Nonmajority Opinions and Biconditional Rules

Adam Steinman

ABSTRACT. In *Hughes v. United States*, the Supreme Court will revisit a thorny question: how to determine the precedential effect of decisions with no majority opinion. For four decades, the clearest instruction from the Court has been the rule from *Marks v. United States*: the Court's holding is "the position taken by those Members who concurred in the judgments on the narrowest grounds." The *Marks* rule raises particular concerns, however, when it is applied to biconditional rules. Biconditionals are distinctive in that they set a standard that dictates both success and failure for a given issue. More formulaically, they combine an if-then proposition (If A, then B) with its inverse (If Not-A, then Not-B).

Appellate courts on both sides of the circuit split that prompted the grant of certiorari in *Hughes* have overlooked the special features of biconditional rules. If the Supreme Court makes the same mistake, it could adopt a misguided approach that would unjustifiably create binding law without a sufficient consensus among the Justices involved in the precedent-setting case. This Essay identifies these concerns and proposes ways to apply *Marks* coherently to non-majority opinions that endorse biconditional rules.

INTRODUCTION

For forty years, this instruction from *Marks v. United States* has governed how to identify the holding of a Supreme Court decision that lacks a majority opinion: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'"[1] The Supreme Court has recognized,

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1. Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell & Stevens, JJ.)).

however, that "pursu[ing] the *Marks* inquiry" has often "baffled and divided the lower courts that have considered it."[2]

That may soon change. The Court has granted certiorari in *Hughes v. United States*, which explicitly asks the Court to clarify the *Marks* rule.[3] *Hughes* involves how to interpret the Supreme Court's 2011 decision in *Freeman v. United States*, in which the Court split four-one-four regarding when certain defendants are eligible to seek a sentence reduction based on a retroactive lowering of the Federal Sentencing Guidelines.[4] Five Justices in *Freeman* found that the defendant was eligible to seek a reduction, with a four-Justice plurality embracing one rationale and a concurring Justice embracing a different rationale.[5] Four Justices dissented, finding that the defendant was ineligible.[6]

Thanks to decades of judicial and scholarly engagement with the *Marks* rule, the Court in *Hughes* will be able to choose from a range of options for determining the precedential effect of decisions with no majority opinion.[7] Under one approach, a nonmajority opinion is binding only when its analysis is the "logical subset" of the other opinions supporting the Court's ultimate result; if no such logical-subset relationship exists, there is no controlling opinion under *Marks*.[8] Under a different approach, *Marks* creates binding law as to the area of "shared agreement" or "partial overlap" between the nonmajority opinions supporting the Court's ultimate judgment.[9] Finally, the *Marks* analysis might include the rationales of dissenting Justices, so long as those rationales combine with enough Justices in the majority to garner five or more votes.[10]

Whichever path the Court takes, it will be crucial to appreciate the particular problems posed by biconditional rules. Biconditionals are distinctive rules in that they set a standard that dictates both success and failure for a given issue. More formulaically, biconditionals combine a conditional proposition (If *A*, then

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2. Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (quoting Nichols v. United States, 511 U.S. 738, 745-46 (1994)).

3. 138 S. Ct. 542, 543 (2017) (granting certiorari); Petition for a Writ of Certiorari at 21, Hughes v. United States, 138 S. Ct. 542 (2017) (No. 17-155) ("The Court should clarify the *Marks* rule . . . .").

4. 564 U.S. 522, 524 (2011).

5. *Id.*

6. *Id.* at 545 (Roberts, C.J., dissenting).

7. Recent discussions of the topic include Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795 (2017), and Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. (forthcoming), http://ssrn.com/abstract=3090620 [https://perma.cc/5BTW-QB38].

8. *See infra* Part II.

9. *See infra* Part III.

10. *See infra* Part IV.

B) with its inverse (If Not-*A*, then Not-*B*).[11] Because biconditionals are two rules rolled into one, they complicate the inquiry into which of two or more opinions provides the "narrowest grounds" under *Marks*.

Appellate courts on both sides of the circuit split that prompted the Court's grant of certiorari in *Hughes* have misunderstood the nature of biconditional rules. Specifically, courts have assumed that Justice Sotomayor's concurring opinion in *Freeman* would be binding under *Marks* if it would make a narrower universe of defendants eligible for a sentence reduction than Justice Kennedy's *Freeman* plurality opinion would.[12] But, as a matter of logic, this assumption is mistaken.

A key disagreement in the lower courts — and between the parties in *Hughes* — is whether the concurring opinion truly is narrower in the sense that it makes fewer defendants eligible for relief. The defendant in *Hughes* argues that the *Freeman* concurrence is not narrower; instead, he maintains that it makes some defendants eligible who would be ineligible under the plurality's approach.[13] The government contests this interpretation, arguing that any defendant who would be eligible under the concurrence's approach *would* necessarily be eligible under the plurality's approach, and thus that the *Freeman* concurrence is narrower.[14] Due to some ambiguities in the *Freeman* plurality opinion, there is indeed some uncertainty on this point.

The dispute on this issue, however, misapprehends the nature of biconditionals. Even if the *Freeman* concurrence makes a *narrower* set of defendants *eligible* for a sentence reduction, it necessarily must make a *broader* set of defendants *ineligible* for a sentence reduction. Yet in *Hughes*, the government is invoking the part of the *Freeman* concurrence's biconditional rule that dictates a defendant's *ineligibility*. To say that the concurrence's ineligibility rule is narrower than the plurality's ineligibility rule turns the narrowest-grounds notion on its head.

If the Supreme Court makes the same mistake, the result could be a reading of *Marks* that unjustifiably creates binding law despite a lack of sufficient consensus among the Justices involved in *Freeman* itself. With respect to the partic-

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11.   *See infra* notes 58-60 and accompanying text.

12.   *See infra* notes 41-44 and accompanying text.

13.   *See* Brief of Petitioner at 37-55, Hughes v. United States, 138 S. Ct. 542 (2017) (No. 17-155). The defendant argues in the alternative that decisions with no majority opinion should create no binding precedent. *See id.* at 55-59.

