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Comment

THE UNSOUNDNESS OF SILENCE:[1] SILENT CONCURRENCES AND THEIR USE IN MARYLAND

SHANE M.K. DOYLE*

"When a judge on [the Court of Appeals] concurs in the judgment only, it is helpful to explain why. Then the reader knows whether there is a substantive reason for that judge's reticence and can assess whether that reason has any merit."[2]

This Comment will discuss the judicial practice of issuing a "silent concurrence," and examine the use of silent concurrences in Maryland. A silent concurrence is when an appellate judge concurs only in the judgment,[3] but does not write a separate opinion.[4] Concurring only in the judgment means a judge agrees with the outcome of a case, but "refuses to join the majority opinion."[5] Or, more consequentially,[6] the judge refuses to join the lead opinion in a plurality decision.[7] Usually, a judge concurs only in the judgment because the judge believes the main opinion is wrong about why the outcome is correct.[8] We know this because judges concurring only in the

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1. *But see* SIMON AND GARFUNKEL, *The Sound of Silence*, *on* SIMON AND GARFUNKEL'S GREATEST HITS (Columbia Records 1972).

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2. State v. Payne, 440 Md. 680, 719, 104 A.3d 142, 165 (2014) (McDonald, J., concurring in judgment only). Judge McDonald begins his concurring opinion in *Payne* with this apparent criticism of Maryland Court of Appeals judges who issue silent concurrences. *Id.*

3. Sometimes called simply "concurring in the judgment," and also "concurring in the judgment only," "joining in the judgment," "joining in the judgment only," and "joining only in the judgment," with the word "result" sometimes being used instead of "judgment." *See* App. Tb. 1 (listing the 175 Maryland cases that had a silent concurrence(s) from January 1, 1990, to August 31, 2019, some of which use one formulation while some use others).

4. Greg Goelzhauser, *Silent Concurrences*, 31 CONST. COMMENT. 351, 351–52 (2016); Alexander I. Platt, *Deciding Not to Decide: A Limited Defense of the Silent Concurrence*, 17 J. APP. PRAC. & PROCESS 141, 141–42 (2016).

5. Goelzhauser, *supra* note 4, at 351–52.

6. *See infra* text accompanying note 17; Sections I.B & I.E.2.

7. This Comment uses the term "main opinion" to refer to majority and lead opinions collectively.

8. *See* HENRY CAMPBELL BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS OR THE SCIENCE OF CASE LAW 135–36 & n.306 (1912) (taking it for granted that when a judge concurs

judgment typically write separate opinions explaining their alternative reasoning.[9] A "silent" concurrence, though, is when a judge concurs only in the judgment without writing a separate opinion.[10] In other words, the judge,

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only in a judgment, it is because the judge has alternative reasons for reaching the result); Goelzhauser, *supra* note 4, at 352–54 (explaining that a judge who *writes an opinion* concurring only in the judgment agrees with the result but disagrees with the main opinion's reasoning).

9. For example, see *State v. Payne*, 440 Md. 680, 719–21, 104 A.3d 142, 165–66 (2014) (McDonald, J., concurring in judgment only). In *Payne*, the court vacated and remanded the decision below, holding that a police officer's testimony regarding cell phone location data was "expert" testimony requiring the officer to be admitted as an expert. *Id.* at 164–65. Judge McDonald explained in his concurring opinion that he disagreed with the majority that the officer's testimony was "expert" testimony, but still agreed the case should be vacated and remanded. *Id.* at 165–66. Judge McDonald explained that, in his view, the officer only provided lay testimony, but vacating and remanding was proper because the officer's testimony required the additional testimony of an expert to be probative. *Id*. *See* BLACK, *supra* note 8, at 135–36 & n.306 (taking it for granted that a judge concurring only in the judgment would write separately explaining their alternative reasons for reaching the result); Goelzhauser, *supra* note 4, at 357 (explaining that when a judge concurs only in the judgment but does not write separately, no one really knows why that judge, in that particular case, voted for the result but refused to join the main opinion); *see also* Platt, *supra* note 4, at 143–44 (explaining that silent concurrences are rare, i.e. judges usually write separately when concurring only in the judgement).

10. Goelzhauser, *supra* note 4, at 352 ("By definition [a silent concurrence] provides no explanation for why a[n appellate judge] agrees with the judgment but refuses to join the majority opinion.").

To avoid confusion, note that there are two kinds of concurrences, a concurrence in the judgment only (a "special" concurrence), and a so-called "regular" concurrence. Goelzhauser, *supra* note 4, at 353–54. As explained below, only the former can be issued "silently" because it would be impossible to issue a regular concurrence without writing a separate opinion, but it *is* possible to concur in the judgment only without writing a separate opinion. *Id. But see infra* note 76 and accompanying text (providing an exception: in California, a *swing-vote* judge cannot concur in the judgment only without writing a separate opinion because the California Constitution, as interpreted by the California Supreme Court, prohibits it).

A regular concurrence is when a judge *does* join the main opinion; i.e. the judge agrees both with the result the court reached *and* the main opinion's reasoning for why that result was correct, but the judge also writes a separate opinion of their own. Goelzhauser, *supra* note 4, at 353–54. In such a case the opinion would state, for example, "Judge *A* delivered the opinion of the court, joined by Judges *B*, *C*, *D*, *E*, *F*, and *G*. Judge *G* also filed a concurring opinion." The separate note about Judge *G* is only there because Judge *G* decided to write separately, while if Judge *G* had not done so, the opinion would just state that Judge *G* joined the majority opinion because there would be no "concurrence" to speak of. *Id.* at 358.

Alternatively, if Judge *G* concurred *in the judgment only*, this means Judge *G* did *not* join the majority opinion, so regardless of whether Judge *G* writes separately, the opinion must still explain Judge *G's* disposition in the case. Thus, the opinion will state, for example, "Judge *A* delivered the opinion of the court, joined by Judges *B*, *C*, *D*, *E*, and *F*. Judge *G* concurred in the judgement only."

While one might expect Judge *G* to write a separate concurring opinion explaining *why* he refused to join the majority opinion (as judges concurring in the judgment only usually do, *see supra* text accompanying note 2; *supra* note 9 and accompanying text), Judge *G's* refusal must be noted either way. Silent concurrences only exist, then, because a judge can vote for a result while refusing to join the main opinion, which necessitates noting that this judge *concurred in the judgment only*; and if said judge does not file a separate opinion, no one knows why Judge *G* voted for the result but refused to join the main opinion (i.e. Judge *G's* concurrence is "silent"). Goelzhauser, *supra* note 4, at 352, 356–57; *see infra* text accompanying notes 14–16.

without offering any explanation, votes in favor of the result but refuses to join the main opinion.[11]

Commentators have described silent concurrences as "puzzling,"[12] and even indefensible,[13] although there have been attempts to defend it as an unfortunate, but occasionally necessary, judicial technique.[14] One thing is certain, though. When a judge concurs silently, the only person who knows why that judge refused to join the main opinion is that judge.[15] Therefore, it is anyone's guess whether the judge actually had any substantive issues with the legal reasoning of the main opinion, and if so, why the judge did not articulate any alternative rules the judge thought were superior.[16] Furthermore, while a silent concurrence does not usually impact the precedential value of a case, when a *swing-vote* judge concurs silently, resulting in a plurality decision, the swing-vote judge unilaterally prevents the case from establishing any clear precedent—but does not explain why.[17]

This Comment will explore the criticisms of, and potential justifications for, silent concurrences in general; specifically examine their use in Maryland; and make three ultimate conclusions. First, silent concurrences are a generally unsound practice because, notwithstanding their potential justifications, litigants and the public have the right to expect judges who vote for the result but do not join the main opinion to offer at least a brief explanation rather than no explanation at all.[18] Second, the data suggest that regardless of whether the potential justifications for silent concurrences are valid, they do not explain the most recent silent concurrences in Maryland.[19] Third, the Court of Appeals should promulgate a rule that nullifies the effect

11. *See supra* note 10.

12. Madelyn Fife et al., *Concurring and Dissenting Without Opinion*, 42 J. SUP. CT. HIST. 171, 171 (2017); Goelzhauser, *supra* note 4, at 352.

13. Richard B. Cappalli, *What is Authority? Creation and Use of Case Law by Pennsylvania's Appellate Courts*, 72 TEMP. L. REV. 303, 380 (1999) (calling it "a debilitating practice with no visible redeeming value"); *see also* Platt, *supra* note 4, at 142 ("[The silent concurrence] is widely regarded as illegitimate. It has been criticized as 'perplexing,' 'an abomination,' 'unnecessary,' 'trouble-provoking,' and 'condemnable,' accused of 'thwart[ing] the judicial process,' of offering 'little value,' or none at all, and condemned as a practice that 'cannot be justified as appropriate judicial methodology,' and must be 'eradicated' or 'abandon[ed].'" (alterations in original) (internal footnotes omitted))).

14. *See infra* text accompanying notes 294–300; *infra* note 362.

15. *See infra* notes 54–59 and accompanying text. Not to mention why the judge agreed the outcome was correct in the first place and voted for it. *See infra* text accompanying notes 247–252.

16. RUGGERO J. ALDISERT, OPINION WRITING 152–53 (3d ed. 2012); *see also* State v. Payne, 440 Md. 680, 719, 104 A.3d 142, 165 (2014) (McDonald, J., concurring in judgment only) (pointing out that when a Maryland Court of Appeals judge concurs silently, no one knows "whether there [was] a *substantive* reason for that judge's reticence" (emphasis added)); *supra* text accompanying notes 8–9; *infra* text accompanying notes 61–62, 301–312 (explaining reasons other than substantive legal disagreement for which a judge might silently concur).

17. *See infra* Sections I.B, I.E.2, II.D.

18. *See infra* Sections II.A–B.

19. *See infra* Section II.C.

of silent concurrences on the precedential value of plurality decisions and by extension discourages the use of silent concurrences generally.[20]

Part I of this Comment will give the following relevant background. First, it will discuss what silent concurrences mean in the context of stare decisis.[21] Second, it will explain how they impact the precedential value of a case when a court is divided, in general, and in Maryland specifically.[22] That analysis requires examining how the Court of Appeals applies its plurality decisions, which, it turns out, contrary to popular belief, does not appear to be the *Marks* rule.[23] Third, it will provide a survey of the criticisms levied at silent concurrences generally.[24] Fourth, it will give potential explanations for the use of silent concurrences.[25] Fifth, it will discuss the trends associated with,[26] and the consequences of,[27] the use of silent concurrences in Maryland from January 1, 1990, to August 31, 2019.

Part II will analyze whether silent concurrences are justifiable, in general,[28] and in Maryland specifically,[29] by examining whether their potential uses outweigh the criticisms levied at them, in light of the alternative options judges have besides issuing a silent concurrence.[30] Part II will argue that silent concurrences are a generally unsound practice that should be questioned and discouraged,[31] particularly in Maryland,[32] and are an indefensible practice in the context of plurality decisions.[33] Part II will also suggest a rule to help prevent the problems silent concurrences can cause.[34]

Silent concurrences do not appear to serve any function so worthwhile that we should expect litigants and the public to ignore that silent concurrences undermine the principles and ideals of our legal system.[35]

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20. *See infra* Section II.D.
21. *See infra* Section I.A.
22. *See infra* Section I.B.
23. *See infra* Section I.B.1; *see also infra* Section I.B.2.b (critiquing the approach to plurality decisions the Court of Appeals apparently uses).
24. *See infra* Section I.C.
25. *See infra* Section I.D.
26. *See infra* Section I.E.1.
27. *See infra* Section I.E.2.
28. *See infra* Section II.A–B.
29. *See infra* Section II.C.
30. *See infra* Sections II.A.–C.
31. *See infra* Sections II.A–B.
32. *See infra* Section II.C.
33. *See infra* Sections II.A–D.
34. *See infra* Section II.D.
35. *See infra* Part III.

I. BACKGROUND

Silent concurrences are worth discussing primarily because judicial decisionmaking in the American legal system operates under the maxim of stare decisis. Stare decisis, "Latin for 'to stand by things decided,'"[36] means appellate courts treat their own prior decisions, or the decisions of higher courts in the same jurisdiction, as binding precedents that dictate how to resolve new cases with the same or analogous facts.[37] This doctrine operates under the general assumption that courts, and by extension judges, issue written opinions explaining why they voted for the result in a given case.[38] Section I.A briefly reviews how the doctrine of precedents operates and how the silent concurrence arises under this framework. Section I.B explains how silent concurrences disrupt precedent-setting, which is of course integral to stare decisis. Section I.B also explains that, contrary to popular belief, Maryland does not actually apply the *Marks* rule to its own plurality decisions. Rather, Maryland uses the "all opinions approach," a "related principle" of *Marks* that differs significantly from the *Marks* rule.[39] Section I.C presents the criticisms levied at silent concurrences. Section I.D discusses potential explanations for the use of silent concurrences. Finally, Section I.E discusses the use of silent concurrences in Maryland.

A. The Mechanics of Stare Decisis and Silent Concurrences

When the majority of an appellate panel agrees that a particular outcome is the proper result in a given case, that will be the result and the resolution of the dispute between the two parties.[40] Importantly, appellate courts also publish opinions that tell not only the parties, but the rest of us, *why* the court decided the outcome was correct.[41] Explaining the result is at the heart of

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36. *Stare Decisis*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/stare_decisis (last updated Mar. 2017).

37. *Id.*; BLACK, *supra* note 8, at 2–5, 7, 10–11; *see also infra* notes 200–203 and accompanying text (explaining the justifications for subscribing to the doctrine of stare decisis).

38. *See* BLACK, *supra* note 8, at 2–5, 7, 10–11 (taking it for granted, in explaining the doctrine of precedents under the maxim of stare decisis, that courts issue written opinions to explain their decisions).

39. *See infra* Section I.B.1; *see also infra* Section I.B.2.a (explaining how silent concurrences impact the precedential value of a plurality decision in Maryland under the all opinions approach); Section I.B.2.b (critiquing Maryland's use of the all opinions approach).

40. BLACK, *supra* note 8, at 136. For example, if party *A* seeks reversal of a trial court decision while party *B* seeks affirmation, and the court decides in favor of party *A* to reverse, reversal is the *result*. *Id.*

41. *Id.* at 2–3, 131–132. For example, picking up from the hypothetical in note 40, the opinion explaining why reversal is the proper outcome might be something like, "In this situation, a trial court must do *XYZ* before making the kind of decision at issue in this case. The trial court, however, did *not* do *XYZ*. Therefore, we are reversing the trial court's decision." Thus, the court articulated a rule that dictates reversing the lower court decision, and that rule is essentially, "in a factual scenario like the one here, when a lower court is making the kind of decision at issue here, that court has to do *XYZ*, so if a lower court makes this kind of decision, in this kind of scenario, *without* doing *XYZ*, then that decision gets reversed on appeal." Under stare decisis, future courts would thus need

stare decisis because when the majority of an appellate panel agrees on both (1) the outcome of a case and (2) the legal reasoning for why that outcome is correct—the single opinion that enjoys majority support binds that court, and lower courts in the same jurisdiction, in future cases.[42] Majority opinions therefore articulate rules, tests, and/or principles that lower and future courts must apply to similar factual scenarios.[43] That is why, as law students learn on day one, appellate opinions are the lifeblood of our legal system.

For purposes of this discussion, it is helpful to (simplistically) visualize the appellate decision-making process as the judges casting two separate and successive votes: First, the members of an appellate panel vote on what should happen as it pertains to the case at hand. If a majority of the panel members vote for outcome *A*, then outcome *A* becomes the judgment of the court that binds the parties of that case.[44] That vote only determines the outcome, it does not establish binding precedent for future cases.[45] This is where the second vote comes in, as the judges who formed a majority in favor of outcome *A* will then vote amongst themselves on why outcome *A* is correct, i.e. the legal rule(s) that dictate outcome *A*.[46]

For example, in a seven-member appellate panel, five judges may agree that the proper result is a reversal of the lower court decision. This means the result of the first vote is 5-2, so reversal will be the outcome of the case. It might also be that only four of those five judges agree on the legal reasoning for why reversal is proper in that case. Thus, the result of the second vote is 4-1. Notice that there is still a majority of the court (four out of seven) voting in favor of both the result, and a particular opinion explaining that result (of course, one of those four is the one writing the opinion in the first place). Thus, the single opinion with the support of those

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to apply this rule in similar (or sufficiently analogous) situations and reverse or affirm as dictated by the rule. *See infra* note 42.

42. BLACK, *supra* note 8, at 2–5, 10, 135–136; Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 CORNELL L. REV. 1593, 1596 (1992); Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. 1942, 1948 n.28, 1966 (2019); *see, e.g.*, Cappalli, *supra* note 13, at 324 (explaining that at least two members of a three-judge panel must agree on both the result and the underlying rationale to create binding precedent); *see also supra* notes 40–41 (giving a hypothetical explaining binding precedent under stare decisis in more detail); *infra* notes 200–203 and accompanying text (discussing the justifications for subscribing to the doctrine of stare decisis).

43. BLACK, *supra* note 8, at 2–4. Of course, any court of last resort is free to overrule its own precedents, but this departure from stare decisis is supposed to be reserved for "exceptional cases and for the very strongest reasons." *Id.* at 3.

44. *See supra* note 42 and accompanying text.

45. *See supra* note 42 and accompanying text. It is not strictly speaking true that a result by itself has no precedential value. The result itself can be precedential, i.e. a future court with identical or analogous facts would be bound to reach the same *result* but could use whatever reasoning. *See infra* text accompanying notes 78–80. The current discussion, however, is about precedential *opinions*, which is the reasoning behind the result.

46. *See supra* note 42 and accompanying text.

four— the majority opinion—becomes binding precedent under the principle of stare decisis.[47]

As for the one remaining judge who agreed with the other four about the result but disagreed with them as to why that result is correct, that judge is said to be concurring only in the judgment.[48] In other words, concurring only in the judgment means that judge is voting along with the other four for reversal, but refusing to vote for the legal reasoning the other four agreed justifies reversal.[49]

A judge concurring only in the judgment has two options.[50] First, they can write a separate opinion explaining what they believe to be the superior grounds upon which the court should have based its decision.[51] The separate opinion will not be binding of course, but it can at least be persuasive authority that points out where the judge believes the majority went wrong and can contribute to further developments in the law.[52] Second, a judge can simply state they concur in the judgment only and leave it at that without writing a separate opinion.[53]

This second option, the "silent" concurrence, tells readers nothing more than that the judge agreed with the result but chose not to join the main opinion explaining that result.[54] While one might assume the judge had some

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47. *See supra* notes 40–43 and accompanying text.

48. Goelzhauser, *supra* note 4, at 351–52.

49. *Id.*

50. *See infra* notes 51–53 and accompanying text.

51. *See, e.g.*, *supra* note 9 (summarizing an opinion concurring only in the judgment in *State v. Payne*, 440 Md. 680, 104 A.3d 142 (2014)); *see supra* notes 8–10 and accompanying text. Or, the judge can at least write a "perfunctory opinion," i.e. a brief explanation as to why the judge did not wish to join the main opinion, e.g., stating simply that the judge agreed with the lower court's original reasoning for its decision rather than the main opinion's reasoning for affirming that decision. Goelzhauser, *supra* note 4, at 352; *see, e.g.*, *infra* note 441 (gathering and quoting brief statements provided in lieu of a full separate opinion).

52. Goelzhauser, *supra* note 4, at 354 ("Written concurrences, like written dissents, are potentially valuable for a number of reasons. As an initial matter, a concurring opinion may prove to be highly influential in the subsequent development of law."). Professor Goelzhauser cites as an example Justice Robert H. Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). *Id.* *See* ALDISERT, *supra* note 16, at 149–50 (explaining that a concurring opinion may "appeal to the intelligence of a future day, when a change in the law may be forthcoming" (quoting R. Dean Moorehead, *Concurring and Dissenting Opinions*, 38 AM. BAR ASS'N J. 821, 823 (1952))); *id.* at 154 (citing the "classic" example of such an opinion—Justice Traynor's famous concurrence in Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 453 (Cal. 1944) that commanded majority approval from the court eighteen years later); Fife, *supra* note 12, at 171 ("As Justice Ruth Bader Ginsburg once wrote, separate opinions 'may provoke clarifications, refinements, [and] modifications in the court's opinions.' Justice Antonin Scalia echoed this point, emphasizing that a 'dissent or concurrence puts [an] opinion to the test, providing a direct confrontation of the best arguments on both sides of the disputed points.'" (alterations in original) (footnotes omitted)).

53. *See supra* note 10.

54. *See* Amwest Sur. Ins. Co. v. Wilson, 906 P.2d. 1112, 1127 (Cal. 1995) ("[A silent concurrence] is equivocal. 'It could mean that the concurring justice does not agree with the principles [stated in the main opinion]; or that [the justice] agrees with the principles or some of them but not with the manner of their statement or the reasoning or authorities set forth in support

issue with the main opinion's reasoning and had alternative reasons for reaching the same result,[55] that is just an educated guess.[56] A judge who concurs silently, by definition, leaves us with no definitive explanation for why they refused to join the main opinion.[57] Thus, all anyone can truly say about a silent concurrence is that the judge refused to join the main opinion—but one can only speculate about why they refused.[58] No one really knows whether the judge had substantive issues with the main opinion (e.g., the judge disagreed with the legal rule the opinion establishes), or if instead the judge refused to join the main opinion for personal, political, or other reasons.[59]

Consider that a judge might silently concur over some inconsequential issue with the main opinion that is purely a matter of linguistic preference.[60] For example, based on private papers that later became publicly available, here is why former Chief Justice Burger silently concurred in *Army & Air Force Exchange Service v. Sheehan*:[61]

> After Justice Blackmun circulated a draft opinion . . . Chief Justice Burger sent him a private note that read in part: "I have tried—and I think succeeded in getting almost everyone to avoid the term plea 'bargain.' That word has no place in the judicial vocabulary. I can join your opinion heartily if you can change 'bargain' . . . to

of them; or that [the justice] neither agrees nor disagrees but wishes to stay aloof and keep himself [or herself] intellectually free to examine the question anew at some later date (perhaps as the author of an opinion); or that [the justice] objects to something in the opinion—a quotation, reliance on an authority that is anathema to him [or her], humor or satire, or castigation of a litigant or counsel—and withholds his [or her] signature because the author would not take it out.'" (third, fourth, fifth, sixth, and seventh alterations in original) (quoting B.E. WITKIN, MANUAL ON APPELLATE COURT OPINIONS 223 (1977))); *supra* note 10 (explaining that a silent concurrence by definition tells us nothing more than that the judge refused to join the main opinion).

55. *See* Ira P. Robbins, *Concurring in Result Without Written Opinion*: *A Condemnable Practice*, 84 JUDICATURE 118, 118, 163 (2000) (assuming that silently concurring judges took some issue with the main opinion's legal reasoning); *see also supra* notes 8–9 and accompanying text (explaining that judges usually write separately explaining alternative reasons for reaching the result when they concur only in the judgment).

56. Goelzhauser, *supra* note 4, at 357 ("[B]ecause the [judge] has not revealed why he or she is concurring, one is left to speculate regarding the possible reason." (quoting PAMELA C. CORLEY, CONCURRING OPINION WRITING ON THE U.S. SUPREME COURT 19 (2010))); *see supra* note 54.

57. Goelzhauser, *supra* note 4, at 352. The judge also leaves us with no explanation for why they voted for the result in the first place. *See infra* text accompanying notes 247–252.

58. Goelzhauser, *supra* note 4, at 357 ("[B]ecause the [judge] has not revealed why he or she is concurring, one is left to speculate regarding the possible reason." (quoting PAMELA C. CORLEY, CONCURRING OPINION WRITING ON THE U.S. SUPREME COURT 19 (2010))).

59. *See* State v. Payne, 440 Md. 680, 719, 104 A.3d 142, 165 (2014) (McDonald, J., concurring in judgment only) (implying that when a judge concurs silently, no one knows "whether there [was] a substantive reason for that judge's reticence"); *supra* note 54; *infra* text accompanying notes 61–71; *see also infra* Section II.A (criticizing silent concurrences precisely because they lead people to believe there is something wrong with the main opinion, even though judges sometimes issue silent concurrences for reasons that have nothing to do with the reasoning of the main opinion).

60. Goelzhauser, *supra* note 4, at 373.

61. 456 U.S. 728 (1982).

> 'negotiations.'" Burger concluded with an ultimatum: "So, show me accordingly as joining or joining the judgment." Blackmun refused Burger's request, suggesting that the phrase had "acquired an accepted meaning in the judicial vocabulary" and was "far more accepted than the noun 'commute' for which I fought a battle . . . when no one supported me, and surely is far more acceptable than the Court's constant misuse of the word 'viable.'" Blackmun closed by citing several opinions Burger had joined that included the phrase "plea bargain," to which Burger playfully responded: "Yes, but I've joined the *last* one. It is a perversion of the English language [and] the law!" As a result of this exchange, appended to the end of Blackmun's otherwise unanimous opinion in *Sheehan* is the line: "The Chief Justice concurs in the judgment."[62]

One might also infer from circumstance that optics, rather than an issue with the main opinion, could be the reason a judge silently concurred in a particular case. For example, consider *International Refugee Assistance Project v. Trump*.[63] In *International Refugee*, the United States Court of Appeals for the Fourth Circuit held, in an opinion by Chief Judge Gregory and joined by Judges Motz, King, Wynn, Diaz, Floyd, and Harris, that (1) the United States District Court for the District of Maryland properly granted a preliminary motion for injunction on President Trump's so-called "Muslim ban"[64] because the plaintiffs showed a likelihood of "succeed[ing] on the merits of their Establishment Clause claim,"[65] and (2) the district court erred in extending that injunction to President Trump directly.[66] Although the opinion stated that "Judge Traxler wrote an opinion concurring in the judgment,"[67] that "opinion" amounted to nothing more than a silent concurrence.[68] Since Judge Traxler agreed with everything the court did and

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62. Goelzhauser, *supra* note 4, at 373 (alterations in original) (internal citations omitted).
63. 857 F.3d 554 (4th Cir. 2017) (en banc).
64. *Id.* at 576 (quoting J.A. 480).
65. *Id.* at 579, 588, 601–02.
66. *Id.* at 604–06.
67. *Id.* at 571.
68. Below is Judge Traxler's opinion in its entirety:

> I concur in the judgment of the majority insofar as it affirms the district court's issuance of a nationwide preliminary injunction as to Section 2(c) of the Executive Order against the officers, agents, and employees of the Executive Branch of the United States, and anyone acting under their authorization or direction, who would attempt to enforce it, because it likely violates the Establishment Clause of the United States Constitution. I also concur in the judgment of the majority to lift the injunction as to President Trump himself.

Id. at 606 (Traxler, J., concurring in the judgment). This only amounts to a silent concurrence because Judge Traxler did not indicate what led him to refuse to join the majority opinion, since he notes no points of disagreement. *See* Goelzhauser, *supra* note 4, at 352 ("By definition [a silent concurrence] provides no explanation for why a[n appellate judge] agrees with the judgment but refuses to join the majority opinion.").

offered no indication that he refused to join the majority opinion over disagreements with the majority's reasoning, one is compelled to guess why he refused to join.[69] One guess could be that Judge Traxler, who has an overwhelmingly conservative voting record,[70] agreed with the majority but did not wish to sign his name to an opinion otherwise joined exclusively by the liberal judges in a high-profile, politically-sensitive en banc case.[71]

B. The Impact of Silent Concurrences on Precedent-Setting

In the hypothetical from Section I.A, the judge's refusal to join the majority opinion does not prevent the setting of a precedent.[72] A four-judge majority already exists, so regardless of whether the concurring judge writes separately (or even dissents), there is still a majority opinion that is binding precedent.[73] In such a situation, while one may take issue in the abstract with judges neglecting to explain their judicial decisions,[74] at least the silent concurrence does not affect the precedential value of the case.[75]

When a court is so divided that it issues a plurality decision, however, there is no majority opinion. For example, only four judges in a seven-member panel agree that outcome *A* is correct, but only three agree on why. In such a scenario, a silently concurring judge is unilaterally (by withholding their swing vote) deciding to leave ambiguities in the law while offering no explanation of why they did so, let alone alternative legal rules.[76] California's Constitution, as interpreted by the California Supreme Court, actually prohibits swing-vote silent concurrences that result in a plurality decision.[77]

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69. *Id.*; *see supra* note 10; *supra* notes 54–58 and accompanying text.

