1. Abstract

When the Supreme Court cannot reach a majority consensus for a case, the Marks rule determines precedential value by identifying the opinion that concurs on the "narrowest grounds." However, this doctrine has proven consistently complex and inconsistent in application, creating uncertainty about its effects on judicial behavior and institutional constraints. The workability of Marks has been studied extensively. This research aims to provide a comprehensive survey and testing of how the Marks doctrine influences judicial behavior. And subsequent analysis of how Marks fits into an evolving federal judiciary and body politic.

By formally recognizing the precedential value of plurality decisions, the Marks rule, or doctrine, alters the judicial environment in a few key ways. First, how precedent changes are evaluated, though not certainly, likely has effects that extend beyond just pluralities and affect the treatment of non-majority precedent more generally. Second, the elevated value of plurality opinions also alters many of the incentives underlying the procedure of Justices bargaining and coalition forming when deciding a case. And third, the inherent ambiguity of the rule and its utilization present allow for precedent and decisions with significantly less clear meaning. Each effect can entail both beneficial and damaging effects on society. What makes Marks interesting is how diffuse an impact these effects can have, and the complexity that goes with parsing out what effects stem from Marks.

The conclusion infers an understanding of Marks based on sentiment data of individual Justices using LIWC-22. Several hypotheses are tested that seek to illuminate the considerations and decisions that inform the creation of plurality precedent and what can be disregarded. From this understanding, a final comment will assess how the Marks doctrine should be viewed in light of recent but long-standing trends in judicial polarization and modernization.

Discourse on marks

The fact that plurality decisions are rendered at all is seen by some as an inherent problem. Supreme Court opinions are -theoretically- granted authority through the ascent

of the judicial majority, as such any precedential value attributed through Marks is seen by some as illegitimate." (Re, 2019). Plurality opinions can be authored by only a single justice, making such an opinion the holding through the application of Marks, which is condemned by many as counter-majoritarian (Rivero et al., 2022). This allows an opinion to be controlling, which may be disagreeable to all eight other justices (William, 2017).

Much of the existing criticism and research originates from law review journals, resulting in a heavy emphasis on such objections. However, what is often ignored is how the existence of the Marks doctrine has practically affected Supreme Court behavior and the treatment of its precedent. There has been limited research in this regard, which has shown Marks to be, in many instances, both practically (Weins, 2007) and theoretically (Steinman, 2018) unworkable. Research has also examined how lower Courts have tackled such instances in divergent ways, from refusing to apply the precedent to stretching its definition, reinterpreting it completely, or finding an opinion to be controlling without articulating any reason why (Berry et al., 2008; Neuenkirchen, 2013). Research has also shown that Marks sometimes results in non-median outcomes in practice (Rivero et al., 2022). Studies have also traced Mark's impact on notable landmark plurality precedents in less mainstream but still socially relevant areas.

Currently, there exists little research that both assesses the practical implications of Marks and considers them within their broader trends. Plurality decisions have been researched quite extensively; however, the actual impact of Marks is decidedly more complex. The Marks rule changes the judicial landscape simply by its existence, even if it is not utilized. This thesis aims to survey theoretical and measurable implications of the Marks doctrine, particularly as it pertains to the modern-day Supreme Court.

2. Legal and Historical Context

To understand the role Marks plays in Supreme Court behavior, we must first examine how opinion-writing practices evolved and the implications for Marks.

Evolution of opinion writing and voting procedure:

The procedures by which the Supreme Court authors and votes on what is to be the

Court's opinion have evolved significantly since its inception. The inaugural Court adopted the British judicial practice of each justice authoring their own individual seriatim opinions. The interpretation of precedent was then entrusted to other lawyers and judges, who were tasked with discerning an overall opinion of the Court through the aggregate analysis of these many opinions. Justice John Marshall, the 4th chief justice of the Court, initiated a departure from this practice and instead pushed for a single opinion of the Court to be authored; the motivation underlying this change was to present a more unified and clear opinion of the Court. This innovation was not done through explicit rule or doctrine, but rather through the creation of voluntary group norms against the publishing of individual opinions (Penrose, 2020).

The authoring of a single opinion of the Court remained the norm until the 1930s, when the authoring of individual opinions began to become commonplace. The rate of individually authored opinions has consistently and significantly increased since. Separate opinions are a far more common occurrence than the old singular opinions of a unified court (Penrose, 2020). Several predominant factors have been proposed as contributing to this sudden increase in individually authored opinions. For one, the addition of law clerks, as well as the subsequent increase of clerking capacity from just 1 for each justice to now having 4, would reduce the opportunity cost for justices to author their own opinions. The effects of increased clerking capacity are further compounded by the more sophisticated technology available to justices and their clerks, allowing for more efficient conducting of legal research (Penrose, 2020). An increasingly politicized judiciary also disincentivizes co-operation and makes justices more inclined to undermine Court consensus for the sake of advancing their ideological preferences (Winters, 2011).

Given the lack of formal protocols, who says what goes into the published opinion of the Court has been flexible. At a broad level, the Court's opinions can be separated into the singular controlling opinion and any number of additional separate opinions. Other than in cases of split decisions, the controlling opinion is that which garners the ascent of the majority and serves to establish the immediate judgment of the Court as well as dictate analogous cases to be adjudicated in like manner. The Chief Justice delegates authorship of the controlling opinion should they be a part of the majority coalition; authorship is otherwise delegated by the most senior Justice of the majority. The formation of voting

coalitions is similarly an informal and dynamic process. However, each Justice is free to author their own opinions or to sign onto another Justice's opinion. Also, authoring an opinion does not preclude a Justice from signing onto others.

Conventional juridical philosophy grants exclusive authority to the holding of the Court, which has binding authority that inferior courts are obliged to adhere to. What technically qualifies as the holding is all and only the opinion content necessary for judgment on the immediate issue at trial, with all other content being dicta - statements made in passing. Rendering the holding could be equated to the creation of precedent; however, the ultimate influence that opinion content can have is very holistic (Berry et al., 2008). So long as they do not directly contradict binding precedent, judges are free to utilize non-binding, often referred to as persuasive, legal sources. Unsurprisingly, the question of what constitutes precedent and under what circumstances precedent should control is one both complex and subject to frequent litigation (Spriggs & Stras, 2010).

Three major obstacles make such determinations inherently difficult. Firstly, there is the ambiguity and innate interrelation between an opinion holding and dicta. Given that some articulation of how the Court reached its decision is necessary for future court decisions to be resolved consistently, demarcating between essential consideration and passing commentary is a perpetual challenge (Khun et al., 2017). Secondly, persuasive authority is still itself a spectrum. Many factors increase the favorability with which persuasive precedent will be treated: Dissents, as direct opposition to the holding of the Court, tend to have lower persuasive value relative to concurring opinions. Concurrences where the authoring justice is a part of the majority coalition tend to be more persuasive (Kirman, 1995). This effect becomes more pronounced if said author utilizes their concurrence to clarify/expand on points of agreement with the majority (Kirman, 1995), and if they provide a vote critical to the formation of a majority (Bennet et al., 2020). Concurrences are typically granted more persuasive value when they receive positive treatment in future citations or are authored by more respected justices (Moore, 2012). Lastly, even binding precedent can see varying degrees of treatment, often also in light of subsequent treatment (Moore, 2012).

The dissent is the more frequent and much simpler form that separate opinions can

take and is self-explanatory in purpose. Dissenting opinions help outline the typically collective reasoning against the decision of the majority. By being categorical in their relation to the controlling opinion and serving a clearly defined purpose, as well as typically representing the opinion of a sizable minority rather than a singular Justice, dissents are usually seen as more benign and constructive relative to concurrence opinions (Berry et al., 2008; Penrose, 2020). However, dissents do still possess a degree of utility beyond their inherent role as legal commentary. Justices utilize rhetoric strategically and dynamically with public opinion and the salience of a case (Wedeking & Zilis, 2018). Particularly prominent in dissenting opinions is the usage of sensational language. Based on the non-legalistic nature of emotional appeals, the highly significant correlation between sensationalism and case salience, and the established pattern of Justice's strategic usage of Supreme Court opinion wording, sensationalist wording has been posited as a means for the dissent to instill public backlash against the majority's decision (Krewson, 2019). Conventional models of public reaction suggest that sensationalism is an effective means to exacerbate adverse reactions to the Court'(Badas & Justus, 2022); dissents with stronger wording have been shown to correlate with negative media coverage. The strongest worded dissents averaged 53.2% more negative media coverage than the blandest dissents (Bryan & Ringsmuth, 2016).

Concurring opinions refer to separate opinions that agree on at least some aspects of the majority's opinion and present far more ambiguity as to both the authors' position and the opinions' precedential authority (Penrose, 2020). Concurrences can be generally categorized as either expansive or limiting. Expansive concurrences express strong agreement with the majority and serve to clarify or expand on particular points of the majority's reasoning, whereas limiting concurrences express disagreement with some or all of the majority's reasoning. On aggregate, expansive concurrences are treated better, receiving more compliance from the lower courts and greater utilization in future Supreme Court cases, whereas limiting concurrences tend to be treated worse (P. Corley, 2010). Lacking a defined purpose, authors of concurrences typically articulate their intentions through how they label their opinions; there exists no exhaustive list, but such opinions commonly end with concurring: in part, in the judgement, in part and dissenting in part, or simply just concurring, but such labels are often misnomers having little relation to the

actual opinion expressed (Moore, 2012). Uncertainty around what elements a concurrence agrees with can cause problems both with determining its potential relevance to the holding as well as whether or not the concurrence should control under an application of Marks, which defines only opinions that "concur in judgement" as helping constitute the holding of the Court (West, 2006).