14.   *See* Brief for the United States at 33-35, *Hughes*, 138 S. Ct. 542 (2017) (No. 17-155). The government alternatively argues that failing to satisfy the *Freeman* concurrence's eligibility test is fatal because that failure would combine with the reasoning of the four *Freeman* dissenters to compel the conclusion that the defendant in *Hughes* is ineligible for a sentence reduction. *See id.* at 35-37.

ular issue in *Hughes*, the *Freeman* concurrence should not qualify as the "narrow-est grounds" simply because it would deem fewer defendants eligible to seek a sentence reduction than would the *Freeman* plurality. As explained below, the only plausible way for the *Freeman* concurrence to be the Court's binding hold-ing is to take into account the views of dissenting Justices—an approach that is contrary to the prevailing understanding of *Marks*. Although the Supreme Court in *Hughes* might adopt the logic of the *Freeman* concurrence on its own merits,[15] it should not do so based on the misconception that a consensus existed between the *Freeman* plurality and concurrence in which the concurrence was "narrow-est."

Part I of this Essay describes the *Freeman* decision and the disagreements in the lower courts that led the Supreme Court to grant certiorari in *Hughes*. This Essay then discusses how to account for biconditional rules under various po-tential approaches to the *Marks* rule. Part II addresses the significance of bicon-ditional rules under an approach to *Marks* that would inquire whether one opin-ion is a "logical subset" of another. In particular, it shows why one biconditional rule can never be a complete logical subset of a competing biconditional rule. Part III applies a similar analysis to an approach to *Marks* that would identify areas of "shared agreement" or "partial overlap" between opinions. Finally, Part IV considers an approach to *Marks* that would both address biconditional rules and incorporate the views of dissenting Justices. To apply the *Marks* rule coher-ently under any approach, the Court must pay particular attention to the special features of biconditionals.

I. FROM *FREEMAN* TO *HUGHES*

This Part first summarizes the Supreme Court's decision in *Freeman*. It then discusses the disagreements among circuit judges regarding how to apply the *Freeman* decision given the lack of a majority opinion.

A. The Supreme Court's Decision in Freeman

The defendant in *Freeman* was indicted for possessing crack cocaine with the intent to distribute. He agreed to plead guilty under Federal Rule of Criminal Procedure 11(c)(1)(C), a provision that allows a defendant and the government

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15. *See* BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 202 (2016) (noting that the *Marks* rule "is somewhat less important for the Supreme Court itself" because the Supreme Court "has flexibility to interpret, clarify, or refashion its precedents, not to mention overturn them").

to agree to a specific sentence or sentencing range, which is then binding on the court if the court accepts the plea agreement.[16]

After the defendant's sentencing, the U.S. Sentencing Commission retroactively amended the Federal Sentencing Guidelines to reduce the disparity in penalties between crack- and powder-cocaine offenses.[17] The defendant moved for a reduction in his sentence under 18 U.S.C. § 3582(c)(2), which gives the district court discretion to reduce a sentence that was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission . . . ."[18] This raised a fundamental statutory question: when is a sentence imposed following an 11(c)(1)(C) agreement "based on" a particular Guidelines range?

By a five-four vote, the Court held in *Freeman* that the defendant was eligible to seek a reduction in his sentence. Justice Kennedy's four-Justice plurality opinion reasoned that a judge's acceptance of an 11(c)(1)(C) plea agreement "is itself based on the Guidelines."[19] He observed that the Guidelines "require the district judge to give due consideration to the relevant sentencing range, even if the defendant and prosecutor recommend a specific sentence as a condition of the guilty plea."[20] Accordingly, the plurality found that a defendant may seek a sentence reduction when the sentence is imposed "in light of the Guidelines"[21] — that is, when "the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement."[22] "Even where the judge varies from the recommended range, if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense a basis for the sentence."[23] In *Freeman*, it was clear that the Guidelines were relevant to the judge's acceptance of the plea agreement, because the district court "expressed its independent judgment that the sentence was appropriate in light of the applicable Guidelines range."[24]

Justice Sotomayor's solo concurring opinion — which provided the fifth vote in favor of the defendant in *Freeman* — adopted a different approach. She argued that a defendant is eligible for a sentence reduction only if the 11(c)(1)(C) agreement itself is based on a subsequently lowered guideline. This would occur if the

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16.   FED. R. CRIM. P. 11(c)(1)(C).

17.   Freeman v. United States, 564 U.S. 522, 528 (2011) (plurality opinion).

18.   18 U.S.C. § 3582(c)(2) (2012).

19.   *Freeman*, 564 U.S. at 529 (plurality opinion).

20.   *Id.* at 530.

21.   *Id.* at 529.

22.   *Id.* at 530.

23.   *Id.* at 529 (citation omitted).

24.   *Id.* at 531.

plea agreement either "call[s] for the defendant to be sentenced within a particular Guidelines sentencing range" or "make[s] clear that the basis for the specified term is a Guidelines sentencing range applicable to the offense to which the defendant pleaded guilty."[25] She found that the defendant in *Freeman* was eligible for a sentence reduction because his plea agreement explicitly used a Guidelines range that was retroactively reduced.[26]

The four-Justice dissenting opinion, authored by Chief Justice Roberts, endorsed a rule that a defendant sentenced pursuant to an 11(c)(1)(C) agreement may never seek a sentence reduction based on a subsequently lowered guideline. Such sentences are "based on the agreement, not the Sentencing Guidelines," and therefore are not eligible for reduction simply because a Guidelines range is retroactively modified in the defendant's favor.[27]

B. *Applying* Freeman

A circuit split quickly developed over what qualified as *Freeman*'s holding under the *Marks* rule, as courts struggled to determine the "position taken by those Members who concurred . . . on the narrowest grounds."[28] Some circuits found that *Marks* required them to follow Justice Sotomayor's concurring opinion in *Freeman*.[29] Others found that neither the concurring opinion nor the plurality opinion was the narrowest, and therefore "no opinion in *Freeman* controls."[30] Those two circuits opted to follow Justice Kennedy's plurality opinion.[31]

In applying *Marks* to the fragmented *Freeman* decision, judges have disagreed on two issues. The first area of disagreement was the content of the rule that the *Freeman* plurality adopted. This is significant for purposes of the *Marks* rule, because to assess which opinion's "grounds" are "narrowest," one must identify what each opinion's "grounds" actually are.