70. Sharon McCloskey, *Is the 4th Circuit Veering Back to the Center?*, N.C. POL'Y WATCH (Feb. 13, 2013), http://www.ncpolicywatch.com/2013/02/13/is-the-4th-circuit-veering-back-to-the-center/.

71. *See infra* text accompanying note 312 (elaborating on what Judge Traxler may have been trying to avoid).

72. *See supra* text accompanying notes 46–49.

73. *See supra* text accompanying notes 46–49.

74. *See infra* note 497; notes 240–254 and accompanying text.

75. *But see* ALDISERT, *supra* note 16, at 153 ("The cryptic statement, 'I concur in the judgment,' has bothered many readers. . . . It produces all the evils of a concurring opinion with none of its values; i.e., it *casts doubt* on the principles declared in the main opinion without indicating why they are wrong or questionable." (emphasis added) (quoting B.E. WITKIN, MANUAL ON APPELLATE COURT OPINIONS 223 (1977))).

76. BLACK, *supra* note 8, at 135–36; Cappalli, *supra* note 13, at 327–30; Kimura, *supra* note 42, at 1596; Robbins, *supra* note 55, at 118, 160, 163.

77. Amwest Sur. Ins. Co. v. Wilson, 906 P.2d. 1112, 1126–28 (Cal. 1995); *see also infra* notes 509–512 (explaining in more detail how the California Supreme Court interpreted the California constitution as prohibiting swing-vote silent concurrences).

Traditionally, a plurality decision resulted in no binding precedent for future courts, aside from the result itself.[78] The result is binding in the sense that a majority of the court agrees that in situation *X*, outcome *A* is the proper result; they just cannot agree on why.[79] Thus, a future court may be bound to reach the same result should situation *X* arise again, but said court is free to use whatever reasoning to explain this result.[80] Section I.B.1 explains how the United States Supreme Court changed the status quo in *Marks v. United States*,[81] making it possible for Supreme Court plurality decisions to establish binding precedent. Section I.B.1 explores how the Court of Appeals extracts precedent from its plurality decisions, which is somewhat similar to the Supreme Court's rule, but also significantly different. Section I.B.2 discusses the potential impact of silent concurrences on the precedential value of a plurality decision in Maryland,[82] and also examines the implications of Maryland's approach to plurality decisions.[83] Section I.B.3 summarizes the impact of swing-vote silent concurrences on the precedential value of plurality decisions.

1. *How Post-*Marks *Courts Sometimes Afford Precedential Weight to Plurality Decisions*

Although plurality decisions are traditionally non-precedential,[84] today, there are mechanisms by which an appellate court can afford precedential weight to an opinion, or opinions, in a plurality decision. The Supreme Court established the *Marks* rule to determine which opinion in a Supreme Court plurality decision is binding: "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.'"[85] Courts faced

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78. BLACK, *supra* note 8, at 135–36; *see also* Re, *supra* note 42, at 1948 n.28 (gathering pre-*Marks* authorities that doubted the precedential value of plurality decisions or dismissed them as non-precedential).

79. *See supra* note 78.

80. *See supra* note 78.

81. 430 U.S. 188 (1977).

82. *See infra* Section I.B.2.a.

83. *See infra* Section I.B.2.b.

84. *See supra* note 78.

85. *Marks*, 430 U.S. at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)). Ironically, *Gregg* was itself a plurality decision, and so although the *Marks* rule originated from *Gregg*, it was not until the majority in *Marks* adopted the rule that it became a binding legal test. Re, *supra* note 42, at 1948–49. Even more interesting is that Justice Powell, who authored the *Marks* opinion, was a member of the plurality in *Gregg*. *Id.* at 1951. So, first, in *Gregg*, the plurality invented a new "narrowest grounds" rule that, if accepted, would suddenly mean the plurality's own *nonbinding* opinion was actually binding (since the lead opinion in *Gregg* was likely the "narrowest grounds" opinion). *Id.* at 1948. Then, a year later, a member of that *Gregg* plurality authored a *majority* opinion in *Marks* officially adopting the very rule the *Gregg* plurality had self-servingly invented. *Id.* at 1951. Thus, "[i]n this way, the clear precedential authority of a majority opinion indirectly blessed the more dubious authority of a plurality." *Id.*

with applying a Supreme Court plurality decision can use this rule to find that the lead opinion, or a concurring one, is binding because it reached the judgment "on the narrowest grounds."[86]

Since *Marks*, some state courts of last resort have adopted the *Marks* rule, or something similar, to apply to their plurality decisions.[87] This includes the Court of Appeals, which appears to use a technique known as the "all opinions approach."[88] The all opinions approach is a "related principle" of the *Marks* rule that differs in essential ways, as explained below.[89]

Some believe the Court of Appeals adopted the *Marks* rule in *State v. Falcon*,[90] but the court only said in that case that Maryland uses a "somewhat similar approach" to *Marks*.[91] An analysis of *Falcon* reveals that this "somewhat similar approach" is the "all opinions approach," which differs from the *Marks* rule in two significant ways.[92] First, unlike the *Marks* rule, the all opinions approach considers all the opinions in a plurality decision—including the dissents[93]—a clear departure from the *Marks* rule's search for "that position taken by those Members who *concurred* in the judgments on

86. *Marks*, 430 U.S. at 193–94; Re, *supra* note 42, at 1947–50; *see also supra* note 85. Although, even the Supreme Court has recognized that the rule can be "more easily stated than applied." Nichols v. United States, 511 U.S. 738, 745 (1994); *see also* Re, *supra* note 42, at 1995 (referring to the preceding quote from *Nichols* as "an exercise of understatement").

87. Re, *supra* note 42, at 1944, 1960–65, 1977, 1980.

88. State v. Falcon, 451 Md. 138, 161–62, 152 A.3d 687, 701 (2017) (explaining that the Court of Appeals applies "a somewhat similar approach [to the *Marks* rule] in determining the precedential significance of a case without a majority opinion by this Court," while citing cases that looked at both concurring and dissenting opinions in a plurality decision to identify particular legal propositions of which a majority of the judges agreed); *id.* at 161–73, 701–08 (looking at all the opinions in a Court of Appeals plurality decision to extract a precedential legal proposition of which a majority agreed and then applying that proposition to the case at hand); Re, *supra* note 42, at 1988–89 (explaining that the "all opinions approach," a "related principle" of *Marks* is substantively different from *Marks* in that it allows for consideration of all the opinions in a plurality decision, including the dissents, and involves deducing particular legal propositions that at least a majority of the court agreed with); *see also infra* note 106. *But see infra* notes 179–180 and accompanying text (explaining that the all opinions approach was only ever proposed as a way for lower courts to predict how a higher court would rule, not for courts of last resort to apply to their own plurality decisions); *infra* Section I.B.2.b. (explaining why it is concerning that a court of last resort would apply the all opinions approach to its plurality decisions).

89. Re, *supra* note 42, at 1988–89; *see supra* note 88; *infra* text accompanying notes 90–100.

90. For example, the Maryland State Bar Association's Litigation Section interprets *Falcon* to mean that Maryland applies the Supreme Court's *Marks* rule to its plurality decisions. *See* Alan B. Sternstein, *Locating a Fragmented Appellate Court's Rule of Decision – The Marks Rule Marks the Spot?*, MD. APP. BLOG (Aug. 28, 2018), https://mdappblog.com/2018/08/28/locating-a-fragmented-appellate-courts-rule-of-decision-the-marks-rule-marks-the-spot/ (citing *Falcon* for the proposition that Maryland uses the *Marks* rule).

91. *Falcon*, 451 Md. at 161–62, 152 A.3d at 701.

92. Re, *supra* note 42, at 1988–89.

93. *Id. But see id.* at 1990 (suggesting that there are subversions of the all opinions approach that would still focus on individual points of law rather than looking for a single binding opinion but would *not* consider the dissents).

the narrowest grounds."[94] Second, unlike the *Marks* rule, the all opinions approach does not look for a single binding opinion.[95] Rather, the all opinions approach extracts individual points of law that at least a majority of the judges either implicitly,[96] or explicitly, agreed on.[97]

Therefore, the all opinions approach is substantively different than the *Marks* rule.[98] The *Marks* rule is an exercise in determining which opinion in a plurality decision, the lead opinion or a concurring one, is the single opinion that must be treated as binding.[99] Meanwhile, the all opinions approach only looks to find individual points a majority of the judges could be said to have agreed on, regardless of whether those judges concurred or dissented.[100]

While the Court of Appeals has never explicitly defined Maryland's rule as the "all opinions approach," and even though many think Maryland uses the *Marks* rule,[101] an analysis of *Falcon* reveals that the Court of Appeals actually applies the all opinions approach to its plurality decisions to extract binding precedent.[102] In *Falcon*, the court considered how to apply *Schisler v. State*,[103] a plurality decision.[104] *Schisler* was "a significant case" bearing on the matter at hand, but because *Schisler* was a plurality decision, it was unclear how *Schisler* applied to the facts in *Falcon*.[105] The *Falcon* court explained that Maryland uses a "somewhat similar approach" to *Marks*, while citing to other Maryland cases that looked at all the opinions in a Court of Appeals plurality decision, including the dissents, to extract individual propositions a majority of the court agreed on (i.e. the all opinions approach).[106] The *Falcon* court spent about ten pages applying this

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94. Marks v. United States, 430 U.S. 188, 193 (1977) (emphasis added) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion))); *see also* Gibson v. Am. Cyanamid Co., 760 F.3d 600, 620 (7th Cir. 2014) ("[U]nder *Marks*, the positions of those Justices who *dissented* from the judgment are not counted in trying to discern a governing holding from divided opinions." (emphasis in original)).

95. Re, *supra* note 42, at 1988–89.

96. *See infra* text accompanying notes 183–188.

97. Re, *supra* note 42, at 1988–89; *see also infra* note 100.

98. Re, *supra* note 42, at 1988–89.

99. *See Marks*, 430 U.S. at 193–94; Re, *supra* note 42, at 1947–50; *see also supra* note 94.

100. Re, *supra* note 42, at 1988–89. *But see infra* notes 179–180 and accompanying text (explaining that the all opinions approach was only ever proposed as a way for lower courts to predict how a higher court would rule, not for courts of last resort to apply to their own plurality decisions); *infra* Section I.B.2.b. (explaining why it is concerning that a court of last resort would apply the all opinions approach to its own plurality decisions).

101. *See supra* note 90; *infra* note 349 (citing two pre-*Falcon* Court of Special Appeals cases where the court implied that Maryland uses the *Marks* rule).

102. *See supra* note 90.

103. 394 Md. 519, 907 A.2d 175 (2006).

104. State v. Falcon, 451 Md. 138, 161, 152 A.3d 687, 701 (2017); *Schisler*, 394 Md. at 519, 907 A.2d at 175.

105. *Falcon*, 451 Md. at 161, 152 A.3d at 701.

106. *Id.* at 161–62, 152 A.3d at 701. The following sentence and its accompanying citations are the only discussion in *Falcon* about how exactly Maryland affords precedential weight to its plurality decisions:

"somewhat similar [to *Marks*]" approach to *Schisler*, ultimately determining that "careful examination" of *Schisler* revealed useful precedent.[107]

To understand how swing-vote silent concurrences can impact the precedential value of a case in Maryland, it is necessary to first examine the *Falcon* court's lengthy analysis of how it applied *Schisler*.[108] An analysis of *Falcon* provides insight into what Maryland's application of the all opinions approach looks like in practice, revealing how silent concurrences could impact the approach. Examining the court's analysis is essential because the court did not actually explain the mechanics of what it was doing in any detail, and so the only real explanation of the rule comes from the court's discussion of how *Schisler* applied.[109]

Falcon was a separation of powers case, where the ultimate question was whether the Maryland General Assembly had unconstitutionally usurped the power of the governor by only terminating the gubernatorially appointed members of a statutorily created commission.[110] The General Assembly amended the statute that established the School Board Nominating Commission of Anne Arundel County, removing the governor's statutory authority to appoint five of the eleven members of the commission.[111] Under the amended statute, those five members would, like the other six members, be appointed by some entity besides the governor.[112] The issue in *Falcon* was that the amendment also terminated the five incumbent gubernatorial appointees before their terms had ended.[113] Four of the five gubernatorial appointees on the commission at the time filed suit, arguing that the Maryland Constitution only allows the governor to terminate civil officers appointed by the governor for a term of years, and so the General Assembly had

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> This Court has applied a somewhat similar approach [to *Marks*] in determining the precedential significance of a case without a majority opinion by this Court. *See*, *e.g.*, Cure v. State, 421 Md. 300, 318, 321, 26 A.3d 899, 910, 911 (2011) (In analyzing what this Court termed a "fractured" opinion, we explained why we were adopting the reasoning of the dissent, stating: "For purposes of *stare decisis*, we note that this is a proposition that garnered the support of four Judges[.]"); *see also* State v. Giddens, 335 Md. 205, 213 & n.6, 642 A.2d 870, 874 & n.6 (1994) (This Court stated that the issue of whether a prior conviction bears on witness credibility is a matter of law because, in an earlier case with no majority, "two concurring judges and two dissenting judges[—i.e., four Judges—]each thought that the question was a matter of law.").

Id. at 162, 152 A.3d at 701 (second and third alterations in original). The opinion then states, "Having discussed how precedential value is determined with a [Maryland] plurality opinion, we turn to *Schisler*." *Id.* The court then proceeded to analyze how to apply *Schisler* by looking at all the opinions, including the dissents, ultimately finding that a majority of the judges, in fact all seven, implicitly agreed on a particular point. *Id.* at 161–73, 152 A.3d at 700–08.

107. *Falcon*, 451 Md. at 161–73, 152 A.3d at 700–08. *But see infra* Section I.B.2.b (critiquing the court's approach and conclusion in *Falcon*).

108. *Falcon*, 451 Md. at 161–73, 152 A.3d at 700–08.

109. *Id.*; *see also supra* note 106.

110. *Falcon*, 451 Md. at 141–42, 152 A.3d at 689–90.

111. *Id.*

112. *Id.*

113. *Id.* at 142–43, 152 A.3d at 689–90.

unconstitutionally usurped this exclusive power of the governor when it ended their terms early.[114]

The parties disagreed about how *Schisler* applied to the case at hand.[115] *Schisler* was "a significant case" addressing a somewhat similar question, but both parties in *Falcon* believed *Schisler* stood for opposite propositions.[116] The plaintiffs argued that under *Schisler*, "the General Assembly may abolish or reconstitute a commission, but may not terminate *only* the gubernatorial appointees on a commission."[117] Alternatively, the State argued that, under *Schisler*, the General Assembly has the power to restructure a statutorily created entity and change who appoints its members, even if that results in the early termination of the existing gubernatorial appointees.[118]

In *Schisler*, the plurality held that the General Assembly had unconstitutionally usurped the governor's power when it terminated the members of the Public Service Commission, all of whom were gubernatorial appointees, and restricted how the governor could choose their replacements.[119] Unlike in *Falcon*, the General Assembly had not amended the law that created the commission, removing the governor's authority to appoint the members and assigning that authority to some other entity.[120] Rather, in *Schisler*, the General Assembly left the statute that gave the governor authority to appoint the members untouched, amending a different statute in the Public Utilities Article to provide that (1) "all existing members of the Public Service Commission would be terminated by a certain date," and (2) "that the President of the Senate and the Speaker of the House would submit lists of names, from which the Governor would choose five new members."[121] Distinguishing that amendment, the *Falcon* court explained that "the legislation at issue in *Schisler* did not involve a restructuring or reconstituting of the Public Service Commission that would implement changes that would apply prospectively to all future appointees."[122] Instead, the legislation in *Schisler* "involved the General Assembly wresting authority away from the Governor and giving itself the one-time authority to submit lists to the Governor and make appointments before reverting back to the old gubernatorial appointment process."[123]

In *Schisler*, the lead opinion, concurring opinion, opinion concurring in part and dissenting in part, and dissenting opinion disagreed about: (A)

114. *Id.* at 159, 152 A.3d at 699–700.

115. *Id.* at 161, 152 A.3d at 701.

116. *Id.*

117. *Id.* at 141–42, 159, 152 A.3d at 689–90, 699 (emphasis added).

118. *Id.* at 158, 152 A.3d at 699.

119. *Id.* at 163–66, 152 A.3d at 701–04 (citing Schisler v. State, 394 Md. 519, 596, 907 A.2d 175, 220 (2006)).

120. *Id.*

121. *Id.* at 163, 178, 152 A.3d at 702, 711 (emphasis added).

122. *Id.*

123. *Id.*

which, if any, constitutional provision the above-quoted[124] amendment violated, and (B) which part of the amendment was unconstitutional, if either.[125] The plurality believed both part (1) and part (2) of the amendment[126] unconstitutionally usurped the governor's power.[127] The plurality believed each action independently violated article II, section 15 of the Maryland constitution.[128] The plurality further explained, though, that if the General Assembly were to amend the law defining a commission's membership to reconstitute or restructure the commission, then there would be no constitutional violation even if this resulted in the early termination of the existing gubernatorial members of that commission.[129]

The concurring opinion agreed with the plurality that what the General Assembly had done was unconstitutional, but disagreed that part (1) of the amendment, ending the appointees' terms early, independently violated article II, section 15.[130] The concurrence believed instead that because the General Assembly had (1) ended gubernatorial appointees to a statutory commission's terms early; (2) vested itself with the authority to interfere with the governor's still existing statutory authority to appoint their replacements; *and* (3) otherwise left the commission "intact," these circumstances taken together violated article 8 of the Maryland declaration of rights and article II, sections 1 and 9 of the Maryland constitution.[131] Disagreeing with the plurality, the concurrence stated that it would have been permissible for the General Assembly to have merely ended the appointees' terms early, as such

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124. *See supra* text accompanying note 121.

125. *Falcon*, 451 Md. at 161–73, 152 A.3d at 700–08.

126. *See supra* text accompanying note 121.

127. *Falcon*, 451 Md. at 164–67, 171–72, 152 A.3d at 703–04, 707 (discussing the plurality opinion in *Schisler*).

128. *Id.*; MD. CONST. art. II, § 15 (granting the governor the power to remove "civil officers who received appointment from the Executive for a term of years."). Only the dissent doubted that gubernatorial appointees to a statutorily created commission counted as "civil officers" under article II, section 15, but only the plurality believed that ending the appointees' terms early implicated article II, section 15. *See Falcon*, 451 Md. at 165–71, 152 A.3d at 703–07 (discussing the different opinions in *Schisler*). The *Falcon* court declined to resolve whether the appointees were civil officers because it was able to use the all opinions approach to find that, under the circumstances in *Falcon*, no member of the *Schisler* court would have found a constitutional violation regardless. *Id.* at 142–43,171–73, 152 A.3d at 690, 707–08; *supra* notes 88, 106 (explaining how the court's analysis of the precedential value of *Schisler* constituted an application of the "all opinions approach").

129. *Id.* at 167, 152 A.3d at 704 (citing Schisler v. State, 394 Md. 519, 598, 907 A.2d 175, 222 (2006) (plurality opinion)).

130. *Id.* at 167–68, 172, 152 A.3d at 704–05, 707 (citing *Schisler*, 394 Md. at 605–06, 907 A.2d at 226 (Wilner, J., concurring)).

131. *Id.* at 167–68, 152 A.3d at 704–05 & n.5 (citing *Schisler*, 394 Md. at 605–06, 907 A.2d at 226 (Wilner, J., concurring)) ("It is the entirety of the legislative assault that runs afoul of Article 8."); MD. CONST., DECL. OF RTS., art. VIII ("[T]he Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other."); MD. CONST. art. II, § 1 (vesting the executive power of the state with the governor); MD. CONST. art. II, § 9 ("[The governor] shall take care that the Laws are faithfully executed.").

an action, in and of itself, would not have separately violated article II, section15.[132]

The opinion concurring in part and dissenting in part *disagreed* with the plurality that part (1) of the amendment, ending the terms early, was unconstitutional, but agreed that part (2), restricting whom the governor could appoint as a replacement, was unconstitutional.[133] The dissenting opinion believed neither were unconstitutional.[134]

In *Falcon*, what the General Assembly had done was somewhat analogous to part (1) and part (2) of the amendment[135] in *Schisler*, and also somewhat different, in important ways. The General Assembly's action in *Falcon* was similar to *Schisler* in that the action only affected gubernatorial appointees.[136] The action was different in that, in *Falcon*, there were other members of the commission whom had never been gubernatorial appointees, and who were, therefore, not terminated.[137] Furthermore, unlike in *Schisler*, the General Assembly in *Falcon* actually amended the law that created the commission to remove the governor's statutory authority to appoint the five members who were terminated.[138] Similar to *Schisler*, however, the General Assembly had only focused on removing the gubernatorially appointed members, as the amendment left who appoints the other members unchanged.[139] But, unlike in *Schisler*, the General Assembly in *Falcon* had not quite left the membership of the commission "otherwise intact."[140] In *Schisler*, the lead opinion and concurrence thought ending gubernatorial terms while leaving the membership of the commission otherwise intact pointed toward a constitutional violation.[141] In *Falcon*, the General Assembly left the *current* membership otherwise intact,[142] but the amendment also made other changes to the *overall* membership of the commission.[143]

Therefore, in *Schisler*, the General Assembly had terminated the members of a commission comprised entirely of gubernatorial appointees

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132. *Falcon*, 451 Md. at 167–68, 152 A.3d at 704–05 (citing *Schisler*, 394 Md. at 605–06, 907 A.2d at 226 (Wilner, J., concurring)).

133. *Id.* at 168–69, 152 A.3d at 705–06 (citing *Schisler*, 394 Md. at 606–07, 907 A.2d at 227 (Harrell, J., concurring and dissenting)).

134. *Id.* at 169–70, 152 A.3d at 705–06. (citing *Schisler*, 394 Md. at 615, 907 A.2d at 232 (Battaglia, J., dissenting)).

135. *See supra* text accompanying note 121.

136. *Falcon*, 451 Md. at 141–43, 163–66, 152 A.3d at 689–90, 701–04 (citing Schisler, 394 Md. at 596, 907 A.2d at 220).

137. *Id.*

138. *Id.* at 163–64, 152 A.3d at 702.

139. *Id.*

140. *Id.* at 173, 152 A.3d at 708.

141. *Id.* at 167, 152 A.3d at 704; *see supra* text accompanying note 131.

142. *See supra* text accompanying note 139.

143. Such as adding two new members, comprising the commission of thirteen members rather than eleven. *Falcon*, 451 Md. at 173, 152 A.3d at 708.

and restricted the governor's still-existing statutory authority to appoint their replacements, but otherwise left the commission intact.[144] In *Falcon*, however, only five of the eleven members of the commission were gubernatorial appointees, but the legislature had only changed who appoints those five seats, thereby only terminating the gubernatorial appointees' terms early, while leaving who appoints the other six seats intact.[145]

The plaintiffs in *Falcon* argued that the General Assembly had not restructured the commission such that the General Assembly could end the plaintiffs' terms early.[146] The plaintiffs argued that, similar to *Schisler*, the legislature had singled out governor-appointed commission members, only changing who appoints those five positions.[147] The plaintiffs did not dispute that the legislature could change who appoints the members as it sees fit, they just argued that the legislature could not end the existing appointees' terms early through such an action.[148] The plaintiffs argued that although the General Assembly had, unlike in *Schisler*, actually amended the law that created the commission to alter how its membership is determined, the General Assembly had clearly singled out only the gubernatorial appointees and terminated them early after changing the rules only for the gubernatorial positions.[149] The plaintiffs argued that such a focused change only impacting the gubernatorial appointees could not fairly be viewed as "reconstituting" a commission whereby the General Assembly could then permissibly end the incumbent members' terms early.[150] Rather, the plaintiffs argued, this was clearly the legislature singling out only those members appointed by the governor and terminating only those members while leaving the rest of the current membership intact, similar to what the General Assembly had done in *Schisler*.[151]

Thus, the relevant disagreement in *Schisler* that the Court of Appeals sought to square with the facts in *Falcon* was the following: The *Schisler* plurality believed it is unconstitutional for the General Assembly to terminate the existing gubernatorial appointees of a commission before their terms are up, *unless* such termination results from a restructuring or reconstituting of the commission itself.[152] Alternatively, all the other judges in *Schisler* disagreed with the plurality that such a qualification was necessary.[153] Those judges believed, instead, that the court does not need to concern itself with

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144. *Id*. at 171–73, 152 A.3d at 707–08; *supra* notes 138–143.
145. *Falcon*, 451 Md. at 171–73, 152 A.3d at 707–08; *supra* notes 138–143.
146. *Id.* at 142, 159, 152 A.3d at 689–90, 699–700.
147. *Falcon*, 451 Md. at 142, 159, 152 A.3d at 689–90, 699–700.
148. *Id.*
149. *Id.*
150. *Id.* at 172, 152 A.3d at 707.
151. *Falcon*, 451 Md. at 159, 152 A.3d at 699–700.
152. *Id.* at 172, 152 A.3d at 707.
153. *Id.*; *supra* text accompanying notes 130–134.

whether the termination results from a restructuring.[154] They thought such an analysis was unnecessary because they believed there is nothing unconstitutional in the first place about the General Assembly prematurely ending the terms of gubernatorial appointees on a statutorily created commission.[155]

After "careful examination" of all the opinions in *Schisler*, the *Falcon* court explained that regardless of their other disagreements, all seven judges in *Schisler* would apparently agree, at least, that no matter who appointed the members, a constitutional violation does not automatically occur when the General Assembly ends statutory-commission members' terms early.[156] The *Falcon* court explained that the lead opinion simply believed that the termination of gubernatorially appointed members must be incidental to reconstituting the membership of a commission to be constitutional, while the other opinions did not think there needed to be any such rule because the termination would be constitutional regardless.[157] Thus, the *Falcon* court held that, under *Schisler*, the General Assembly's restructuring of the School Board Nominating Commission of Anne Arundel County did not violate the Maryland Constitution simply because that restructuring incidentally resulted in the early termination of only the governor-appointed members.[158]

It is clear that the court did not apply the *Marks* rule, as the court did not decide that either the lead opinion or the concurring one reached the result on the narrowest grounds and was therefore the single binding opinion.[159] Rather, the court looked at all the opinions, including the dissents, to see if a majority would have agreed on whether there was a constitutional violation just because the legislature terminated only the gubernatorially appointed members.[160] The court found that the answer was yes—a majority of the judges, in fact all seven, would have agreed that just because all the terminated members were appointed by the governor does not mean there was a constitutional violation.[161] It was on this basis—that a majority of the

154. *Falcon*, 451 Md. at 171–73, 152 A.3d at 707–08.

155. *Id.* Strictly speaking, the concurrence only believed that there was nothing unconstitutional *in and of itself* about terminating the members but *did* believe terminating the members was unconstitutional in *Schisler*, only because of additional facts in that case that did not exist in *Falcon*. *See id.*; *supra* text accompanying notes 130–132.

156. *Falcon*, 451 Md. at 171–73, 152 A.3d at 707–08.

157. *Id.*

158. *Id. But see infra* Section I.B.2.b. (critiquing *Falcon*'s use of the all opinions approach and its conclusion based on that approach).

159. *Falcon*, 451 Md. at 171–73, 152 A.3d at 707–08; *see supra* notes 99–100 and accompanying text (explaining the difference between the *Marks* rule and the all opinions approach).

160. *Falcon*, 451 Md. at 171–73, 152 A.3d at 707–08. *But see infra* notes 179–180 and accompanying text (explaining that the all opinions approach was only ever proposed as a way for lower courts to predict how a higher court would rule, not for courts of last resort to apply to their own plurality decisions); *infra* Section I.B.2.b (explaining why it is troubling for a court of last resort to apply the all opinions approach to its own plurality decisions).