Polarization:

Despite questions of a political nature being formally outside the jurisdiction of the Court, the recent saga of Trump's judicial nominees merely follows a long trend of an increasingly politicized process of appointing to the federal judiciary (Gould, 2021). Since 2006 no justice has received senatorial confirmation with anything less than 30 nay votes (1/3 of the senate). However, the current 6/3 balance of conservatives still represents the most partisan the Court has been in decades (Houston, 2023). This stands in stark contrast to the not-too-distant confirmations of Justices Kennedy and Scalia, who were unanimously approved by the Senate (Zilis & Blandau, 2021). The consequences of this are not limited to a more polarized Supreme Court but also to more polarized inferior federal courts (Grove, 2021) and an increasing perception among the American populace that the Court is a political institution (Houston, 2023). Perceptions of actual polarization are further compounded by the concomitant polarization of both the American populace and news media, which provides critical information on the Court. Negative media coverage that is consistent and attacking the Court's legitimacy is posited to be particularly effective (Zilis & Blandau, 2021).

Two factors largely underlie the politicization of the American judiciary. Firstly, the Supreme Court has been active and spent decades expanding their influence through incrementally stretching what qualifies as matters of law versus questions of Politics (Strum, 1974). Issues of top-down enforcement for Supreme Court judicial directives have necessitated political interests to play a predominant factor in appointments to the federal courts (Grove, 2021). Additionally, an increasingly politicized body politic and news media in the U.S. have likely emboldened members of the Court to be more overtly political, as they are still in a position less politicized relative to the rest of the nation and other branches of government (Epstein & Posner, 2018; Houston, 2023).

The ongoing and increasing polarization of both the Supreme Court and lower federal courts is central to both the problems potentially posed by the Mark's rule and its effects. Plurality decisions and ambiguous precedent can help obfuscate extreme or unpopular ideological directions for the Court, by making the media less able to hone in on ideological factions (Denison et al., 2016). Ideology also plays a bigger role in voting behavior when a single vote is pivotal (Clark et al., 2022). Having more partisan and ideologically extreme Justices also makes counter-majoritarian concerns more serious and societally relevant. As a -likely- inevitable consequence of the increasing desire for ideological loyalty and extremism in judicial appointments (Winters, 2011), increased authoring of individual opinions (Penrose, 2020), and the greater intermingling of the judiciary with political questions (Davis & Reynolds, 1974) a drastic rise in split or plurality decisions began in the 1950's. This rise preceded the 1977 US v. Marks decision.

The occurrence of split decisions dropped significantly after 1988, which came about following legislation allowing the Court control over their docket. Notably, occurrences of split decisions spiked in the 1970 and 1975 terms, preceding the establishment of the Marks doctrine and before the implementation of docket control. Following docket control, the Supreme Court opted to hear far fewer opinions each year, reducing the number of cases heard by nearly half. Coming down even further in the last decade, to be down 60% from before docket control. Plurality decisions have experienced a proportional decline relative to all opinions heard. Recent years have seen an initial trend upwards from the 2015 term (Rivero et al., 2022). While the Court justified this proposal on the basis that many cases stemming from prior mandatory jurisdiction posed exceedingly complex but unimportant issues, no proportional increase in the hearing of politically salient cases has been observed since 1988. Meanwhile, an ever-increasing number of circuit splits remain unresolved each year (Hitt, 2019).

This evolution toward increased individual opinion writing and judicial polarization sets the stage for understanding the significance of the Marks doctrine. When justices cannot agree on reasoning despite reaching the same outcome, the Court must determine which opinion controls—a challenge that becomes more complex as justices become more willing to author separate opinions, and less inclined to bargain or compromise.

3. The Marks rule:

Having established the historical context of increasing individual opinion writing, we can now examine how the Marks rule emerged to address the resulting interpretive challenges. The directive of Marks states that when the Court issues a split decision, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds". Uncertainty as to what precisely this ambiguous directive means pervades the judiciary. This has resulted in completely disharmonious interpretation and application by the different federal circuits (Berry et al., 2008), gaming by individual justices to arbitrarily proclaim themselves as holding the narrowest opinion (Rivero et al., 2022), and in many cases resulting in opinions being deemed as controlling which are neither the narrowest (Re, 2019) nor the most ideologically central (Rivero et al., 2022). Citations to the Marks rule by the federal courts have seen a precipitous rise in recent years. This is largely due to the essential role that plurality opinions, and by extension the Marks rule, have played in the landmark cases of novel litigation over affirmative action (Re, 2019) and the death penalty (Marceau, 2009).

However, quantifying the actual impact of Marks on the judicial decision-making of the Supreme Court and inferior federal courts is an intrinsically challenging task, as its impact extends far beyond its explicit utilization. For one, the utilization of Marks by inferior courts is often implicit, occurring through both the citation of split decisions without explicit appeal to Marks (Re, 2019) and through the enhanced precedential value attributed to non-controlling opinions (Penrose, 2020; Weins, 2007). By elevating the value of both plurality and non-controlling opinions, Marks also works through altering the voting and deliberation behavior of the Supreme Court (Berry et al., 2008; Toepfer, 2021).

Some proxies as to the significance of Marks' impact can be approximated by examining the number and types of cases that produce plurality opinions. Although plurality opinions predate the Marks rule, they are theoretically incentivized by Marks, and where any ramifications from the rule ultimately stem. From 1955 to 2010, the Supreme Court authored only 213 plurality opinions, accounting for 3.3% of their total case load (P. C. Corley et al., 2010). However, where plurality decisions do arise, they are disproportionately impactful. Depending on the measure, cases which result in plurality

decisions are between 3.5 and 6 times as likely to be salient (Rivero et al., 2022). Plurality decisions are 250% more common in cases involving civil rights. Plurality decisions are additionally ten times more likely to arise in cases where judicial review is exercised, particularly when the Supreme Court annuls congressional legislation, thereby elevating counter-majoritarian concerns (Hitt, 2019). Plurality opinions have been passed down on multiple landmark cases in the novel and divisive litigation areas of the constitutionality of affirmative action and the death penalty. Resultingly, the Marks rule has been fundamental to the litigation of these areas both in creating the seminal precedents and in later interpreting and applying those cases (Marceau, 2009; Re, 2019).

5. A problematic precedent?

The altered incentives established by the Marks rule have been criticized along three main points. 1: Through incentivizing the filing of lone opinions and the difficulty in interpreting Marks precedent, the Marks rule is legally inefficient. 2: Through allowing unclear and logically indeterminable holdings to be rendered, the Marks rule allows for potentially unpopular opinions to be obscured. 3: Through allowing for a minority of justices to decide cases, undesirable outcomes may be reached (Davisson, 2020; Weins, 2007).

Judicial inefficiency:

One of the most common issues raised with the Marks rule is that by incentivizing the authoring of plurality opinions and providing unclear guidelines for their application, the doctrine creates tremendous difficulty for lower Courts. Marks has been shown to be, in many instances, both practically (Weins, 2007) and theoretically (Steinman, 2018) unworkable. Lower Courts have tackled such instances in divergent ways, from refusing to apply the precedent, stretching its definition, re-interpreting it completely, or finding an opinion to be controlling without articulating any reason why (Berry et al., 2008; Neuenkirchen, 2013). This can be deleterious from an efficiency standpoint, both in the work it takes for each Court to attempt to apply Marks in relevant cases (Re, 2019), and the high likelihood that the precarious legal conclusions reached will not be appealed later (Berry et al., 2008).

Additionally, Marks can also incentivize judicial inefficiency by causing cases to take longer to be heard. Marks makes lone opinions as potential plurality precedent more valuable bargaining chips (Gould, 2021). Separate opinions being filed significantly affect the content of the main opinion rendered by the Court (Matthews, 2022), in terms of length and content. It has been observed that majority opinions are more likely to cite and discuss dissents with more citations (Corley & Ward, 2020) , and majority opinions in turn utilize more precedent when accompanied by multiple separate opinions (Lupu & Fowler, 2013).

Regardless of the potential impact of Marks, the Supreme Court's insufficient capacity to resolve legal divides among the lower courts is a far broader problem stemming from evolutionary developments of the Court. The Court has remained static at nine members, while the rest of the federal judiciary has grown. The Court, as a result of their own activism and an increasingly connected and polemic nation, has grown from its congenital role as an eminent legal authority to a full-fledged apparatus of American governance (Strum, 1974). Additionally, Marks can help complex and socially fluid cases from having to be reheard by the Supreme Court, through allowing such cases to be better handled by the lower courts (Berry et al., 2008). This is particularly relevant in cases where rigid application might prove problematic or counterproductive (Weins, 2007).

Marks and judicial vagueness:

Uncertainty surrounding how the Marks rule will be applied leaves the Supreme Court unsure as to how lower courts will interpret and utilize precedent, and lower Courts unsure about whether and how to do so (Weins, 2007). Given that vague judicial directives inherently promote non-compliance, why judiciaries often don't seek to maximize clarity in their directives is the subject of significant research. One notable motivation is that unclear directives allow those tasked with carrying out enforcement to have more agency. This can be desirable in areas where non-judicial actors, typically government agencies, are better equipped with the requisite experience to implement policies in line with the general principles articulated in court directives. A lack of clarity can also serve to obfuscate expected non-compliance of judicial directives in order to minimize the legitimacy cost which comes from non-compliance (Staton & Vanberg, 2008).

The doctrine has also been used both implicitly and explicitly to justify the utilization

of limiting concurrences, and sometimes dissenting opinions (Berry et al., 2008), even when a formal majority opinion exists (Moore, 2012). This can allow for unpopular opinion content to be obscured from the general public (Caldeira, 1986) and other state actors (Staton & Vanberg, 2008). This ambiguity can also facilitate and obfuscate the strategic and ideological voting behavior of both Supreme Court justices and lower court judges, while simultaneously creating unclear and unworkable guidelines for the lower courts (Caldeira, 1987; Gibson & Nelson, 2015; Houston, 2023).

Declining to give a clear interpretation or guidelines to apply the Marks rule leaves the lower courts with far more discretion when it comes to utilizing plurality precedent. Lower courts are more vulnerable to capture by local public opinion(Staton & Vanberg, 2008) , and are even more polarized (Grove, 2021).

