WHEN THE COURT DIVIDES: RECONSIDERING THE PRECEDENTIAL VALUE OF SUPREME COURT PLURALITY DECISIONS

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INTRODUCTION

When the Supreme Court decides a case, the Federal District Courts and Circuit Courts of Appeals are responsible for finding the governing rules of law in that decision. The first lower court to deal with the issue often "defines" the holding of the case by reviewing the reasoning found in the Supreme Court's opinion. Other lower courts then rely largely on this interpretation. Plurality decisions[1] greatly complicate this process because lower courts not only have to find the rationale of each opinion, but must also decide which opinion's rationale governs. With all these choices, it is not surprising that plurality decisions often do "more to confuse the current state of the law than to clarify it."[2]

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1. A plurality decision is a case without an Opinion of the Court: A majority of the Court's members agree on the result, i.e., which party prevails—plaintiff or defendant, petitioner or respondent—but there is no majority agreement on the reason for that result. The Justices write several concurring opinions, explaining their differing views. If one of these opinions receives more votes than the others, it is designated the plurality opinion. For the purposes of this Note, plurality decisions are cases in which there is neither explicit nor implicit agreement among a majority of the Justices on a proposition necessary to reach the result. This definition includes those decisions in which there is no plurality opinion, i.e., no opinion that is joined by more Justices than join any other concurring opinions. However, this group does not include either "false plurality" decisions, in which the concurring Justice or Justices do not join the plurality opinion but adopt essentially the same line of reasoning, or "dual majority" cases, which contain two distinct majorities, one supporting the result and the other supporting a rationale. *See, e.g.*, Comment, *Supreme Court No-Clear Majority Decisions: A Study in* Stare Decisis, 24 U. CHI. L. REV. 99 (1956) (analyzing various types of no-clear-majority decisions and considering their treatment by subsequent courts); Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127, 1130–32 (1981) (describing "false plurality" decisions). For an illustration of the distinction between plurality and dual majority cases, see Appendix B.

2. John F. Davis & William L. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 62.

Traditionally, only the *results* of plurality decisions were considered authoritative.[3] At first, this limitation was rarely questioned, as the Supreme Court rendered fewer than twenty no-clear-majority decisions before 1938.[4] As plurality decisions became more common, however, courts began to deviate from the traditional approach.[5] Many courts simply followed plurality opinions as though they were Opinions of the Court;[6] other courts looked for a logical connection or implicit agreement between the plurality and concurring opinions;[7] and still other courts remained true to the classical view, limiting plurality decisions to their results.[8] With no guidance from the Supreme Court on the propriety of these different approaches, plurality decisions frequently gave rise to "collective confusion as to what [was] held by the Court."[9]

Undertaking to end this confusion, the Supreme Court adopted the "narrowest grounds" doctrine in *Marks v. United States*.[10] The Court explained the doctrine as follows:

> 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 . . . ."[11]

One way to determine the "narrowest grounds" is to look for the opinion "most clearly tailored to the specific fact situation before

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3. *See, e.g.*, HENRY C. BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS 135–36 (1912); EUGENE WAMBAUGH, THE STUDY OF CASES § 48 (Boston, Little, Brown & Co. 2d ed. 1894). Other common law jurisdictions have taken the same approach. *See* RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW 84–93 (4th ed. 1991) (discussing precedential value of no-clear-majority decisions of the House of Lords and other multi-member appellate tribunals); G.W. Paton and G. Sawer, *Ratio Decidendi and Obiter Dictum in Appellate Courts*, 63 L.Q. REV. 461, 465–70 (1947) (discussing practice in Australian courts); *see also* Fellner v. Minister of the Interior, 4 S. AFR. L. REP. 523 (App. Div. 1954) (holding that in South Africa *stare decisis* does not apply to reasoning supported by less than a majority of the sitting judges).

4. *See* Comment, *supra* note 1, at 99–100 & n.4.

5. *Id.* at 154–56 ("[T]hese practices [subsequent treatment of no-clear-majority cases] do not accord with the theory put forth in the texts.").

6. *See infra* notes 141–45 and accompanying text.

7. *See infra* note 151 and accompanying text.