161. *Falcon*, 451 Md. at 171–73, 152 A.3d at 707–08.

judges would have necessarily agreed on a particular point—that the *Falcon* court decided that, under *Schisler*, the State prevails.[162] Therefore, while some seem to take for granted that Maryland uses the Supreme Court's *Marks* rule,[163] this is incorrect. Maryland apparently uses the all opinions approach, not the *Marks* rule, to afford precedential weight to Maryland plurality decisions.[164] Answering the question of how silent concurrences impact the precedential value of plurality decisions in Maryland, then, depends on the effect of silent concurrences when applying the all opinions approach.

2. *The Potential Impact of Silent Concurrences on the Precedential Value of a Plurality Decision in Maryland and a Closer Look at* Falcon

Silent concurrences can confound the precedential value of a Maryland plurality decision,[165] but they would not have done so in *Falcon*.[166] It turns out, though, the fact that silent concurrences in *Schisler* would not have mattered in *Falcon* makes clear that the all opinions approach, particularly as applied in *Falcon*, seems oddly detached from why stare decisis exists in the first place.[167]

a. *How Silent Concurrences Complicate Plurality Decisions but Would Not Have Changed the Outcome in* Falcon

None of the concurrences in *Schisler* were silent.[168] Thus, the *Falcon* court had every judge's alternative reasoning available to help determine how *Schisler* applied.[169] If the concurrences had been silent, it would not have mattered in *Falcon* because the plurality and either of the dissenters in *Schisler* (four of seven judges) could still be said to have "agreed" about the relevant proposition the *Falcon* court extracted from *Schisler*.[170]

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162. *Id.*

163. *See supra* note 89 (providing an example of an organization believing *Falcon* meant Maryland uses the *Marks* rule); *infra* note 349 (citing two pre-*Falcon* Court of Special Appeals cases where the court seemed to believe Maryland uses the *Marks* rule).

164. *See supra* Section I.B.1. The Court of Appeals using the all opinions approach is odd for many reasons, *see infra* Section I.B.2.b., not the least of which being that the all opinions approach was only ever proposed as a tool for *lower* courts to predict how a *higher* court would rule based on a plurality decision from the higher court. *See infra* notes 179–180 and accompanying text.

165. *See, e.g.*, Section I.E.2.

166. *See supra* Section I.B.2.a.

167. *See supra* Section I.B.2.b.

168. Schisler v. State, 394 Md. 519, 907 A.2d 175 (2006).

169. State v. Falcon, 451 Md. 138, 161–73, 152 A.3d 687, 700–08 (2017).

170. *See supra* note 106 (providing a quote from *Falcon* where the court cited to a Maryland case that combined two concurring opinions and two dissenting ones to find a single precedential proposition because all that is needed is a majority); *supra* text accompanying notes 156–158 (explaining that the *Falcon* court found all seven of the judges in *Schisler* would have agreed on the relevant point). *But see infra* Section I.B.2.b. (discussing why finding precedent by combining separate opposing opinions based on what they technically "agreed" about is problematic).

Hypothetically, though, if it had been unclear whether the lead opinion and the dissents agreed on the relevant point (and had the concurrences been silent), then the *Falcon* court would have had no binding precedent to apply.[171] There would only have been five judges who explained their reasoning at all, and only three in agreement, thus no majority.[172]

Therefore, while swing-vote concurrences always disrupt the flow of precedent by preventing a majority opinion, swing-vote *silent* concurrences complicate matters even further.[173] They complicate matters further because even though Maryland can afford precedential weight to a plurality decision via the all opinions approach, this enterprise relies on judges writing separately so future courts can examine their opinions.[174] When the concurrences are silent, a later court is left with nothing but a lead opinion and a dissent(s), which may or may not have any points of overlap, implicit or otherwise.[175]

b. Falcon *Reveals a Disconnect Between the Court of Appeals's Use of the All Opinions Approach and the Point of Stare Decisis*

This subsection is a slight diversion from the discussion of silent concurrences in and of themselves, but there is something essential to note about the all opinions approach, particularly as applied in *Falcon*. Focusing on how silent concurrences would not have altered *Falcon*'s application of *Schisler* fleshes out how the court's use of the all opinions approach, while using the language of stare decisis, has little to do with why stare decisis exists.[176] Again, the *Falcon* court found that all seven of the judges in *Schisler* implicitly agreed on a particular point and that this point was therefore precedential because a majority would have agreed with it.[177] Such a rule is concerning because (1) it seems to allow courts to mix and match

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171. *Falcon*, 451 Md. at 162, 152 A.3d at 701 (explaining that the precedential weight of a Maryland plurality decision depends on finding something a majority of the judges could be said to have agreed about); *supra* note 106 (quoting the relevant language from this part of *Falcon*).

172. *See supra* note 171.

173. *See, e.g.*, Wright v. State, 2016 WL 2944069, at *3 n.3 (Md. Ct. Spec. App. May 17, 2016) (noting the difficulty the court had in applying *Barnes v. State*, 423 Md. 75, 31 A.3d 203 (2011) (plurality decision) because of a swing-vote silent concurrence); Feaster v. State, 2015 WL 9590659, at *2 n.4 (Md. Ct. Spec. App. Dec. 30, 2015) (same); *see also infra* Section I.E.2.

174. *See supra* Section I.B.1. (explaining the all opinions approach, which necessarily requires having opinions to examine); *infra* Section I.E.2. (providing examples of Maryland plurality decisions with silent concurrences resulting in legal ambiguity). Of course, the *Marks* rule also relies on concurring judges writing separately. *See supra* notes 85–86 and accompanying text (explaining the *Marks* rule).

175. See, for example, the cases discussed *infra* in Section I.E.2. Besides the notion of extracting actual precedent from plurality decisions, silent concurrences also deprive the court of opinions that could at least aid the court as persuasive authority in developing and adopting rules in the future. *See supra* notes 9, 52 and accompanying text; *infra* note 205.

176. *See infra* notes 197–206 and accompanying text.

177. State v. Falcon, 451 Md. at 171–73, 152 A.3d at 707–08 (2017); *see supra* text accompanying notes 156–158.

opinions authored by judges who deliberately wrote separately rather than form a majority and (2) this mixing and matching seems to enable courts to extract precedential propositions those judges would likely have disagreed with based solely on the notion that the separate opinions "agree" in some technical sense.[178]

Before continuing, it is worth noting that proponents of the all opinions approach only ever proposed it as a methodological tool for lower courts to predict how a higher court would rule in a case under review by the lower court, when the only case from the higher court addressing a similar question is a plurality decision.[179] The all opinions approach was not intended for courts of last resort to apply to their own plurality decisions as if theoretical areas of overlap between opposing opinions were necessarily binding on those courts.[180]

Issues with the all opinions approach are clearest when one considers how the *Falcon* court could have applied *Schisler* the same way based only on the lead opinion and either one of the dissents.[181] While the *Falcon* court found all seven judges in *Schisler* "agreed" on the relevant point, that point would still have been precedential even if only the lead opinion and either of the dissents had "agreed."[182]

As an initial matter, intuitively, one would think an opinion explaining the result and an opinion dissenting in that result[183] do not "agree," but rather, by definition, *disagree*.[184] When the *Falcon* court stated the lead opinion and the dissent "agreed," it meant the following: The lead opinion in *Schisler* held there *was* a constitutional violation because the termination of the gubernatorial appointees *had not* been incidental to a restructuring of the commission.[185] Conversely, the dissents *did not* believe there was a constitutional violation because they believed the General Assembly had the power to terminate early the members of a statutorily created entity, regardless of who appointed the members, and regardless of whether the

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178. *See infra* note 210 and accompanying text.

179. Re, *supra* note 42, at 1988–89 ("The idea is to view all the opinions in a . . . [plurality] decision, including the dissents, as contributing to the rule of decision for future cases, *at least in lower courts*." (emphasis added)); *see id.* at 1988–93 (explaining in more detail how lower courts would use the all opinions approach).

180. *See id.* at 1988–93 (explaining the all opinions approach as only a tool for lower courts, thus not considering the notion that a court of last resort could use the all opinions approach on its own plurality decisions). Even the Supreme Court applies the *Marks* rule to its own opinions sparingly, with the rule being more a creature of lower courts trying to interpret Supreme Court plurality decisions. *Id.* at 1951–54; *see also infra* note 205 and accompanying text.

181. *See supra* note 106 (quoting *Falcon* explaining that the Court of Appeals can find precedent in a plurality decision by combining dissents with other opinions).

182. State v. Falcon, 451 Md. 138, 172, 152 A.3d 687, 701 (2017); *see supra* note 106 (providing a quotation from *Falcon* citing another case that found a precedential point of agreement between two concurring opinions and two dissenting ones).

183. And, for that matter, an opinion concurring only in the result.

184. *See infra* note 210 and accompanying text.

185. *Falcon*, 451 Md. at 172, 152 A.3d at 707.

termination was incidental to a restructuring.[186] Thus, technically, both opinions would agree that nothing unconstitutional occurs when the General Assembly amends the law defining who appoints members of a statutorily created commission, and in so doing, ends the current terms of only the governor-appointed members early.[187] The *Falcon* court reasoned that neither the *Schisler* plurality nor the dissenters would have found a constitutional violation in *Falcon*.[188]

While examining implicit areas of overlap between opinions might be a useful intellectual exercise, it is worrisome that a hypothetical opinion stitched together from separate disagreeing opinions could be considered a pre-existing precedent that a court of last resort must follow.[189] The dissenters in *Schisler*[190] fundamentally disagreed with the lead opinion, which is presumably why those judges dissented rather than help create a precedential majority opinion.[191] The lead opinion believed the rule should be that, even if the only thing at issue is whether the General Assembly can terminate gubernatorial appointees on a statutorily created commission, the dispositive question is whether the termination is incidental to a restructuring of the commission itself.[192] If not, the termination is unconstitutional.[193] The plurality could not convince a fourth judge of this.[194] Conversely, the dissents believed such an analysis is irrelevant because the General Assembly has the power to end the terms early, whether incidental to a restructuring or not.[195] Thus, although it may be true that the lead opinion and the dissents would have agreed no constitutional violation occurred in *Falcon*, they had very different constitutional interpretations that led them to that conclusion.[196] Still, though, the opinions were lumped together as if they formed a binding majority under the maxim of stare decisis.[197]

From a doctrinal standpoint, the problem is that a court of last resort "careful[ly]" stitching together precedent based on what disagreeing judges in a plurality decision would have theoretically agreed about has little to do with why we subscribe to the maxim of stare decisis in the first place.[198] Forming precedent under the maxim of stare decisis traditionally requires (1)

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186. *Id.* at 172–73, 152 A.3d at 707–08.
187. *Id.*
188. *Id.*; *see supra* text accompanying notes 156–158.
189. *See infra* notes 190–226 and accompanying text.
190. And the concurrence, actually.
191. *See infra* note 210 and accompanying text.
192. *See supra* notes 125–134, 152–155.
193. *See supra* notes 125–134, 152–155.
194. *See supra* notes 153–162 and accompanying text.
195. State v. Falcon, 451 Md. 138, 161–73, 152 A.3d 687, 700–08 (2017); *see supra* notes 125–134, 152–155.
196. *See supra* notes 125–134, 152–155.
197. *See supra* notes 125–134, 152–155.
198. *Falcon*, 451 Md. at 161–73, 152 A.3d at 700–08; *see supra* text accompanying note 107; *infra* note 212 and accompanying text.

that the majority of an appellate panel, (2) explicitly agrees on, (a) a particular result, and (b) the legal reasoning that dictates that result.[199] Stare decisis literally means "to stand by *things decided*,"[200] the idea being that when a court has the chance to consider a particular set of facts, whatever reasoning a majority can agree dictates the result in that case is binding on future cases with similar facts.[201]

The basic justification for basing our legal system on the principle of stare decisis is two-fold. First, we assign inherent authority to a rule when the majority of an appellate panel, faced with the same set of facts, could agree on that rule, and applied it to those facts, to reach the same result.[202] Second, stare decisis aids in predictability of the law, promotes fairness, and "contributes to the actual and perceived integrity of the judicial process," by ensuring that the rules explained and applied in one case will apply to similar cases in the future.[203]

Yet, the all opinions approach, as applied in *Falcon*, allows a court of last resort to give all the weight of a precedent to the notion that at least four judges, who did not even agree on the result in one case, would hypothetically agree, technically, with a proposition relevant to a new case with different facts.[204] Having done so, a court can dispense with any discussion of the merits of the rule and simply state there is a binding rule that shall now be applied under the maxim of stare decisis.[205] Thus, under the reasoning of

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199. BLACK, *supra* note 8, at 2–6, 10, 135–136; Re, *supra* note 42, at 1948 n.28, 1966; *supra* text accompanying notes 40–43.

200. *Stare Decisis*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/stare_decisis (last updated Mar. 2017) (emphasis added).

201. *See supra* note 199.

202. HENRY CAMPBELL BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS OR THE SCIENCE OF CASE LAW 3–6 (1912); *see id.* at 3 ("The authoritative force of judicial precedents rests partly on the legal presumption that what has previously been decided by a court of competent jurisdiction was correctly decided and therefore should not be reconsidered."); *id.* at 5–6 ("The operation of precedents is based on the legal presumption of the correctness of judicial decisions." (quoting JOHN W. SALMOND, JURISPRUDENCE 171 (2d ed. 1907))).

203. Kimble v. Marvel Entm't, Inc., 135 S. Ct. 2401, 2409 (2015); *accord* BLACK, *supra* note 202 ("[I]t is an established rule to abide by former precedents where the same points come again in litigation, as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion, as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule." (quoting SIR WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS 69 (1753))).

204. *See supra* Section I.B.1.

205. *Compare* Nichols v. United States, 511 U.S. 738, 745–46 (1994) ("We think it not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it. This degree of confusion following a splintered decision . . . is itself a reason for reexamining that decision."), *and id.* at 746–47 (acknowledging the Court was in fact adopting new rules based on the *persuasive* authority of various opinions in a plurality decision, without insisting the plurality decision was somehow binding precedent under the principle of stare decisis), *with* State v. Falcon, 451 Md. 138, 171–79, 152 A.3d 687, 707–12 (2017) (basing its legal analysis almost entirely on how *Schisler* could technically be said to stand

Falcon, a court can proceed as if there is authoritative precedent that dictates a certain result—while at the same time contrivedly synthesizing that precedent in a manner unrelated to what it means to "stand by *things decided*."[206] Stare decisis means standing by rules a majority previously applied to a particular set of facts to reach a particular result—not standing by complicated extrapolations of what four of seven judges, who did not even agree on the result, would have, technically, agreed on given the chance to opine on a new case with different facts.[207]

In addition to the general doctrinal issues, the logic of *Falcon* is potentially confusing for two reasons. First, no majority in *Schisler* could agree whether the legislature's early termination of governor-appointed members needed to be incidental to be constitutional, and yet *Falcon,* purporting to be following what all the judges agreed on in *Schisler*, found that the termination in *Falcon* was constitutional *because* it was incidental.[208] Second, even if the concurrence had been silent, the *Falcon* court could have done the same thing with only the lead opinion and a dissent, even though the dissents quite clearly would have disagreed with the court undertaking an analysis of whether the termination was incidental.[209]

University of California-Los Angeles Law Professor Richard Re points out that the all opinions approach could be considered problematic because judges who write separately rather than join the lead opinion "prefer that no precedent be established," and so "they should be able to act on that wish rather than having to join (and make precedential) views diametrically contrary to their own" via subsequent application of the all opinions approach.[210] A court treats the rule that it pieces together from separate

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for a binding proposition, and then applying that proposition without further discussion of its merits).

206. *Stare Decisis*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/stare_decisis (last updated Mar. 2017); *cf.* Re, *supra* note 42, at 1951 (explaining that the *Marks* rule itself was established when "the clear precedential authority of a [Supreme Court] majority opinion indirectly blessed the more dubious authority of a [Supreme Court] plurality"). If the above description of why stare decisis exists in the first place is correct, then picking one opinion that is decided on what a court deems "the narrowest grounds" and treating it as binding, i.e. the *Marks* rule, also seems to have little to do with why the principle of stare decisis exists. *See infra* text accompanying notes 212–213; *infra* note 225 and accompanying text.

207. *See supra* notes 202–206 and accompanying text; *see also* Re, *supra* note 42, at 1992–93 (making a similar point, although in the context of lower courts applying the approach to a higher court's plurality decision, as lower courts trying to predict how a higher court might rule is the only purpose for which the all opinions approach was ever proposed).

208. *See supra* notes 125–134, 152–155.

209. Schisler v. State, 394 Md. 519, 606–14, 907 A.2d 175, 226–31 (2006) (Harrel, J., and Raker, J., concurring in part and dissenting in part); *id.* at 614–32, 907 A.2d at 231–42 (Battaglia, J., dissenting).

210. Re, *supra* note 42, at 1973 n.168; *see also id.* at 1990 ("Some judges and commentators object to . . . giv[ing] binding force to dissents. Because they do not adjudicate rights or establish precedent, dissents tend to be less inhibited than the sober majority opinions that they criticize. Dissenters let off steam, offer visionary meditations, and otherwise act in ways that the dissenters themselves would view as inappropriate in a ruling with the force of law.").

opinions as binding precedent, even though "not a single [judge from the plurality decision] would necessarily approve of the resulting combination of rules."[211] Re ultimately argues that "[n]o approach to the *Marks* rule finds footing in logic, prudence, or tradition,"[212] for reasons that are beyond the scope of this Comment.[213]

Exemplifying the concerns Professor Re notes above, the *Falcon* court explained that its decision was dictated by what all the judges implicitly "agreed" on in *Schisler*, while applying the very same analysis the *Schisler* judges could not agree was necessary—an analysis of whether the early termination was incidental to a restructuring.[214] The non-lead opinions' authors apparently felt strongly enough that no such analysis was necessary that they wrote separately—rather than allowing the case to result in a precedential majority opinion whereby a future court would undertake that analysis.[215] The *Falcon* court performed that very analysis, though, while concluding that its decision was based on a precedential point of agreement between all the judges in *Schisler*.

The all opinions approach allowed the *Falcon* court to read *Schisler* as standing for the binding proposition that there was no constitutional violation in *Falcon*—on the grounds that the "termination of the [gubernatorial] Appointees' terms was incidental to the General Assembly's restructuring and reconstituting of the Nominating Commission."[216] The court, purporting to follow stare decisis, could "[a]pply[] the rationale of *Schisler* here" to determine "that, under *Schisler*, *according to a majority of this [c]ourt*, such action does not rise to the level of a constitutional violation."[217] The court proceeded to explain and analyze why what the General Assembly did could rightly be considered "restructuring," and why the termination was incidental to this restructuring, even though undertaking such an analysis is something the concurrence and the dissents did not think future courts need to do—

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211. *Id.* at 1993.

212. *Id.* at 1997.

213. For a thorough analysis of the difficulties in extracting precedent from plurality opinions via the *Marks* rule and its variants, and criticism on these grounds of both the rule, and of judges failing to compromise sufficiently to reach a majority decision, see Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. 1942 (2019).

214. *See supra* text accompanying notes 125–134, 156–158.

215. *See supra* text accompanying notes 125–134, 156–158; *cf. supra* notes 210–211 and accompanying text (explaining why forming precedent by combining disagreeing separate opinions could be considered ill-advised).

216. State v. Falcon, 451 Md. 138, 171–74, 152 A.3d 687, 707–08 (2017).

217. *Id.* (emphasis added). *But see supra* note 205 and accompanying text (pointing out that when a court of last resort faces a legal question that previously divided that court resulting in confusion over what the rule is or should be, it is probably preferable for the court to explore and discuss the merits of whatever rule it adopts—which is why it is concerning that the all opinions approach can reduce a court's analysis to declaring that the court is applying some pre-existing binding precedent).

which is presumably why they wrote separately rather than allowing *Schisler* to set such a precedent.[218]

Furthermore, had the concurrences in *Schisler* been silent, the *Falcon* court, under its own logic, could still have reached the same conclusion based only on the lead opinion and either of the dissents.[219] The *Falcon* court interpreted the dissents as agreeing with the lead opinion that incidental termination of only the gubernatorial appointees on a statutorily created commission is not a constitutional violation.[220] While the notion that the lead and dissenting opinions agreed about this is technically true, it ignores the fact that the dissents' point was that it should not matter whether the termination is incidental to anything.[221] The *Falcon* court may be technically correct that both the plurality and the dissenters in *Schisler* would not have found a constitutional violation in *Falcon*.[222] Still, it seems odd that even based on the most diametrically opposed opinions in *Schisler*, the court could have proceeded as if the relevant analysis "under *Schisler*"[223] is whether the termination was incidental, when the relevance of such an analysis is essentially what no majority could agree on in *Schisler*.[224]

3. Summarizing the Effect of Silent Concurrences on the Precedential Value of Plurality Decisions

Based on Sections I.B.1 and I.B.2, the following two propositions are true. First, when a failure to reach a compromise results in a plurality decision, the precedential value of the case is left uncertain, and it will take further litigation that is likely to be complex and unpredictable to sort out these ambiguities in the law.[225] Second, when a swing-voter concurs *silently*, it can be even more difficult, if not impossible, to sort out these ambiguities.[226] The silently concurring judge both disrupts the establishment of precedent and offers no assistance to future courts or litigants in using the *Marks* rule, or a technique such as the all opinions approach, to resolve

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218. *Id.* at 172–74, 152 A.3d at 707–08; *see supra* notes 125–134, 152–155; *cf. supra* note 210 (offering criticism that would seem to apply to *Falcon* of the general notion of combining dissents with concurring and lead opinions to form precedent).

219. *See supra* notes 89, 106 and text accompanying notes 156–163.

220. *See supra* text accompanying notes 156–163.

221. Schisler v. State, 394 Md. 519, 606–14, 907 A.2d 175, 226–31 (2006) (Harrel, J., and Raker, J., concurring in part and dissenting in part); *id.* at 614–32, 907 A.2d at 231–42 (Battaglia, J., dissenting). *Contra supra* note 210 and accompanying text (explaining that judges probably do not want their separate opinions to be mixed with diametrically opposed opinions to form precedent, since they specifically chose to write separately rather than form precedent).

222. *See supra* text accompanying notes 156–163.

223. *Falcon*, 451 Md. at 172–73, 152 A.3d at 707–08.

224. *See supra* note 221.

225. For a thorough analysis of why litigation that requires applying plurality decisions can be particularly complex and unpredictable post-*Marks*, see Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. 1942 (2019).

226. *See infra* note 227.

questions of law left confounded by the plurality decision.[227] Furthermore, aside from the notion of actually extracting precedent from a plurality decision, a swing-vote silent concurrence generally deprives future courts of additional persuasive authority to help resolve questions left unanswered by a plurality decision.[228]

C. A Survey of the Criticisms of Silent Concurrences

Critics take particular issue with swing-vote silent concurrences because they lead to plurality decisions, but also criticize the practice generally, regardless of whether there is still a majority opinion. When a judge's silent concurrence results in a plurality decision, one criticism is the judge caused there to be ambiguities in the law but did not explain why.[229] Rather than the case settling a legal question, future litigants will need to re-litigate the same issue before a clear legal rule can emerge.[230] While this is a criticism that could be directed at a court as a whole when the judges' inability to compromise results in a plurality decision,[231] the key point is that with a silent concurrence, there is no hint as to what the disagreement even was or what legal principles the concurring judge thinks should have decided the case.[232]

Furthermore, there is concern about the unilateral nature of a swing-vote silent concurrence.[233] When a court as a whole leaves ambiguities in the law, either by failing to find a compromise that allows for a majority opinion,[234] issuing a summary disposition that does not explain the court's reasoning, or

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227. *See* Robbins, *supra* note 55, at 161–65 (explaining that swing-vote silent concurrences leave ambiguities in the law that it will take further litigation to sort out definitively); *infra* note 349 and accompanying text (providing two examples where the Maryland Court of Special Appeals noted particular difficulty in applying a Court of Appeals plurality decision because of a silent concurrence); *infra* Section I.E.2; *see also infra* note 494 (addressing the potential argument that the all opinions approach may in fact make silent concurrences more justifiable in Maryland).

228. *See supra* note 175 (explaining that silently concurring judges have also deprived future courts of additional persuasive authority to help further develop the law even in the absence of rules like the *Marks* rule, or where plurality-precedent-extracting rules are of no help in a given instance).

229. *See* Robbins, *supra* note 55, at 161–65 (criticizing swing-vote judges in particular for issuing silent concurrences because they leave ambiguities in the law that will require further litigation); *see also supra* text accompanying note 76 (explaining that plurality decisions leave ambiguities in the law).

230. Robbins, *supra* note 55, at 161–65.

231. *See supra* note 225.

232. *See supra* notes 55–59 and accompanying text (explaining how a silent concurrence tells us nothing more than that a judge refused to join the main opinion); *supra* Section I.B.3; *infra* note 349 (citing two Maryland Court of Special Appeals cases where the court noted particular difficulty applying a Court of Appeals plurality decision because of a silent concurrence, as it provided no insight into the disagreement or alternative grounds for the result); *infra* Section I.E.2 (discussing five Court of Appeals plurality decisions with one or more silent concurrences and the resulting legal ambiguities from those cases); *supra* note 52 and accompanying text (explaining that one of the reasons disagreeing judges should write separate opinions is to contribute to the development of the law).

233. *See infra* notes 237, 240, 252.

234. *See supra* note 225.

issuing an unpublished opinion,[235] this is at least the court acting as a collective body.[236] A silent concurrence, however, allows a single judge to stand in the way of precedent, for whatever reason the judge may have, and not provide any rationale.[237] For example, a single judge may not want a particular rule to become precedent for personal or political reasons.[238] If that judge happens to be the swing voter, then the silent concurrence allows that judge to exercise their will independently, unlike when the court acts collectively, and without writing separately to explain their decision to the public.[239]

When the silently concurring judge is not a swing voter disrupting the establishment of precedent, the general criticism of silent concurrences is essentially that "[j]udges have a duty to write and to provide reasoning for their decisions."[240] Critics do not necessarily argue that a judge must write a lengthy and detailed separate opinion.[241] Rather, the criticism is that a judge ought to at least give some indication that they in fact considered the case carefully before casting a vote in favor of a given result,[242] and some statement as to why the judge is choosing not to join the main opinion.[243] This statement may be as simple as explaining that the judge agreed with the lower court's reason for reaching the result rather than the reasoning in the

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235. Robbins, *supra* note 55, at 118, 161–62 (describing these sorts of situations as comparable to a silent concurrence insofar as the reasoning is left unstated).

236. *Id.* at 161, 163–64; *see infra* note 237.

237. Robbins, *supra* note 55, at 161, 163–64; *see also* Platt *supra*, note 4, at 160 ("Critics might argue that silent concurrences are more subject to inappropriate use than other [methods by which a court as a whole might withhold its reasoning] because they are exercised unilaterally."). As will be addressed in the Analysis, *see infra* notes 419–437 and accompanying text, Platt argues that the unilateral nature of a silent concurrence is not a concern. Platt, *supra* note 4, at 160.

238. *See* Robbins, *supra* note 55, at 163–64 (stating that disrupting precedent without providing any rationale "rais[es] the specter of arbitrariness").

239. *Id.* at 161, 163–64; *infra* note 252; *see also infra* note 240.

240. *Id.* at 161 n.16; *accord* Goelzhauser, *supra* note 4, at 355–56 ("[W]ritten opinions provide a measure of public accountability. . . . Obscuring justifications for votes may complicate the task of maintaining or building institutional legitimacy." (citing Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 140 (1990))); *infra* note 247 and accompanying text.