Marks and undesirable outcomes:

Given the divisive and salient nature typical of cases that generate plurality opinions, a pressing concern is whether the altered incentives under the Marks rule will generate undesirable or unpopular legal outcomes (Rivero et al., 2022; Toepfer, 2021). I specifically focus on these factors, and not the commonly expressed concerns for legal soundness (Re, 2019; Steinman, 2018), as they predominantly are of practical concern to the American populace. Of course, what is desirable to Americans is highly subjective and presumably sensitive to people's partisan leanings (Clark, 2009). However, public opinion data consistently finds that public support for the Court is bolstered by a perception that it operates based on genuine legal principles and exerts a non-partisan influence on American governance (Gibson & Nelson, 2015; Zilis & Blandau, 2021). Under an increasingly polemic body politic, the Court's role as a non-partisan moderator against extreme partisanship is of high, and appreciating, value (Epstein & Posner, 2018). As such, desirable decisions will be seen as those which present a politically moderate outcome; and to the extent that ambiguity exists, it is for either purposes of expressing genuine disagreement or uncertainty, or to facilitate flexible application as precedent or flexible enforcement as a judicial directive. In embracing a more activist Court, it is also imperative for judicial conservatism to be prioritized (Strum, 1974).

A polarized populace is likely to be more sensitive to undesirable holdings on matters

salient in political discourse (Zilis & Blandau, 2021). As such, where strong contention exists among the nine Justices, decisions of the Court should exercise caution by minimizing the peripheral impact of their precedent. Although Marks explicitly prescribes control based on an opinion concurring on the "narrowest grounds", discord surrounding the rules proper interpretation and application, as well as gaming by justices to self-identify their opinion as narrowest, has resulted in the controlling opinion found under Marks to not be the narrowest in some instances (Re, 2019). And in many cases, a faithful application of Marks is logically impossible (Steinman, 2018).

Politically salient cases, where strategic behavior would be most pertinent, are most likely to result in the authoring of both concurring (Winters, 2011) and plurality (Rivero et al., 2022) opinions. However, the most salient cases are also the least likely to see counter-attitudinal voting (Wedeking & Zilis, 2018), making it hard to disentangle strategic opposition from genuine and irreconcilable disagreement on salient issues ("Plurality Decisions and Judicial Decisionmaking," 1981).

Having established the doctrinal confusion surrounding Marks, the central question becomes: what drives justices to create plurality opinions in the first place? Understanding these motivations is crucial because it determines whether the problems identified above stem from institutional design flaws or from strategic behavior that could be addressed through different means.

5. Why Split?

The extent to which Marks has influenced the authoring of individual and plurality opinions, and the extent to which any such opinions are borne out of strategic motivation, is unclear given the concomitant factors such as polarization, which provide alike incentives for judicial strategizing and disagreement. The incentives of Marks need to be understood in the context of how members of the Court treat Marks and plurality precedent. It is accordingly investigating what considerations go into the decision to split from the majority.

Internal documents have noted the general aversion of Justices to handing down plurality decisions (Hitt, 2019). Pluralities are less likely to be utilized by lower courts (Clark,

2016). Furthermore, even the most dogmatic justices have frequently been willing to form compromise opinions to attain a majority (Re, 2019). Given these conditions, why do plurality decisions ever even occur? Political Scientist Matt Hitt posits that three conditions are necessary for the Court to hand down a split decision (Hitt, 2019). Firstly, there must be sufficient cause for the case being heard in the first place. Typically, this condition is satisfied either through a case falling under the Court's mandatory jurisdiction or it being too important to be denied certiorari (Hitt, 2019). Second, the case must allow for multi-dimensional preferences to be formed; if all justices held only a single voting preference, they would form a majority coalition around the median justice. Third, the combined preferences of the justices cannot be single-peaked; that is, on at least one preference dimension, each justice cannot be arranged left-to-right such that the ideological distance from their most desired preference will always result in a less favorable preference. Should this not be the case, then a majority coalition could be reached by a convergence to the median of the aggregate of all preferences.

Plurality decisions are twice as likely to be made by disordered (non-single peaked). However, case complexity is not significantly correlated with the creation of plurality precedent (Corley, 2009). And heterogenous coalitions negatively correlate with the creation of plurality precedent (P. C. Corley et al., 2010). Given that most case salience measures correlate with the creation of plurality precedent (Hitt, 2019), case complexity should capture a second dimension of preference. That it does not suggests either the second preference dimension is unrelated to case outcome or is already captured in the first preference dimension. Both explanations have support in existing literature. Judicial preferences vary considerably across areas beyond what can be captured in one-dimensional preference variables (CLARK & LAUDERDALE, 2012). Justices to the Court have been found to often have strongly held beliefs outside of conventional partisan lines and not readily simplified to a single axis of preference (Badas & Justus, 2022). Justices also have individual non-policy preferences such as workload or the institutional status of the Court (Winters, 2011). Control over opinion dicta and reasoning can also be a preference dimension (Carrubba et al., 2012).

The inferior courts.

The preferences of the lower courts must also be considered by the Supreme Court. While technically bound by the opinions of the Supreme Court, judges have discretion in how they craft and what cases they cite in a legal argument. More heavily cited cases tend to have a bigger impact on national jurisprudence (Hitt, 2019). Likewise, a precedent at odds with a judge's preferences can be narrowly tailored or outright ignored; the likelihood of this occurring is significantly tied to both the precedent's popularity among other lower court judges and the perceived legitimacy of the current Supreme Court (BAUM, 1978). Empirical evidence shows that the Supreme Court is aware of, and responsive to, the opinions of the lower courts (Hitt, 2019).

Unlike the Supreme Court, lower Court judges have a real possibility for their decisions to be reviewed, and possibly overturned (Hitt, 2019). When it comes to split decisions, a significant burden is placed upon the judges of the lower courts to interpret what is and is not persuasive. This process is primarily accomplished through adherence to the Marks rule, which prescribes that only the narrowest doctrine of the combined opinions is to be followed as precedent. This puts far more scrutiny on the judges of the lower court as they, rather than the Supreme Court, are making interpretive decisions, and it is being done so on a judicial principle not even formally recognized (Re, 2019). Accordingly, the lower courts cite plurality judgments at less than one-third of the rate of consistent judgments; however, citations are no more likely to be negative relative to consistent judgments (Hitt, 2019).

Public Opinion:

The degree of influence public opinion exerts on the Court's decision-making is heavily correlated with the political salience of a given case (Bryan & Kromphardt, 2016). Political saliency influences the extent to which people notice and care about a particular decision, and the Court is known to act more incrementally in politically salient cases (Smirnov & Smith, 2013). Additionally, litigations involving civil rights

issues tend to create precedent with more peripheral impact on other areas of law (Hitt, 2019), and their outcomes tend to be more contentious among the lower courts (BAUM, 1978). The influence of public opinion on decision-making is even more pronounced when it contravenes the Court's preferences (Bryan & Kromphardt, 2016); notably, public sentiment is more heavily swayed by unpopular decisions than by favorable ones. The court also appears responsive to the level of media coverage on an issue; cases under heavy media attention take far longer to deliberate, receive significantly more drafts, and are more likely to be granted a rehearing (Badas & Justus, 2022).

Despite a clear relationship, whether public opinion factors into the Court's strategic considerations has been heavily doubted in scholarship (Bryan & Kromphardt, 2016; Gibson & Nelson, 2015; Nelson & Tucker, 2021). In comparison to the other branches of government, the Supreme Court enjoys both very positive and relatively stable support from the American public (Gibson & Nelson, 2015). Furthermore, public opinion on a given ruling has only a loose relation to the diffuse opinion of the Court (Nelson & Tucker, 2021). Several explanations have been posited to explain the Court’s relative inoculation from the vicissitudes of public opinion. For one, exposure to legal writing and symbols of judicial authority has been shown to buttress judicial legitimacy, which can mitigate any disfavor garnered by unpopular opinions (Gibson & Nelson, 2015; Hitt, 2019). Institutional legitimacy also appears grounded significantly in fundamental values; both support for liberty and rule of law are heavily correlated with support for the Court and are both stronger correlates of support than is ideological alignment with the Court (Gibson & Nelson, 2015). The majority of Americans also view the Supreme Court as not being overly political (Gibson & Nelson, 2015), which contrasts with an increasing perception of partisanship among the other branches of government (Epstein & Posner, 2018).

However, there is some evidence that the effect of public opinion is better understood as the result of justices being individually enmeshed in societal discourse. For one, public opinion has a stronger correlation with counter-attitudinal voting than case salience (Bryan & Kromphardt, 2016). A justice highly cognizant of public opinion has little reason to go against their preferences on an opinion which is unlikely even

to be seen by the public. Alternatively, this statistic could be explained by genuine policy preferences on salient opinions. Furthermore, the Court displays responsiveness to the general topics of public opinion but is less aligned when it comes to specific points of issue (Bryan & Kromphardt, 2016). Also, the Court heeds public sentiment even in cases where enforcement would be handled solely by the lower courts (Bryan & Kromphardt, 2016) and does not especially concern the Court.

Notably, the Court becomes more responsive to public pressure when their popular support is waning; effectively treating institutional legitimacy like a reservoir that can withstand intermittent disapproval by drawing upon their established goodwill (Gibson & Nelson, 2015). Additionally, individual support for the Court is much more variable than aggregate support. This suggests that the effect ideologically unfavorable Supreme Court opinions have on people may be more substantial than measures of correlation would suggest, as their effect on popular opinion is kept in relative equilibrium due to the relatively equal rate at which the Court issues conservative and liberal opinions (Nelson & Tucker, 2021). Whether this equilibrium is the result of deliberate strategy is hard to discern, as the ideological balance of the Court tends to remain balanced; justices seem to play an active role in maintaining this equipoise by re-aligning themselves to maintain a relatively consistent ideological mean (Smirnov & Smith, 2013).