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25. *Id.* at 538-39 (Sotomayor, J., concurring).

26. *Id.* at 542-44.

27. *Id.* at 544 (Roberts, C.J., dissenting).

28. Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell & Stevens, JJ.)).

29. *See, e.g.*, United States v. Hughes, 849 F.3d 1008, 1015 (11th Cir. 2017); United States v. Rivera-Martínez, 665 F.3d 344, 348-50 (1st Cir. 2011); United States v. Brown, 653 F.3d 337, 340 & n.1 (4th Cir. 2011).

30. *See* United States v. Davis, 825 F.3d 1014, 1026 (9th Cir. 2016) (en banc); United States v. Epps, 707 F.3d 337, 350 (D.C. Cir. 2013).

31. *Davis*, 825 F.3d at 1026-27; *Epps*, 707 F.3d at 351-52.

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A defendant would certainly be eligible for a sentence reduction under the plurality opinion if the district court considered the subsequently lowered guideline in accepting the plea and imposing the designated sentence.[32] Some judges, however, read the plurality's opinion more broadly. On one such reading, a defendant would "always" be eligible to seek a sentence modification in cases in which an applicable sentencing guideline has been lowered.[33] On another reading, any defendant whose Rule 11(c)(1)(C) plea agreement indicates that the sentence was based on a subsequently lowered guideline would be eligible under the plurality's rule, even if the judge did not rely on that guideline in her decision to approve the plea agreement.[34] Some judges have justified this reading based on the plurality's statement that a defendant would be eligible "if the judge uses the sentencing range as the beginning point" of her analysis.[35] Even if the sentencing judge does not rely on the subsequently lowered guideline in approving the plea agreement, that guideline is still at least a "beginning point" insofar as it was the basis of the plea agreement that the judge ultimately approved. Judges adopting this reading have also emphasized the *Freeman* plurality's characterization of the concurrence's approach as an "*intermediate* position" that would permit a sentence reduction only for a "*subset* of defendants."[36] Under both this interpretation and the always-eligible interpretation, every defendant who would be eligible for a sentence reduction under the plurality's rule would necessarily be eligible for a sentence reduction under the concurrence's rule.[37] Thus, judges adopting these interpretations have found that the concurrence's rule was a "logical subset" of the plurality's rule.[38]

Other judges, however, read the *Freeman* plurality opinion less generously. Because the plurality emphasized that the district court's acceptance of the plea agreement is the ultimate basis for the sentence, it would arguably find a defend-

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32. *See supra* notes 19-24 and accompanying text.

33. *Davis*, 825 F.3d at 1030 (Bea, J., dissenting); United States v. Duvall, 740 F.3d 604, 612 (D.C. Cir. 2013) (Kavanaugh, J., concurring in the denial of rehearing en banc).

34. *See Hughes*, 849 F.3d at 1015; *Rivera-Martínez*, 665 F.3d at 348; *Brown*, 653 F.3d at 340 n.1.

35. Freeman v. United States, 564 U.S. 522, 529 (2011) (plurality opinion); *see Duvall*, 740 F.3d at 614 n.5 (Kavanaugh, J., concurring in the denial of rehearing en banc) (relying on this "beginning point" language from the *Freeman* plurality).

36. *Freeman*, 564 U.S. at 532, 533 (plurality opinion) (emphasis added); *see Davis*, 825 F.3d at 1037-38 (Bea, J., dissenting) (relying on the *Freeman* plurality's "subset of defendants" statement); *Duvall*, 740 F.3d at 608-09 (Kavanaugh, J., concurring in the denial of rehearing en banc) (relying on the *Freeman* plurality's "intermediate position" statement).

37. *Rivera-Martínez*, 665 F.3d at 348; *see Hughes*, 849 F.3d at 1015 ("[W]henever Justice Sotomayor's opinion would permit a sentence reduction, the plurality opinion would as well.").

38. *Rivera-Martínez*, 665 F.3d at 347-48.

ant ineligible for a sentence reduction in the following situation: the plea agreement explicitly relied on a subsequently lowered guideline, the district court found that guideline inapplicable, and the court nonetheless accepted the plea agreement "for reasons unrelated to the guideline range determined by the parties."[39] On this reading, "the set of cases where the defendant prevails under the concurrence is not always nestled within the set of cases where the defendant prevails under the plurality."[40]

The second area of disagreement was the methodology for identifying the rule that qualifies as the "narrowest grounds" under *Marks*. Some judges insisted that *Marks* applies only when separate opinions supporting the Court's ultimate decision "share common reasoning whereby one analysis is a 'logical subset,' of the other."[41] If there is no logical subset, there is no "controlling opinion."[42] For judges that adopted this methodology, the *Marks* inquiry hinged on the first area of disagreement. If they found that any defendant who was eligible under the *Freeman* concurrence was necessarily eligible under the plurality, then they held that the *Freeman* concurrence was binding under *Marks*. In that situation, the universe of eligible defendants under the concurrence's reasoning seemed to be a logical subset of the universe of eligible defendants under the plurality's reasoning.[43] But if judges found that some defendants could be eligible for a sentence reduction under the *Freeman* concurrence but ineligible under the *Freeman* plurality, then judges applying a logical-subset approach held that neither opinion was "narrowest" and, therefore, neither opinion was controlling.[44]

Some judges, however, disagreed with the logical-subset approach. Rather, they argued that *Marks* makes binding any "legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree."[45] Notably, the views of dissenting Justices can count under this approach—provided their views combine with those of non-dissenting Justices

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39. United States v. Epps, 707 F.3d 337, 350-51 & n.8 (D.C. Cir. 2013).

40. *Davis*, 825 F.3d at 1022-23 (quoting *Epps*, 707 F.3d at 351).