241. *See* Goelzhauser, *supra* note 4, at 352 ("[Silent concurrences are] puzzling because Justices have several low-cost alternatives . . . . As an initial matter, Justices might issue perfunctory opinions that offer a brief explanation for staking out a separate position."). This is worth noting because a principle defense of the silent concurrence is that judges have limited time, and there can be situations where a judge disagrees with the main opinion's reasoning, but it would be a poor use of limited judicial resources for the judge to write a full opinion explaining why. *See infra* notes 294–300 and accompanying text. *But see infra* Section II.B.1; *infra* note 441 (citing examples of brief statements supplied in lieu of full separate opinions).

242. Goelzhauser, *supra* note 4, at 352; *see infra* notes 247, 252–253 and accompanying text.

243. Robbins, *supra* note 55, at 162; *see also* Platt, *supra* note 4, at 141 ("The unexplained vote is commonly understood to be the province of the legislator; judicial power is customarily exercised through reasoned, written opinions.").

majority opinion.[244] Critics argue that a judge who agrees with the result should only refuse to join the main opinion if the judge has substantial concerns about the reasoning in the main opinion, and that if a judge has such substantial concerns, the judge has a duty to explain them—"If the disagreement is not substantial, the main opinion ought to be signed; if the disagreement is substantial, the reason should be stated."[245]

In addition, "separate opinions may help foster public confidence in the judiciary and promote institutional legitimacy,"[246] as "separate opinions help demonstrate that legal conclusions are the 'product of independent and thoughtful minds.'"[247] The criticism, then, is that a judge who silently concurs (for all anyone knows) may have no sound legal reason for voting in favor of the result, which is precisely why our system presumes judges should explain their decisions.[248]

Another criticism in this same vein is that it is unfair to the parties of a case for judges to be partly responsible for the result, but not explain their reasoning.[249] One can imagine that it would be troubling to a party that loses an appeal when one or more of the judges[250] responsible for providing the vote(s) necessary for that party to lose does not explain why they voted for that result.[251] Not only is the party unsure why the judge who silently concurred voted for their side to lose, but they also have no assurance that the judge's decision is based on sound rational consideration of the merits of the case.[252] That is, one function of written opinions in general is that they assure not only the public, but also the litigants for whom the decision impacts directly, that the judges responsible for the court's ultimate decision considered the litigants' case and reached a reasoned result based on sound

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244. Goelzhauser, *supra* note 4, at 352; Robbins, *supra* note 55, at 163; *see also infra* note 441 (citing examples from the Court of Appeals of brief statements in lieu of full opinions accompanying concurrences in the judgment).

245. ALDISERT, *supra* note 16, at 153 (citing B.E. WITKIN, MANUAL ON APPELLATE COURT OPINIONS 223 (1977)); *see also supra* note 2 and accompanying text.

246. Fife, *supra* note 12, at 172.

247. *Id.* (quoting Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 35 (1999)); *accord* ALDISERT, *supra* note 16, at 149–50 (noting that one function of a concurring opinion is "[t]o assure counsel and the public that the case has received careful consideration" (citing R. Dean Moorehead, *Concurring and Dissenting Opinions*, 38 AM. BAR ASS'N J. 821, 823 (1952))); Goelzhauser, *supra* note 4, at 355–56.

248. *See supra* note 247 and accompanying text; *see also infra* Section II.A.

249. *See infra* notes 250–254 and accompanying text.

250. Sometimes more than one judge silently concurs in a given case. *See* App. Tb. 1.

251. Robbins, *supra* note 55, at 118, 163 ("Concurring in result without providing reasons undermines the judicial process and can be fundamentally unfair to litigants.").

252. *Id.* at 163 ("By raising the specter of arbitrariness, this unchecked decision making seems repugnant to the deeply rooted notions of justice and ordered liberty that due process undoubtedly protects."). Professor Robbins' article goes so far as to argue that deciding for or against a party without giving even a cursory explanation could violate due process, at least when the judge casts a swing vote. *Id.*

legal principles:[253] "[A]s Chief Justice Harlan Fiske Stone once explained, separate opinions provide 'some assurance to counsel and to the public that [the] decision has not been perfunctory, which is one of the most important objects of opinion writing.'"[254]

In summary, critics argue that there does not appear to be any legitimate reason for a silent concurrence since judges voting for the ultimate result are supposed to explain their reasoning. If a judge does not think their reasons are worth explaining, then the judge should simply join the main opinion rather than cast doubt on it. Or, the judge should, at the very least, give some cursory explanation rather than no explanation at all.[255]

D. Potential Reasons Judges Use Silent Concurrences

In his article *Silent Concurrences*, Associate Professor of Political Science at Utah State University Greg Goelzhauser examined "the private papers of several" Supreme Court Justices from the Burger Court to try to explain why a judge might silently concur.[256] He found that a silent concurrence might be due to any one of the following: "time constraints, perceptions about case importance or the importance of a prospective concurring opinion, vote switching, uncertainty about the proper disposition or legal rule, a desire to maintain a consistent voting record and withhold support for disfavored precedents, and bargaining failures over opinion language and scope."[257]

Appellate judges write separate opinions "on [their] own time," on top of their mandatory workload, so limited time could lead an appellate judge to concur silently if the judge believes the case, or their issue with the opinion,

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253. BLACK, *supra* note 8, at 4–6; Robbins, *supra* note 55, at 163–64; *see supra* note 247.

254. Fife, *supra* note 12, at 172 (quoting Harlan F. Stone, *Dissenting Opinions are not Without Value*, 26 J. AM. JUDICATURE SOC'Y 78, 78 (1942)). *But see* Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 514–25 (2015) (explaining the potential downsides of separate opinions, including that too many may actually decrease rather than increase the public's confidence in the legitimacy of a court).

255. *See supra* note 241 and accompanying text.

256. Goelzhauser, *supra* note 4, at 353.

257. *Id.* at 357–58; *accord* Amwest Sur. Ins. Co. v. Wilson, 906 P.2d. 1112, 1127 (Cal. 1995) ("[A silent concurrence] is equivocal. 'It could mean that the concurring justice does not agree with the principles; or that [the justice] agrees with the principles or some of them but not with the manner of their statement or the reasoning or authorities set forth in support of them; or that [the justice] neither agrees nor disagrees but wishes to stay aloof and keep himself [or herself] intellectually free to examine the question anew at some later date (perhaps as the author of an opinion); or that [the justice] objects to something in the opinion—a quotation, reliance on an authority that is anathema to him [or her], humor or satire, or castigation of a litigant or counsel—and withholds his [or her] signature because the author would not take it out.'" (second, third, fourth, fifth, and sixth alterations in original) (quoting B.E. WITKIN, MANUAL ON APPELLATE COURT OPINIONS 223 (1977))); *see also infra* note 401 (providing another potential reason for silent concurrences suggested by Judge Richard Posner that did not warrant full discussion in this Section, while explaining why that reason does not negate this Comment's argument).

is not important enough to warrant the time expenditure.[258] For example, Justice Blackmun once told Justice O'Connor, via notes on her draft, that he took issue with a single footnote[259] in her majority opinion in *Engle v. Isaac*.[260] Justice O'Connor indicated in her response that she would not be deleting the footnote and urged Justice Blackmun to join the opinion and note his concerns separately.[261] Justice Blackmun responded asking Justice O'Connor to simply put at the end of her next draft "Justice Blackmun concurs in the result."[262] Professor Goelzhauser supposes that it is "plausible" that Justice Blackmun simply found "it too tedious" to write even a perfunctory opinion about his disagreement with one footnote.[263]

Judges may also switch their votes multiple times during the deliberation process, ultimately deciding that they are so uncertain that they do not think it is prudent to go so far as to dissent, but nonetheless do not want to give their support to the main opinion, nor are they confident enough about what the best rule should be to author a separate opinion.[264] Time

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258. Goelzhauser, *supra* note 4, at 358 (quoting Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 142 (1990)); *accord* Robbins, *supra* note 55, at 160 & n.11 ("One reason that judges might [concur silently] is that their dockets are large and unmanageable. . . . In short, over-worked judges may be using [silent concurrences] simply as a technique to avoid spending time articulating disagreement with the majority's or plurality's rationale.").

259. Justice Blackmun also took issue with the language on one page, although in subsequent correspondences with Justice O'Connor, he said his main concern was with footnote 32. Goelzhauser, *supra* note 4, at 359. The sentence to which the footnote is attached explains that a writ of habeas corpus "undermines the usual principles of finality of litigation," and the footnote states:

> Judge Friendly and Professor Bator suggest that this absence of finality also frustrates deterrence and rehabilitation. Deterrence depends upon the expectation that 'one violating the law will swiftly and certainly become subject to punishment, just punishment.' Rehabilitation demands that the convicted defendant realize that 'he is justly subject to sanction, that he stands in need of rehabilitation.'

Engle v. Isaac, 456 U.S. 107, 127 & n.32 (1982) (first citing Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV 441, 452 (1963); then citing Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 146 (1970)).

260. 456 U.S. 107 (1982) (reversing the Sixth Circuit's grant of habeas relief to several state prisoners because they had not raised their constitutional claims properly at the state level, holding that prisoners must show "cause" and "actual prejudice" to overcome such procedural defaults); Goelzhauser, *supra* note 4, at 358–59.

261. Goelzhauser, *supra* note 4, at 359. That is, Justice O'Connor asked that Justice Blackmun issue a *regular* concurrence. *Id.*; *see supra* note 10 (explaining the difference between a special concurrence and a regular concurrence).

262. Goelzhauser, *supra* note 4, at 359 (quoting Letter from Harry A. Blackmun to Sandra Day O'Connor, No. 80-1430 (Mar. 12, 1982), http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1981/80-1430.pdf).

263. Goelzhauser, *supra* note 4, at 359. *But see infra* text accompanying notes 460–463 (arguing that Professor Goelzhauser's explanation is dubious). In addition to the disagreement between Justices O'Connor and Blackmun being an example where time pressures could have been a factor, it is also an example of "bargaining failures over opinion language and scope." *See* Goelzhauser, *supra* note 4, at 353, 357–58, 373–74.

264. Goelzhauser, *supra* note 4, at 363–68.

pressures can also be a factor in such situations, especially near the end of a term.[265] Additionally, even if a judge does not switch votes during the process, it is possible that a judge might "hedge" their bets with a silent concurrence when they are simply puzzled by what the proper rule should be and are unpersuaded by the majority opinion.[266]

Issuing a silent concurrence due to general uncertainty is odd, though, considering there is a less ambiguous mechanism by which a judge can express amorphous doubts about the majority opinion.[267] A judge can join the majority opinion *dubitante*, or author a "*dubitante* opinion."[268] While joining *dubitante* is rare,[269] it signifies that a judge has some doubts about whether the majority opinion is correct but is not prepared to declare it is wrong or refuse to join it.[270] If the judge would prefer to explain their doubts rather than simply join *dubitante*, the judge can instead write a *dubitante* opinion.[271] A *dubitante* opinion functions as a middle ground between a concurring opinion and a dissenting opinion.[272] The judge is not claiming the main opinion is wrong, the judge is just noting general doubts they have about whether it is right.[273] Essentially, "these opinions can serve as a signal to lawyers that a better, but not yet conceived, legal argument may exist."[274] Furthermore, "*[d]ubitante* opinions can also be brief and do not connote a high level of disagreement with fellow judges."[275] Thus, whether a judge joins the main opinion *dubitante* or instead issues a *dubitante* opinion, the judge is still officially supporting the majority opinion, unlike with a silent concurrence.[276]

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265. *Id.* at 360–62.

266. *Id.* at 367.

267. *See id.* (explaining that judges can also express uncertainty by writing a *dubitante* opinion).

268. Jason J. Czarnezki, *The* Dubitante *Opinion*, 39 AKRON L. REV. 1, 1–5 (2006).

269. As of 2006, the term *dubitante* had only been used in 626 opinions in in the United States. *Id.* at 1–2. Interestingly, the first appearance of the word *dubitante* in a court opinion in the United States was a Maryland case. *Id.* (citing Fulton v. Wood, 3 H & McH. 99, 100 (Md. 1792)).

270. *Id.* at 1–5 (explaining the meaning of *dubitante* mainly in the context of *dubitante* opinions); *id.* at 5 ("[A] judge can [also] join a majority opinion *dubitante* without a writing.").

271. *Id.* at 1–5.

272. *Id.* at 4 ("The term *dubitante* can best be seen as a level of agreement between fully joining the majority opinion and a concurrence."); *see id.* at 2 ("A *dubitante* (pronounced d[y]oo-bi-**tan**-tee) opinion indicates that 'the judge doubted a legal point but was unwilling to state that it was wrong.'" (quoting BLACK'S LAW DICTIONARY 515 (7th ed. 1999))).

273. *Id.* at 4 (citing as examples Majors v. Abell, 361 F.3d 349, 358 (7th Cir. 2004) (Easterbrook, J., *dubitante*); Kartell, v. Blue Shield of Mass., Inc., 592 F.2d 1191, 1195 (1st Cir. 1979) (Coffin, J., *dubitante*); Feldman v. Allegheny Airlines, Inc., 524 F.2d 384, 393 (2d Cir. 1975) (Friendly, J., *dubitante*)).

274. *Id.* at 5.

275. *Id.*

276. *Id.* at 4 ("[T]he [*dubitante*] judge can be seen as agreeing with the rationale in the majority opinion, but having reservations about the very same rationale."); *id.* at 6 ("While issuance of a *dubitante* opinion by a judge expresses reservations with the majority's holding, the *dubitante* opinion nevertheless, by design, also indicates a judge's (possibly reluctant) agreement with the majority's rationale. Thus, an opinion issued *dubitante* should be considered to represent a vote

Justice Burger apparently considered at least one of his silent concurrences to be akin to voting *dubitante*, although if not for the records of his letters, no one would ever know that vague doubts were why he concurred silently in that case.[277] A more transparent example of a concurrence functioning as a *dubitante* vote is Seventh Circuit Judge Richard Cudahy's regular[278] concurrence in *World Outreach Conference Center v. City of Chicago*,[279] which reads in its entirety: "Cudahy, Circuit Judge, concurring. Unfortunately; and I think the opinion must be stamped with a large 'MAYBE.'"[280] Commentators noted that, technically, the concurrence expressed the same meaning as having had the word *dubitante* next to Judge Cudahy's name instead of "concurring."[281]

Similar to having ill-defined doubts, a judge just might not be ready to establish law on a certain point.[282] The judge might think it is best to withhold support for an opinion setting a particular precedent, but not to vote against the result.[283] The judge may prefer to have more than the factual scenario at hand to base a definitive rule on, i.e. the judge would like to wait for more cases to come along with other facts before settling on a binding rule.[284] Preferring no precedent at all could be the reason a judge decides to

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with the majority and does become binding precedent (*i.e.*, not a plurality) where the *dubitante* opinion is the deciding vote."); *supra* Section I.B.3 (explaining that a swing-vote silent concurrence prevents a precedential majority and results in a plurality decision).

277. Goelzhauser, *supra* note 4, at 367 ("[T]he best I can do is join the judgment. In that 'dubitante' status!, I am more comfortable joining only the judgment." (quoting Letter from Warren E. Burger to William J. Brennan, No. 78-740 (Nov. 19, 1979) http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1979/78-740.pdf)). This was in reference to the majority opinion in *Andrus v. Allard*, 441 U.S. 51 (1979). *Id.* Professor Goelzhauser also notes that without access to a judge or judges' private information, "[the use of a silent concurrence in a given instance] cannot be explained . . . . [As] 'the Justice has not revealed why he or she is concurring, one is left to speculate regarding the possible reason.'" *Id.* at 357 (quoting PAMELA C. CORLEY, CONCURRING OPINION WRITING ON THE U.S. SUPREME COURT 19 (2010)).

278. *See supra* note 10 (explaining that a silent concurrence is just a "special" concurrence (i.e. a concurrence in the judgment only) without opinion, while a regular concurrence is when a judge does not refuse to join the main opinion but simply chooses to also write separately, which means a regular concurrence necessarily could never be "silent").

279. 787 F.3d 839 (7th Cir. 2015).

280. *Id.* at 845 (Cudahy, J., concurring).

281. David Lat, *The Greatest Concurrence Ever? Maybe False*, ABOVE THE LAW (July 2, 2015), https://abovethelaw.com/2015/06/the-greatest-concurrence-ever-maybe/?rf=1; Debra Cassens Weiss, *7th Circuit Judge Writes One-Sentence 'Maybe' Concurrence; Was it a 'Dubitante' Opinion?*, AM. BAR ASS'N J. (June 3, 2015), https://www.abajournal.com/news/article/7th_circuit_judge_writes_one_sentence_maybe_concurrence_was_it_a_dubitante; see also *supra* note 271 (providing the legal definition of *dubitante*).

282. Cappalli, *supra* note 13, at 355 ("The 'silent concurrence' may mean: 'I am thinking, but I am not ready to establish law.'").

283. *Id.*

284. *Id.*; *see generally* Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 356 (2006) (describing a principle Professor Sunstein dubs "Burkean minimalism," explaining that "Burkean minimalists believe that constitutional principles must be built incrementally and by analogy, with close reference to long-standing practices"). The author highly recommends the *Burkean Minimalism* article for anyone interested in a thorough discussion of competing

withhold their crucial swing vote and cause a plurality decision, thereby thwarting the precedent that would have otherwise been set.[285] Similarly, a judge might believe a rule is too broad to make for a prudent precedent at that time, or believe the language used to explain the rule is too ambiguous or problematic.[286] Of course, this is all still just a deductive guess based on situations where it seemed reasonable to some commentators that this could have been why a swing-vote judge silently concurred.[287]

A judge may also concur silently when they dissented in a previous case and the same issue arises in a new case.[288] The judge might prefer to adhere to stare decisis by acknowledging that precedent dictates a certain result, i.e. vote for a result that the judge's preferred rule would not have reached.[289] Still, though, the judge might want to concur in the judgment only rather than lend their name in support of a rule the judge previously explained they think is incorrect, or maybe even that the judge detests.[290] The judge does not write separately, then, because the judge does not have any alternative legal rules to offer that would reach the same result, as the judge's preferred alternative would actually reach a different result.[291] The judge is only voting for the result out of respect for precedent.[292] The judge could of course issue another dissent instead, but it is possible the judge does not wish to fight the same battle again and would simply rather vote in accordance with precedent, at least as it pertains to the result, while maintaining their distaste for the rule itself.[293]

Alexander I. Platt argues that silent concurrences can be a legitimate judicial technique because judges have limited time, and a judge may need to save time by not writing an opinion in one case so the judge can spend more time on another, presumably more consequential case.[294] Platt compares a judge concurring silently to a federal court refusing to decide certain issues in a case, the Supreme Court denying a petition for certiorari, or a court issuing an unpublished (non-precedential) opinion.[295] In those situations, a court is not necessarily explaining the reasoning behind its decision, but is

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philosophies that often underlie judicial decisionmaking and how judges might find compromises that allow for a majority opinion when a court is divided.

285. Cappalli, *supra* note 13, at 355–56; Robbins, *supra* note 55, at 161.

286. Goelzhauser, *supra* note 4, at 372–78. *But see supra* text accompanying notes 61–62 (giving an example where a disagreement over language that led to a silent concurrence seemed inconsequential from a legal standpoint).

287. *See, e.g.*, Cappalli, *supra* note 13, at 355–56; *see also supra* note 277 and accompanying text.

288. Goelzhauser, *supra* note 4, at 368–72.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. Platt, *supra* note 4, at 143, 149–62.

295. *Id.* at 151–54, 158, 160–62.

just using its discretion to efficiently manage the limited judicial resources available.[296] Platt argues that because courts must selectively focus their attention on cases and issues that are the most efficient expenditure of time, criticisms of the silent concurrence are "overstated," as it is just one of several "negative agenda-setting" techniques that are necessary to cope with the reality of limited judicial resources.[297] Platt takes the time-saving explanations described previously and goes so far as to affirmatively argue that this is a legitimate reason to issue a silent concurrence:

> Silent concurrences ought to be evaluated alongside other instruments of negative judicial agenda-setting. A federal appellate judge with doubts about an opinion by a colleague (particularly an opinion that has already attracted a [majority] vote) may dispense with the otherwise time-consuming process of trying to resolve those doubts while drafting a concurring or dissenting opinion, and instead issue a silent concurrence. This leaves the doubting judge with surplus time to allocate to other opinions.[298]

Platt's argument is based on his examination of federal courts of appeals, where he found data showing a correlation between silent concurrences and workload.[299] That correlation bolstered his hypothesis that silent concurrences are mainly used as a "negative agenda-setting" technique, i.e. as a way for judges to choose what cases not to spend time on so that they can use their time more efficiently.[300]

So far, all of these potential explanations have related to some substantive disagreement or issue with the main opinion itself,[301] but judges can also have reasons for refusing to sign opinions authored by a particular judge that are unrelated to any substantive issues with those opinions.[302] As Judge McDonald implies in the quote that opens this Comment, a silently concurring judge may very well have no substantive reason for refusing to join the main opinion.[303] For example, former Supreme Court Justice McReynolds, who was openly anti-Semitic, refused to join any opinion Justice Brandeis, who was Jewish, authored.[304] Also, as suggested by

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296. *Id.* at 143, 149–62.

297. *Id.* at 142, 162.

298. *Id.* at 154.

299. *Id.* at 142, 155.

300. *Id.* The data for silent concurrences in Maryland, however, show no such correlation. *See infra* Sections I.E.1, II.C; *see also* App. Tb. 1.

301. *But see supra* text accompanying notes 61–62 (giving an example where a disagreement over language that led to a silent concurrence seemed inconsequential from a legal standpoint).

302. *See infra* notes 303–305 and accompanying text.

303. State v. Payne, 440 Md. 680, 719, 104 A.3d 142, 165 (2014) (McDonald, J., concurring in judgment only). ("When a judge on [the Court of Appeals] concurs in the judgment only, it is helpful to explain why. Then the reader knows *whether there is a substantive reason for that judge's reticence* and can assess whether that reason has any merit." (emphasis added)).

304. John Fox, *Biographies of the Robes: James Clark McReynolds*, THIRTEEN, https://www.thirteen.org/wnet/supremecourt/capitalism/robes_mcreynolds.html.

Bernard E. Witkin in the *Manual of Appellate Court Opinions*, and quoted by the California Supreme Court, a judge may silently concur because they prefer to remain "intellectually free" to author an opinion themselves that addresses the same legal question in the future.[305]

Again, the potential explanations for silent concurrences are educated guesses based on the surrounding circumstances and whatever private information may be available, since a silent concurrence, by definition, tells us nothing.[306] Thus, one can do nothing more than speculate as to whether something other than substantive legal disagreements may be the reason a judge silently concurred, at least where there is some reasonable basis for such speculation.[307] While Justice McReynolds "made no secret" of why he refused to join Justice Brandeis's opinions,[308] there could, of course, be situations where a judge silently concurs and one can only reasonably guess that, perhaps, the judge's reasons for doing so were not necessarily substantive disagreement with the legal reasoning of the main opinion.[309] While the author believes that speculation in the absence of authority is generally ill-advised, silent concurrences compel one to speculate based on whatever other information is available, since there is no opinion to consider.[310] For example, this Comment posits that it is not unreasonable to suppose Fourth Circuit Court of Appeals Judge William B. Traxler might have silently concurred in *International Refugee Assistance Project v. Trump* because Judge Traxler did not want to be the lone conservative judge to join an opinion otherwise joined exclusively by the liberal judges in a high-profile, politically sensitive, en banc case.[311] In the absence of a separate opinion explaining why he refused to join the main opinion, one might speculate that Judge Traxler concurred in the result because he agreed with the majority, but refused to join the majority opinion because Judge Traxler did not want the opinion to read "Chief Judge Gregory authored the majority opinion, joined by Judges Motz, King, Wynn, Diaz, Floyd, Harris, *and Traxler*."[312]

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305. Amwest Sur. Ins. Co. v. Wilson, 906 P.2d. 1112, 1127 (Cal. 1995); *see supra* note 257 (providing a longer quotation from this portion of *Amwest Sur. Ins. Co.*).

306. Czarnezki, *supra* note 268, at 5.

307. *Id.*

308. *James C. McReynolds*, OYEZ, https://www.oyez.org/justices/james_c_mcreynolds ("McReynolds made no secret of his anti-Semitism by refusing to speak to fellow justices Louis Brandeis and Benjamin Cardozo."); *see supra* note 304 and accompanying text.

309. *See infra* note 310.

310. Czarnezki, *supra* note 268, at 5. The fact that silent concurrences compel guesswork and speculation is perhaps one more reason, in addition to those discussed *supra* in Section I.C., to be critical of silent concurrences.

311. *See supra* text accompanying notes 63–70 (discussing Judge Traxler's concurrence in *International Refugee* in more detail).

312. *See supra* notes 55–59 and accompanying text (explaining how a silent concurrence tells us nothing more than that a judge refused to join the main opinion, meaning one can only speculate as to why they refused).

E. The Silent Concurrence in Maryland: Silent Concurrences from 1990 to Present

Having discussed the criticisms of, and potential reasons for, silent concurrences, this Section focuses on the use of silent concurrences in Maryland from January 1, 1990, to August 31, 2019. Section I.E.1 discusses noteworthy trends from the 175 cases with a silent concurrence during that period. Section I.E.2 discusses the five cases from that set that were plurality decisions leaving no clear precedent.

1. Trends of Note

From January 1, 1990, to August 31, 2019, there were 175 appellate cases in Maryland where one or more judges issued a silent concurrence.[313] Four cases were from the Court of Special Appeals, and the rest were from the Court of Appeals.[314] With the departure of Judge Greene in 2019, the only sitting Court of Appeals judge who has issued a silent concurrence is Judge Watts.[315] Judge Watts issued the last ten silent concurrences,[316] and in the first nine of those ten cases,[317] Judge Hotten authored the majority opinion.[318] While the data suggest that Court of Appeals judges over the years have been more likely to silently concur when certain judges write the main opinion, the trend with Judge Watts silently concurring when Judge Hotten authors the opinion is by far the strongest and most obvious.[319] As

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313. For all statements in this section about silent-concurrence trends in Maryland, see the two tables in the Appendix. Table 1 lists all the cases in Maryland (both by the Court of Appeals and the Court of Special Appeals) that had a silent concurrence(s) from January 1, 1990, to August 31, 2019. *See* App. Tb. 1. All cases in Table 1 of the Appendix were found by running the following Westlaw searches and manually checking the results to confirm which cases had a silent concurrence(s): advanced: (concur! /4 only) & DA(aft 12-31-1989 & bef 09-01-2019); advanced: (join! /3 judgment /2 only) & DA(aft 12-31-1989 & bef 09-01-2019); advanced: (join! /3 result /2 only) & DA(aft 12-31-1989 & bef 09-01-2019). It is of course possible that this did not capture every single silent concurrence. Table 2 shows the number of cases decided each year by the Court of Appeals along with the number of silent concurrences that year. *See* App. Tb. 2.

314. *See* App. Tb. 1.

315. *See* App. Tb. 1.

316. Including one case in which Judge Watts *and* (retired) Judge Adkins silently concurred. *See* App. Tb. 1.

317. *See infra* note 322.

318. *See* App. Tb. 1. What to make of this trend is anyone's guess, as a silent concurrence by definition tells us nothing, inviting one to speculate. *See supra* notes 10, 257, 277; *supra* text accompanying notes 55–59; *see also supra* text accompanying note 2 (suggesting that in the absence of explanation, one does not know *why* a silently concurring judge refused to join a main opinion, including whether that reason was "substantive"); *supra* text accompanying notes 61–62, 301–312 and accompanying text (explaining that sometimes judges have reasons for refusing to join opinions authored by a particular judge or judges that have nothing to do with the legal reasoning of those opinions and providing examples); *supra* Section I.D. (presenting the findings of academics and courts that speculate on why judges issue silent concurrences in general or in a given instance). This Comment further discusses this trend in the Analysis. *See infra* text accompanying notes 481–487.