In recent years, the previously accepted notion of a relatively stable reservoir of goodwill that insulates the Court from popular backlash has been called into question. Starting in 2018 with Trump's controversial appointment of Justice Gorsuch, a seat initially meant to be filled by Obama's blocked nomination of Merrick Garland, media coverage has been rife with discussion of the Court's precarious legitimacy. The emergent discourse over the institutional legitimacy of the Court has only intensified following the controversial appointment of Justice Kavanaugh, as well as the decision to overturn Roe. V. Wade and Casey v. Planned Parenthood in the Court's ruling on Dobbs v. Jackson Women's Health Organization. Repeated skepticism by the media as to the Court's partisanship and legitimacy may be enough to meaningfully degrade the Court's long-established goodwill (Houston, 2023). This leaves the Supreme Court more vulnerable to interference from other branches of

government, as the American people are less likely to rally to its defense (Caldeira, 1987). Consequently, coercion efforts by other government actors are likely to be more effective, as interference poses a more credible threat (Hitt, 2019), and Justices of the Court should act more responsively to public opinion (Bryan & Kromphardt, 2016).

Other Branches:

Although action by other branches is rare, the threat alone is often enough to influence Court behavior. Congressional bills targeting the Court, such as court-packing bills, serve to censure the Court and have been shown to reduce the use of judicial review simply by being proposed (Hitt, 2019). The Supreme Court's behavior has been effectively modeled as considering potential executive and congressional constraints (Bergara et al., 2003).

Although far less common, reprimand from the executive is also possible. Of the few instances of executive interference, likely the most notable was Franklin Roosevelt's nearly successful attempt to pack the Court with 6 extra justices of his choosing. Importantly, coverage at the time conveyed discontent solely over the outcome reached by the Supreme Court; it seems unlikely that better legal reasoning would have prevented Roosevelt's retaliation. What is, however, credited with helping prevent the packing of the Court was the public support they had at the time (Caldeira, 1987). The Supreme Court gives very little deference to the President, a trend that has declined drastically since FDR (Epstein & Posner, 2018).

Collective norms:

The probability that a case heard by the Court will result in a plurality decision decline by 33% when the Chief Justice assigns the writer of the Court's opinion (Corley et al., 2010); this happens whenever the Chief Justice is a part of the initial majority coalition, otherwise it is assigned by the most senior member of the majority. While the Chief Justice has the same vote as all other justices, they have the additional responsibility, as leader of the Court, to ensure its proper functioning and organization. Whether due to concerns about institutional legitimacy or personal legacy, on aggregate, those in the role of chief justice have taken this responsibility

seriously (Maltzman & Wahlbeck, 2004). Split decisions reflect badly on the Court and, by extension, the chief justice themselves. The chief justice is by far the least likely of any justice to write or join a special concurrence (Corley et al., 2010).

When in the majority, the chief justice can strategically assign opinion authorship to minimize defection; As Chief Justice Roberts explains, the Chief Justice can maximize the chance for a consensus by selecting the justice with the strongest preference to author the opinion, as those with weaker opinions are more likely to defect (Corley et al., 2010). Opinion authors have significant control over the final opinion of the Court, making strategic considerations highly relevant (Bonneau et al., 2007). Further data corroborate the conclusion that the chief justice acts strategically to secure a consensus; the chief justice is more likely to self-author on unanimous opinions and more likely to delegate on highly divided opinions. Opinions authored by the chief justice are also the least likely to result in plurality opinions, occurring 40% less often as opposed to only 33% when the chief delegates (Corley et al., 2010). This behavior can also be understood by models of utility maximization, as Justices who defy cooperation norms see more defection in subsequent cases (Spriggs & Stras, 2010), a factor most prevalent for Chief Justices.

Justices of the Court also tend to write special concurrences more when they are more ideologically distant from the median justice, but more often write general concurrences (seen as more of an addendum to the opinion's rationale than a completely divergent explanation) when more ideologically distant from the authoring justice (Khun et al., 2017). Therefore, having an extreme justice as an author should discourage defection, as most justices would be more ideologically distant than if it were the median justice assigned as author. And over 45% of the special concurrences which resulted in split decisions were authored by the 3 most median justices (Corley et al., 2010).

Justices appear to perform ideological counterbalancing in response to the addition of new members to the Court. While this helps ensure moderation, the behavior is also in accordance with individual calculations to optimize utility (Smirnov & Smith, 2013). By incentivizing swing voters, the Marks rule encourages Justices to

moderate. Additionally, the Justices tend to sort themselves into regular roles, with usual swing-voters being established as time passes while membership remains unchanged. (Collins, 2008; Gould, 2021).

7. Judicial ambiguity Case Studies

To understand how judicial ambiguity functions in practice, it is essential to examine prominent cases that illustrate both strategic and genuine uses of unclear precedent. The following cases demonstrate how courts have used ambiguity for different purposes, providing context for understanding Marks-specific ambiguity.

Ambiguity is innately neither good nor bad but is a necessary means in the Judicial process. Marks, as a means of sewing judicial ambiguity, and alternatives to it should thus be evaluated on their observed or expected tendency to be utilized for societally constructive versus destructive ends. To contextualize judicial ambiguity, it is worth examining prominent usages that could provide analogs to the Marks rule. Unreasoned opinions are all opinions that lack a consensus rationale for their decision. Plurality precedent is not necessarily unreasoned, as every part of the holding technically should and oftentimes does have explicit backing from a majority of Justices, even when the majority coalition is not the same for all issues. But plurality precedent does constitute the bulk of unreasoned opinions, with some more clearly displaying their lack of reasoning than others (Hitt, 2019).

This evaluation is relevant not just to the Supreme Court but also to the lower courts, and to an even greater degree. Unlike the Supreme Court, lower courts have mandatory jurisdiction and cannot simply wave away complex but practically insignificant cases (Grove, 2021). Despite the much greater potential for their decisions to be reviewed and overturned (Hitt, 2019) judges of the inferior federal courts also display some strategic use of ambiguity, especially when the case concerns contentious political issues (Grove, 2021). Ideology as an influence on the decisions of lower courts is, in several ways, more pernicious than its influence on the Supreme Court. Foremost among them is that the ideological composition of the lower courts is typically more fluctuating (Hitt, 2019).

All appointments to the federal judiciary are, to some degree, balanced by being made

by the president and thus entangled with the political process. However, whereas the Supreme Court is a singular body, the lower courts are many, yet the balancing of executive appointments occurs only at the aggregate national level. Consequently, the ideology of the presiding Judge in a trial, or a three-judge panel in an appeal, is largely a matter of chance. Additionally, while judges of the inferior federal courts are more legally accountable, they do not have the watchful eyes of national news media like those of the Supreme Court. Both the Supreme Court and lower courts are cognizant of and influenced by public opinion (Bryan & Kromphardt, 2016; Grove, 2021).

Brown v. Board:

Whereas the Supreme Court is influenced by the opinion of the national public, lower courts are influenced by the much more variable opinion of their respective local public. Brown v. Board is a prominent illustration of judicial ambiguity being used strategically to veil non-enforcement. The famous directive of the Supreme Court that desegregation of schools must be commenced with "all deliberate speed" was delivered precisely because its nebulous guidelines would assuredly result in a slow and gradual process of desegregation. The NAACP explicitly petitioned for a more explicit judgment with a greater requirement for expediency. Brown v. Board has faced its share of criticism, but the Court's passivity in deciding Brown v. Board worked to preserve the Court's institutional legitimacy against the almost certain resistance that desegregation efforts would encounter across much of the American South.

However, a lagged process of integration is not all that came from the Court's refusal to explicate any timeline. The Court's opinion in Brown v. Board in effect offloaded the actual challenge of enforcing desegregation onto the lower courts. Judges of lower courts face far more localized scrutiny, and many opted for non-enforcement of the Supreme Court's decision, either because of local pressure or their own ideological disagreement with the Court's ruling. Furthermore, those judges who were inclined to follow the Court's directive would ultimately bear the legitimacy cost of non-compliance (Staton & Vanberg, 2008). A significant consequence of the "all deliberate speed" edict was spurring the politicization of appoinwewddsfdcs12345543]w34e2r421tments to the inferior federal courts. Prior to this time, positions in the federal judiciary were largely allotted based on a

patronage system. Throughout the rest of the 50's and well into the 60's, presidential administrations specifically looked to judges who would enforce integration for appointments, which would ultimately result in party affiliation and ideology being predominant factors in selections to the federal courts (Grove, 2021).

Planned Parenthood v. Casey:

Ambiguity can also serve to preserve institutional legitimacy in the inverse situation, where the Court's decision is a placation to public opinion. A cogent example can be found in the now-overturned landmark abortion cases of Roe v. Wade and Planned Parenthood v. Casey. At the time Roe v. Wade was decided, the topic of abortion was essentially absent from public discourse. However, the Roe decision mobilized religious conservatives and effectively birthed a pro-life movement. Being decided prior to abortion becoming an issue of political contention, Roe outlined the fundamental right to an abortion using the broad and explicit trimester framework. Abortion advocates specifically celebrated the victory of Roe as an immediately enforceable precedent, which was explicitly held in contrast to the "all deliberate speed" edict of Brown. The emergent pro-life movement, in response to Roe, would become an increasingly prominent political force pushing to overturn the precedent. Less than two decades later, the Court would re-hear the question of abortion in Planned Parenthood v. Casey. Casey completely reformulated both the legal underpinnings of Roe and replaced the trimester framework with the significantly weaker and vaguer directive that regulations of pre-viability abortions are permissible so long as they do not impose an "undue burden" on the right to terminate pregnancy.

Despite completely overhauling the abortion right of Roe, the opinion of Casey purports to reaffirm Roe. Notably, an initial draft of the Court opinion did formally overturn Roe, but late in deliberations, Justices came to the more compromised opinion that was ultimately issued. A consensus among legal scholars credits the decision to avoid explicit overturning of Roe as predominantly the result of concern for institutional legitimacy; Justices of the Court did not want to give the appearance of making decisions based on vocal public opinion. The opinion of Casey added ambiguity both to the precedential authority of Roe, which was effectively nullified and replaced by Casey, as well as to what

regulatory action would violate the abortion right. The opinion of Casey helped placate the pro-life movement by allowing far broader discretion to lower judges to allow regulatory obstacles to abortion access while also saving face by not clearly capitulating to public outcries (Grove, 2021). The opinion of Casey was significant in helping to facilitate the eventual overturning of itself as well as Roe v. Wade in the Dobbs v. Jackson decision ("The Paradox of Precedent About Precedent," 2025).