41. *Epps*, 707 F.3d at 350 (quoting King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc)); *see also Duvall*, 740 F.3d at 620 (Williams, J., concurring in the denial of rehearing en banc) ("Where (1) Rule B calls for relief in every case where Rule A does, and (2) Rule B calls for relief in no other cases, Rule B is clearly 'narrower' than Rule A.").

42. *Epps*, 707 F.3d at 350.

43. *Rivera-Martínez*, 665 F.3d at 347-48.

44. *Davis*, 825 F.3d at 1022-26; *Epps*, 707 F.3d at 348-51.

45. United States v. Hughes, 849 F.3d 1008, 1014-15 (11th Cir. 2017) (quoting *Davis*, 825 F.3d at 1035 (Bea, J., dissenting)); *see also Duvall*, 740 F.3d at 610 (Kavanaugh, J., concurring in the denial of rehearing en banc) ("*Marks* means that, when one of the opinions in a splintered Supreme Court decision has adopted a legal standard that would produce results with which a majority of the Court in that case necessarily would agree, that opinion controls.").

to generate a five-Justice majority.[46] On this understanding of *Marks*, failure to satisfy the *Freeman* concurrence—because the plea agreement itself did not indicate that it relied on a subsequently reduced sentencing guideline—would be fatal. That one vote against eligibility from the *Freeman* concurrence would combine with four votes from the *Freeman* dissenters (for whom *all* defendants who plead guilty under Rule 11(c)(1)(C) are ineligible) to compel the conclusion that the defendant is ineligible for a sentence reduction.[47]

In December 2017, the Supreme Court granted certiorari in *Hughes v. United States*.[48] The defendant in *Hughes* pleaded guilty to a number of drug and firearm offenses, and he sought a reduction in his sentence after the Sentencing Commission retroactively lowered the offense levels for certain drug crimes. The Eleventh Circuit found that the *Freeman* concurrence was binding under *Marks*.[49] Accordingly, it ruled that the defendant was not eligible to seek a sentence reduction because his plea agreement did not refer to the subsequently lowered guideline.[50] The *Hughes* petition for certiorari explicitly asks the Supreme Court to decide whether the Eleventh Circuit correctly applied the *Marks* rule.[51]

II. BICONDITIONAL RULES AND LOGICAL SUBSETS

As described above, some lower courts have endorsed an approach to *Marks* that inquires whether one opinion is the logical subset of another. One of the key areas of disagreement between the defendant and the government in *Hughes* is whether the *Freeman* concurrence is a logical subset of the *Freeman* plurality.[52] This Part defines the notion of a logical subset, and then turns to the particular

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46.   *See Duvall*, 740 F.3d at 611, 614, 617 n.8 (Kavanaugh, J., concurring in the denial of rehearing en banc).

47.   *See id.* at 614; *see also Davis*, 825 F.3d at 1036-37 (Bea, J., dissenting) ("In circumstances in which Justice Sotomayor would permit reduction of a prior sentence, so too would the plurality (resulting in a five-Justice majority). Where Justice Sotomayor's criterion are not met, she would find agreement in the four-Justice dissent that the prisoner's sentence is *not* 'based on' the Guidelines (which would also result in a five-Justice majority). Justice Sotomayor's approach therefore constitutes the 'narrowest grounds' for reaching a result that, in any circumstance, will be consistent with the result that a majority of the Supreme Court would reach under Freeman.").

48.   138 S. Ct. 542, 543 (2017) (granting certiorari).

49.   *Hughes*, 849 F.3d at 1011-15.

50.   *Id.* at 1015-16.

51.   *See* Petition for a Writ of Certiorari at i, *Hughes*, 138 S. Ct. 542 (2017) (No. 17-155).

52.   *See supra* notes 13-14 and accompanying text.

challenges of applying a logical-subset approach to biconditional rules like those articulated in the competing *Freeman* opinions.

A. What Is a Logical Subset?

To clarify what is meant by a logical subset, it is helpful to conceptualize the competing rules in a case like *Freeman* as if-then propositions, also known as conditional statements.[53] Formulaically, the *Freeman* plurality's rule can be described as (If *P*, then *X*), where *P* (for plurality) defines the characteristics of cases in which a defendant is eligible to seek a sentence reduction, and *X* is the result that such a defendant is eligible. Using the formal terminology, *P* is the antecedent of the conditional statement, and *X* is the consequent.[54]

The *Freeman* concurrence's rule can be described as (If *C*, then *X*), where *C* (for concurrence) defines the characteristics of cases in which a defendant is eligible to seek a sentence reduction, and *X* is the result that such a defendant is eligible. For the concurrence, *C* is the antecedent and *X* is the consequent.

To say that the concurrence's *rule* is a logical subset of the plurality's rule is to say that the concurrence's *antecedent* (*C*) is a logical subset of the plurality's *antecedent* (*P*).[55] That is, the universe of cases that would be eligible for a sentence reduction under the plurality's rule necessarily includes all of the cases that would be eligible for a sentence reduction under the concurrence's rule. As discussed above, there is disagreement over whether this logical-subset relationship exists between the *Freeman* concurrence and plurality.[56] It is clear, however, that the focus of this disagreement is on whether every case that satisfies the concurrence's antecedent would necessarily satisfy the plurality's antecedent. In other words, the disagreement is whether Justice Sotomayor's rule would allow any defendants to seek sentence reductions whom the plurality's rule would not; if so then the antecedent (*C*) of Justice Sotomayor's rule (If *C*, then *X*) is *not* a logical subset of the antecedent (*P*) of the plurality's rule (If *P*, then *X*).

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53. *See* Adam N. Steinman, *To Say What the Law Is: Rules, Results, and the Dangers of Inferential Stare Decisis*, 99 VA. L. REV. 1737, 1792-93 (2013) (describing how legal rules can be expressed as conditional statements).

54. Horacio Arlo-Costa & Paul Egré, *The Logic of Conditionals*, STAN. ENCYCLOPEDIA PHIL. (Edward N. Zalta ed., Winter 2016), http://plato.stanford.edu/archives/win2016/entries/logic-conditionals [https://perma.cc/CTY7-VHWG].