319. *See* App. Tb. 1. For example, former Chief Judge Bell issued the most silent concurrences (by far) during the period studied, with fifty-one. *See* App. Tb. 1. The breakdown of these fifty-

for the four silent concurrences on the Maryland Court of Special Appeals, this is too small of a data set to examine for clear trends. The only "trend" to speak of is that in two of the four cases, Judge Graeff silently concurred where Judge Moylan wrote the opinion.[320]

Unlike the data Platt found supporting his hypothesis that silent concurrences are mainly used as a "negative agenda-setting" technique on the federal courts of appeals,[321] there does not appear to be a similar correlation on the Court of Appeals based on workload, nor on time constraints as the term deadline approaches.[322] The use of silent concurrences has increased over the years, with the Court of Appeals averaging about five per year from 1990 to 1999, about six per year from 2000 to 2009, and about seven per year from 2010 to 2019.[323] The only years in which the number of silent concurrences reached double digits were 2006 (10), 2010 (18), and 2011 (13).[324]

2. *Swing-Vote Silent Concurrences*

Of the 175 cases with a silent concurrence from the period studied, five of them are swing-vote situations resulting in a plurality decision, i.e. no clear precedent.[325] Each case and the uncertainty resulting from it are discussed below.

In *Bible v. State*,[326] the Court of Appeals reversed a Court of Special Appeals decision, which reversed the convictions of a defendant convicted

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one by the author of the majority opinion is: Raker (11), Harrell (10), J. Murphy (6), Karwacki (4), Wilner (3), Barbera (3), Battaglia (3), R. Murphy (3), Adkins (2), Cathell (2), Chasanow (2), Greene (1), Rodowsky (1). *See* App. Tb. 1.

320. *See* App. Tb. 1.

321. *See supra* text accompanying notes 294–300 (explaining that correlations with workload and term deadlines indicated that federal circuit judges use silent concurrences to save time so they can focus on writing opinions in more consequential cases).

322. *See* App. Tbs. 1–2. The Court of Appeals did not even have a term deadline until 2014 when Chief Judge Mary Ellen Barbera instituted one. Michael Wein, *Maryland Court of Appeals to Follow SCOTUS Policy of Deciding Argued Cases by Term's End*, MD. APP. BLOG (Oct. 11, 2013), https://mdappblog.com/2013/10/11/maryland-court-of-appeals-to-follow-scotus-policy-of-deciding-argued-cases-by-terms-end/. Before that, decisions could, and sometimes did, come years after a case was argued. *Id.* Since 2014, though, the court has been required to decide cases argued between September and June by August 31. *Id.* The rate of silent concurrences on the court has not increased since this deadline was established (any more than it was already increasing), nor does the rate increase as the deadline approaches. *See* App. Tbs. 1–2. Thus, there is no correlation to suggest that time pressures due to the nearing end of a term explain silent concurrences on the Court of Appeals. The only potential exceptions are: (1) the most recent silent concurrence, which was issued by Judge Watts in a case where Judge Getty authored the majority opinion, as this case was decided August 29, 2019, two days before the term deadline; and (2) one of the nine silent concurrences Judge Watts issued when Judge Hotten wrote the majority opinion in a case that was also decided August 29 (2017). *See* App. Tbs. 1–2.

323. *See* App. Tb. 1.

324. *See* App. Tb. 2.

325. *See supra* Section I.B.

326. 411 Md. 138, 982 A.2d 348 (2009).

of third- and fourth-degree sexual offenses.[327] Judges Battaglia and Eldridge silently concurred.[328] The lead opinion's reasoning was that the State had failed to produce evidence proving the defendant touched the victim's buttocks "for the purposes of sexual gratification or arousal."[329] The dissent argued that the buttocks are an "intimate area," meaning additional evidence of purpose was not required, as purpose could be inferred from context.[330] Judges Battaglia and Eldridge's silent concurrences mean it is unsettled whether the State can convict someone of those sexual offenses based solely on evidence that the defendant touched the victim's buttocks or whether the State must present additional evidence that the defendant touched the victim's buttocks "*for purposes of sexual gratification or arousal*."[331]

In *Agurs v. State*,[332] Judge Battaglia silently concurred in a plurality decision that reversed a conviction because the police officer's use of a deficient warrant did not meet the good faith exception to the exclusionary rule, and thus the evidence from that search should have been suppressed.[333] Concurring in part and dissenting in part, Judge Murphy, in an opinion joined by Judge Adkins (who also joined Chief Judge Barbera's dissenting opinion), explained that he believed the case was so "close" that remand for an evidentiary hearing on the good faith issue alone was appropriate, even though this had never been done before.[334] The dissenting opinion by Chief Judge Barbera argued that "[u]nless and until" the Court of Appeals recognizes both that (1) there is an exclusionary rule under article 26 of the Maryland declaration of rights and (2) this exclusionary rule does *not* recognize the "good faith" exception, facts like those in *Agurs* require finding the good faith exception applies.[335] Therefore, because Judge Battaglia silently concurred, the issues left unanswered by this case are: (1) whether remand for a good faith hearing is appropriate (or possible) in a "close" case, and (2) whether there is an exclusionary rule under article 26 of the Maryland declaration of rights.[336]

In *Smith v. County Commissioners of Kent County*,[337] Judge Battaglia silently concurred.[338] The court vacated the Court of Special Appeals judgment and remanded the case on procedural grounds to the Court of Special Appeals, "with directions [that the Court of Special Appeals] dismiss

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327. *Id.* at 138, 143, 160, 982 A.2d at 348, 351, 361.
328. *Id.* at 161, 982 A.2d at 348.
329. *Id.* at 160, 982 A.2d at 360–61.
330. *Id.* at 161–62, 982 A.2d at 361–62 (Harrell, J., dissenting).
331. *Id.* at 138, 143, 160, 982 A.2d at 348, 351, 361 (plurality opinion).
332. 415 Md. 62, 998 A.2d 868 (2010).
333. *Id.* at 66, 99, 998 A.2d at 870, 890.
334. *Id.* at 99–102, 998 A.2d at 890–91 (Murphy, J., concurring in part and dissenting in part).
335. *Id.* at 102–13, 998 A.2d at 891–98 (Barbera, J., dissenting).
336. *See supra* notes 332–335.
337. 418 Md. 692, 18 A.3d 16 (2011).
338. *Id.* at 720, 18 A.3d at 32 (stating that Battaglia, J., "join[ed] in the judgment only").

the appeal, vacate the judgment of the Circuit Court for Kent County, and remand the case to the circuit court with directions that it dismiss petitioners' petition for judicial review." [339] The plurality opinion explained this was proper because the case "raise[d] more questions than may (or should) be answered on its record and briefs."[340] Judge Adkins' dissenting opinion, joined by Chief Judge Bell and Judge Greene, argued that "[t]he appropriate disposition of a prematurely filed review action depends, at least in part, on the reason that action is premature."[341] The dissent further argued that in situations like *Smith*, where the reason the action is premature is "not because of a jurisdictional defect," but because the petitioner has not exhausted other available administrative remedies, a stay of judicial review, rather than dismissal, is appropriate.[342] Therefore, Judge Battaglia's silent concurrence makes it unclear whether in similar situations a dismissal is necessarily the right outcome as opposed to a stay of judicial review.[343]

In *Barnes v. State*,[344] Judge Greene silently concurred.[345] The plurality opinion held that a motion to correct an illegal sentence under rule 4-345(a)[346] should be dismissed as moot if the sentence has been served.[347] Both dissenters argued the case should not have been dismissed as moot.[348] Therefore, Judge Greene's silent concurrence makes it unclear from this case whether there is a strict delineation between motions to correct an illegal sentence and equitable writs to correct an illegal sentence.[349] It now remains unclear whether a motion to correct an illegal sentence under rule 4-345(a) is proper after the defendant's prison term has ended, or whether the defendant must instead file a post-conviction action or seek a declaratory judgment.[350]

In *State v. Bircher*,[351] Judge Harrell silently concurred.[352] Bircher, who had been convicted in a criminal case, argued that a supplemental jury instruction given after closing arguments that introduced a new theory of the case was prejudicial because the defense would have made different strategic

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339. *Id.* at 718–19, 18 A.3d at 32.

340. *Id.* at 718–19, 18 A.3d at 32.

341. *Id.* at 720, 18 A.3d at 32–33 (Adkins, J. dissenting).

342. *Id.* at 720–32, 18 A.3d at 32–40.

343. *See supra* notes 337–342.

344. 423 Md. 75, 31 A.3d 203 (2011).

345. *Id.* at 88, 31 A.3d at 211 (stating that "Greene, J., join[ed] [in the] judgment only").

346. MD. R. 4-345(a) ("The court may correct an illegal sentence at any time.").

347. *Barnes*, 423 Md. at 87–88, 31 A.3d at 210–11.

348. *Id.* at 89, 31 A.3d at 211 (Murphy, J., dissenting); *id.* at 89–91, 31 A.3d at 211–12 (Eldridge, J. dissenting).

349. *Id.* at 85–88 & n.4, n.5, 31 A.3d at 209–11 & n.4, n.5; *see also* Wright v. State, 2016 WL 2944069, at *3 n.3 (Md. Ct. Spec. App. May 17, 2016) (noting the difficulty the court had in applying *Barnes* because of the silent concurrence); Feaster v. State, 2015 WL 9590659, at *2 n.4 (Md. Ct. Spec. App. Dec. 30, 2015) (same).

350. *See supra* note 349.

351. 446 Md. 458, 132 A.3d 292 (2016).

352. *Id.* at 482, 132 A.3d at 306 (stating Harrell, J., "join[ed] in the judgment only").

decisions during trial had the defense known the instruction would be given.[353] Bircher further argued that the trial court's allowance for additional closing arguments did not cure this prejudice.[354] The plurality held that the trial court did not abuse its discretion in giving the supplemental instruction because: (1) the instruction was generated by the evidence (and was a correct statement of the law) and (2) did not prejudice Bircher because (a) Bircher never specifically conceded anything that would have "walked into" the issue raised by the supplemental instruction, and (b) the trial court allowed the defense to make additional closing remarks.[355] The dissent from Judge Watts,[356] joined by Chief Judge Barbera and Judge Adkins, argued that notwithstanding any of this, a supplemental instruction can still be prejudicial (and was in this case), and that supplemental instructions are judged by "a higher standard."[357] Judge Watts explained, for example, that

> [a]lthough a group of judges may be able to determine that neither Bircher nor his counsel made an explicit concession [that would have made it so the supplemental instruction undermined Bircher's legal argument], it is less clear that a jury of lay people would necessarily have discerned the same.[358]

Therefore, Judge Harrell's silent concurrence makes it unclear from this case whether a supplemental jury instruction introducing a new theory of the case can ever be prejudicial to a defendant if the instruction is generated by the evidence (and a correct statement of the law), the defendant does not specifically concede anything during trial that directly "walk[s] into" the issue raised by the supplemental instruction, and the trial court allows for additional closing remarks.[359]

Thus, these five cases represent instances in which silent concurrences left ambiguities in Maryland law that now require further litigation to resolve.[360] Furthermore, that litigation will require litigants to try to make sense of these difficult-to-interpret plurality decisions rather than applying a clearer, more predictable rule.[361]

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353. *Id.* at 477, 132 A.3d at 303.

354. *Id.* at 478–82, 132 A.3d at 304–06.

355. *Id.*

356. Which the author believes makes an excellent point.

357. *Id.* at 482–90, 132 A.3d at 306–11 (Watts, J., joined by Barbera, C.J., and Adkins, J., dissenting).

358. *Id.* at 489, 132 A.3d at 311 (Watts, J., joined by Barbera, C.J., and Adkins, J., dissenting).

359. *Id.* at 482–90, 132 A.3d at 304, 306–11 (Watts, J., joined by Barbera, C.J., and Adkins, J., dissenting).

360. *See infra* notes 514–516 and accompanying text.

361. *See supra* Section I.B.3; *supra* note 349.

II. ANALYSIS

This Analysis explains why the criticisms of silent concurrences outweigh their potential justifications, how the negative impacts of silent concurrences could be mitigated, and how to reduce their use in general. While commentators have offered potential explanations and justifications for silent concurrences, no one seems to argue that they are an ideal practice in their own right.[362] Furthermore, commentators who are not outright critics of the practice mainly offer potential explanations for why judges sometime concur silently, presumably for scholars and appellate advocacy wonks who might be curious, but the commenters offer few, if any, normative judgments about whether these explanations are *satisfactory*.[363] The exception is Alexander I. Platt, who affirmatively argues that silent concurrences are justifiable (i.e. excusable) insofar as limited judicial resources sometimes make them necessary.[364] Otherwise, judgments about the practice come mainly from those who are critical of it.[365]

Section II.A gives a brief overview of why this Comment argues we should generally discourage silent concurrences and question their use. Section II.B explains why the potential justifications for why judges concur silently are unsatisfactory in light of the criticisms. These justifications are unsatisfactory because a judge could always explain something rather than nothing at all, and parties and the public have the right to expect judges to do so.[366] Section II.C argues that (1) regardless of whether these justifications are valid, the data suggest they do not apply to the most recent uses of the silent concurrence on the Court of Appeals; and (2) swing-vote silent concurrences are even less defensible in Maryland because Maryland uses the all opinions approach to determine the precedential value of Maryland

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362. *See* Platt, *supra* note 4, at 162 (stating, while defending silent concurrences, that "[s]ilent concurrences are surely flawed, and may impose significant costs on both the parties to an individual case and the legal system in general. But any unfavorable evaluation of this technique must account for the persistence of parallel techniques of negative agenda-setting that seem to pose similar cost/benefit ratios and yet remain deeply entrenched in judicial practices"); *supra* notes 12–13 and accompanying text; *supra* Section I.D.

363. *See, e.g.*, Goelzhauser, *supra* note 4. Professor Goelzhauser does refer to the potential explanations he lists as "[j]ustifications for [s]ilent [c]oncurrences"; however, he does not affirmatively argue that any of the potential explanations he offers are *satisfactory* explanations in light of the criticisms of silent concurrences. *Id.* at 357–80. Rather, Professor Goelzhauser lists and explains the potential reasons a judge might silently concur based on what he discovered examining the private papers of Justices who served during the Burger Court. *Id.*

364. *See supra* note 362.

365. *See, e.g.*, *supra* notes 13, 55, 245; *infra* note 497 and accompanying text.

366. Put another way, the explanations offered for why a judge might silently concur are really just (potentially valid) reasons a judge might not wish *to join the main opinion*, but this still leaves the question of why the public, and the parties in a given case, should consider it acceptable for a judge who concurs only in a judgment to leave everyone guessing as to *which* of these possible reasons was the actual reason the judge refused to join the main opinion in that particular case. *See supra* Sections I.A–C; *infra* Sections II.A–B. Not to mention what led the judge to vote for the result at all. *See supra* text accompanying notes 247–252.

plurality decisions. Finally, Section II.D argues that the Court of Appeals should promulgate a rule that would (1) prevent a swing-vote silent concurrence from impacting the precedential value of a plurality decision, and, by extension, (2) discourage the use of silent concurrences altogether. Section II.D further argues that the legal community should pay more attention to silent concurrences and hold judges accountable for issuing them, thereby supporting the expectation of transparency in judicial decisionmaking that is central to our legal system.

A. *Why Silent Concurrences Should Be Questioned and Discouraged*

This Section provides the basic structure of the argument that will then be expanded and relied upon in subsequent Sections. The practice of issuing silent concurrences is generally unsound, and silent concurrences are particularly indefensible when they result in a plurality decision. The reasons not to issue silent concurrences outweigh the potential justifications for them, considering that judges have better options.[367]

The general expectation in our legal system is that judges who vote for a result explain their reasoning.[368] Appellate cases are decided when the majority of an appellate panel votes for a particular result, and opinions are how those judges explain why they voted for that result.[369] Opinions supporting the ultimate result are not only central to stare decisis but also provide transparency and promote institutional legitimacy.[370] Usually, the judges responsible for the result join a single binding opinion that both announces the result and explains why those judges voted for that result.[371] When a judge concurs in the judgment only, that judge votes for the result, but does not join that opinion.[372] The general assumption is that judges concur only in the judgment because they have alternative reasons for reaching the result, and we expect judges who concur only in the judgment to write separately.[373] We expect them to write separately both to serve the goals of transparency and institutional legitimacy noted above, but also because a judge's role is ultimately to contribute to the development of the law by either joining an opinion or writing separately, not to take part in results for reasons unstated.[374]

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367. *See infra* Section II.B; *see also infra* Sections II.C–D; *cf.* Goelzhauser, *supra* note 4, at 352, 355–56 ("[Silent concurrences are] puzzling because Justices have several low-cost alternatives . . . .").

368. *See supra* notes 9, 16, 38, 41, 52, 75, 243, 245, 247, 277 and accompanying text; *infra* note 497; *see also supra* Sections I.A, I.C.

369. *See supra* notes 40–43 and accompanying text.

370. *Id.*; *see supra* notes 240, 252; *see also supra* Section I.C.

371. *See supra* notes 40–43 and accompanying text.

372. *See supra* notes 48–49 and accompanying text.

373. *See supra* note 9 and accompanying text.

374. *See* Fife, *supra* note 12, at 172 (explaining that Justice William J. Brennan believed judges have an "obligation" to explain their legal conclusions because it "serv[es] a function within the

Silent concurrences undermine all those principles.[375] When a judge concurs only in a judgment without writing separately, i.e. concurs silently, there is no explanation for why the judge voted for that result.[376] Additionally, when a swing-vote judge concurs silently resulting in a plurality decision, the situation is even worse because the judge, while offering no explanation, stands in the way of precedent.[377] In either case, no one really knows whether the judge had what people would consider legitimate reasons for refusing to join the main opinion.[378] Since transparency is one of the reasons judges are expected to explain their votes by either joining or writing an opinion, it is worth questioning whether judges should have the unilateral power to issue a silent concurrence.[379] Silent concurrences allow judges to refuse to join an opinion for reasons litigants and the public might consider questionable, unprofessional, or illegitimate.[380] For example, judges sometimes silently concur over inconsequential matters related to language preferences in an opinion,[381] personal disagreements with the author of the main opinion,[382] or possibly even political optics.[383]

Moreover, even though judges sometimes issue silent concurrences when they do not substantively disagree with the main opinion, a silent concurrence nonetheless casts doubt on the main opinion.[384] Silent concurrences cast doubt on the main opinion precisely because people incorrectly assume that judges do not refuse to join main opinions for trivial

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judicial process similar to that served by the electoral process with regard to the political branches of government" (citing William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 435 (1985))); ALDISERT, *supra* note 16, at 153 ("If the disagreement is not substantial, the main opinion ought to be signed; if the disagreement is substantial, the reason should be stated." (citing B.E. WITKIN, MANUAL ON APPELLATE COURT OPINIONS 223 (1977))); *supra* note 52 (citing multiple authorities describing how judges ought to contribute to the development of the law by explaining why they did not join the main opinion); *supra* note 240 and accompanying text (explaining that judges have a duty to explain their votes, and that not doing so detracts from public accountability and institutional legitimacy (citing Robbins, *supra* note 55, at 161 n.16; Goelzhauser, *supra* note 4, at 355–56)); *supra* note 252; *supra* Section I.C; *infra* Section II.B.

375. *See* ALDISERT, *supra* note 16, at 153 ("The cryptic statement, 'I concur in the judgment,' [without a separate opinion] has bothered many readers. . . . It produces all the evils of a concurring opinion with none of its values, i.e., it casts doubt on the principles declared in the main opinion without indicating why they are wrong or questionable." (quoting B.E. WITKIN, MANUAL ON APPELLATE COURT OPINIONS 223 (1977))); *supra* note 240 and accompanying text; *supra* notes 251, 252; *supra* Section I.C; *infra* Section II.B.

376. *See supra* note 10 and notes 55–59 and accompanying text (explaining how a silent concurrence tells us nothing more than that a judge refused to join the main opinion); *see also supra* text accompanying notes 2, 61–62; *supra* notes 301–312 and accompanying text.

377. Robbins, *supra* note 55, at 163; *see supra* Section I.B.3.

378. Robbins, *supra* note 55, at 163; *see supra* Section I.B.3.

379. *See infra* Section II.B.1.

380. *See supra* Section I.C; *supra* note 376.

381. *See supra* text accompanying notes 61–62; *supra* note 257.

382. *See supra* text accompanying notes 304–305.

383. *See supra* notes 311–312.

384. *See supra* note 375.

reasons.[385] The assumption is that a concurrence only in the judgment means a judge had substantive disagreements with the legal reasoning of the main opinion.[386] Silent concurrences, therefore, give people the impression they should treat the main opinion's reasoning as suspect, because it seems as though a judge had some worthwhile disagreement with that opinion.[387] This ambiguity causes litigants, courts, and academics (and law students) to puzzle over silent concurrences, trying to make sense of what a judge's silence meant.[388] In this way, silent concurrences also compel speculation based on trends, context, and anything else that might shed light on why a judge voted for a result but refused to join the main opinion.[389] Of course, educated guesses and speculation based on trends can lead to inaccurate conclusions, which is why a separate opinion that renders speculation unnecessary is preferable.[390]

The crux of this Comment's argument against silent concurrences is that there is no good reason to accept the ambiguity silent concurrences cause, nor their potential for abuse, when a judge could instead write a brief statement if they are unable to write a full opinion, or just join the main opinion, if only *dubitante*.[391] This Comment recognizes that time constraints can sometimes make it impractical for a judge to write a full separate opinion.[392] Furthermore, sometimes a judge does not actually disagree with the main opinion, but has amorphous doubts, or is otherwise uncertain as to what the precise rule should be.[393] These situations preclude writing a full separate opinion explaining any alternative legal reasoning for the result.[394] Time constraints and uncertainty do not justify silent concurrences, though, because a silent concurrence is ambiguous and could just as easily mean the judge does not care for the author of the main opinion's writing style, or even

385. *See supra* notes 55–59 and accompanying text (explaining that people tend to assume a silent concurrence means the judge actually disagreed with the main opinion and why they are incorrect to do so); *see also supra* text accompanying notes 2, 61–62; *supra* notes 9, 301–312 and accompanying text.

386. *See supra* notes 9, 55–59 and accompanying text; *see also* Robbins, *supra* note 55, at 163 ("[S]ilence indicates that the judge failed either to find common ground with his or her colleagues or to reach an independent basis for decision.").

387. *See supra* notes 2, 9–10, 55–59, 61–62, 301–312 and accompanying text; notes 257 and 277.

388. *See, e.g.*, *supra* note 257 (providing a quotation from the California Supreme Court discussing the ambiguous nature of silent concurrences); *supra* note 349 (citing two cases from the Court of Special Appeals that struggled to interpret a plurality decision with a silent concurrence); *supra* Section I.D (discussing attempts to explain silent concurrences).

389. *See supra* Section I.D; *infra* Section II.C.

390. *See infra* text accompanying notes 460–463, 481–487; *supra* text accompanying notes 63–70, 308–312.

391. *See infra* Sections II.B–D; *cf.* Goelzhauser, *supra* note 4, at 352, 355–56 ("[Silent concurrences are] puzzling because Justices have several low-cost alternatives . . . .").

392. *See infra* Sections II.B.1, II.D; *see also supra* notes 258–263 and accompanying text (discussing how time constraints can be a factor when a judge decides to issue a silent concurrence).

393. *See supra* notes 264–287.

394. *See supra* notes 264–287.

the author themselves.[395] This ambiguity is unacceptable when the judge has simple, less ambiguous options than a silent concurrence, which are joining the main opinion anyway, concurring while at least writing a brief statement, or joining *dubitante*.[396]

If a judge has disagreements that are not worth the time it would take to explain, or a judge has doubts they cannot articulate, one option could be to just join the main opinion anyway, as no opinion is perfect.[397] In the event a judge cannot bring themselves to do that, though, a judge could still write a brief statement indicating *something* about what led the judge to vote for the result but refuse to join the main opinion.[398] A judge can also express vague doubts and uncertainty by joining the main opinion *dubitante*, meaning the judge had doubts about the main opinion but was unwilling to declare it as wrong, as opposed to refusing to join the main opinion altogether.[399] Therefore, while this Comment stops short of making a blanket assertion that there can never be a legitimate reason for a silent concurrence,[400] it is exceedingly difficult to think of one.[401]

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395. *See supra* notes 55–62, 302–313 and accompanying text.

396. *See infra* Sections II.B–D; *supra* note 391.

397. *See* Cohen, *supra* note 254, at 514–25 (explaining the potential downsides of separate opinions, including that too many may actually decrease rather than increase the public's confidence in the legitimacy of a court); *id.* at 515–16 (explaining that it is unlikely appellate panels regularly all agree with every single aspect of a single opinion, but single binding opinions without separate disagreeing ones are more efficient and legally certain); *see also supra* text accompanying note 245.

398. *See infra* note 402, *see also infra* Section II.B.

399. *See supra* notes 268–281 and accompanying text; *infra* notes 532–535 and accompanying text; *see also infra* Section II.B.

400. *See infra* note 497 and accompanying text.

401. *See infra* Sections II.B–D; *cf.* Cappalli, *supra* note 13, at 380 ("The 'silent concurrence' is a debilitating practice with no visible redeeming value."). *But see* Fife, *supra* note 12, at 172 (explaining that Judge Richard Posner thought silent concurrences (and silent dissents) were indefensible until he realized they could be a way to maintain collegiality and promote legal certainty, as opposed to separate opinions attacking the main opinion and introducing multiple potential legal arguments). In response to Judge Posner's point, one could argue that it promotes collegiality and legal certainty even more if judges join the main opinion when they do not wish to articulate any disagreement with it. *See supra* notes 378–390, 397 and accompanying text (explaining that judges sometimes silently concur over personal disagreements, and that silent concurrences cast doubt on the main opinion); *infra* note 402 and accompanying text. Furthermore, the problem is that because silent concurrences are ambiguous, no one really knows whether a judge silently concurred in a given instance to maintain collegiality and promote legal certainty, or if instead the judge was obscuring some less "edifying" reason for voting for the result while refusing to join the main opinion. Fife, *supra* note 12, at 172 (explaining that Judge Posner "c[a]me to realize that there are other, more edifying explanations" for silent concurrences such as collegiality and legal certainty) (alteration in original) (quoting RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 174–75 (1999)); *see* Goelzhauser, *supra* note 4, at 355–56 ("[W]ritten opinions provide a measure of public accountability. . . . Obscuring justifications for votes may complicate the task of maintaining or building institutional legitimacy." (citing Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 140 (1990))); *supra* Sections I.A, I.C; *supra* notes 378–390 and accompanying text; *infra* notes 402–404 and accompanying text; *infra* Sections II.A–D. Nonetheless, this Comment does appreciate the fact that its author is a mere law student, while Judge Posner is an esteemed judge, and two other esteemed judges who are harshly critical of silent concurrences only go so far as to state that silent concurrences should be

Lastly, this Comment should not be interpreted as suggesting judges should write separately or join opinions *dubitante* whenever they have minor doubts or disagreements with the main opinion.[402] Ideally, judges with relatively inconsequential concerns about a main opinion would, as they often do, just join the opinion anyway since their disagreement is not substantial.[403] This Comment merely asserts that when a judge votes for the result but refuses to join the main opinion, remaining silent about why is an unsound way to proceed.[404]

B. *Why Criticisms of the Silent Concurrence Outweigh Their Potential Justifications*

As explained in Section I.D, the substantive reasons[405] a judge might concur silently are: (1) time constraints and perceptions about the importance of the case (i.e. negative agenda-setting), (2) "vote switching" and "uncertainty about the proper disposition or legal rule," (3) "a desire to maintain a consistent voting record and withhold support for disfavored precedents," and (4) "bargaining failures over opinion language and scope."[406] As explained in Section I.C, the criticisms boil down to that in our legal system, appellate judges who vote for a result are expected to be transparent and explain their reasoning to assure litigants and the public that the merits of the case were properly considered, and to contribute to the development of the law.[407] As such, if a judge does not think their reasons are worth explaining, then the judge should simply join the main opinion rather than cast doubt on it.[408] Or, the judge should, at the very least, give

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used "sparingly." *See infra* note 497 and accompanying text. Thus, this Comment assumes there are some things its author just might not know or appreciate having never been a judge, and so rather than argue silent concurrences can never be legitimate and must be banned altogether, this Comment only argues silent concurrences should be questioned and discouraged, and that their impacts on plurality decisions should be negated. *See infra* Section II.D.