Bush v. Gore

Per-curiam opinions are opinions left unsigned, usually to deny the opinion's precedential value, hide the author(s), or reflect unanimity of the Court. Per-curium opinions can also be reasoned; however, the line is less gray than with plurality decisions. If the unsigned opinion has reasoning, then it is reasoned otherwise it is not. Bush v. Gore is almost certainly the most prominent and likely impactful, per-curium opinion of recent times. For Bush v. Gore, the reason to be unreasoned is predominantly expediency and the need to render a judgment. There is little concealing the verdict of Bush v. Gore as it is clearly unreasoned. Subsequently, Bush v. Gore would face heavy public and scholarly outrage over the Court's failure to justify a consistent rationale for their decision (Prosise & Smith, 2001).

McDonald v. Chicago

Despite featuring a formal majority opinion, McDonald v. Chicago can be considered unreasoned as only four justices' assent to the opinion judgment as well as its reasoning. McDonald is an illustrative case of both the possibility of an ambiguous precedent in the absence of the Marks rule and the potential for persuasive content to shape precedent. The case was a landmark decision that formally incorporated the Second Amendment under the Due Process Clause of the Fourteenth Amendment and accordingly held that city and state legislation can be struck down if it infringes on constitutional gun rights. 5 Justices signed onto the majority opinion; however, Justice Thomas also authored his own concurrence alongside the majority opinion that he also signed onto.

Thomas's concurrence rejected any usage of the 14th Amendment due process clause and instead argued to utilize the privileges and immunities clause. This would remove the

precedential foundation of most prominent civil rights legislation, nearly all of which Thomas advocated for overturning in his concurrence on Dobbs v. Jackson. This means the conventional due process standard of incorporation only had four justices sign onto the reasoning. Despite this, Justice Thomas's concurrence has been well treated. It is one of the most cited non-majority opinions and spurred novel discourse around incorporation via the privileges and immunities clause. (Bennet et al., 2020; Moore, 2012).

VI. Marks Case Studies:

Marks creates judicial ambiguity both inherently and often deliberately; however, that ambiguity has to be put in the perspective of its function. The three cases selected constitute the most prominent Marks cases by number of citations in Rapanos v. United States and the most significant plurality precedent on salient and practically relevant issues. Baze v. Rees and UC v. Bakke were seminal precedents on novel areas of litigation: the death penalty and affirmative action, respectively. These cases represent some of the most studied and influential plurality precedents.

Rapanos v. US

Rapanos v. United States provides an apt illustration of the confusion and complexity that can abound when trying to determine what the "narrowest ground" is in many cases. Rapanos sought to clarify what bodies of water fall under the jurisdiction of the Clean Water Act (CWA). The CWA grants the federal government, specifically the EPA and Army Corps of Engineers, oversight to regulate "navigable waters", and disallow the discharge of pollutants into said waters. The CWA defines "navigable waters" as "the waters of the United States", but this latter definition provides very little in the way of clarity. Specifically at issue was whether, and if so, which, wetlands fell under the jurisdiction of the CWA. The Court ultimately sided with the petitioner at trial, who contended that his wetlands fell outside the defined jurisdiction of the CWA.

Justice Scalia, speaking for the four-justice plurality, outlined a test that first defined waters of the United States as relatively permanent bodies of water connected to traditional interstate navigable waterways. The plurality opinion also specifically excluded wetlands that possessed only a "physically remote hydrologic connection to 'the waters of the United

States'". In his special concurrence, Justice Kennedy adopted an entirely different "significant nexus" test to arrive at the same outcome as the plurality. Kennedy directed that the CWA only encompasses wetlands when there exists a "significant nexus between the wetlands and navigable water" (Berry et al., 2008). Although a majority of the Court agreed that allowing the CWA to encompass all wetlands was overly broad, completely divergent guidelines were proposed to establish which wetlands should qualify.

The Marks "narrowest ground" doctrine is clearly not well equipped to handle a split decision like Rapanos, where two completely different tests are adopted without any clear implicit consensus or logical subset between the two opinions. Despite this, Chief Justice Roberts issued an expansive opinion specifically directing lower courts to utilize Marks when deciphering what parts of Rapanos are controlling. Additionally, Justice Stevens authored an individual dissenting opinion which instructed lower courts to side with the State should they hear a case which fails either the plurality's test or Kennedy's significant nexus test; adherence to this directive would clearly serve the interests of the dissenting coalition, as a requirement to pass both articulated tests would maximize the instances where jurisdiction is granted under the CWA. Unsurprisingly, the Rapanos precedent led to completely disharmonious treatment among the various federal circuits, as well as the agencies charged with implementing the Court's declaration. Only half of the inferior courts found Marks to even be applicable, with the other half denying any precedential control to Rapanos, specifically going against Justice Roberts' directive to apply Marks (Berry et al., 2008).

Of the courts which did apply Marks, all of them found Kennedy's test to be controlling. The 7th Circuit found Kennedy's significant nexus test to be controlling, as it would most often grant jurisdiction to the State and was thus seen as the "narrower" opinion. The 11th Circuit adopted the same conclusion and reasoning, however, also explicitly rejected the instructions of Steven's dissent as they understood Marks to prescribe value to exclusively concurrence opinions. The 9th Circuit also adopted Kennedy's test but explicated no reasoning as to why. Of the courts that refused to apply Marks some disregarded Rapanos as precedent, opting to rely on other cases to settle related matters. Others, such as the 1st and D.C. circuits, adopted their own method of deciphering a controlling precedent, which ultimately led them to follow the conclusion of

Stevens' dissent to grant jurisdiction under either test - although Stevens' dissent was not actually cited in their reasoning. Following the Rapanos decision, the Army Corps of Engineers and the EPA released memos on how to handle jurisdiction in light of the ruling. In these memos, both explicitly cite Steven's dissent and establish protocol that jurisdiction can be found when either test is satisfied (Berry et al., 2008).

Like many prominent Marks cases, Rapanos was a landmark precedent in an emerging field of law. Rapanos stands as a pivotal case in the developing jurisprudence of environmental law and discretion granted to federal agencies. Although the Army Corps and EPA interpreted the decision most favorably to them, the EPA and Army Corps had significantly less agency following Rapanos. The enforcement costs of Rapanos were effectively passed on to the EPA and Army Corps, as well as private entities working with them, who have had to deal with the transaction costs associated with the significant procedural density added by Rapanos. Rapanos has been met with scholarly criticism, however, still little relative to salient cases. Additionally, the main concern of Rapanos would be state opposition, as neither the general public nor the lower courts are implicated. Rapanos did bear heavily on both the executive and legislative branches and rendered an unfavorable judgement on the particularly contentious issue of agencies interpreting the environmental commerce clause. Supreme Court jurisprudence had been decidedly hostile to this issue preceding Rapanos, and it was a point of heavy contention among executive agencies and the Court. Denying agency autonomy in Rapanos not only served the Courts' immediate interest to reign in the power of executive agencies, but helped facilitate the much more significant 2024 overturning of Chevron v. US. Chevron directed agencies be allowed to international discretion of the Clean Air Act, a cause furthered by Rapanos very similar fact pattern (Brader, 2012).

Baze v. Rees:

The 2008 argument on behalf of petitioners Ralph Baze and Thomas Bowling was the first time the Supreme Court had considered 8th amendment objections to the methods of administering the death penalty. They argued that the three-drug lethal injection protocol imposed by Kentucky, and nearly all states with death penalty statutes, was a significant risk to cause them unnecessary pain and suffering. Constitutional questions as to the

constitutionality of the protocol had halted executions in nearly every state (Acker, 2008). The plurality was authored by Chief Justice Roberts and joined by Justices Kennedy, Alito, and Thomas. The plurality opinion devised a standard that methods of execution violate the Eighth Amendment only if they pose a "substantial risk of serious harm" or an "obviously intolerable risk" compared to known alternatives. This was a more stringent standard than those put forward by Kennedy, Alito, or Thomas. A noteworthy implication of Roberts' holding was reframing the analysis of human dignity from the condemned to the witness, arguing that death penalty procedures advanced state interests by preserving the legitimacy of the procedure (Marceau, 2009).

Justices Breyer and Stevens both filed limiting concurrences. Breyer's opinion agreed with the immediate judgment but limited broad support for methods of execution. It was Justice Stevens's concurrence that would prove essential to restarting death penalty executions. In his opinion, Steven strongly asserted the unconstitutionality of the death penalty while simultaneously approving of the three-drug protocol used. This gave the plurality its crucial fifth vote for the constitutionality of the method, where Breyer provided the fifth vote for the constitutionality of the death penalty generally.

Steven's concurrence alleged that capital punishment is patently excessive and cruel while serving no legitimate purpose. He sided with the majority on the basis that precedent on the constitutionality of the death penalty generally was binding. Stevens had opposed the death penalty in the past; however, he had consistently opposed challenges to the death penalty based on racially unequal outcomes (Acker, 2008).

Justice Stevens' opinion was explicit that he expected continued debate and re-percolation on the issue, also specifically warning states to avoid similar execution protocols to safeguard against litigation. His opinion denied precedent to either side's test by not adopting either. Baze did not significantly alter existing death penalty precedent; however, it did greatly encourage further contestation, especially at the state level. The precedent set by Baze also encouraged circuit courts that wished to leave open the death penalty as a political question (Marceau, 2009).

Steven's opinion reflects his own contrasting views on the death penalty as well as his situation. In his role as senior justice, Stevens had gone on record as having a preference

for assigning majorities, where he would delegate authorship by deliberately siding with the coalition that did not include the Chief Justice. Stevens' opinion reflects a genuine objection to the death penalty, but also a desire not to contradict the precedent he helped create. Baze v. Rees was selected for certiorari over a similar case in Taylor v. Crawford. Taylor was less developed and raised more concerns regarding the actual protocol for execution. Whereas the method in Baze was representative of almost all executions nationally, and was far less likely to be overturned on the basis of the method (Marceau, 2009).