8. *See infra* notes 142–44 and accompanying text.

9. Davis & Reynolds, *supra* note 2, at 62.

10. 430 U.S. 188 (1977).

11. *Id.* at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

the Court and thus applicable to the fewest cases, in contrast to an opinion that takes a more absolutist position or suggests more general rules."[12] The "narrowest grounds" doctrine will "identify as authoritative the standard articulated by a Justice or Justices that would uphold the fewest laws as constitutional" or "that . . . would invalidate the fewest laws as unconstitutional."[13] The *Marks* rule, therefore, is intended to limit the precedential reach of plurality decisions, while ensuring that they are followed by lower courts.

Unfortunately, the *Marks* approach does not always work. Its failings are not surprising, given the lack of analysis of plurality decisions in the *Marks* opinion, which merely makes a passing reference to the line of no-clear-majority decisions on obscenity that were issued between 1957 and 1973.[14] A more careful study of plurality decisions is needed—an analysis grounded in the same fundamentals that are implicit in our interpretation of clear-majority decisions should not only improve the consistency of result in cases that follow a plurality decision, but should also reconcile interpretive doctrines.

This Note considers the operation of the *Marks* "narrowest grounds" doctrine, and concludes that the *Marks* rule is insupportable and should be rejected. It develops a more broadly applicable and analytically sound approach to Supreme Court plurality decisions. Part I addresses the problems that arise when a single authoritative proposition must be found in the pronouncements of a multi-member tribunal. This Part emphasizes the difficulty in finding such a single rule of law when a plurality decision, with its multiple opinions, is rendered.[15] Part II considers the practical application of the *Marks* rule, and shows that the "narrowest grounds" doctrine has significant shortcomings. These practical failures are related to the *Marks* rule's analytical deficiencies. In Part III, an alternative to the *Marks* rule is developed. This approach is a hybrid: It limits the binding authority of plurality decisions to their specific results, while recognizing and ranking the

12. Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 763 (1980).

13. Planned Parenthood of Southeastern Pa. v. Casey, 947 F.2d 682, 694 (3d Cir. 1991), *aff'd in part and rev'd in part*, 112 S. Ct. 2791 (1992).

14. *Marks*, 430 U.S. at 193–94.

15. This Note focuses on the lower courts' task of interpreting and following the Supreme Court's fragmented decisions.

persuasive authority of the various propositions found in such cases. In Part IV, this hybrid approach is applied to several cases previously analyzed under the *Marks* rule. This Part shows that the hybrid approach provides a reasonable and workable alternative to the *Marks* "narrowest grounds" doctrine.

I. *RATIO DECIDENDI* AND A MULTI-MEMBER COURT

Few would dispute that lower courts must follow the decisions of the Supreme Court.[16] *Stare decisis* and the hierarchical nature of our judiciary demand that lower courts abide by the pronouncements of their superiors.[17] However, this apparently straightforward requirement masks an onerous practical problem: How is an inferior tribunal to determine which pronouncements warrant precedential respect? To answer this question requires a return to traditional principles of jurisprudence. This Part briefly explains the origins and development of Anglo-American interpretive doctrine. It then focuses on the breakdown of traditional interpretive approaches when multi-member Courts issue multiple opinions.

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16. Some commentators, however, have questioned this obligation and have offered several justifications for lower court deviation from seemingly authoritative Supreme Court decisions. *See, e.g.*, Margaret N. Kniffin, *Overruling Supreme Court Precedents: Anticipatory Action by United States Courts of Appeals*, 51 FORDHAM L. REV. 53 (1982); Note, *The Attitude of Lower Courts to Changing Precedents*, 50 YALE L.J. 1448 (1941); David C. Bratz, Comment, *Stare Decisis in Lower Courts: Predicting the Demise of Supreme Court Precedent*, 60 WASH. L. REV. 87 (1984); Note, *Lower Court Disavowal of Supreme Court Precedent*, 60 VA. L. REV. 494 (1974).