402. *See* ALDISERT, *supra* note 16, at 153 ("If the disagreement is not substantial, the main opinion ought to be signed; if the disagreement is substantial, the reason should be stated." (citing B.E. WITKIN, MANUAL ON APPELLATE COURT OPINIONS 223 (1977))); Cohen, *supra* note 254, at 514–25 (explaining the potential downsides of frequent separate opinions—they can lessen the degree of collegiality among the judges on a panel, decrease judicial efficiency and legal certainty, and decrease the public's confidence in the legitimacy of a court); Fife, *supra* note 12, at 173 (noting the same concerns (citing Cohen, *supra* note 254, at 514–25)); *see also infra* note 514 (suggesting that compromises that achieve majority opinions are preferable to frequent use of separate opinions).

403. *See supra* notes 397, 402; *infra* note 497.

404. *See infra* Sections II.B–D.

405. As in reasons related to the substance of the legal analysis in the main opinion, as opposed to personal differences or inconsequential disagreements. *See supra* text accompanying notes 61–62; *supra* notes 301–312 and accompanying text (providing examples of non-substantive reasons a judge might silently concur).

406. Goelzhauser, *supra* note 4, at 357–58; *see supra* notes 257, 294–300 and accompanying text.

407. *See supra* notes 240–254 and accompanying text.

408. *See supra* notes 240–254 and accompanying text.

some cursory explanation rather than no explanation.[409] The additional criticism levied at swing-vote silent concurrences is that a judge is unilaterally standing in the way of precedent, leaving ambiguities in the law that may adversely impact the public, while offering the public no explanation (i.e. written opinion) for why the judge thought this to be appropriate.[410]

Platt's "[l]imited [d]efense" of the silent concurrence is based solely on the grounds that limited judicial resources require appellate courts to use multiple time-saving techniques, such as issuing unpublished summary dispositions, declining to decide all issues in a case, and denying petitions for review altogether.[411] Platt argues that silent concurrences are no different from these other time-saving techniques.[412] His argument, then, does not consider whether the non-time related reasons a judge might silently concur are justifiable.[413] Section II.B.1 addresses Platt's argument, ultimately concluding that, even assuming *arguendo* that judges can have legitimate reasons for refusing to join a main opinion that are not worth the time it would take explain, (1) silent concurrences are not as legitimate as other time-saving techniques because they are exercised unilaterally, and (2) even if parties and the public must accept the reality of limited judicial resources, they still have the right to expect judges who vote for a result without joining the main opinion to give some indication of why, however brief. Sections II.B.2 through II.B.4 discuss, respectively, each of the remaining potential explanations listed above,[414] ultimately concluding that these are not satisfactory justifications either.

1. *Silent Concurrences Are Not as Legitimate as Other Judicial Time-Saving Techniques*

Harvard Fellow and Lecturer Platt argues that "any unfavorable evaluation of [silent concurrences] must account for the persistence of parallel techniques of negative agenda-setting[415] that seem to pose similar cost/benefit ratios and yet remain deeply entrenched in judicial practices."[416] Disagreeing with Platt's underlying assumption that silent concurrences are a "parallel technique[]" to other techniques courts as a whole use to save

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409. *See supra* note 242 and accompanying text.

410. *See supra* notes 229–239 and accompanying text.

411. *See* Platt, *supra* note 4, at 141, 160–62; *supra* note 362.

412. *See* Platt, *supra* note 4, at 141, 160–62; *supra* note 362.

413. *See* Platt, *supra* note 4, at 141 (defending silent concurrences only insofar as they can be used as a time-saving technique).

414. *See supra* text accompanying note 406.

415. By parallel techniques, Platt means techniques such as summary dispositions, unpublished opinions, declining to decide all issues in a case, and denying a petition for certiorari. *See* Platt, *supra* note 4, at 141, 160–62; *supra* note 362.

416. Platt, *supra* note 4, at 162; *see supra* note 362.

time,[417] this Comment argues that the silent concurrence is not a parallel technique, but is in fact inherently less legitimate than these other techniques.[418] Silent concurrences are inherently less legitimate because (1) silent concurrences are exercised unilaterally rather than by the court as a collective body, and (2) a lone judge could save time by writing a brief statement indicating the judge's specific concerns rather than writing nothing at all.[419]

Platt offers only three sentences to counter the notion that silent concurrences are less legitimate than other "negative agenda-setting practices"[420] because they are exercised unilaterally:

> Critics might argue that silent concurrences are more subject to inappropriate use than other negative agenda-setting practices because they are exercised unilaterally. But unilateralism is a feature, not a bug: A silent concurrence does not deprive the parties (or the legal system) of anything except the opinion of the single judge who deploys it. The majority opinion, fully reasoned and published, is binding on the parties and on future panels.[421]

There are three major interrelated issues with Platt's reasoning. First, Platt purports to address the argument "that silent concurrences are *more subject to inappropriate use* . . . because they are exercised unilaterally,"[422] but his argument does not address the fact that a power exercised unilaterally is more subject to abuse than one exercised collectively. Platt argues instead that depriving litigants and the public of a lone judge's reasoning is simply not that big of a concern regardless of whether the silent concurrence is more subject to inappropriate use.[423] Thus, Platt's argument does not address whether the fact that silent concurrences are more subject to inappropriate use makes the silent concurrence inherently less legitimate than other judicial time-saving techniques. Other time-saving techniques, however, require multiple judges to agree to use the technique. This prevents individual judges who do not want to explain themselves from exercising their will independently of a collective judicial decisionmaking process.[424]

As an analogy, imagine the common scene in modern war movies where two people have to simultaneously turn two separate keys at a terminal to

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417. Platt, *supra* note 4, at 162.

418. *See infra* notes 420–447 and accompanying text.

419. *See infra* notes 420–447 and accompanying text.

420. Platt uses the term "negative agenda-setting practices" to mean any technique by which courts choose what *not* to spend time on so that they can efficiently focus their limited time on the most pressing matters, e.g., denying a petition for certiorari. Platt, *supra* note 4, at 142, 154; *see supra* text accompanying note 300.

421. Platt, *supra* note 4, at 160.

422. *Id.* (emphasis added).

423. *Id.*

424. *See supra* notes 239, 252 and accompanying text.

launch a nuclear missile.[425] Imagine further, for the sake of argument, that a separate terminal existed that only launched a firecracker, and only needed one person to turn a key. That means one person can launch the firecracker without having to convince a second person there are legitimate reasons to do so. If someone pointed out that one-key terminals are more subject to inappropriate use because one person can decide to turn their key whenever they want, then Platt's argument is akin to countering that firecrackers are not as destructive as nuclear missiles.[426] That is a fair point to make. This Comment still takes issue with Platt's suggestion that a process requiring two people to turn two keys can be a "parallel technique[]" to a process that only requires one person to turn their own key.[427] Operating a two-key terminal is not a "parallel technique[]" to operating a one-key terminal because a power that requires multiple people to agree to its use is an altogether different sort of thing than a power one person can exercise unilaterally.

Second, Platt's unilaterality argument does not address swing-vote silent concurrences. Platt argues that a lone silent concurrence only deprives the legal system and the parties of one judge's opinion because a binding majority opinion still exists.[428] This ignores the fact that one of the criticisms of the silent concurrence is that it allows a judge to unilaterally deprive the legal system of a binding precedent, without writing separately to explain why, if that judge happens to be the swing voter.[429] Thus, a silent concurrence *can* deprive the public of a precedent. Unlike a court's collective decision to issue an unpublished opinion or deny certiorari, a lone judge can issue a silent concurrence unilaterally any time they happen to be the swing voter and do not want to explain their reasons.[430] While a swing-vote judge can always unilaterally disrupt precedent by concurring in the judgment only, when a judge does so without writing a separate opinion, then the swing-voter has also unilaterally deprived the legal system of any indication as to what the proper rule should be when the issue arises again, including any help with applying a *Marks* inquiry or similar test to extract precedent from the case.[431]

Third, our legal system presumes judges generally explain their judicial decisions,[432] so the fact that a silent concurrence's unilateral nature makes it

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425. *See, e.g.*, WAR GAMES (MGM 1983).

426. *See supra* text accompanying note 421.

427. Platt, *supra* note 4, at 162; *see supra* notes 294–297, 415–420 and accompanying text.

428. *See supra* text accompanying note 421.

429. *See supra* text accompanying notes 229–239, 245.

430. *See supra* Sections I.A–B.

431. *See supra* Sections I.A–B, I.E.2. Furthermore, unlike a swing voter who concurs in the judgment only *and writes separately*, a silently concurring swing-vote judge has neglected to give the public any indication as to why the judge thought disrupting the establishment of precedent was a prudent course of action. *See supra* notes 240, 252.

432. *See supra* notes 9, 16, 38, 41, 52, 75, 243, 245, 247, 277 and accompanying text; *infra* note 497; *see also supra* Sections I.A., I.C.

more subject to inappropriate use is a concern in the abstract.[433] Judges are generally expected to join or provide written explanations when they vote for a result—in large part to promote fairness and transparency—so we should automatically question the validity of a technique that allows judges to unliterally decide to vote for a result without explaining why.[434] Moreover, since a silently concurring judge is partly responsible for the result, the losing party certainly has a right to expect some indication that this judge thoughtfully considered the case.[435] Platt supposes that the parties have been deprived of nothing of import, when really, the losing party is deprived of any indication why that judge voted for that party to lose, which a litigant has the right to expect a judge to provide.[436]

Therefore, contrary to Platt's argument, the fact that silent concurrences are exercised unilaterally and are thus more subject to inappropriate use does in fact distinguish silent concurrences from other judicial time-saving techniques that require the court to act collectively.[437] There is more reason to be critical of silent concurrences than there is to be critical of other negative agenda-setting techniques used by courts as a whole,[438] even assuming, *arguendo*, Platt is correct that negative agenda-setting is the main reason judges concur silently.

Furthermore, even if Platt is right that judges sometimes have legitimate reasons for withholding their name from a main opinion that are not worth the time it would take to write a full separate opinion, this does not explain why a judge could not write something rather than nothing, however brief.[439] As noted previously,[440] judges can, and sometimes do, concur only in a judgement while writing (or authorizing the author of the main opinion to write) a brief statement that gives an indication of where the disagreement lies.[441] Some, such as former Third Circuit Judge Ruggiero Aldisert and

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433. *See supra* Sections I.A., I.C.

434. *See supra* Sections I.A., I.C.

435. *See supra* notes 246–254 and accompanying text.

436. *See supra* notes 246–254 and accompanying text.

437. *See supra* note 252; *cf.* Goelzhauser, *supra* note 4, at 355–56 ("[W]ritten opinions provide a measure of public accountability. . . . Obscuring justifications for votes may complicate the task of maintaining or building institutional legitimacy." (citing Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 140 (1990))).

438. *See supra* note 437.

439. *See supra* note 51; notes 241–245 and accompanying text.

440. *See supra* note 51; notes 241–245 and accompanying text.

441. *See, e.g.*, Cooper v. State, 434 Md. 209, 245, 73 A.3d 1108, 1129 (2013) (McDonald, J., concurring) ("I join the Court's opinion with the exception that I join in the judgment only as to the Confrontation Clause issue, for the reasons set forth in my concurring opinion in *Derr v. State*, No. 6. September Term 2010 (August 22, 2013)."); Mayor of Balt. City v. Valsamaki, 397 Md. 222, 277, 916 A.2d 324, 356–57 (2007) ("Judge Raker and Judge Harrell authorize [the author of the majority opinion] to state that they join in the analysis and conclusion regarding immediacy in this opinion and, therefore join the judgment; however, they do not join the analysis or conclusion regarding public purpose"); Chesapeake Publ'g Corp. v. Williams, 339 Md. 285, 304, 661 A.2d 1169, 1179 (1995) (Chasanow, Bell, and Raker, JJ., concurring in the result only) ("Judges

former California Supreme Court Judge B.E. Witkin, argue that if a disagreement does not merit explanation, then the disagreement is not substantial enough to justify refusing to join the main opinion in the first place.[442] This Comment agrees, but adds that even if a disagreement is not substantial enough to warrant *thorough* explanation, the judge should either join the main opinion or provide *some* explanation.[443] Consider that even if a judge only writes "I concur in the judgment only for reasons that are not substantial enough to warrant thorough explanation," such a minimal statement still provides more information than a silent concurrence. At least then people know that time constraints and a lack of particularly substantial concerns were the reasons the judge refused to join the main opinion, rather than having to guess whether the judge's refusal was due to any other potential reason.[444] This is not to imply that such a bare statement should be considered acceptable. Ideally, a judge's brief statement would touch on the reasons they did not want to join the main opinion.[445] This type of transparency is the expectation in the American legal system, so judges should offer some explanation as to why they refused to join the main opinion, even if they do not write a full separate opinion.[446]

Therefore, silent concurrences are not simply one more unfortunate, but equally valid and necessary, "negative agenda-setting" technique used by courts to efficiently focus limited judicial resources.[447] Other techniques, like denying certiorari or issuing summary disposition, require a court to act collectively, while silent concurrences used as a time-saving technique allow a single judge to obscure the reasoning behind their vote whenever a judge

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Chasanow, Bell, and Raker concur in the result only because we believe the action is barred by the statute of limitations. Maryland Rule 2–101(b) should not be applied retrospectively to toll limitations where the time for filing the action has run years before the tolling rule was adopted by this Court in 1992."); Williams v. State, 326 Md. 367, 383, 605 A.2d 103, 111 (1992) ("Murphy, C.J., and Chasanow, J., concur in the result only. They believe that the test enunciated by the United States Supreme Court in *Strickland v. Washington* . . . is that there must be a 'reasonable probability' that counsel's deficient conduct affected the result." (parallel citations omitted)); *see supra* note 51 and accompanying text. Interestingly, there is at least one instance where there was a brief statement by the author of a majority opinion that stated, "[c]onsistent with their positions in [J.P. Delphey Ltd. P'ship v. Mayor of Frederick, 396 Md. 180, 913 A.2d 28 (2006)], Judges Cathell and Harrell join in the judgment only." River Walk Apartments v. Twigg, 396 Md. 527, 550, 914 A.2d 770, 783 (2007). What makes this odd is that Judges Cathell and Harrell also silently concurred in *Delphey*, so this is a somewhat more elaborate than usual silent concurrence that *seems* to point the reader to more information—but does not. *Id.*; *Delphey*, 396 Md. at 202, 913 A.2d at 41.

442. ALDISERT, *supra* note 16, at 153 (citing B.E. WITKIN, MANUAL ON APPELLATE COURT OPINIONS 223 (1977)); *see supra* text accompanying note 245; *infra* text accompanying notes 532–535.

443. See *supra* note 441 for examples of brief statements when concurring in the judgment only.

444. *See supra* notes 10, 257, 277; *supra* text accompanying notes 55–59.

445. See, for example, the brief opinions quoted in note 441.

446. *See supra* Sections I.A, I.C; *see supra* notes 9, 16, 38, 41, 52, 75, 243, 245, 247, 277 and accompanying text; *infra* note 497; *see also supra* Sections I.A., I.C.

447. *See* Platt, *supra* note 4, at 142.

does not wish to spend even the minimal time it would take to provide a brief explanatory statement.[448]

2. *Vote Switching/Uncertainty About the Proper Legal Rule Does Not Justify Silent Concurrences*

If a judge is uncertain about the proper legal rule, the judge could concur in the judgment only and simply state, for example, the judge is uncertain about the legal rule and would prefer to withhold support for the main opinion without having had more time, or factual scenarios, to consider. Or, join the main opinion *dubitante*.[449] The judge could explain, for example, that they were more persuaded by the main opinion's result than the dissent's, so they concurred in the result, but as to the legal rule, the judge is not comfortable lending support to one at this time. A silent concurrence, though, leaves everyone guessing as to why the judge refused to join the main opinion—even though the American legal system generally expects judges to explain their votes.[450] Therefore, uncertainty about the proper rule might explain why a judge cannot write a separate opinion explaining an alternative rule, but it does not justify a judge explaining nothing at all.

For example, as noted in Section I.D., especially in a plurality decision, one potential explanation for the silent concurrence is that "[t]he 'silent concurrence' may mean: 'I am thinking, but I am not ready to establish law.'"[451] The operative words here are "may mean," i.e. no one really knows what a silent concurrence means in a given case, and can only guess.[452] This is unacceptable when the judge could write something akin to "I am thinking, but I am not ready to establish law." Then, at least, people know that uncertainty about the proper legal rule is the reason that judge concurred only in the judgment in that case. If a judge prefers not to publicly state that they concur only in the judgment because they are unsure what the legal rule should be, then the judge could always join the main opinion, if only *dubitante*.[453] Furthermore, the notion that silent concurrences are justifiable because a judge might not want to join a main opinion for reasons they would

448. *See supra* notes 294–300, 412 and accompanying text.

449. *See supra* notes 268–277 and accompanying text; *infra* notes 532–535 and accompanying text (explaining that unlike a silent concurrence, joining an opinion *dubitante* allows a judge to note uncertainty without implying, unfairly, there is something seriously wrong with the main opinion).

450. *See supra* notes 9, 16, 38, 41, 52, 75, 243, 245, 247, 277 and accompanying text; *infra* note 497; *see also supra* Sections I.A., I.C.

451. *See* Cappalli, *supra* note 13, at 355; *see supra* notes 282–287 and accompanying text.

452. *See supra* notes 277, 282–287 and accompanying text.

453. *See supra* notes 268–277 and accompanying text; *infra* notes 532–535 and accompanying text (explaining that unlike a silent concurrence, joining an opinion *dubitante* allows a judge to note uncertainty without implying, unduly, there is something seriously wrong with the main opinion).

prefer not to state publicly is at odds with the general expectation in our legal system that judges explain why they voted for a given result.[454]

Therefore, uncertainty is not a satisfactory explanation for a silent concurrence. A judge has other options besides deviating from the general expectation that judges explain their votes, namely: (1) noting that uncertainty about the proper legal rule is the reason the judge did not join the main opinion (and perhaps what specifically, if anything, made the judge so uncertain), (2) joining the main opinion anyway, or (3) joining the main opinion *dubitante*.[455] The fact that judges have more preferable options than a silent concurrence is why the next two Sections argue the potential justifications those Sections address are also unsatisfactory.[456]

3. Bargaining Failures over Opinion Language and Scope Are an Unsatisfactory Explanation for Silent Concurrences

If bargaining failures over language and scope are the issue, the judge could simply state as much. To explain nothing at all is to leave litigants and the public puzzled only because the judge prefers not to publicly state that the judge did not join the opinion, for example, because of a concern about a single footnote's language.[457] Litigants and the public should not be expected to accept a mechanism enabling judges to vote for a result, refuse to join the main opinion, and decline to explain why, simply because judges might sometimes prefer not to explain why they are doing what they are doing.[458]

Furthermore, in the example where a Supreme Court justice silently concurred because he disagreed with the language in a single footnote,[459] Professor Goelzhauser believes that perhaps the Justice thought it was "too tedious" to write even a perfunctory opinion about a single footnote.[460] This is dubious. It takes no time at all to write "I concur in the judgment only because I take issue with the language in footnote 32." Even though the judge

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454. *See supra* notes 432–436 and accompanying text; *supra* note 437; *see also supra* Sections I.A., I.C.

455. *See supra* Section II.A.; *see also supra* note 241.

456. *See* Goelzhauser, *supra* note 4, at 352 ("[Silent concurrences are] puzzling because Justices have several low-cost alternatives . . . .").

457. *See, e.g.*, *supra* notes 259–263 and accompanying text.

458. *See* Goelzhauser, *supra* note 4, at 355–56 ("[W]ritten opinions provide a measure of public accountability. . . . Obscuring justifications for votes may complicate the task of maintaining or building institutional legitimacy." (citing Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 140 (1990))); *see also* ALDISERT, *supra* note 16, at 149–50 ("[One function of a concurring opinion is] [t]o assure counsel and the public that the case has received careful consideration." (citing R. Dean Moorehead, *Concurring and Dissenting Opinions*, 38 AM. B. ASS'N J. 821, 823 (1952))); Fife, *supra* note 12, at 172 ("[S]eparate opinions may help foster public confidence in the judiciary and promote institutional legitimacy. . . . '[S]eparate opinions help demonstrate that legal conclusions are the 'product of independent and thoughtful minds.'" (quoting Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 35 (1994))); *supra* text accompanying notes 61–62; *supra* Sections I.A, I.C.

459. *See supra* notes 259–263 and accompanying text.

460. Goelzhauser, *supra* note 4, at 359; *see supra* notes 259–263 and accompanying text.

is not explaining *why* they take issue with the footnote, at least the judge is only casting doubt on footnote 32, rather than the entire opinion.[461] If a judge does not wish to admit that disagreement with some aspect of the language or scope of an opinion is the issue, then the judge should simply join the main opinion,[462] as opposed to making a judicial decision for reasons the judge is not willing to stand by publicly and then obscuring that reason.[463]

4. A Desire to Maintain a Consistent Voting Record and Withhold Support for Disfavored Precedents Does Not Justify Concurring Silently

Sometimes a judge might silently concur because they agree the result is dictated by precedent, but they dissented in the case establishing that precedent, so they do not want to support the rule by signing their name to the majority opinion.[464] In this situation, however, a judge could write, "I concur in the judgment only because, while I concede that precedent dictates this result, I dissented in that precedent, and so do not wish to lend support to the main opinion's exposition of a rule I disagree with." Since it takes almost no time to write this, it seems the only reason a judge concurs silently in this situation is that the judge prefers not to publicly state that they agree an opinion is legally correct, but refuse to join it, because they wish it was not legally correct.[465] While it might be understandable that judges might prefer not to explain why they withheld their name from an opinion when they do not want people to know the reason, this is an insufficient justification for silent concurrences.[466] Judges in the American legal system are expected

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461. *See supra* notes 75, 384–387 and accompanying text.

462. *See supra* note 245 and accompanying text.

463. *See supra* Sections I.A, I.C (demonstrating that hiding reasons would be at odds with the general principles and assumptions upon which our system is based); *supra* note 458.

464. *See supra* text accompanying notes 288–293.

465. *See* Goelzhauser, *supra* note 4, at 368 ("In the ongoing empirical debate over the extent to which precedent influences judicial decision making, one of the key tests has been whether Justices change their voting behavior after dissenting in previous cases. The logic behind this test is that a precedent becomes binding once decided and should therefore be followed in subsequent cases even by those who initially dissented. . . . [S]ilent concurrences can serve as a type of middle ground between joining an opinion *that follows the previous precedent* and writing a dissenting opinion *revisiting settled principles*." (emphasis added) (internal citations omitted)). Another way of putting this is that silent concurrences enable judges to obscure the reasoning behind their vote whenever: (1) a judge would personally prefer the precedent were not what it is; (2) as a result of said preference, the judge does not want to sign opinions that properly apply that precedent; (3) the judge cannot bring themselves to openly suggest the *result* is incorrect, since the result is clearly dictated by law as explained in the main opinion; and (4) the judge would also prefer no one knew that numbers (1), (2), and (3) are why the judge nonetheless refused to join the main opinion. *But cf.* Goelzhauser, *supra* note 4, at 355–56 ("[W]ritten opinions provide a measure of public accountability. . . . Obscuring justifications for votes may complicate the task of maintaining or building institutional legitimacy." (citing Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 140 (1990))).

466. *See supra* note 465.

to explain their judicial decisions precisely because transparency in judicial decisionmaking is one of our system's ideals.[467]

C. *The Justifications for Silent Concurrences Do Not Seem to Apply to the Use of Silent Concurrences in Maryland*

Without access to judges' private information, the potential explanation for silent concurrences that can most confidently be assessed is whether their use correlates with workload, i.e. whether time constraints are a likely explanation.[468] Time constraints do not appear to be a likely explanation for silent concurrences in Maryland.[469] Unlike Platt's analysis of federal courts,[470] the most recent silent concurrences in Maryland do not correlate with term deadlines or caseloads.[471] The only clear trend that stands out from the data is that nine of the last ten silent concurrences were issued by Judge Watts in cases where Judge Hotten wrote the majority opinion.[472]

In Maryland, there is no discernable trend based on the number of cases, nor the approaching end of a term.[473] Also, the use of silent concurrences was increasing in Maryland even before Chief Judge Barbera instituted the term deadline in 2014.[474] Therefore, even if one agrees with the argument that silent concurrences are a legitimate "negative agenda-setting" technique,[475] the Court of Appeals of Maryland does not appear to use silent concurrences mainly, if at all, as a "negative agenda-setting" technique.[476]

Furthermore, it is important to note that federal circuit courts, which may use silent concurrences as a "negative agenda-setting" technique, do not have the same control over their workload that a court of last resort, like the Court of Appeals, does.[477] The Court of Appeals can control its workload by denying petitions for certiorari,[478] while federal circuit courts must review appeals of final decisions by federal district courts.[479] Therefore, even if one

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467. *See supra* notes 9, 16, 38, 41, 52, 75, 243, 245, 247, 277and accompanying text; *infra* note 497; *see also supra* Sections I.A, I.C.

468. *See supra* note 277; *supra* note 300 and accompanying text. The assertion that time constraints can be more confidently assessed than other possibilities means that a correlation based on workload and deadlines would at least be hard data, rather than pure conjecture about what was inside a judge's head.

469. *See* App. Tbs. 1–2 (showing that silent concurrences in Maryland from 1990 to 2019 did not correlate with workload or the nearing end of a term).

470. *See supra* text accompanying notes 294–300.

471. *See* App. Tbs. 1–2. *But see supra* note 322 (providing two potential exceptions where a silent concurrence was issued two days before the term deadline).

472. *See* notes 313–319 and accompanying text; App. Tb. 1.

473. *See* Section I.E.1; App. Tbs. 1–2.

474. *See supra* text accompanying note 323.

475. Platt, *supra* note 4, at 142; *see supra* text accompanying note 300.

476. Platt, *supra* note 4, at 142.

477. *Id.*

478. MD. R. 8-303(f).

479. 28 U.S.C. § 1291 (2012).

agrees with Platt's argument as it pertains to federal courts of appeals, that argument does not necessarily extend to the Court of Appeals, which has far more control over its workload.[480]

Since the only recent trend in the Court of Appeals is that Judge Watts often silently concurs when Judge Hotten authors the majority opinion,[481] some discussion of this correlation is warranted. As noted previously, however, one can only speculate,[482] and this Comment argues that is the real point.[483] Judge McDonald points out that when a Court of Appeals judge concurs silently, no one knows "whether there [was] a substantive reason for that judge's reticence."[484] Also, judges can have other reasons for refusing to join opinions authored by a particular judge unrelated to any substantive concerns with the legal reasoning of those opinions.[485] Is it reasonable to suppose something other than substantive legal disagreement might explain nine silent concurrences in a row by one judge when another judge wrote the majority opinion? The more pressing point is silent concurrences leave the public with nothing but educated guesses, compelling people to speculate based on trends and whatever other information is available, which may or may not lead to accurate conclusions.[486] Such problems can be avoided by adhering to the general expectation that judges voting for a result offer some explanation for that vote.[487]

Lastly, since Maryland (appears to)[488] use the all opinions approach to determine the precedential value of Maryland plurality decisions, which looks to all the opinions in a plurality decision to extract individual points of law a majority agreed on,[489] swing-vote silent concurrences are particularly indefensible in Maryland.[490] This is because the swing judge can, instead of concurring silently, at least note which parts of the lead opinion they take issue with, which would allow precedent to be easily extracted from the rest

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480. *See supra* text accompanying notes 477–479.

481. *See* App. Tb. 1.

482. *See supra* note 318 and accompanying text.

483. *See supra* Section II.A; *infra* text accompanying notes 486–487.

484. State v. Payne, 440 Md. 680, 719, 104 A.3d 142, 165 (2014) (McDonald, J., concurring in judgment only) (emphasis added).