55. This is because both rules share the same consequent (*X*).

56. *See supra* notes 13-14, 32-47 and accompanying text.

B. The Freeman Opinions as Biconditionals

In *Hughes*, the government is not invoking the *Freeman* concurrence's rule described above (If *C*, then *X*). The government is invoking the *inverse* of that rule (If Not-*C*, then Not-*X*). More specifically, the rule that was dispositive for the concurrence in *Freeman* was:

> If a defendant's plea agreement clearly relies on a subsequently lowered sentencing guideline, then the defendant is eligible to seek a reduction (If *C*, then *X*).[57]

But the government in *Hughes* is invoking the rule:

> If a defendant's plea agreement does *not* clearly rely on a subsequently lowered sentencing guideline, then the defendant is *not* eligible to seek a reduction (If Not-*C*, then Not-*X*).

These are distinct principles. Of course, it is not uncommon for a judicial opinion to endorse both a proposition and its inverse simultaneously. When a court does so, it articulates not only an *if-then* rule but an *if-and-only-if* rule. An if-and-only-if rule is called a *bi*conditional rule precisely because it combines a conditional rule with its inverse.[58] By using a biconditional, a court provides "a comprehensive resolution to the relevant question"[59]—a test that will determine both success (*X*) and failure (Not-*X*).[60] We can think of the first rule (If *C,* then *X*) as the top half of the *Freeman* concurrence's biconditional, and the second rule (If Not-*C*, then Not-*X*) as the bottom half of the biconditional.

One can reasonably read the opinions in *Freeman* as stating biconditional rules. That is, the concurrence and the plurality sought to set standards that would determine both eligibility and ineligibility for a sentence reduction. The *Freeman* concurrence stated that the defendant's plea agreement "*must* use a Guidelines sentencing range that has subsequently been lowered by the Sentencing Commission."[61] The plurality wrote that a sentence reduction is available "*to*

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57. *See supra* notes 25-26 and accompanying text (describing the rule outlined in the *Freeman* concurrence).

58. Adam N. Steinman, *Case Law*, 97 B.U. L. REV. 1947, 2007 (2017).

59. Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1038 (2005).

60. Steinman, *supra* note 58 ("When courts formulate a test to govern a particular issue, the test is often meant to determine both success and failure.").

61. Freeman v. United States, 564 U.S. 522, 542 (2016) (Sotomayor, J., concurring) (emphasis added); *see also id.* at 543 n.9 (noting that if the plea agreement "does not contain any references to the Guidelines," then "a prisoner sentenced under such an agreement would not be eligible" (internal quotation marks omitted)).

whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement."[62] Recognizing that these are biconditional rules, however, only complicates the logical-subset inquiry. In fact, as the next Section will show, it is logically impossible for one complete biconditional to be a logical subset of another complete biconditional.[63]

C. A Biconditional Rule Can Never Be a Logical Subset of Another Biconditional Rule

To begin, imagine the following simple example: Charlie and Pam are co-workers. They propose different rules for deciding when they will go out to lunch and when they will eat at the office. They work a typical five-day work week. Charlie wants to go out to lunch only on Friday, and Pam wants to go out to lunch only on Thursday and Friday.

Focus first on the top half of each biconditional. Charlie's top-half rule is: if it is Friday (C), then we will go out to lunch (X). Pam's top-half rule is: If it is Thursday or Friday (P), then we will go out to lunch (X). For the top half of the biconditional, C is clearly a logical subset of P. Every time Charlie's antecedent is satisfied (because it is Friday), Pam's antecedent is necessarily satisfied.

For the bottom half of the biconditional, however, the opposite is true. Charlie's bottom-half rule is: If it is Monday, Tuesday, Wednesday, or Thursday (Not-C), then we will *not* go out to lunch (Not-X). Pam's bottom-half rule is: If it is Monday, Tuesday, or Wednesday (Not-P), then we will *not* go out to lunch (Not-X). As to the two bottom-half rules, *Pam's* antecedent is the logical subset of *Charlie's*. Every time Not-P is true (because it is Monday, Tuesday, or Wednesday), Charlie's bottom-half antecedent (Not-C) is necessarily satisfied.

This simple example confirms a crucial proposition: one biconditional can never be a logical subset of another biconditional. When the top-half antecedent of Charlie's rule is a logical subset of the top-half antecedent of Pam's rule, their roles are necessarily reversed as to their bottom-half antecedents.

This example also shows that it is possible to separate the biconditional into its component parts, and then to identify different logical subsets for the top half and the bottom half. Under a logical-subset approach, Charlie and Pam will go

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62. *Id.* at 530 (plurality opinion) (emphasis added).

63. The only exception to this principle would be if the antecedents of each biconditional are *identical*. If so, each biconditional would technically be a logical subset of the other. If they are identical, however, there would be no *Marks* problem because there would be a majority of Justices endorsing identical rationales.

out to lunch on Friday and they will not go out to lunch on Monday, Tuesday or Wednesday. No logical subset exists with respect to Thursday.

Thus, we can only identify logical subsets that truly reflect consensus by looking at both halves of biconditional rules independently. If identifying areas of consensus is the goal, it would have been a mistake to look solely at the top-half of the biconditional. We would have found that Charlie's rule is the logical subset because "Friday" is a logical subset of "Thursday or Friday," and we therefore would have declared that they would not go to lunch on Thursday. The right thing to say about Thursday, however, is that no rule controls it.

D. Logical Subsets in Freeman

As mentioned earlier, lower courts have disagreed about whether any logical-subset relationship exists between the *Freeman* concurrence and the *Freeman* plurality.[64] Let us assume, however, that the *Freeman* plurality is read so that every time a defendant is eligible for a sentence reduction under the concurring opinion, he or she will necessarily be eligible under the plurality opinion.

Recall that on this reading of the *Freeman* plurality opinion, the top half of the plurality's rule would be:

> If either the plea agreement clearly relies on a subsequently lowered sentencing guideline or that guideline is otherwise relevant to the judge's analysis in approving the plea agreement, then the defendant is eligible to seek a reduction. (If *P*, then *X*.)