17. *Stare decisis* should be distinguished from hierarchical, structural obligations. *Stare decisis* is simply a jurisprudential version of the common-sense notion that things decided should not be unsettled. While there are many important reasons for adhering to precedent in the name of *stare decisis*, this doctrine does not require or create an absolute obligation to follow earlier decisions. *See, e.g.*, Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595–602 (1987) (discussing the arguments most frequently given in support of *stare decisis*—fairness, predictability, efficiency, and stability). In contrast, the absolute obligation of a lower court to abide by the decisions of its superior courts is derived from the structure of the judiciary, rather than from traditional *stare decisis* concerns. Although lower court disavowal of certain authoritative Supreme Court propositions might not undermine the stability of the judicial system, and in fact might even enhance stability in certain settings, the lower court must still follow the Supreme Court's holdings. In this sense, it seems incorrect to call this obligation *stare decisis*. *See, e.g.*, Patrick Higginbotham, *Text and Precedent in Constitutional Adjudication*, 73 CORNELL L. REV. 411, 411–12 (1988) (noting the distinction between procedurally binding rules and *stare decisis*: "While these rules may incidentally serve purposes similar to the purposes of stare decisis, their primary purpose is to cope with the increasing size and output of the courts and to manage the mechanics of judicial decisionmaking.").

A. *Origins and Development of Interpretive Doctrine*

Early legal scholars divided judicial decisions into two parts: the *ratio decidendi* (reason for deciding) and *obiter dictum* (stated by the way).[18] This basic distinction limits a case's authority to its *ratio decidendi*, which is comprised of the postulates or conclusions necessary to reach the result in that case. This conservative position derives from the function of the common law judiciary to resolve only the dispute before the court.[19] The difficulty lies in determining what constitutes binding *ratio* and what is merely *dictum*, as judges seldom describe their rulings using these terms.

A technique for finding the governing doctrine of a case was provided by Eugene Wambaugh, a prominent English legal scholar during the late nineteenth and early twentieth centuries:

> In order to make the test, let him first frame carefully the supposed proposition of law. Let him then insert in the proposition a word reversing its meaning. Let him then inquire whether, if the court had conceived the new proposition to be good, and had had it in mind, the decision could have been the same. If the answer be affirmative, then, however excellent the original proposition may be, the case is not a precedent for that proposition, but if the answer be negative the case is a precedent for the original proposition and possibly for other propositions also . . . . In short, when a case turns on only one point the proposition or doctrine of the case, the reason of the decision, the *ratio decidendi*, must be a general rule without which the case must have been decided otherwise.[20]

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18. *See, e.g.*, WAMBAUGH, *supra* note 3, §§ 11–13. *See generally* JOHN C. GRAY, THE NATURE AND SOURCES OF THE LAW (2d ed. 1921); Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930); Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71 (1928).

19. The same principles guided the formulation of the "case or controversy" requirement found in the U.S. Constitution. U.S. CONST. art. III, § 2, cl. 1; *see* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 539 (Norton 1987) (1893). *See generally* David E. Engdahl, *John Marshall's "Jeffersonian" View of Judicial Review*, 42 DUKE L.J. 279 (1992).

20. WAMBAUGH, *supra* note 3, at §§ 11–12 (footnote omitted). As an example of how to apply Wambaugh's technique, consider the holding in *Roth v. United States*, 354 U.S. 476 (1957). This decision concerned the conviction of Roth for mailing obscene materials, under the federal obscenity statute. The Court held "that obscenity is not within the area of constitutionally protected speech or press." *Id.* at 485. Because the Court found no error in the lower court's conclusion that the materials mailed by Roth were obscene, it affirmed his conviction. Wambaugh's test may be utilized to determine whether the quoted view of the Court concerning obscenity and the First Amendment is the

All propositions that do not satisfy Wambaugh's test are merely *dicta*.[21] Wambaugh's method, based on principles of judicial restraint,[22] remains useful for determining which portions of a decision warrant precedential respect.