485. *See supra* text accompanying notes 61–62; *supra* notes 301–312 and accompanying text.

486. *See supra* note 310–312 and accompanying text (arguing that the fact that silent concurrences compel speculation because there is no official explanation is perhaps an additional criticism that could be levied at silent concurrences).

487. *See supra* note 450 and accompanying text.

488. *See supra* Section I.B.1 (explaining that while the Maryland Court of Appeals has not explicitly labeled its approach the "all opinions approach," the way the court extracts precedent from Maryland plurality decisions appears to be identical to a technique known as the "all opinions approach," a "related principle" of the *Marks* rule that differs in important ways).

489. *See supra* Section I.B.1.

490. *See infra* text accompanying notes 514–519 (explaining how the Maryland cases discussed in Section I.E.2 demonstrate why silently concurring in a plurality decision is problematic, while discussing this Comment's suggested solution to prevent those problems).

of the lead opinion.[491] While the judge might not offer lengthy explanations for why they disagree with those parts of the lead opinion or alternative rules, at least a future court (and litigants) could easily determine that the rest of the lead opinion is binding.[492] They could easily determine the rest of the lead opinion is binding because a majority of the court (four of the seven, i.e. the plurality plus the judge concurring in the judgment only) agreed on everything in the lead opinion except those parts with which the concurring judge noted disagreement.[493] A Maryland appellate judge who silently concurs when they are the swing voter, resulting in a plurality decision, is unilaterally disrupting the establishment of precedent *and* neglecting to spend the minimal time it takes to make the precedential value of the case significantly easier for future courts and litigants to determine.[494]

Thus, silent concurrences are difficult to defend for a number of reasons, but are even more difficult to defend in Maryland specifically, because: (1) in Maryland, silent concurrences do not appear to be used as a "negative agenda-setting"[495] technique (assuming *arguendo* that this would be legitimate in the first place); and (2) a swing-vote judge in Maryland can reduce the inherent ambiguity of a plurality decision with only a few sentences.[496]

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491. *See, e.g.*, *supra* note 441 and accompanying text; *see supra* notes 78–227 and accompanying text (explaining how the court extracts precedent from plurality decisions).

492. *Cf. supra* note text accompanying note 203 (explaining that how our legal system works is that prior decisions are followed so that the law is more predictable and fair).

493. *See supra* Section I.B.1 (explaining that the all opinions approach allows the Court of Appeals to combine opinions from their plurality decisions to find precedent where there are propositions that a majority of the judges could be said to have agreed on).

494. *See supra* Section I.B. One might make the counterargument that because Maryland uses the all opinions approach, *supra* Section I.B.1, a judge might be justified in using a silent concurrence if they prefer no precedent be established because they do not want to write anything that would allow a future court to mix their opinion with others to form precedent. *See supra* Section I.B.2.b (explaining how the all opinions approach can combine separate opinions in a plurality decision to form a precedential rule even though the judges chose to write separately rather than help form a precedential majority). Given that silent concurrences are generally an unsound practice in their own right, *see supra* Section II.A, that argument is more a critique of the all opinions approach than a justification for silent concurrences. *See supra* Section I.B.2.b (critiquing Maryland's use of the all opinions approach). If the all opinions approach leads to more silent concurrences by discouraging judges from explaining themselves, this Comment's response is that is one more reason besides the reasons presented in Section I.B.2.b to be critical of Maryland's use of the all opinions approach. Furthermore, the situation still does not justify concurring silently when the judge could instead just write "I concur in the judgment only for reasons I will not elaborate on, lest parts of my opinion later be merged with parts of other opinions to form precedential propositions. *See, e.g.*, State v. Falcon, 451 Md. 138, 152 A.3d 687 (2017)." *See supra* Section I.B.2.b (discussing how *Falcon* combined separate opinions in a plurality decision to extract a precedential rule).

495. Platt, *supra* note 3, at 142.

496. A concurring judge can simply note which parts of the lead opinion the judge disagrees with, allowing the rest of the lead opinion to remain precedential, even if there is no explanation as to *why* the concurring judge disagrees with those parts. *See supra* text accompanying notes 488–512; *see also supra* note 441 (providing examples of concurring judges in Maryland briefly noting particular points of disagreement).

D. The Court of Appeals Should Promulgate a Rule that Nullifies the Precedential Effect of a Silent Concurrence in Plurality Decisions

This Comment does not argue that silent concurrences should be banned altogether because its author is simply not prepared to suppose that there can never be a legitimate instance where a silent concurrence is appropriate or reasonable.[497] Nonetheless, silent concurrences are always indefensible when they result in plurality decisions because the swing-vote judge is unilaterally disrupting the creation of precedent without offering any explanation, and silent concurrences are at least generally indefensible otherwise.[498] This Comment, then, argues only for a rule that would nullify the effect of a silent concurrence on the precedential value of a plurality decision, and that would, by extension, at least discourage silent concurrences generally.

While the manner in which precedent is extracted from plurality decisions is a matter of case law,[499] the Court of Appeals could use its authority to create procedural rules[500] to: (1) nullify the precedent-disrupting effect of a swing-vote silent concurrence,[501] and, by extension, (2) discourage judges from issuing silent concurrences in general. The rule would be something to the effect of:

> When an appellate judge concurs only in a judgment because the judge has significant substantive disagreement(s) with the legal reasoning of the main opinion, such a judge shall file a separate opinion explicitly indicating that substantive disagreement with the legal reasoning of the main opinion is the reason the judge did not join the main opinion.[502]

Under this rule, a judge who notes nothing more than that they "concur in the judgment only" (i.e., concurs silently) does not imply any substantive disagreement with the rules, legal principles, or tests announced in the main opinion, nor any issues with the main opinion's application of those rules,

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497. Even two textbooks on opinion writing by two former appellate judges who are strong critics of the silent concurrence only go so far as to state that "[the silent concurrence] should be used sparingly." ALDISERT, *supra* note 16, at 153 (quoting B.E. WITKIN, MANUAL ON APPELLATE COURT OPINIONS 223 (1977)); *see also supra* note 401 (elaborating on why this Comment stops short of arguing for a blanket ban on silent concurrences). *But see* ALDISERT, *supra* note 16, at 152 ("The second type of improper concurrence is the naked statement, 'I concur in the result.' This is the kind of thing that prompts the young to scoff, 'Big deal!' I scoff at the 'concurrence in the result' practice as an abomination. What is being served? Very little, except, perhaps—to use the vernacular again—an ego trip.").

498. *See supra* Section II.A.

499. *See supra* Section I.B.

500. MD. CONST. art. IV, § 18(a).

501. *See supra* Sections I.B.3, I.E.2.

502. *See infra* text accompanying notes 511–515 (describing how California happened upon a similar rule for plurality decisions via the California Supreme Court's interpretation of a provision in California's constitution requiring that decisions be in writing *with reasons stated*).

legal principles, or tests to the facts of that case.[503] Since a silent concurrence would not imply any substantive disagreement, a silent concurrence could only mean a judge had some esoteric reason for refusing to join the main opinion unrelated to the main opinion's legal reasoning.[504] Thus, Maryland courts applying a plurality decision with a silent concurrence (that is decided after the proposed rule is promulgated) can, and in fact must, treat the lead opinion as binding.[505] Under the suggested rule, the swing-voter's silence would necessarily mean that the swing-voter substantively agreed with the lead opinion, i.e. that a majority of the court agreed with the law and its application as explained in the lead opinion.[506] Practically speaking, this rule would make it impossible for a silent concurrence to result in a plurality decision at all, since there is necessarily a majority in agreement about what is written in a single opinion.[507] Thus, a judge could no longer unilaterally stand in the way of precedent by "cryptic[ally]" writing nothing more than that they "concur in the judgment only."[508] Under the suggested rule, if a swing-vote judge wants to disrupt precedent, the judge has to at least write *something*.

The suggested rule is loosely similar to the California rule, where the California Supreme Court held in *Amwest Surety Insurance Co. v. Wilson* that because California's Constitution requires "that the decision of an appellate court be in writing 'with reasons stated,'" and that a "decision" requires the *majority* of the court, a swing-vote *silent* concurrence resulting in a plurality decision renders a decision invalid altogether.[509] When there is a swing-vote silent concurrence, a majority of the court agreed on the result, but this majority did not state its reasons because there was only a lead opinion and a silent concurrence.[510] Thus, if a swing-voter wants to concur in the judgment only, the judge must write separately so that a majority of

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503. *See supra* text accompanying note 502; *see, e.g.*, Goelzhauser, *supra* note 4, at 373 (describing when former Chief Justice Burger silently concurred in a case only because he preferred the term "plea . . . negotiations" to "plea bargain," and the author of the majority opinion (Justice Blackmun) would not make the change (internal quotation marks omitted)); *see also supra* text accompanying notes 61–62; *supra* notes 301–312 (describing other non-legally-substantive reasons judges silently concur).

504. *See, e.g.*, *supra* text accompanying notes 61–62; *supra* notes 301–312 (describing other non-legally-substantive reasons judges silently concur).

505. *See supra* Sections I.A, I.B.

506. *See supra* Sections I.A, I.B.

507. *See supra* Sections I.A, I.B.

508. *See* ALDISERT, *supra* note 16, at 153 ("The cryptic statement, 'I concur in the judgment,' has bothered many readers. . . . It produces all the evils of a concurring opinion with none of its values; i.e., it *casts doubt* on the principles declared in the main opinion without indicating why they are wrong or questionable." (emphasis added) (quoting B.E. WITKIN, MANUAL ON APPELLATE COURT OPINIONS 223 (1977))); *see also supra* Section I.B.3.

509. Amwest Sur. Ins. Co. v. Wilson, 906 P.2d. 1112, 1126–28 (Cal. 1995); Robbins, *supra* note 55, at 160 (discussing California's rule).

510. Amwest Sur. Ins. Co. v. Wilson, 906 P.2d. 1112, 1126–28 (Cal. 1995); Robbins, *supra* note 55, at 160 (discussing California's rule).

the court has both rendered a result in writing, and, as required by California's Constitution, "with reasons stated."[511] Maryland's Constitution has no such provision.[512]

Creating a rule that nullifies the effect of a silent concurrence in a plurality decision is important because it would prevent situations like the five cases discussed in Section I.E.2.[513] These five cases, like all plurality decisions, represent the failure of an appellate court to reach a compromise that allows for a majority opinion.[514] The fact that the concurrences are silent, however, further leaves us with no insight as to what issues the concurring judges had with their respective lead opinions.[515] These five cases, therefore, represent examples of the worst case scenario, where silently concurring judges not only leave the public guessing as to why they refused to join the main opinion (as all silent concurrences do), but also disrupt the setting of a precedent without explaining why (via an opinion), let alone any alternative rules.[516] Under the suggested rule, a judge who silently concurs is not indicating any substantive legal disagreement with the lead opinion, and so the lead opinion is binding. It is a given under the rule that the silently concurring judge only has some esoteric reason for not joining the main opinion that is unrelated to the validity of the rules, principles, or tests announced or discussed in that opinion. Thus, under the suggested rule,[517] it would be impossible for a judge to disrupt precedent without any explanation, as a swing-vote judge has to give *some* explanation rather than none at all if the judge wishes to actually impact the precedential value of a case.[518] Furthermore, the rule would discourage judges from issuing a silent concurrence except in those limited instances (if they exist) where a judge is prepared to defend the fact that they refused to join a main opinion even though they did not substantively disagree with the main opinion's reasoning.

The suggested rule not only discourages silent concurrences generally, but also directly neutralizes the use of silent concurrences in situations where a judge uses one because the judge agrees the main opinion is legally correct,

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511. *Amwest Sur. Ins. Co.*, 906 P.2d at 1128 (quoting CAL. CONST. art. VI, § 14).

512. *See* MD. CONST (containing no such provision).

513. *See supra* Section I.B.3 (providing a concise explanation of why silent concurrences in plurality decisions cause problems).

514. Assistant Professor at UCLA School of Law Richard Re argues that the *Marks* rule actually encourages appellate judges to refuse to compromise rather than reach consensus. Re, *supra* note 42, at 1971–75. University of Chicago Law Professor Cass Sunstein suggests that when appellate panels are divided, the judge authoring the opinion could alter the opinion to make it "shallow[er]" or "narrow[er]," *see* Sunstein, *supra* note 284, at 362–66 (defining what Sunstein means by "shallower" and "narrower"), to reach consensus (i.e. secure a majority opinion), rather than refusing to compromise and issuing a plurality decision, *see id.* at 362–408.

515. *See supra* Section I.B.3; *supra* notes 229–239 and accompanying text.

516. *See supra* Section I.B.3; *supra* notes 229–239 and accompanying text.

517. *See supra* text accompanying note 502.

518. *See supra* text accompanying notes 503–504.

but wishes the law were different.[519] Sometimes, a judge dissents in Case *A*, and then later, in Case *B*, Case *A* is the applicable precedent.[520] The previously dissenting judge may accept that Case *A* is now precedent and thus dictates a certain result, but the judge still disagrees with Case *A's* rule.[521] Such situations represent one of the potential reasons a judge might silently concur rather than join the main opinion.[522] This Comment argues that there is no reason to consider such a practice acceptable when the judge can easily provide a simple explanation—or instead just join the main opinion, since Case *A* is the precedent regardless of what the judge prefers.[523] Under the suggested rule, such a judge cannot use a silent concurrence to withhold support for the main opinion in Case *B*, as the silent concurrence does not actually indicate the judge has any substantive issues with the rules applied in Case *B*.[524] Again, under the suggested rule, it is a given that a silent concurrence only means a judge has some unique reason for refusing to join the main opinion unrelated to the rules cited and applied in the main opinion.[525]

If the judge still wants to vote for the result while indicating they have some real point of contention, the judge would simply need to do what judges normally do and are expected to do—write separately explaining why the judge voted for the result but refused to join the main opinion.[526] For example, the judge could easily write, "For the reasons expressed in my dissent in Case *A*, I do not join the majority opinion. I accept that Case *A* is now the applicable precedent and dictates the result in this case."[527] This is much more informative, and is in line with the general expectation that judges who vote for a result either join the main opinion, or write separately to provide some explanation for why they voted for the result.[528]

Although a judge could still comply with the suggested rule by stating no more than, "I concur in the judgment only because I have substantive disagreements with the majority's (or plurality's) legal reasoning," this is by

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519. *See supra* Section II.B.4.

520. *See supra* Section II.B.4.

521. *See supra* Section II.B.4.

522. *See supra* Section II.B.4.

523. *See supra* Section II.B.4.

524. *See supra* text accompanying notes 502–503.

525. *See supra* text accompanying notes 502–503; *see, e.g.*, *supra* text accompanying notes 61–62 (describing when former Chief Justice Burger silently concurred in a case only because he preferred the term "plea . . . negotiations" to "plea bargain," and the author of the majority opinion (Justice Blackmun) would not make the change (internal quotation marks omitted)); *supra* notes 301–312 (describing other non-legally-substantive reasons judges silently concur).

526. *See supra* notes 9, 16, 38, 41, 52, 75, 243, 245, 247, 277 and accompanying text; *supra* note 497; *see also supra* Sections I.A, I.C.

527. *Cf. supra* note 441 (providing examples of short statements in lieu of full separate opinions, one of which points the reader to a previous separate opinion by that judge rather than restate the judge's argument in full).

528. *See supra* notes 9, 16, 38, 41, 52, 75, 243, 245, 247, 277 and accompanying text; *supra* note 497; *see also supra* Sections I.A, I.C.

design. While such an opaque statement may seem no better than a silent concurrence,[529] a judge has to call attention to the fact they have issues with the main opinion they think are worth withholding their support over, but not worth explaining.[530] This Comment posits that if judges were generally willing to do this so explicitly, the silent concurrence would not exist in the first place. More likely, a judge would at least give some indication of what their concerns are, e.g., that the judge has substantive disagreements about the scope of the rule being announced or a particular footnote's language.[531]

Additionally, the judge could always join the main opinion *dubitante*, which allows the judge to note that they have vague doubts or concerns without actually withholding their support for the main opinion.[532] Since the judge is not actually refusing to join the main opinion, there is less concern about the judge not explaining their doubts.[533] There is less concern because the judge is not giving the impression they think the main opinion is wrong, and it is a given when joining *dubitante* that the judge's concerns must not be very strong.[534] Joining the main opinion *dubitante* is unlike a silent concurrence, where the judge *does* imply there is something seriously wrong with the main opinion, going so far as to refuse to join it, but gives no hint as to what is so wrong with that opinion.[535] The practice of voting *dubitante* pre-dates the United States, but, interestingly, the first appearance of the word *dubitante* in a court opinion in the United States was a Maryland case.[536]

Moreover, the fact that a cursory statement can satisfy the rule is part of the point, as there can be no accusation that the rule requires judges to spend time that they do not have writing lengthy opinions.[537] If a judge agrees with

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529. In that the judge is casting doubt on the main opinion without offering any explanation as to what the judge's concerns are. *See* ALDISERT, *supra* note 16, at 153 ("The cryptic statement, 'I concur in the judgment,' has bothered many readers. . . . It produces all the evils of a concurring opinion with none of its values; i.e., it *casts doubt* on the principles declared in the main opinion without indicating why they are wrong or questionable." (emphasis added) (quoting B.E. WITKIN, MANUAL ON APPELLATE COURT OPINIONS 223 (1977))); *supra* notes 384–389 and accompanying text.

530. *Cf.* ALDISERT, *supra* note 16, at 153 ("If the disagreement is not substantial, the main opinion ought to be signed; if the disagreement is substantial, the reason should be stated." (quoting B.E. WITKIN, MANUAL ON APPELLATE COURT OPINIONS 223 (1977))).

531. This can be done in a way similar to the examples cited in note 441.

532. *See supra* text accompanying notes 268– 277 and accompanying text.

533. *Cf. supra* notes 240–245 (explaining that a criticism of the silent concurrence is that a judge should explain why they did not join the main opinion).

534. *See supra* text accompanying notes 268–275 (explaining that a judge can also issue a *dubitante* opinion noting their doubts, and that *dubitante* opinions are typically brief and do not signify substantial disagreement with the majority opinion).

535. ALDISERT, *supra* note 16, at 153; *supra* note 276 and accompanying text (explaining that whether a judge simply joins the main opinion *dubitante* or writes a separate *dubitante* opinion, the judge is still seen as supporting the majority opinion).

536. *See supra* note 269.

537. *See supra* text accompanying note 502 (the suggested rule). Time constraints are the principal basis of Platt's "limited defense" of the silent concurrence. Platt, *supra* note 4; *see supra* notes 294–300 and accompanying text; *see also supra* Section II.B.1.

a result, but not the main opinion's reasoning, and the time it would take to write separately could be better spent on other matters, the judge is still free to save time by writing only a brief statement that still gives the reader more information than a silent concurrence.[538]

Lastly, announcing the new rule would draw attention to the existence of silent concurrences and make the legal community better able to hold judges more accountable for issuing them. Ultimately, it is up to the legal community to notice silent concurrences and question their use because judges are less likely to issue them if they think their peers notice, and care.[539] However, lawyers, law students,[540] and professors are often unfamiliar with silent concurrences. Or, if they are familiar, they are unaware of the potential impact silent concurrences can have on precedent-setting, and that there is significant criticism of the practice in general. Certainly, the general public was not aware of the silent-concurrence trends in Maryland noted previously.[541] The conspicuous announcing of a new rule would make the legal community in general more aware of what silent concurrences are and that there is reason to be critical of them, which is also largely the ultimate aim of this Comment. It is the legal community's duty to uphold the principles and assumptions under which our legal system operates, namely that judges are generally expected to explain their votes, and should not take part in a result without giving the parties, and the public, some indication of the reasoning behind their vote.[542]

III. CONCLUSION

Silent concurrences are a generally unsound practice that should be questioned, discouraged, and officially defined as meaning only that a judge had some idiosyncratic reason for refusing to join a main opinion.[543] Silent concurrences cast doubt on main opinions[544] and confound the precedential value of plurality decisions.[545] Judges, however, sometimes issue them for trivial reasons even when they do not substantively disagree with the main

538. *See, e.g.*, *supra* note 441.

539. Robbins, *supra* note 55, at 165.

540. Including the author before stumbling upon the topic.

541. *See supra* Section I.E.1.

542. *See supra* notes 9, 16, 38, 41, 52, 75, 243, 245, 247, 277 and accompanying text; *supra* notes 497, 539; *see also supra* Sections I.A, I.C.

543. *See supra* Sections II.A–D.

544. *See supra* notes 384–390; *see also* ALDISERT, *supra* note 16, at 153 ("The cryptic statement, 'I concur in the judgment,' [without a separate opinion] has bothered many readers. . . . It produces all the evils of a concurring opinion with none of its values; i.e., it casts doubt on the principles declared in the main opinion without indicating why they are wrong or questionable." (quoting B.E. WITKIN, MANUAL ON APPELLATE COURT OPINIONS 223 (1977))).

545. *See supra* Sections I.B, I.E.2.

opinion.[546] The fact that most nonetheless assume silent concurrences indicate substantive disagreement causes ambiguity, confusion, and speculation.[547] Furthermore, to promote transparency, fairness, institutional legitimacy, and the development of the law, our legal system expects judges to explain their votes through written opinions, particularly when they vote for the ultimate result.[548] Yet a judge can unilaterally decide to issue a silent concurrence whenever a judge, for whatever reason, wants to vote for the result, not join the main opinion, and not explain why.[549]

There is no reason to accept the ambiguity and confusion silent concurrences cause, nor their potential for inappropriate use, when judges who are short on time, or only have vague or relatively inconsequential disagreements, could either (1) write a brief statement indicating where the disagreement lies if a full opinion is not feasible, (2) join the main opinion *dubitante*, or (3) join the main opinion anyway despite their relatively minor concerns.[550] In short, silent concurrences do not appear to serve any function so worthwhile that we should expect litigants and the public to ignore that silent concurrences undermine the overall principles and ideals of our legal system.[551] Attempts to explain silent concurrences boil down to the notion that judges sometimes do not have enough time to write separately, or they cannot really articulate their concerns because they only have vague doubts about the main opinion or are just altogether uncertain about what the rule should be.[552] While these guesses may sometimes be true, it also turns out that judges sometimes silently concur even when they do not disagree with the substance of the main opinion at all.[553] Furthermore, in Maryland, time

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546. *See supra* note 257; *see also* ALDISERT, *supra* note 16, at 152 ("[One] type of improper concurrence is the naked statement, 'I concur in the result.' This is the kind of thing that prompts the young to scoff, 'Big deal!' I scoff at the 'concurrence in the result' practice as an abomination. What is being served? Very little, except, perhaps—to use the vernacular again—an ego trip."); *supra* text accompanying notes 61–62, 301–312 (providing examples of reasons other than substantive disagreement that judges silently concur). Judge McDonald, in the quotation that opens this Comment, explains that when a Court of Appeals judge concurs silently, no one knows "whether there [was] a substantive reason for that judge's reticence." State v. Payne, 440 Md. 680, 719, 104 A.3d 142, 165 (2014) (McDonald, J., concurring in judgment only); *see supra* note 2 and accompanying text.

547. *See supra* text accompanying notes 385–390; *supra* notes 309–312, 481–487 and accompanying text; *see also* State v. Payne, 440 Md. 680, 719, 104 A.3d 142, 165 (2014) (McDonald, J., concurring in judgment only) (implying that when a Maryland Court of Appeals Judge concurs silently, no one knows "whether there [was] a substantive reason for that judge's reticence"); *supra* Section I.D (presenting numerous scholars trying to make sense of what silent concurrences mean).

548. *See supra* Sections I.C, II.A–D.

549. *See supra* Sections II.B.1–4.

550. *See supra* Section II.A; *see also supra* Sections II.B–D.

551. *See supra* Sections II.A–D; *cf.* Cappalli, *supra* note 13, at 380 ("[Silent concurrences are] a debilitating practice with no visible redeeming value.").

552. *See supra* Section I.D.

553. *See supra* note 546.

constraints do not even appear to be a reasonable guess as to why judges issue silent concurrences.[554]

Regardless, the point is we should not have to guess.[555] Where time is a concern, a judge can write briefly, even just noting what they disagreed with without elaborating at length, and this is at least more in line with the expectations of our legal system.[556] The same is true where a judge only has vague doubts or is simply uncertain.[557] Furthermore, a judge also has the option of indicating general uncertainty by joining the main opinion *dubitante*, which is less ambiguous than a silent concurrence, and avoids the problems caused by silent concurrences.[558] Better still, a judge can always join the main opinion in full if they cannot conjure a substantive or articulable point of disagreement.[559] All of these options are better than refusing to join the opinion without explaining why, which leaves everyone confused as to what level of skepticism the silent concurrence should imbue on the main opinion, if any.[560]

Therefore, not only should members of the legal community consider silent concurrences a generally unsound practice and question their use,[561] but the Court of Appeals should also adopt a rule that would mean, officially, silent concurrences do not indicate any substantive disagreement with the main opinion.[562] If a judge has some other reason for refusing to join the main opinion, then, under this rule, at least people would know there was not a legal disagreement.[563] Not only would that discourage silent concurrences generally, but it would also prevent swing-vote judges from using silent concurrences to disrupt precedent by causing a plurality decision.[564] A swing-vote judge can still disrupt precedent if they wish, they just would have to do what judges normally do and are expected to do—write separately to explain why—as silence would not indicate they disagree with the lead opinion in any legal sense under the suggested rule.[565] Thus, the rule would make silent concurrences in Maryland less ambiguous, less damaging, and less common.[566] Reducing the frequency and impact of silent concurrences is worthwhile because our legal system calls for judges to explain their votes,

554. *See supra* Section II.C.
555. *See supra* Sections II.A–D.
556. *See supra* Section II.B.1; *see also supra* Section II.A.
557. *See supra* Section II.B.2.
558. *See supra* notes 268–281, 532–536 and accompanying text; *see also supra* Sections II.A–D.
559. *See supra* notes 402–404 and accompanying text; *see also supra* Sections II.A.–II.D.
560. *See supra* Sections I.C, I.D, I.E.2, II.A–D.
561. *See supra* Section II.A.
562. *See supra* Section II.D.
563. *See supra* Section II.D.
564. *See supra* Section II.D.
565. *See supra* Section II.D.
566. *See supra* Section II.D.

and in the absence of a satisfactory justification for deviating from that principle, silence is unsound.

APPENDIX

TABLE 1. SILENT CONCURRENCES IN MARYLAND FROM JANUARY 1, 1990, TO AUGUST 31, 2019[567]

CASE CITATION	DATE OF DECISION	AUTHOR	SILENTLY CONCURRING JUDGE(S)
Ademiluyi v. Egbuonu, 466 Md. 80, 215 A.3d 329 (2019)	Aug. 29	Getty, J.	Watts, J.
Comm'r of Labor Indus. v. Whiting-Turner Contracting Co., 462 Md. 479, 200 A.3d 844 (2019)	Jan. 23	Hotten, J.	Watts, J.
Cagle v. State, 462 Md. 67, 198 A.3d 209 (2018)	Dec. 13	Hotten, J.	Adkins, J., Watts, J.
Owusu v. M.V.A, 461 Md. 687, 197 A.3d 35 (2018)	Nov. 20	Hotten, J.	Watts, J.
Collins v. State, 238 Md. App. 545, 192 A.3d 920 (2018)	Aug. 30	Moylan, J.	Graeff, J.
C & B Constr., Inc. v. Dashiell, 460 Md. 272, 190 A.3d 271 (2018)	July 30	Hotten, J.	Watts, J.
Otto v. State, 459 Md. 423, 187 A.3d 47 (2018)	June 21	Hotten, J.	Watts, J.
Williams v. State, 457 Md. 551, 179 A.3d 1006 (2018)	Feb. 21	Hotten, J.	Watts, J.
Burak v. Burak, 455 Md. 564, 168 A.3d 883 (2017)	Aug. 29	Hotten, J.	Watts, J.
Fuentes v. State, 454 Md. 296, 164 A.3d 265 (2017)	July 12	Hotten, J.	Watts, J.
State v. Bey, 452 Md. 255, 156 A.3d 873 (2017)	Mar. 27	Hotten, J.	Watts, J.
Norman v. State, 452 Md. 373, 156 A.3d 940 (2017)	Mar. 27	Watts, J.	Greene, J.
Assateague Coastal Tr. v. Schwalbach, 448 Md. 112, 136 A.3d 866 (2016)	May 23	McDonald, J.	Battaglia, J.
Att'y Grievance Comm'n of Md. v. Chanthunya, 446 Md. 576, 133 A.3d 1034 (2016)	Mar. 25	Watts, J.	Harrell, J.

