretive


270 “Lee Epstein and Jack Knight . . . suggest that Supreme Court Justices are sophisticated and strategic, maximizing their personal public policy preferences while simultaneously satisfying external observers that the Court is legitimately staying within the bounds of the law.” Cross, supra note 263, at 511. But see Cross supra note 263, at 546 (“Nothing in the concept of judicial strategy requires the assumption that Justices are exclusive maximizers of their policy preferences”).

271 See Cross, supra note 263, at 522.
development in a re-percolation period by authoring a single concurrence will write separately. If the Marks doctrine makes the separate opinion controlling or at least more influential, it is rational for a judge with specific preferences to write separately rather than work to achieve a consensus opinion. In deciding whether to write separately, the legal treatment of such opinions affects incentives regarding whether to concur rather than join. Marks creates the possibility that a Justice writing separately in a manner that leaves no true majority could have greater influence once a case must be applied in the lower courts. By writing separately, that Justice has an opportunity for disproportionate influence, above and beyond what he might have in working with other members of the court to create a true majority test. The Marks doctrine, therefore, could incentivize strategic justices to concur (or dissent) in order to maximize their influence by both creating a re-percolation period as a result where Marks makes their independent views more influential than they would be if instead they negotiate a compromise to reach a majority.

Assume the following scenario. Justice X, who may agree with a majority holding but have misgivings about the appropriate rationale, can choose to join an opinion in which he agrees with the holding in order to make it a five-four majority. Alternatively, Justice X can choose to create a four-one-four split. Her influence, post-Marks, is substantially higher by choosing the four-one-four alternative, and being the “one”. Although interests in certainty and predictability in law would counsel a judge to err toward creating a clear majority for stare decisis values, that requires that the metrics motivating her choice are indeed those values and not her independent influence on the shape of the law. The mere threat of concurring might also play a role in the game theoretic analysis.

If Justice X chooses to join the opinion of the four and not write separately, however, her influence value is diminished because it then essentially precludes the triggering of a re-percolation period where her independent opinion could alter the state of the law as a result of the Marks doctrine. Whether the existence of Marks could affect judicial behavior in this manner is speculative and theoretical at this stage, it warrants consideration especially when we value the clarity of rules and the creation of precedents that can help provide order to the legal regime.
CONCLUSION

While the Supreme Court as a whole has an incentive to speak as one voice through a majority because that is the most definitive way to assure clarity of the law, which provides guidance to the legal community, predictability and stability, strong incentives exist for individual Justices to write separately. Justices who concur, and they are increasingly doing so, recognize the power they hold in shaping the law where they cannot otherwise garner a majority in support of their view. This power, however, is limited in the sense that, under the Marks doctrine, if the Justice strays too far from the rationale of the plurality, his or her opinion may not be followed.

Rapanos provides an excellent case study of a fragmented decision in the era of many such decisions. The confusion that it has caused is serious and reflects the limitations of lower courts’ ability to apply the Marks doctrine as well as the limitations of the doctrine itself. As a result, to the extent Justice Kennedy sought to announce “the” rule in Rapanos, it is not at all clear that this will be the case. We will learn more as the re-percolation continues, perhaps with the inevitable consequence of parties (regulators and regulated) seeking clarity from the Court in a future case.

While the Marks doctrine creates self-interested incentives to write separately, its limitations act as a check on these incentives. Confusion in legal doctrine is only sustainable for so long. Whether that check is enough to control the pride, prejudice or prudence that causes the Court to issue a fractured decision is questionable. As a result, some plurality decisions are much ado about nothing, but others are a source of ongoing confusion and uncertainty that seriously undermines our system of precedent.