And recall the concurrence's rule:

> If a defendant's plea agreement clearly relies on a subsequently lowered sentencing guideline, then the defendant is eligible to seek a reduction. (If *C*, then *X*.)

In this example, *C* is a logical subset of *P*. If the plea agreement clearly relies on a subsequently lowered sentencing guideline (*C* is true), then it is necessarily true that *either* the plea agreement clearly relies on a subsequently lowered sentencing guideline *or* that guideline was otherwise relevant to the judge's approval of the plea agreement (*P* is true). The universe of cases where the plurality's antecedent (*P*) is satisfied completely encompasses the universe of cases where the concurrence's antecedent (*C*) is satisfied.

Now look at the bottom half of the biconditional. For the plurality, the inverse of its rule would be:

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64. *See supra* notes 32-40 and accompanying text.

If the plea agreement does not clearly rely on a subsequently lowered sentencing guideline and that guideline is not otherwise relevant to the judge's analysis in approving the plea agreement, then the defendant is not eligible to seek a reduction. (If Not-*P*, then Not-*X*).

And recall the bottom half of the concurrence's rule:

If a defendant's plea agreement does not clearly rely on a subsequently lowered sentencing guideline, then the defendant is not eligible to seek a reduction. (If Not-*C*, then Not-*X*).

Here, Not-*P* is a logical subset of Not-*C*. If it is true that both the plea agreement did not clearly rely on a subsequently lowered sentencing guideline and the subsequently lowered guideline was not otherwise relevant to the judge's analysis (Not-*P* is true), then it is necessarily true that the plea agreement did not clearly rely on a subsequently lowered sentencing guideline (Not-*C* is true). As to the bottom half of the biconditional, then, the *plurality's* rule is the logical subset of the *concurrence's* rule — not the other way around.

This is precisely the problem illustrated by the example of Charlie and Pam's lunch preferences examined above. Focusing on the bottom half of the biconditional (that is, the rules that dictate the conclusion that the defendant is *not* eligible for a sentence reduction), it cannot be said that the *Freeman* concurrence is the logical subset of the *Freeman* plurality. This holds even if — as the government argues in *Hughes*[65] — every defendant who *would* be eligible under the concurrence's approach would also be eligible under the plurality's approach.

E. Applying a Logical-Subset Approach to Biconditionals

While it is impossible for one biconditional rule to be a logical subset of another, there are two ways one might employ a logical-subset approach to the *Marks* rule in the context of biconditionals.

Option 1: There is binding precedent only as to one half of the biconditional.

One possibility is to read a fragmented case as setting binding precedent only as to the half of the biconditional that was dispositive in that case. With respect to *Freeman*, this approach would work as follows. Assume again that the *Freeman* plurality is broad enough that, every time a defendant is eligible for a reduction under the *Freeman* concurrence, he or she is necessarily eligible for a reduction

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65. *See* Brief for the United States at 33-35, Hughes v. United States, 138 S. Ct. 542 (2017) (No. 17-155).

under the *Freeman* plurality. This would mean that the top half of the *Freeman* concurrence is the logical subset of the top half of the plurality. On this approach, *Freeman* would establish the following proposition from Justice Sotomayor's concurrence: If a defendant's plea agreement clearly relies on a subsequently lowered sentencing guideline, then the defendant is eligible to seek a reduction (If *C*, then *X*). That would be the "narrowest grounds" for purposes of *Marks*, and future courts would be bound to accept that rule.

Freeman would not establish any binding law, however, with respect to whether a defendant is eligible in cases where the plea agreement does *not* clearly rely on a subsequently lowered sentencing guideline (Not-*C*). The simplest example of this would be the area of disagreement between the plurality and the concurrence—where the plea agreement does not refer at all to the subsequently lowered guideline, but that guideline is relevant to the judge's analysis in accepting the plea agreement. In that situation, future courts would have the leeway to adopt the more defendant-friendly top-half rule embraced by the *Freeman* plurality: if either the plea agreement clearly relies on a subsequently lowered sentencing guideline or that guideline is relevant to the judge's analysis in approving the plea agreement, then the defendant is eligible to seek a reduction (If *P*, then *X*). Or they might adopt the bottom half of the concurrence's rule: If a defendant's plea agreement does *not* clearly rely on a subsequently lowered sentencing guideline, then the defendant is *not* eligible to seek a reduction (If Not-*C*, then Not-*X*.) Or they might adopt some other rule. These would remain open questions. As one judge put it, the lack of an identifiable "narrowest ground" in the context of *Marks* is "similar to a 4-4 split that affirms the lower court's opinion but does not supply a national rule governing future litigation."[66]

Option 2: Different opinions govern different halves of the biconditional.

A second approach would look at both halves of the biconditional independently and apply the logical-subset inquiry to each, even though this approach would follow the concurrence for one half and the plurality for the other. Assume again that the *Freeman* plurality's rule is such that every time a defendant is eligible for a reduction under the *Freeman* concurrence he or she is necessarily eligible for a reduction under the *Freeman* plurality. As with Option 1 above, the *Freeman* concurrence would be the logical subset of the plurality with respect to the top half of the biconditional. Accordingly, *Freeman* would establish the con-

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66. United States v. Duvall, 740 F.3d 604, 621-22 (D.C. Cir. 2013) (Williams, J., concurring in the denial of rehearing en banc).

currence's top-half rule: If a defendant's plea agreement clearly relies on a subsequently lowered sentencing guideline, then the defendant is eligible to seek a reduction (If C, then X).

This second approach, however, would also establish as binding law the bottom-half of the plurality's biconditional.[67] Assuming that C is a logical subset of P, the universe of cases where the plurality would find the defendant ineligible for a sentencing reduction (Not-P) would necessarily be a subset of the universe of cases where the concurrence would find the defendant ineligible (Not-C). Accordingly, *Freeman* would establish the plurality's bottom-half rule: If the plea agreement does not clearly rely on a subsequently lowered sentencing guideline and that guideline is not relevant to the judge's analysis in approving the plea agreement, then the defendant is not eligible to seek a reduction (If Not-P, then Not-X).