567. *See supra* note 313 for an explanation of how the cases in this table were compiled.

CASE CITATION	DATE OF DECISION	AUTHOR	SILENTLY CONCURRING JUDGE(S)
Sharp v. State, 446 Md. 669, 133 A.3d 1089 (2016)	Mar. 25	Watts, J.	Battaglia, J.
Toms v. Calvary Assembly of God, Inc., 446 Md. 543, 132 A.3d 866 (2016)	Feb. 29	Greene, J.	Harrell, J.
State v. Bircher, 446 Md. 458, 132 A.3d 292 (2016)	Feb. 23	Battaglia, J.	Harrell, J.
Varriale v. State, 444 Md. 400, 119 A.3d 824 (2015)	Aug. 11	Greene, J.	Watts, J.
State v. Norton, 443 Md. 517, 117 A.3d 1055 (2015)	July 9	Battaglia, J.	Harrell, J.
Att'y Grievance Comm'n of Md. v. Mixter, 441 Md. 416, 109 A.3d 1 (2015)	Feb. 2	Battaglia, J.	Harrell, J.
Burson v. Capps, 440 Md. 328, 102 A.3d 353 (2014)	Oct. 23	Harrell, J.	Watts, J.
Chesapeake Bay Found., Inc. v. DCW Dutchship Island, LLC, 439 Md. 588, 97 A.3d 135 (2014)	Aug. 4	Adkins, J.	Harrell, J.
Balt. City v. Fraternal Order of Police, 439 Md. 547, 96 A.3d 742 (2014)	July 29	Harrell, J.	Watts, J.
Morgan v. State, 438 Md. 11, 89 A.3d 1149 (2014)	Apr. 23	Adkins, J.	Watts, J.
State Ctr., LLC v. Lexington Charles Ltd. P'ship, 438 Md. 451, 92 A.3d 400 (2014)	Mar. 27	Harrell, J.	Battaglia, J.
Att'y Grievance Comm'n of Md. v. Mahone, 435 Md. 84, 76 A.3d 1198 (2013)	Sept. 30	Bell, J.	Harrell, J.
In re Adoption/Guardianship of Jayden G., 433 Md. 50, 70 A.3d 276 (2013)	July 16	Adkins, J.	Bell, J., Harrell, J.
Georgia-Pac., LLLC v. Farrar, 432 Md. 523, 69 A.3d 1028 (2013)	July 8	Wilner, J.	Bell, J.

CASE CITATION	DATE OF DECISION	AUTHOR	SILENTLY CONCURRING JUDGE(S)
State v. Fennell, 431 Md. 500, 66 A.3d 630 (2013)	May 17	Harrell, J.	Battaglia, J.
Haile v. State, 431 Md. 448, 66 A.3d 600 (2013)	Apr. 25	Bell, J.	Raker, J.
Bd. of Dirs. of Cameron Grove Condo., II v. State Comm'n on Human Res., 431 Md. 61, 63 A.3d 1064 (2013)	Mar. 28	Battaglia, J.	Harrell, J.
Koste v. Town of Oxford, 431 Md. 14, 63 A.3d 582 (2013)	Mar. 26	Harrell, J.	Battaglia, J.
Thomas v. State, 429 Md. 85, 55 A.3d 10 (2012)	Oct. 22	Greene, J.	Battaglia, J.
State v. Harris, 428 Md. 700, 53 A.3d 1171 (2012)	Sept. 27	Bell, J.	Harrell, J.
Ingram v. State, 427 Md. 717, 50 A.3d 1127 (2012)	Aug. 21	Harrell, J.	Bell, J.
State v. Stringfellow, 425 Md. 461, 42 A.3d 27 (2012)	Apr. 23	Harrell, J.	Bell, J.
Montgomery Pres., Inc. v. Montgomery Cty. Planning Bd., 424 Md. 367, 36 A.3d 419 (2012)	Jan. 24	Adkins, J.	Eldridge, J.
Stoddard v. State, 423 Md. 420, 31 A.3d 603 (2011)	Nov. 3	Raker, J.	Battaglia, J., Harrell, J.
Barnes v. State, 423 Md. 75, 31 A.3d 203 (2011)	Oct. 27	Adkins, J.	Greene, J.
Harrod v. State, 423 Md. 24, 31 A.3d 173 (2011)	Oct. 27	Battaglia, J.	J. Murphy, J.
Stevenson v. State, 423 Md. 42, 31 A.3d 184 (2011)	Oct. 27	J. Murphy, J.	Bell, J., Greene, J.
In re Adoption/Guardianship of Chaden M., 422 Md. 498, 30 A.3d 935 (2011)	Oct. 25	Barbera, J.	J. Murphy, J.
Briscoe v. State, 422 Md. 384, 30 A.3d 870 (2011)	Oct. 24	Barbera, J.	Bell, J.

CASE CITATION	DATE OF DECISION	AUTHOR	SILENTLY CONCURRING JUDGE(S)
Thomas v. State, 422 Md. 67, 29 A.3d 286 (2011)	Sept. 22	Barbera, J.	Eldridge, J.
Miller v. State, 421 Md. 609, 28 A.3d 675 (2011)	Sept. 20	J. Murphy, J.	Harrell, J.
Hovnanian Land Inv. Grp. v. Annapolis Towne Ctr., 421 Md. 94, 25 A.3d 967 (2011)	July 20	Adkins, J.	Bell, J.
Barksdale v. Wilkowsky, 419 Md. 649, 20 A.3d 765 (2011)	May 23	Adkins, J.	Battaglia, J.
In re Shirley B., 419 Md. 1, 18 A.3d 40 (2011)	Apr. 25	Adkins, J.	Harrell, J.
Smith v. Cty. Comm'rs of Kent Cty., 418 Md. 692, 18 A.3d 16 (2011)	Apr. 25	Harrell, J.	Battaglia, J.
Menefee v. State, 417 Md. 740, 12 A.3d 153 (2011)	Jan. 24	Harrell, J.	Battaglia, J.
Elliott v. State, 417 Md. 413, 10 A.3d 761 (2010)	Dec. 21	Greene, J.	Adkins, J.
State v. Harding, 196 Md. App. 384, 9 A.3d 547 (2010)	Dec. 10	Moylan, J.	Graeff, J.
In re Adoption/Guardianship of Cadence B., 417 Md. 146, 9 A.3d 14 (2010)	Nov. 22	Adkins, J.	Harrell, J.
In re Adoption/Guardianship of Ta'Niya C., 417 Md. 90, 8 A.3d 745 (2010)	Nov. 22	Adkins, J.	Greene, J.
Monmouth Meadows Homeowners Ass'n, Inc. v. Hamilton, 416 Md. 325, 7 A.3d 1 (2010)	Oct. 25	Adkins, J.	Battaglia, J.
State v. Pair, 416 Md. 157, 5 A.3d 1090 (2010)	Oct. 7	Barbera, J.	R. Murphy, J.
State v. DiGennaro, 415 Md. 551, 3 A.3d 1201 (2010)	Aug. 31	J. Murphy, J.	Bell, J.
Marshall v. State, 415 Md. 399, 2 A.3d 360 (2010)	Aug. 23	Harrell, J.	Battaglia, J., Bell, J., J. Murphy, J.

CASE CITATION	DATE OF DECISION	AUTHOR	SILENTLY CONCURRING JUDGE(S)
Marshall v. State, 415 Md. 248, 999 A.2d 1029 (2010)	July 27	Eldridge, J.	Adkins, J.
State v. Matthews, 415 Md. 286, 999 A.2d 1050 (2010)	July 27	Battaglia, J.	Harrell, J.
Caldes v. Elm St. Dev., 415 Md. 122, 999 A.2d 956 (2010)	July 22	J. Murphy, J.	Bell, J.
Agurs v. State, 415 Md. 62, 998 A.2d 868 (2010)	May 19	Greene, J.	Battaglia, J.
Prince George's Cty. v. Brent, 414 Md. 334, 995 A.2d 672 (2010)	May 17	Rodowsky, J.	J. Murphy, J.
Smith v. State, 414 Md. 357, 995 A.2d 685 (2010)	May 17	Greene, J.	J. Murphy, J.
120 W. Fayette St., LLP v. Mayor of Balt., 413 Md. 309, 992 A.2d 459 (2010)	Apr. 13	Barbera, J.	Battaglia, J., Bell, J.
Henriquez v. Henriquez, 413 Md. 287, 992 A.2d 446 (2010)	Apr. 13	Battaglia, J.	J. Murphy, J.
Mirjafari v. Cohn, 412 Md. 475, 988 A.2d 997 (2010)	Feb. 16	Harrell, J.	Bell, J.
Flanagan v. Dep't of Human Res., 412 Md. 616, 989 A.2d 1139 (2010)	Feb. 9	Harrell, J.	J. Murphy, J.
Md. Agric. Land Pres. Found. v. Claggett, 412 Md. 45, 985 A.2d 565 (2009)	Dec. 22	Adkins, J.	J. Murphy, J.
Bible v. State, 411 Md. 138, 982 A.2d 348 (2009)	Oct. 14	Adkins, J.	Battaglia, J., Eldridge, J.
McQuitty v. Spangler, 410 Md. 1, 976 A.2d 1020 (2009)	July 24	Battaglia, J.	Greene, J.
Master Fin. Inc. v. Crowder, 409 Md. 51, 972 A.2d 864 (2009)	June 9	Wilner, J.	Eldridge, J.

CASE CITATION	DATE OF DECISION	AUTHOR	SILENTLY CONCURRING JUDGE(S)
Att'y Grievance Comm'n of Md. v. Beatty, 409 Md. 11, 972 A.2d 840 (2009)	June 8	J. Murphy, J.	Bell, J.
Decker v. State, 408 Md. 631, 971 A.2d 268 (2009)	May 13	Barbera, J.	Bell, J.
Johnson v. State, 408 Md. 204, 969 A.2d 262 (2009)	Apr. 8	J. Murphy, J.	Bell, J.
In re Deontay J., 408 Md. 152, 968 A.2d 1067 (2009)	Apr. 7	J. Murphy, J.	Bell, J.
McDowell v. State, 407 Md. 327, 965 A.2d 877 (2009)	Feb. 19	Wilner, J.	Eldridge, J.
Jones v. State, 407 Md. 33, 962 A.2d 393 (2008)	Dec. 23	Raker, J.	Bell, J., Eldridge, J.
La Belle Epoque, LLC v. Old Europe Antique Manor, LLC, 406 Md. 194, 958 A.2d 269 (2008)	Oct. 8	Greene, J.	Harrell, J., Raker, J.
Wildwood Med. Ctr. v. Montgomery Cty., 405 Md. 489, 954 A.2d 457 (2008)	Aug. 22	*per curiam*	Cathell, J.
Allen v. State, 402 Md. 59, 935 A.2d 421 (2007)	Nov. 8	Harrell, J.	Bell, J.
Arrington v. Dep't of Human Res., 402 Md. 79, 935 A.2d 432 (2007)	Nov. 8	Wilner, J.	Bell, J.
Boyd v. State, 399 Md. 457, 924 A.2d 1112 (2007)	June 7	Eldridge, J.	Cathell, J.
Jackson v. Pasadena Receivables, Inc., 398 Md. 611, 921 A.2d 799 (2007)	Apr. 11	Wilner, J.	Eldridge, J.
Brown v. State, 397 Md. 89, 916 A.2d 245 (2007)	Feb. 7	Raker, J.	Battaglia, J., Greene, J.
River Walk Apartments, LLC v. Twigg, 396 Md. 527, 914 A.2d 770 (2007)[568]	Jan. 10	Battaglia, J.	Cathell, J., Harrell, J.

568. Although the opinion states that "[c]onsistent with their positions in [*J.P. Delphey Ltd. P'ship v. Mayor of Frederick*, 396 Md. 180, 913 A.2d 28 (2006)], Judges Cathell and Harell join in the judgment only," *River Walk*, 396 Md. at 550, 914 A.2d at 783, Judges Cathell and Harrell also silently concurred in *Delphey* (a month earlier), J.P. Delphey Ltd. P'ship v. Mayor of Frederick, 396 Md. 180, 202, 913 A.2d 28, 41 (2006). Thus, this explanation does not actually point the reader to

CASE CITATION	DATE OF DECISION	AUTHOR	SILENTLY CONCURRING JUDGE(S)
J.P. Delphey Ltd. P'ship v. Mayor of Frederick, 396 Md. 180, 913 A.2d 28 (2006)	Dec. 14	Battaglia, J.	Cathell, J., Harrell, J.
Woodfield v. W. River Improvement Ass'n, Inc., 395 Md. 377, 910 A.2d 452 (2006)	Nov. 6	Wilner, J.	Cathell, J.
Mayor of Balt. v. Whalen, 395 Md. 154, 909 A.2d 683 (2006)	Oct. 19	Cathell, J.	Harrell, J.
Lowden v. Bosley, 395 Md. 58, 909 A.2d 261 (2006)	Oct. 17	Eldridge, J.	Wilner, J.
Ehrlich v. Perez, 394 Md. 691, 908 A.2d 1220 (2006)	Oct. 12	Harrell, J.	Cathell, J., Wilner, J.
In re Kaela C., 394 Md. 432, 906 A.2d 915 (2006)	Sept. 8	Battaglia, J.	Wilner, J.
State v. Logan, 394 Md. 378, 906 A.2d 374 (2006)	Sept. 1	Raker, J.	Bell, J.
Garg v. Garg, 393 Md. 225, 900 A.2d 739 (2006)	June 8	Wilner, J.	Raker, J.
Chmurny v. State, 392 Md. 159, 896 A.2d 354 (2006)	Apr. 13	Wilner, J.	Bell, J.
State v. Pitt, 390 Md. 697, 891 A.2d 312 (2006)	Feb. 1	Bell, J.	Cathell, J.
Anne Arundel Cty. Bd. of Educ. v. Norville, 390 Md. 93, 887 A.2d 1029 (2005)	Dec. 12	Raker, J.	Bell, J.
Whiting v. State, 389 Md. 334, 885 A.2d 785 (2005)	Nov. 8	Battaglia, J.	Bell, J.
Harvey v. Marshall, 389 Md. 243, 884 A.2d 1171 (2005)	Oct. 14	Harrell, J.	Bell, J.
Wynn v. State, 388 Md. 423, 879 A.2d 1097 (2005)	Aug. 11	Raker, J.	Bell, J.

any further information and means simply that Judges Cathell and Harrell were silently concurring in *River Walk* just as they did in *Delphey*. *Id.*

CASE CITATION	DATE OF DECISION	AUTHOR	SILENTLY CONCURRING JUDGE(S)
Rockwood Cas. Ins. Co. v. Uninsured Emp'rs Fund, 385 Md. 99, 867 A.2d 1026 (2005)	Feb. 8	Greene, J.	Bell, J.
Dehn v. Edgecombe, 384 Md. 606, 865 A.2d 603 (2005)	Jan. 14	Raker, J.	Eldridge, J.
Patton v. U.S. Rugby Football Union, Ltd., 381 Md. 627, 851 A.2d 566 (2004)	June 10	Harrell, J.	Bell, J.
State v. Tolbert, 381 Md. 539, 850 A.2d 1192 (2004)	June 8	Raker, J.	Bell, J.
Richardson v. State, 381 Md. 348, 849 A.2d 487 (2004)	May 14	Bell, J.	Raker, J.
Spencer v. Md. State Bd. of Pharmacy, 380 Md. 515, 846 A.2d 341 (2004)	Mar. 11	Raker, J.	Bell, J.
Wilson v. Simms, 380 Md. 206, 844 A.2d 412 (2004)	Mar. 11	Battaglia, J.	Raker, J.
Remsburg v. Montgomery, 376 Md. 568, 831 A.2d 18 (2003)	Aug. 27	Harrell, J.	Bell, J.
Creveling v. Gov't Emp. Ins. Co., 376 Md. 72, 828 A.2d 229 (2003)	July 3	Raker, J.	Bell, J.
Jenkins v. State, 375 Md. 284, 825 A.2d 1008 (2003)	June 12	Cathell, J.	Eldridge, J., Raker, J.
Miller v. State, 151 Md. App. 235, 824 A.2d 1017 (2003)	May 29	Krauser, J.	Alpert, J.
Att'y Grievance Comm'n of Md. v. Awuah, 374 Md. 505, 823 A.2d 651 (2003)	May 9	Battaglia, J.	Bell, J.
Livering v. Richardson's Rest., 374 Md. 566, 823 A.2d 687 (2003)	May 9	Raker, J.	Cathell, J.
Shurupoff v. Vockroth, 372 Md. 639, 814 A.2d 543 (2003)	Jan. 7	Wilner, J.	Cathell, J.
Williams v. State, 372 Md. 386, 813 A.2d 231 (2002)	Dec. 19	Raker, J.	Bell, J.

CASE CITATION	DATE OF DECISION	AUTHOR	SILENTLY CONCURRING JUDGE(S)
Gross v. State, 371 Md. 334, 809 A.2d 627 (2002)	Oct. 11	Raker, J.	Bell, J.
Moose v. Fraternal Order of Police, 369 Md. 476, 800 A.2d 790 (2002)	June 13	Cathell, J.	Raker, J.
Att'y Grievance Comm'n of Md. v. Angst, 369 Md. 404, 800 A.2d 747 (2002)	June 12	Battaglia, J.	Bell, J.
Att'y Grievance Comm'n of Md. v. Lane, 367 Md. 633, 790 A.2d 621 (2002)	Feb. 7	Cathell, J.	Bell, J.
Clark v. State, 364 Md. 611, 774 A.2d 1136 (2001)	June 26	Harrell, J.	Bell, J.
Rawlings v. Rawlings, 362 Md. 535, 766 A.2d 98 (2001)	Feb. 5	Harrell, J.	Bell, J.
Winder v. State, 362 Md. 275, 765 A.2d 97 (2001)	Jan. 9	Harrell, J.	Cathell, J.
Snyder v. State, 361 Md. 580, 762 A.2d 125 (2000)	Nov. 16	Bell, J.	Cathell, J.
Markov v. Markov, 360 Md. 296, 758 A.2d 75 (2000)	Aug. 23	Raker, J.	Bell, J.
Cty. Council of Prince George's Cty. v. Collington Corp. Ctr. I Ltd. P'ship, 358 Md. 296, 747 A.2d 1219 (2000)	Mar. 13	Rodowsky, J.	Eldridge, J.
McNeil v. State, 356 Md. 396, 739 A.2d 80 (1999)	Oct. 19	Wilner, J.	Eldridge, J.
Motor Vehicle Admin. v. Richards, 356 Md. 356, 739 A.2d 58 (1999)	Oct. 14	Raker, J.	Rodowsky, J.
Calabi v. Gov't Emp. Ins. Co., 353 Md. 649, 728 A.2d 206 (1999)	Apr. 21	Rodowsky, J.	Chasanow, J.
State v. Bell, 351 Md. 709, 720 A.2d 311 (1998)	Nov. 17	Cathell, J.	Bell, J.
Edwards v. State, 350 Md. 433, 713 A.2d 342 (1998)	July 17	Wilner, J.	Chasanow, J.
Pettit v. Erie Ins. Exch., 349 Md. 777, 709 A.2d 1287 (1998)	May 21	Rodowsky, J.	Chasanow, J.
Argyrou v. State, 349 Md. 587, 709 A.2d 1194 (1998)	May 18	Bell, J.	Eldridge, J.

CASE CITATION	DATE OF DECISION	AUTHOR	SILENTLY CONCURRING JUDGE(S)
Balt. Gas & Elec. Co. v. Flippo, 348 Md. 680, 705 A.2d 1144 (1998)	Feb. 18	Chasanow, J.	Raker, J.
Kroll v. Nehmer, 348 Md. 616, 705 A.2d 716 (1998)	Feb. 11	Wilner, J.	Eldridge, J.
Ginsberg v. McIntyre, 348 Md. 526, 704 A.2d 1246 (1998)	Jan. 23	Rodowsky, J.	Eldridge, J.
Johns Hopkins Hosp. v. Pepper, 346 Md. 679, 697 A.2d 1358 (1997)	Aug. 22	Karwacki, J.	Chasanow, J.
Merzbacher v. State, 346 Md. 391, 697 A.2d 432 (1997)	July 28	Karwacki, J.	Bell, J., Eldridge, J.
Scott v. Jenkins, 345 Md. 21, 690 A.2d 1000 (1997)	Mar. 14	Karwacki, J.	Bell, J.
Williams v. State, 344 Md. 358, 686 A.2d 1096 (1996)	Dec. 26	Bell, J.	Raker, J.
In re Lakeysha P., 343 Md. 627, 684 A.2d 5 (1996)	Nov. 1	*per curiam*	Raker, J.
Hartford Fire Ins. Co. v. Md. Nat'l Bank, 341 Md. 408, 671 A.2d 22 (1996)	Feb. 7	R. Murphy, J.	Chasanow, J.
Ashton v. Brown, 339 Md. 70, 660 A.2d 447 (1995)	June 30	Eldridge, J.	Chasanow, J.
Balt. Gas & Elec. Co. v. Lane, 338 Md. 34, 656 A.2d 307 (1995)	Mar. 28	R. Murphy, J.	Eldridge, J.
Beckman v. Boggs, 337 Md. 688, 655 A.2d 901 (1995)	Mar. 22	R. Murphy, J.	Bell, J.
Davis v. Dipino, 337 Md. 642, 655 A.2d 401 (1995)	Mar. 13	Chasanow, J.	Eldridge, J.
Att'y Grievance Comm'n of Md. v. Saul, 337 Md. 258, 653 A.2d 430 (1995)	Feb. 6	Karwacki, J.	Chasanow, J.
Chambers v. State, 337 Md. 44, 650 A.2d 727 (1994)	Dec. 19	Raker, J.	Rodowsky, J.

CASE CITATION	DATE OF DECISION	AUTHOR	SILENTLY CONCURRING JUDGE(S)
Richwind Joint Venture 4 v. Brunson, 335 Md. 661, 645 A.2d 1147 (1994)	Aug. 22	Chasanow, J.	Bell, J.
Scroggins v. Dahne, 335 Md. 688, 645 A.2d 1160 (1994)	Aug. 22	Chasanow, J.	Bell, J.
Wolf v. Ford, 335 Md. 525, 644 A.2d 522 (1994)	July 18	Karwacki, J.	Bell, J., Chasanow, J.
Rose v. Fox Pool Corp., 335 Md. 351, 643 A.2d 906 (1994)	July 5	Raker, J.	Bell, J., Eldridge, J.
In re Adoption/Guardianship No. 10941, 335 Md. 99, 642 A.2d 201 (1994)	June 7	Karwacki, J.	Bell, J., Raker, J.
State v. Montgomery, 334 Md. 20, 637 A.2d 1193 (1994)	Mar. 9	Bell, J.	Eldridge, J.
B. Frank Joy Co. v. Isaac, 333 Md. 628, 636 A.2d 1016 (1994)	Feb. 10	Orth, J.	McAuliffe, J., Rodowsky, J.
Walsh v. Walsh, 333 Md. 492, 635 A.2d 1340 (1994)	Jan. 27	Chasanow, J.	McAuliffe, J.
Eckard v. Eckard, 333 Md. 531, 636 A.2d 455 (1994)	Jan. 18	Rodowsky, J.	Eldridge, J.
Condon v. State of Md.–Univ. of Md., 332 Md. 481, 632 A.2d 753 (1993)	Nov. 1	R. Murphy, J.	Bell, J.
State v. Thompson, 332 Md. 1, 629 A.2d 731 (1993)	Aug. 26	Bell, J.	Chasanow, J.
Beatty v. Trailmaster Prod., Inc., 330 Md. 726, 625 A.2d 1005 (1993)	June 10	R. Murphy, J.	Bell, J.
Prince George's Cty. v. Sunrise Dev. Ltd. P'ship, 330 Md. 297, 623 A.2d 1296 (1993)	Apr. 22	Rodowsky, J.	Bell, J.
Mejia v. State, 328 Md. 522, 616 A.2d 356 (1992)	Dec. 9	Bell, J.	Eldridge, J.
Kline v. Cent. Motors Dodge, Inc., 328 Md. 448, 614 A.2d 1313 (1992)	Nov. 16	Rodowsky, J.	Chasanow, J.
Willey v. State, 328 Md. 126, 613 A.2d 956 (1992)	Oct. 13	Chasanow, J.	McAuliffe, J.

CASE CITATION	DATE OF DECISION	AUTHOR	SILENTLY CONCURRING JUDGE(S)
Reynolds v. State, 327 Md. 494, 610 A.2d 782 (1992)	Aug. 24	Chasanow, J.	Eldridge, J.
Hare v. Motor Vehicle Admin., 326 Md. 296, 604 A.2d 914 (1992)	Apr. 14	Bell, J.	Eldridge, J.
Motor Vehicle Admin. v. Chamberlain, 326 Md. 306, 604 A.2d 919 (1992)	Apr. 14	Bell, J.	Eldridge, J.
Eagle-Pitcher Indus., Inc. v. Balbos, 326 Md. 179, 604 A.2d 445 (1992)	Apr. 10	Rodowsky, J.	Chasanow, J.
C.N. Robinson Lighting Supply Co. v. Bd. of Educ. of Howard Cty., 90 Md. App. 515, 602 A.2d 195 (1992)	Feb. 28	Motz, J.	Cathell, J.
Campbell v. State, 325 Md. 488, 601 A.2d 667 (1992)	Feb. 19	Bell, J.	R. Murphy, J.
Federated Dep't Stores, Inc. v. Le, 324 Md. 71, 595 A.2d 1067 (1991)	Sept. 13	Eldridge, J.	Chasanow, J.
Forbes v. Harleysville Mut. Ins. Co., 322 Md. 689, 589 A.2d 944 (1991)	May 10	Eldridge, J.	McAuliffe, J.
Gov't Emp. Ins. Co. v. Grp. Hospitalization Med. Servs., Inc., 322 Md. 645, 589 A.2d 464 (1991)	May 6	McAuliffe, J.	Eldridge, J.
Monumental Life Ins. Co. v. Trs. of Clients' Sec. Tr. Fund of Bar of Md., 322 Md. 442, 588 A.2d 340 (1991)	April 8	McAuliffe, J.	Eldridge, J.
Girouard v. State, 321 Md. 532, 583 A.2d 718 (1991)	Jan. 8	Cole, J.	Eldridge, J.
Monoker v. State, 321 Md. 214, 582 A.2d 525 (1990)	Dec. 5	Cole, J.	Eldridge, J.

TABLE 2. CASELOADS AND SILENT CONCURRENCES BY YEAR

YEAR	NUMBER OF CASES DECIDED BY THE COURT OF APPEALS[569]	NUMBER OF SILENT CONCURRENCES
2019	138	2
2018	161	6
2017	194	4
2016	174	5
2015	177	3
2014	208	5
2013	239	7
2012	217	5
2011	237	13
2010	186	18
2009	176	9
2008	174	3
2007	206	6
2006	211	10
2005	203	6
2004	200	5
2003	227	7
2002	192	5
2001	143	3
2000	134	3
1999	148	3
1998	132	7
1997	126	3
1996	114	3
1995	155	5
1990–1994	See note 569	29

569. *Maryland Appellate Court Opinions*, MD. CTS., https://www.courts.state.md.us/opinions/opinions. This data was only available from 1995 onward.