UC v. Bakke

The case of UC v. Bakke is likely the most salient plurality decision of the time, and still now. UC v. Bakke was the first case to tackle the issue of affirmative action in a major ruling. The question before the Court was whether UC Davis Medical School violated equal protections and the Civil Rights Act by denying an applicant when 16/100 seats were reserved for disadvantaged minority applicants. Justice Powell's plurality became the controlling opinion of the Court and ruled the quota system unconstitutional because it excluded applicants on race alone.

Justice Stevens wrote for the four-justice coalition favoring color blind admissions and proclaiming all affirmative action policies unconstitutional at least for universities. An opposing coalition comprised of Justices Brennan, White, Marshall, and Blackmun favored color-conscious admissions, reasoning that racial remedial preferences should face a lower standard than strict scrutiny. Justice Powell's plurality chose to adopt the strict scrutiny standard typically used for race-based discrimination, but found diversity efforts to qualify as a sufficiently compelling interest.

In his reasoning, Powell rejected the notion that reverse discrimination should similarly invoke strict scrutiny. Powell also rejected the distinction between quota and goal-based systems for implementing affirmative action. Despite this, Powell treated affirmative action as equally warranting of strict scrutiny, and that a goal-based system can serve diversity interests adequately, where quotas are too broad. The conflicting views Powell expresses are in part representative of his own mixed views on race. Justice Powell had opposed equal education, pivoting his stance directly following the Brown v. Board

decision. Powell's decision was a clear middle ground but was also informed by his view that affirmative action should be a purely transitional process to equalize racial disparities, and not a long-term solution. Powell worried that more formal systems, like quotes, could become entrenched.

Powell initially authored a general concurrence; however, at the suggestion of Justice Brennan, he filed his opinion instead as a limiting concurrence. Brennan made his suggestion in the hope that a plurality opinion would signal a compromise to a divided public. However, the choice to do so also gave Powell a massive influence on developing future jurisprudence, with future cases being decided in a strikingly similar fashion. The 2003 decision of Grutter v. Bollinger serves as the most comprehensive affirmative action precedent since Bakke, upholding the constitutionality of non-quota affirmative action practices by the University of Michigan Law School. The majority reaffirmed Powell's 3 main stipulations: that affirmative action must pass strict scrutiny, that it be acceptable as a purely transitional system, and that it must be holistic in approach (Anderson, 2003).

The need to broadcast compromise is sensible given the unusual saliency of UC v. Bakke among the general public. Lines to hear oral arguments saw people line up overnight, and over 300 people were turned away despite rules allowing viewers only 3 minutes each to watch (Piccus, 1992). The ambiguous middle ground established by UC v. Bakke was successful in tempering a divisive public while still retaining its long-term precedential authority. Although legal scholars and professionals initially criticized Bakke for failing to set a clear precedent, it was received favorably by the general public. Anti-affirmative action activists tried appealing the decision for lacking clear reasoning; however, the debate has long since shifted from whether Bakke will be overturned to how far it will be extended.

Each of these examples illustrates largely compatible findings. The use of plurality precedent established middle-ground rulings. Every case involved instances where a Justice strategically tries to position themselves as the median Justice and their preference as controlling. However, both UC v. Bakke and Baze v. Rees appear to predominantly reflect sincerely held beliefs on salient matters. The immediate precedent on cases tends to be a mild change from the status quo while still imparting significant precedential legacies.

VII. Methods:

Determining the impact of the Marks doctrine cruxes on the questions of how Supreme Court Justices view plurality precedent and what motivates their decision to split from the majority. If ambiguity or bargaining are maximized by strategic justices, especially on a polarized Court, that holds very different incentives than if plurality decisions reflected genuine disagreement among Justices. To achieve an understanding of the motivations behind the reaching of a plurality decision, we must first juxtapose each possibility against models of Judicial behavior.

Whenever a plurality opinion is issued, an active decision was made by the author(s) of the special competition(s) to not assent to the majority, and as a consequence, grant greater precedential value to their decision(s). This can be done as a manifestation of Justice's strategic impetus to maximize their influence over Court decisions (Smirnov & Smith, 2013), either through enabling lone Justices to author controlling opinions or granting them greater leverage in bargaining (Lax & Cameron, 2007). Influence can also serve strategic considerations of institutional status and legitimacy (Winters, 2011). Alternatively, plurality opinions may denote genuine disagreement among justices (Berry et al., 2008).

None of these factors are dipositive, and each will be examined based on how well they explain correlates of plurality decisions and Justice behavior. Each factor must also be assessed on whether it aligns better with a purely attitudinal model of Justice behavior, expecting that preferences are primarily functions of their judicial preferences. Or to a partially strategic model in which Justice's exercise either collective preferences or individual utility maximization. To identify potential explanatory factors, the Linguistic Inquiry and Word Count will be used to compute sentiment data from opinion word usage.

A. Sentiment data:

LIWC-22 computes sentiment data based on a number of pre-set dictionaries. These values are computed primarily by counting the proportion of certain words within a text. Psycholinguistics provides a way to understand the law as a product of Justices' underlying motivations and preferences that shape their perception of cases and policy (Goldstein,

1968). LIWC has been utilized to test a number of specific hypotheses pertaining to Judicial motivations, as well as a predictive tool. Psychoanalytical models utilizing LIWC data have predicted Supreme Court decisions with higher accuracy than conventional models (Gandall et al., 2023). As well as analyzing the motivations and considerations behind dissenting opinions (Corley & Ward, 2020).

The LIWC core dictionaries are used with default entries, with minor corrections made for words that are overemphasized in legal texts. Each score is computed on an ascending scale from 0-100, with 50 indicating a score in the middle of the range. For complex sentiment scores measuring less easily classifiable patterns, it is recommended to use compound variables with equal weightings (Ballingrud, 2022). Following the lead of (Owens & Wedeking, 2012) cognitive complexity will be measured by aggregating scores for causation, discrepancy, tentative, certainty, inclusiveness, exclusiveness, negations, and words of 6+ letters. These scores help measure words indicative of logical and specific thought processes. Then, a related measure of cognitive inconsistency is computed from the standard deviation of cognitive complexity aggregated by Justice. This particular measure has been found to correlate with Justices with high ideological drift, and indicates that a Justice displays reorganizations of their cognitive processes (Owens & Wedeking, 2012).

Core dictionary modules measure Authenticity, Clout, and Analytic. Analytic tone is a similar measure to cognitive complexity; however, the core module allows for more complex work classification logic for core dictionaries. Analytic tone is thus computed as a dummy variable for cognitive complexity. Authenticity measures the degree to which Justices' writing conveys genuineness and individual thought. While Authenticity has proven useful in most text contexts, it has so far seen limited application to specifically Supreme Court Justices. Clout is a measure of status, leadership, and confidence reflected by an author. Past research has linked clout to negatively correlate with the Courts' vulnerability to executive actors (Ballingrud, 2022). Clarity is lastly computed to measure readability and the complexity of words, but not thought processes.

A. Summary data:

The Supreme Court Database contains case and justice feature data for all published

Supreme Court opinions. The case data and justice data are conjoined to run dataset, such that every justice entry has relevant case features appended to it. This conjoined sheet is additionally merged with Martin-Quinn scores of each justice by year, and saliency measures based on case appearance in either or both the New York Times and CQ's landmark cases (treated as three categories of salience = 0,1,2)

Marks' cases were filtered by finding all cases where the decision type is either opinion of the Court or judgment of the Court, and the minority coalition is equal to 4. Additionally, only cases featuring a special concurrence, in addition to the judgment of the Court, are kept. This leaves 272 opinions as identified Marks cases. To create a representative sample, cases most likely to have been Marks cases are used. This is similarly filtered, but only cases with a regular concurrence and dissenting opinion are retained, resulting in 253 opinions to constitute the control sample.

The 525 total opinions have their main body text extracted. Progressive identification identifies start and end elements of each opinion, as well as Justices named on the opinion, and those authoring. Citations are processed out, and the citation count is calculated for each opinion as a factor of its length. Citation count is inclusive of footnotes (removed before text extraction) but not headers. *I.d.* citation calls are also removed, as they trigger false detections from LIWC dictionaries. Opinions start after I, A, or the announcement string of each opinion if no section headings are present. Segments are created from each authored opinion, starting with the identification of all relevant positions. Each opinion and constituent segment is then cross-referenced with the conjoined datasheet to ensure that expected opinion authors match, concurring justices match, and approximate page ranges match and are contiguous for each section.

All published opinions were downloaded from the Hein Supreme Court library database, while unpublished slip opinions needed to be downloaded from the official Supreme Court website. The Hein database already has text content generated for PDFs; however, optical character recognition (OCR) needed to be run on slip opinion PDFs.

OCR text was added using a dual-pass system that first identifies expected numeric values of each page based on static values from the data sheet, such as US cite and Docket numbers. The second pass then fills in around the extracted numbers. A grid-map is then

computed to store unique patterns of case and heading elements, as well as content gridlines and relational position data. Whenever multiple positional references can be found and used to validate an unknown reference, that element gets added to a running list of known pattern templates. This creates a generative system where patterns can be added through multiple iterations on a selection of PDFs. The system uses the continually generated patterns to identify key reference values like Names, case identifiers, or page numbers to be mapped and cross-validated for each case, and is robust to OCR artifacts and formatting deviations.

Although OCR text had already been generated for all but the most recent cases, older case PDFs were still included in the PDF selection used to test the OCR system. This was done to both validate system performance and allow for positional pattern templates to be generated and stored for variant opinion formats. Although OCR text was not regenerated for computational efficiency, the positional patterns were utilized in the workflow to assist with opinion extraction validation. The coordinate values of positional patterns were also stored and used to calibrate OCR processing of PDFs without text content on a case-by-case basis.

Hein PDFs store uncorrected OCR text that often has leftover visual artifacts; the presence of artifacts is very pronounced in older opinions, where document scans are of poorer quality. LIWC is tolerant of misspellings, as they are simply left out of sentiment measures. However, conjoined/split words as well as punctuation artifacts can cause false positives for dictionaries relying heavily on grammatical structure. Additionally, the high presence of OCR errors, disproportionate to old opinions, creates a degree of bias towards lower values across the board. OCR error correction was performed as a discrete post-processing stage to enable the processing of PDFs with pre-generated text without redundant OCR.