During the first half of the twentieth century, several English legal scholars attempted to refine Wambaugh's method. The most significant and lasting contribution was made by Professor A.L. Goodhart in his important article, *Determining the Ratio Decidendi of a Case*.[23] Goodhart emphasized the importance of determining which facts the judge deemed material.[24] According to Goodhart, the authoritative *ratio decidendi* of a case is the proposition or propositions required to reach the result in that case *given the facts as seen by the judge*.[25] The judge's perspective and analysis of the facts must be used, as they formed the basis for the deci-

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ratio decidendi of the case. If we "insert in the proposition a word reversing its meaning," that is, if the Court had instead stated that obscenity *is* within the area of constitutionally protected speech, would Roth's conviction still be affirmed? No, such a conviction would be inconsistent with the First Amendment. Therefore, without the proposition that obscenity is not protected by the First Amendment, *Roth* would have "been decided otherwise." The exclusion of obscenity from the First Amendment is a *ratio decidendi* of *Roth*.

21. WAMBAUGH, *supra* note 3, §§ 13–16; *see also* CROSS & HARRIS, *supra* note 3, at 52.

22. Wambaugh provided four principles to guide the search for a *ratio decidendi*:

> First Principle: the Court's Duty to decide the very Case: Hypothetical Cases. The first key to the discovery of the doctrine of a case is found in the principle that the court making the decision is under a duty to decide the very case presented and has no authority to decide any other.
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> Second Principle: the Court's Duty to follow a general Rule . . . . [T]he second key to the discovery of propositions of law, is the principle that the court must pass upon each case precisely as it would pass upon a similar case, that is to say, in accordance with a general rule.
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> Third Principle: [t]he very Words of the Court not the Doctrine of the Case. Accordingly, the third key to the discovery of the doctrine of a reported case is the principle, or rather the caution, that the doctrine of the case is not the language of the judges. In so far as the words of the judges go beyond the precise doctrine necessary to the decision, laying down a different rule or a broader rule, they are mere *dicta*.
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> Fourth Principle: Doctrine in the Mind of the Court: Necessity for Deliberation: . . . This fourth principle is, that a case is not a precedent for any proposition that was neither consciously nor unconsciously in the mind of the court. It is the duty of the court to deliberate . . . . What makes decisions of value as precedents is the fact that they are based upon reasoning and not upon chance. If it can be shown that there was no deliberation, it follows that the case is of no authority for any proposition whatever.

WAMBAUGH, *supra* note 3, §§ 5, 7, 16, 17 (footnotes omitted).

23. Goodhart, *supra* note 18.

24. *See id.* at 169–74.

25. *Id.* at 169.

sion. Goodhart considered the expressed reasoning of the judge important, for this reasoning provided valuable insight into which facts the judge felt were material.[26] However, Goodhart explained, the judge's reasoning may not reflect the binding doctrine of the case as many important rules of law result from faulty reasoning, and moreover, some reported decisions simply contained no reasoning.[27]

Goodhart's writings on *ratio decidendi* set off a flurry of activity among English legal scholars.[28] Goodhart's critics focused on his refusal to accept a judge's expressed reasoning as governing.[29] Goodhart's and Goodhart's critics' approaches to determining the *ratio decidendi* of a case have been described, respectively, as prescriptive and descriptive.[30] Goodhart's approach is prescriptive, because it looks for the logically necessary proposition, the rational link between the judge's view of the facts and his decision. Goodhart's critics' approach, on the other hand, is descriptive, holding that "the ratio decidendi is the rule or principle that the precedent-setting court considered to be necessary for its decision."[31] At least one commentator argued that the two *rationes*—the prescriptive and descriptive—would converge.[32] But a

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26. *Id.* at 174–78. Goodhart summarized his approach to finding the *ratio decidendi* as follows:

> (1) The principle of a case is not found in the reasons given in the opinion.
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> (2) The principle is not found in the rule of law set forth in the opinion.
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> (3) The principle is not necessarily found by a consideration of all the ascertainable facts of the case and the judge's decision.
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> (4) The principle of the case is found by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them.
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> (5) In finding the principle it is also necessary to establish what facts were held to be immaterial by the judge, for the principle may depend as much on exclusion as it does on inclusion.

Id. at 182.

27. *Id.* at 165–69.

28. *See, e.g.*, Charles W. Collier, *Precedent and Legal Authority: A Critical History*, 1988 WIS. L. REV. 771, 794 nn.99–100 (documenting debate over Wambaugh's and Goodhart's approaches to determining the *ratio decidendi*); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 372 n.21 (1988) (same).