To summarize, this approach would generate the following rules:

> If a defendant's plea agreement clearly relies on a subsequently lowered sentencing guideline, then the defendant is eligible to seek a reduction. (If C, then X.).

And:

> If the plea agreement does not clearly rely on a subsequently lowered sentencing guideline and that guideline is not relevant to the judge's analysis in approving the plea agreement, then the defendant is not eligible to seek a reduction. (If Not-P, then Not-X).

Here too, however, no binding law would be made with respect to the key area of disagreement between the plurality and concurrence: that is, the situation where the plea agreement does not refer to the subsequently lowered guideline but that guideline is relevant to the judge's analysis in accepting the plea agreement. As with Option 1, future courts would be free to adopt the plurality's more

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67. One might argue more generally that only the dispositive half of a biconditional rule should be binding because only the dispositive half is "necessary" to the Court's decision. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 67 (1996) (stating that courts are bound to follow "those portions of the opinion necessary to [the Court's] result"); Steinman, *supra* note 53, at 1803 (noting the argument that the other half of a biconditional rule is "not strictly necessary"); *see also* Abramowicz & Stearns, *supra* note 59, at 1039 (considering this view but arguing that "[a]s a general matter, we believe that the inverse statements of holdings generally should count as holdings as well"). On this line of argument, the non-dispositive half of a biconditional rule would not be binding even if a majority opinion endorses an entire biconditional rule. This Essay assumes that, as a general matter, a complete biconditional rule can be binding as a matter of stare decisis even if only one half of that biconditional rule is dispositive in the precedent-setting case.

defendant-friendly top-half rule — which would allow a sentence reduction based on the judge's use of the subsequently lowered guideline. Or they might adopt the concurrence's less defendant-friendly bottom-half rule — which would forbid a sentence reduction due to the plea agreement's failure to clearly rely on a subsequently lowered guideline. Or they might adopt some other rule.

<div align="center">⋆ ⋆ ⋆</div>

This Essay's goal is not to endorse either one of the two options above — or even to endorse the logical-subset approach as a general matter. Option 2 would generate more law than Option 1, and it would do so only as to areas of consensus between the plurality and the concurrence. On the other hand, it would mean that no *single* opinion would constitute the Court's holding. The crucial point here is that under either variant of the logical-subset approach, the *Freeman* concurrence's complete biconditional rule would not be binding. This makes sense because the plurality and concurrence would not necessarily reach the same result for a defendant whose plea agreement did not clearly refer to a subsequently lowered sentencing guideline. Although future courts would have the option to adopt both halves of the *Freeman* concurrence, they would not be bound to do so.

III. BICONDITIONALS AND PARTIAL OVERLAPS

Under a logical-subset approach to the *Marks* rule, a nonmajority opinion would create binding law only if there is a complete overlap as to at least one-half of the biconditional. When there is only a partial overlap, one might still extract binding law using what has been called a shared-agreement approach.[68] This is a more expansive approach because it can create binding law even if no logical-subset relationship exists between the plurality and the concurrence. But it still requires consensus between the judges in the majority in the sense that it would make law only as to the area of partial overlap between the antecedents of the competing rules. Even on this understanding of *Marks*, however, it is important to examine each half of the competing biconditional rules.

Focusing first on the top half of a biconditional rule, a shared-agreement or partial-overlap approach unfolds as follows. Assume, as above, the plurality's rule is (If P, then X) and the concurrence's rule is (If C, then X). Even if neither rule is necessarily narrower than the other, they logically encompass the rule (If both P and C, then X). When both P and C are true, the plurality demands the

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68. *See* Williams, *supra* note 7, at 838 (arguing that *Marks* should focus on "the domain of shared agreement between the judgment-supportive rationales"); Re, *supra* note 7, at 31 (describing but criticizing such an approach).

consequent *X* (because *P* would be true), and the concurrence would also demand the consequent *X* (because *C* would be true). The decision would establish as binding precedent the rule that reflects that area of partial overlap (If both *P* and *C*, then *X*).[69]

This would provide a workable solution even when the precise contours of the competing rules are unclear. For example, as described above, lower courts have disagreed about whether the *Freeman* plurality would deem a defendant eligible for a sentence reduction when the plea agreement clearly relied on a subsequently lowered guideline, but the district court judge did not consider that guideline when accepting the agreement.[70] One might read the plurality opinion to endorse the general principle that a defendant is eligible for a sentence reduction when the subsequently lowered guideline is relevant to the *judge's* analysis in approving the plea agreement, but not to conclusively resolve whether that guideline is relevant to the judge's analysis *solely* because plea agreement itself relied on it.

On this reading, the top-half rule of the *Freeman* plurality would be:

> If a subsequently lowered sentencing guideline is relevant to the judge's analysis in approving the plea agreement, then the defendant is eligible to seek a reduction (If *P*, then *X*).

Although we might not know with certainty whether this rule necessarily would be satisfied in every case when the concurrence's rule is satisfied, the following rule would cover the area of (at least partial) overlap between the plurality and the concurrence:

> If a subsequently lowered sentencing guideline is relevant to the judge's analysis in approving the plea agreement *and* the defendant's plea agreement clearly relies on a subsequently lowered sentencing guideline, then the defendant is eligible to seek a reduction (If both *P* and *C*, then *X*).

A shared agreement would also exist with respect to the bottom half of the competing biconditionals. The plurality's bottom-half rule is (If Not-*P*, then Not-*X*), and the concurrence's bottom-half rule is (If Not-*C*, then Not-*X*). These logically encompass the rule (If both Not-*P* and Not-*C*, then Not-*X*).

This partial-overlap approach would establish the following bottom-half rule:

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69. *See* Steinman, *supra* note 58, at 2003 (proposing this synthesis of if-then rules as a way to "identify the stare decisis effect of decisions where no faction within the majority articulates a rule that is identifiably the 'narrowest'").

70. *See supra* notes 32-40 and accompanying text.