To correct OCR errors with minimal risk of altering uncommon or otherwise intended words, a hybrid system is used to perform spell correction only based on combined language and visual analysis. Suspected typos are corrected only when both analysis dimensions align, making the process very conservative against false positives. Contextual analysis is performed by an n-gram language model that is domain-specific to formal legal

texts. Weighted case edit distance is used to approximate the likelihood that a given word is the result of OCR error.

Edit distance is a measure of how many single character edits need to be made for a word to be transformed. Since Supreme Court opinions are practically free from any actual typos, the errors found are consistently among visually similar and consistent characters. A weighted confusion matrix is computed using Python Tesseract for every five year interval, this assigns common or expected misspellings weightings to lower the effective edit distance they are considered as. Misspellings are identified by finding words unrecognized in both a general pre-defined dictionary or pre-defined legal dictionary, after fixing conjoined, split, and hyphenated words.

Where misspellings are found, the top 5 replacement candidates are generated by a function-specific 4-gram learning model. N-gram models are a common and rudimentary solution to text processing. N-gram models look for common frequencies of word combinations n-words long. N-gram models are relatively fast to process when n = 3 or 4; however, they do need to be trained on large amounts of data to have accurate frequencies trained. The lexical corpus selected for training also allows n-gram models to be well tailored to applicable tasks without any supervision.

A legal corpus was created from U.S. court opinions downloaded through Court Listener. Although their download API is rate limited, a corpus of ~14,000 opinion texts was able to be downloaded in under two days. This provided a corpus of ~5.5 million words. While this is on the lower end, it is more than sufficient for the limited and highly domain specific use case the model was used for.

Of the 525 samples, about ~10% of the main opinions and ~20% of the secondary opinions failed to extract. Additionally, about 15% of secondary opinions were skipped for being under 3 pages in length. Opinions were not extracted due to automated extraction functions failing to identify highly atypical start and end patterns. These opinions were not added manually both so that the process could stay fully automated and computer-validated and because opinions tended to be unique in writing characteristics that could affect LIWC measures. A total of ~1,415 opinions were successfully extracted, cleaned, and run through LIWC sentiment analysis, of which 455 were main opinions.

Test hypotheses:

Based on initial data and case studies a number of hypotheses have been formulated to test decouple potential motivations and reasons for the filing of pluralities. H1 tests the assumption that genuine disagreement, at least on prominent issues, stems from genuine disagreement on issues. H2 tests the secondary that the failure of Justices to converge on the median is based on individual considerations of utility, rather than multi-dimensional policy preferences or collective preferences.

H1: Plurality precedent on salient and contentious topics is primarily the result of genuine disagreemen

This hypothesis would expect plurality preference to bear more resemblance to the majority opinion than non-majority opinions. Additionally, salient cases should see very little effect of strategy consideration variable. The following postulates should help validate:

1. Authenticity should be higher than majority opinions, since lone opinions would be expected to express more individuality. Whereas majorities are typically a consensus of the coalition, and tend to express most closely the preferences of the median Justice in the majority coalition (Carrubba et al., 2012).

2. Strategic considerations may factor potential backlash from state actors, however public opinion should not be relevant in non-salient cases. And in salient cases Justices attitudes should be a greater predictor of voting than strategic considerations. Complexity and analytic should not have significant relationships to case saliency when controlled against non-plurality opinions.

3. Authenticity should be higher in salient cases versus cases involving federal appellants where attitudinal differences will be less apparent.

H2: Dissensus is shaped by motivation for utility.

This secondary hypothesis asserts that the actual reason majority coalitions fail to form is predominantly the result of Justice's individual utility maximization. Specifically, the desire to control opinion content creates a non-standard preference dimension that is unrelated to case complexity.

1. Cognitive inconsistency, but not complexity, correlates to plurality opinions. Complexity should only increase if the case is more complicated, or the plurality precedent is being obfuscated. Cognitive inconsistency has already been shown to be a correlate of drift (Owens & Wedeking, 2012).

2. Analytic and cognitive complexity values should not correlate to authenticity; this is the inverse from what would be expected under the alternative hypothesis that dissensus is motivated by complex policy preferences. Though it should correlate to case complexity.

3. Heterogenous voting coalitions should negatively correlate with authenticity and positively correlate with cognitive inconsistency for plurality opinions. Heterogenous coalitions should optimize potential utility maximization and provide the strongest incentives for swing voters. This would also follow from existing findings that Justices are more inclined to file limiting concurrences when ideologically distant from majority author or extreme relative to the median justice (Spriggs & Stras, 2010).

4. Plurality opinions should average more citations than majority opinions and have higher analytic than majority opinions. Dissents and concurrences feature heavy citation use and legal reasoning to increase bargaining value and influence precedent treatment. If utility optimization leads Justices to file pluralities, they should adhere to the same logic (Bennet et al., 2020; Corley & Ward, 2020).

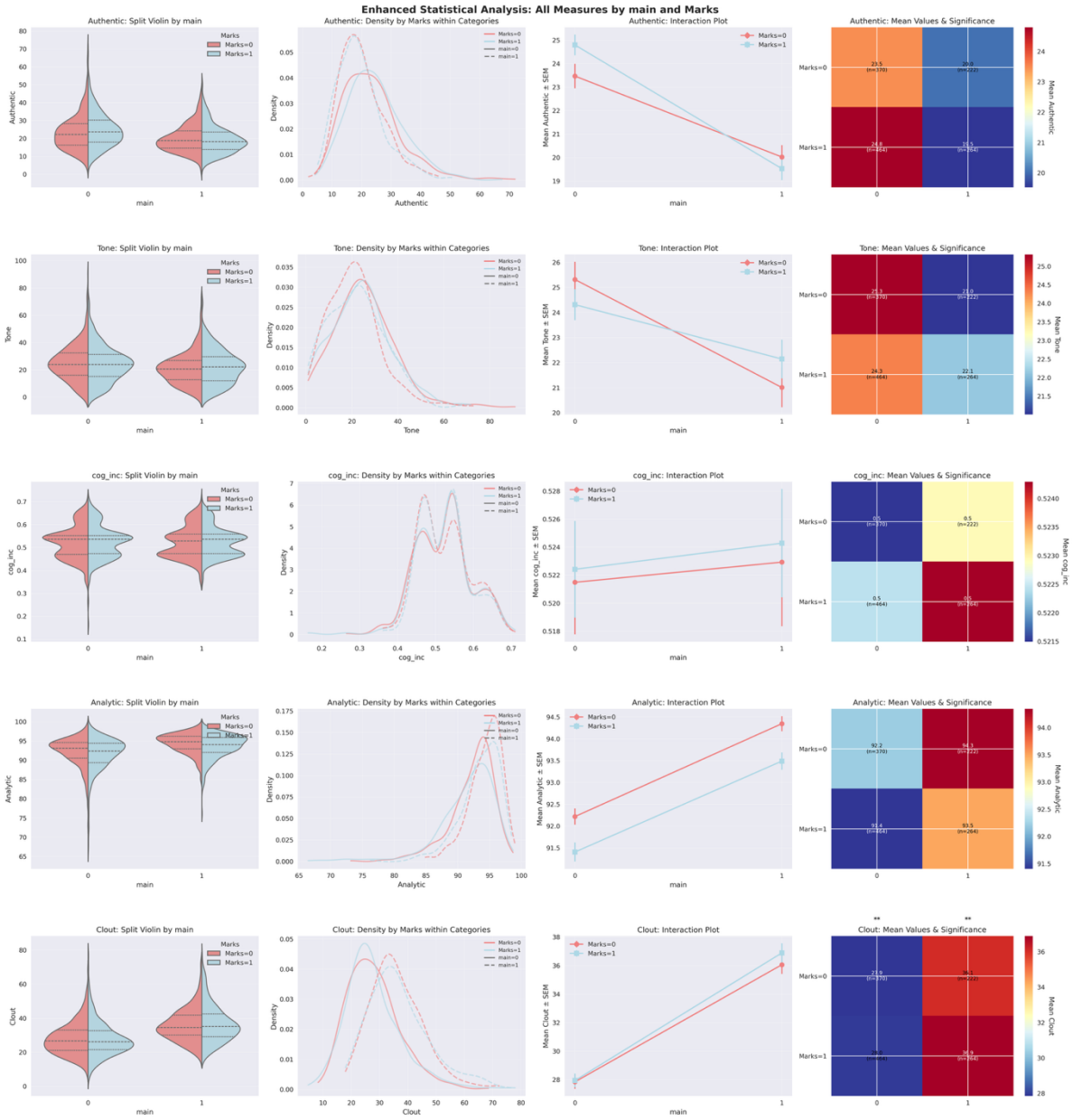
Data Analysis:

To interpret the variances in sentiment measures observed in Marks' cases vs. control cases, they must first be broken down by their respective opinion types. Based on existing findings it is expected that Tone should be higher at least for dissenting opinions. However, Marks should