If a subsequently lowered sentencing guideline is not relevant to the judge's analysis in approving the plea agreement *and* the defendant's plea agreement does not clearly rely on a subsequently lowered sentencing guideline, then the defendant is not eligible to seek a reduction (If both Not-*P* and Not-*C*, then Not-*X*).

As with the logical-subset inquiry, this approach would make no law in the potential areas of disagreement between the plurality and the concurrence. This would leave future courts free to adopt other rules to handle those areas of disagreement, including the plurality's entire biconditional or the concurrence's entire biconditional. It follows that under this partial-overlap approach, courts would not be compelled to adopt the *Freeman* concurrence in its entirety.

IV. COUNTING DISSENTING VOTES

Another possible approach would incorporate rules endorsed by dissenting Justices into either a logical-subset or partial-overlap analysis. The basic mechanics of identifying logical subsets or partial overlaps would be the same as described above. The difference would be that rules adopted by dissenting Justices must also be considered, as long as they combine with rules endorsed by enough other Justices to "get to five."[71]

While it would not be implausible to consider the rationales of dissenting Justices,[72] this is not the prevailing view. As a recent treatise explained, "the prevailing view is that the narrowest grounds are those that, when applied to other cases, would consistently produce results that a majority of the Justices *supporting the result* in the governing precedent would have reached."[73] Even the Eleventh Circuit—which found that the *Freeman* concurrence stated the Supreme Court's complete holding—has explained that "*Marks* does *not* direct lower courts interpreting fractured Supreme Court decisions to consider the positions of those who dissented."[74]

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71. *Cf.* Dawn Johnsen, *Justice Brennan: Legacy of a Champion*, 111 MICH. L. REV. 1151, 1159 (2013) (describing Justice Brennan's focus on "getting to five").

72. *See, e.g.*, United States v. Johnson, 467 F.3d 56, 65 (1st Cir. 2006) (deeming it permissible to "combin[e] a dissent with a concurrence to find the ground of decision embraced by a majority of the Justices").

73. GARNER ET AL., *supra* note 15, at 200. Recall that *Marks* itself suggests this approach: "the holding of the Court may be viewed as that position taken by those Members *who concurred in the judgments* on the narrowest grounds" (emphasis added). *See supra* note 1 and accompanying text.

74. United States v. Robison, 505 F.3d 1208, 1221 (11th Cir. 2007); *see also* King v. Palmer, 950 F.2d 771, 783 (D.C. Cir. 1991) (en banc) ("[W]e do not think we are free to combine a dissent with a concurrence to form a *Marks* majority.").

In *Freeman*, incorporating the rules of the dissenters could yield a range of outcomes, particularly in light of the uncertainty surrounding the scope of the plurality's rule. This Essay will not itemize all of the possible permutations, but it will walk through one example to illustrate an important point. Counting the views of dissenting Justices is the *only* way to support the government's position in *Hughes*: namely, that courts are bound to follow the bottom-half rule of the *Freeman* concurrence, which makes a defendant ineligible for a sentence reduction if the plea agreement does not clearly refer to a subsequently lowered guideline.

As described earlier, the dissenting Justices in *Freeman* endorsed a rule: if a defendant is sentenced pursuant to a Rule 11(c)(1)(C) plea agreement, then the defendant is not eligible for a sentence reduction (If *D*, then Not-*X*.)[75] Because this rule compels the consequent (Not-*X*), the four dissenting Justices would add no votes to either the plurality's or the concurrence's top-half rules. But the dissenters can create five-Justice coalitions by combining with either the plurality's or the concurrence's bottom-half rules.

For illustration, focus on the relationship between the dissent and the concurrence. Recall the bottom-half rule of the *Freeman* concurrence: if a defendant's plea agreement does *not* clearly rely on a subsequently lowered sentencing guideline, then the defendant is *not* eligible to seek a reduction. (If Not-*C*, then Not-*X*.)

The antecedent of this rule (Not-*C*) is a logical subset of the dissent's rule. The universe of cases where a defendant is sentenced pursuant to an 11(c)(1)(C) plea agreement (*D*) includes both cases where the plea agreement *does* clearly rely on a subsequently lowered sentencing guideline (*C*) and cases where it *does not* clearly rely on a subsequently lowered sentencing guideline (Not-*C*).

Therefore, when we factor in the *Freeman* dissenters—using either a logical-subset or partial-overlap methodology—there are five Justices whose rules support the proposition that a defendant is ineligible for a sentence reduction when an 11(c)(1)(C) plea agreement does not clearly refer to a subsequently lowered sentencing guideline. The dissenting Justices would agree because in their view *no* defendants who are sentenced pursuant to an 11(c)(1)(C) plea are eligible. And the concurrence would agree because such a defendant's plea agreement did not clearly refer to the subsequently lowered guideline. The big picture here is not surprising. When we incorporate the restrictive approach of the *Freeman* dissenters, we end up with case law that is less friendly to defendants.

It is beyond the scope of this Essay to comprehensively assess the advantages and disadvantages of an approach to *Marks* that considers the rationales of dissenting Justices. As discussed above, however, allowing dissenting Justices to

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75. *See supra* note 27 and accompanying text (describing the rule set out in the *Freeman* dissent).

determine the binding content of a Supreme Court decision would be a significant departure from the prevailing understanding of *Marks*.[76] Yet the government's position in *Hughes*—and the Eleventh Circuit's reading of *Freeman*—can only be correct if the Supreme Court decides to embrace an approach to *Marks* that incorporates the views of dissenting Justices.

CONCLUSION

Courts and scholars have articulated a variety of ways to determine the law-generating content of Supreme Court decisions that lack a majority opinion. Whether the Court embraces an approach that requires logical subsets, an approach that identifies partial overlaps, or an approach that counts dissenting votes, a coherent methodology must take into account the unique features of biconditional rules. There is simply no way to do *Marks* right without analyzing biconditionals, and courts and litigants have been trying unsuccessfully for too long. *Hughes* is a perfect opportunity for the Supreme Court to direct courts and litigants to attend to biconditionals when applying the *Marks* rule, however conceived.

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76. *See supra* notes 73-74 and accompanying text.