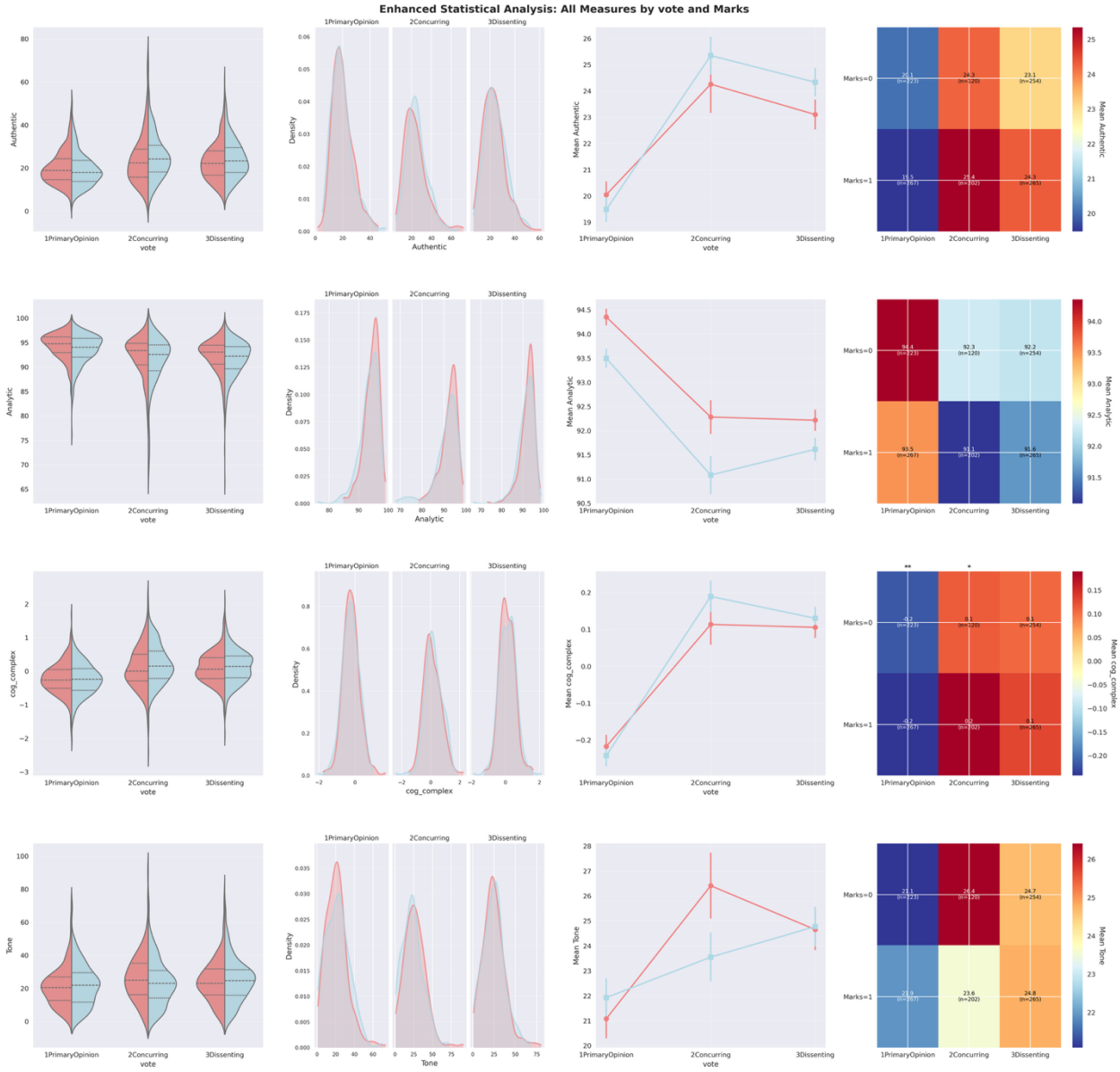
display interaction effects based on opinion types. Notably special concurrences are labeled for Marks cases within the Supreme Court database (vote = 4) however are all categorized into either regular concurrences (vote = 3) or dissents (vote = 2). Measures of Tone, Cognitive, Complexity, Analytic, and Authentic are mapped by opinion type below.

The data shows relatively consistent means across groups, but statistically significant interaction effects. Notably, special concurrences (vote = 4, only coded in plurality cases) did not seem to have measurable differences in sentiment measures from regular concurrence opinions (vote = 3) sampled from Marks cases.

Comparison of main-opinion vs separate opinions in Marks vs. Control samples:

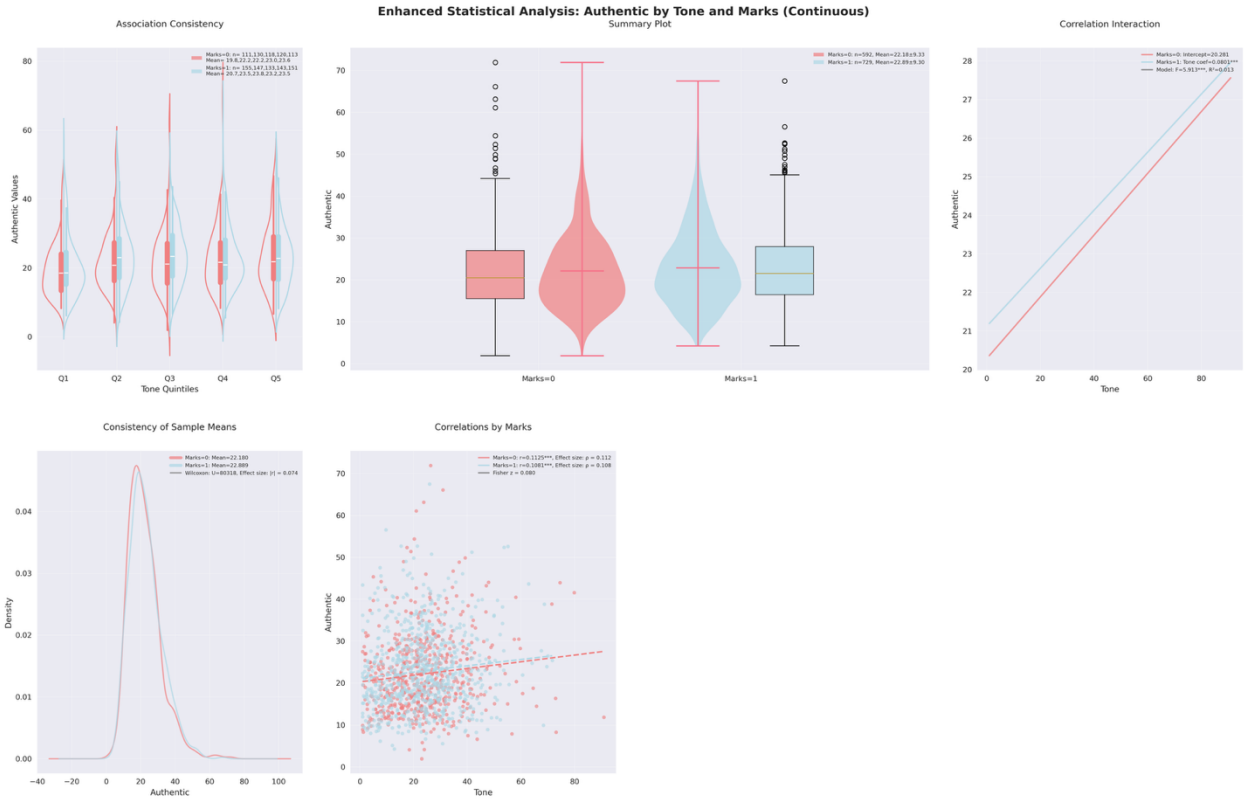


Comparison of vote types grouped (1,5 = main, 3,4 = concurring, 2 = dissenting):



The interaction between Tone and Authentic is then examined across groupings of saliency. Based on the initial hypotheses this would be expected to have greater interaction in non-marks cases where the most salient cases would be assumed to have lower Tone and Authentic measures. Saliency was coded along a scale of 0-2 based on whether cases were

marked as appearing on the New York Times or CQ. Interestingly, the assumption holds true for cases of intermediate saliency (appears in either NYT or CQ, but not both), but is reversed for the most salient cases, where Marks cases had the lowest mean Authentic and Tone measures. Accordingly, measures of non-linear association showed a much greater relationship between Tone and Authentic measures in Marks vs control cases.

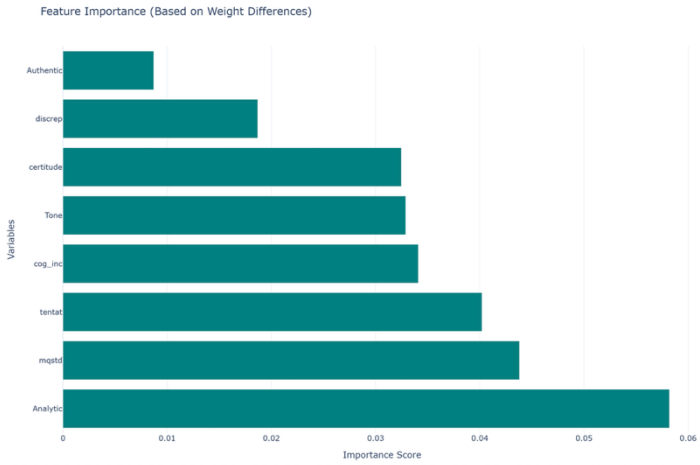


To examine the impact of varying factors on the non-linear effects observed between Marks and control cases, a method was tested using two restricted-bottzman models trained on the treatment vs. control datasets to quantify the importance a given set of factors has in observed differences in a given treatment value. Restricted bottzman brain machines are quasi-neural networks where nodes within a given layer have no connections between each other. A visible layer holds factors understood to have a relationship to each other and to

the difference given outcome measures across Marks and control cases. The invisible layer that is configurable to have n nodes, which become activated based on the values of visible layers in a given opinion. The invisible layers represent amorphous factor groups that are trained to optimize a combined output value based on the input values of a given case. Since all nodes within the invisible layer cannot have values dependent on each other, the nodes are incentivized to optimize the weightings of distinct underlying covariates, since training is optimized based on the average value of all n-nodes. Each hidden layer can then be interpreted by looking at how it weighs input values, and how this is different across models trained in treatment vs control groups.

Example with single hidden layer:

```
GROUP SIZES:
  Group 0: n=597
  Group 1: n=735

ANALYSIS PARAMETERS
----------------------------------------
Visible variables: Tone, Analytic, Authentic, tentat, certitude, discrep, mqstd, cog_inc
Hidden units: 1

Note on hidden units: Default of 3 balances model complexity with interpretability.
- Too few units: May miss subtle treatment effects
- Too many units: Risk overfitting, especially with limited samples
- 3 units typically capture main treatment-related patterns

Learning rate: 0.01
Epochs: 100

WEIGHT ANALYSIS
----------------------------------------
Overall weight difference (Frobenius norm): 0.1032
Maximum weight change: 0.0582
Mean absolute weight change: 0.0336

Feature Importance (top 5):
  Analytic: 0.0582
  mqstd: 0.0438
  tentat: 0.0402
  cog_inc: 0.0341
  Tone: 0.0329
```



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