29. *See, e.g.*, CROSS & HARRIS, *supra* note 3, at 67–69.

30. *See, e.g.*, Collier, *supra* note 28, at 795.

31. Collier, *supra* note 28, at 799 (footnote omitted); *see also* CROSS & HARRIS *supra* note 3, at 67, 72–74 (noting that "the distinction is one which does not need to be drawn in the majority of cases"); Julius Stone, *The Ratio of the Ratio Decidendi*, 22 MOD. L. REV. 597, 600–03 (1959); Michael S. Moore, *Precedent, Induction, and Ethical Generalization*, *in* PRECEDENT IN LAW 183, 184–88 (Laurence Goldstein ed., paperback reprint ed. 1991) (1987).

32. *See, e.g.*, A.W.B. Simpson, *The Ratio Decidendi of a Case*, 20 MOD. L. REV. 413

variant of Goodhart's approach seems to have prevailed: "The *ratio decidendi* of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury."[33]

B. *Finding a* Ratio Decidendi[34] *in a Plurality Decision*

"The *ratio decidendi* is a conception that is peculiarly appropriate to a single judgment."[35] Several of the early scholars who considered the problems of finding the governing doctrine recognized the limitation this principle represents with regard to plurality decisions.[36] When a multi-member tribunal hears a case and issues multiple opinions, determining the *ratio decidendi* is a two-step process. First, the *ratio decidendi* for each opinion must be determined.[37] Second, the various *rationes decidendi* are compared to determine the extent of agreement between the concurring opinions. When all or a majority of the members of a court agree on a particular rationale, this two-step process, although tedious, is not problematic. However, when such agreement cannot be found, it may be impossible to find a *ratio decidendi.*[38]

It is also noteworthy that Anglo-American judicial systems, with their unique emphasis on *stare decisis* and *ratio decidendi*,[39] have structures that exacerbate these difficulties. Our use of multi-member appellate courts significantly complicates the process de-

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(1957); A.W.B. Simpson, *The Ratio Decidendi of a Case*, 22 MOD. L. REV. 453 (1959).

33. CROSS & HARRIS, *supra* note 3, at 72.

34. The use of the singular *ratio decidendi* here must be emphasized. Finding such a *ratio* for each concurring opinion does not, or at least should not, end the analysis. The phrase "a *ratio decidendi* of the case," refers to the final, single, authoritative doctrine of the case.

35. CROSS & HARRIS, *supra* note 3, at 85.

36. *See* WAMBAUGH, *supra* note 3, at 47–50; Goodhart, *supra* note 18, at 165, 167–68.

37. The *ratio decidendi* is found by using the rules explained above in Section A.

38. This is why the traditional view limited the precedential authority of these cases to their results. *See supra* note 3 and accompanying text.

39. "[T]he doctrine of the binding precedent is of such importance that it may be said to furnish the fundamental distinction between the English and the Continental legal method." A.L. Goodhart, *Precedent in English and Continental Law*, 50 LAW Q. REV. 40, 42 (1934). *See generally* Fred W. Catlett, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied*, 21 WASH. L. REV. 158 (1946) (discussing the frequent mid-twentieth century reversals of United States Supreme Court decisions, and the status and efficacy of the modern doctrine of *stare decisis*).

scribed by Wambaugh and Goodhart. The United States' nine-Justice Supreme Court is an extreme example. When the Supreme Court—the Court with the largest number of jurists per panel of any normally configured American court[40] (as well as the greatest responsibility for pronouncing authoritative doctrine)—divides, it can be exceedingly difficult to find any single authoritative rule of law in the Court's decision. Multi-member tribunals can avoid this difficulty, however, by issuing a single Opinion of the Court. This practice, adopted by Chief Justice Marshall in the early nineteenth century,[41] allows multi-member Courts to approximate the single judge model used in the discussion of *ratio decidendi* in Section A. Several authors have noted the benefits of this practice over the traditional practice of delivering *seriatim* opinions.[42] Unfortunately, the Supreme Court has been unable to consistently reach the consensus necessary to exploit these advantages.

When the Supreme Court does not deliver an Opinion of the Court, it moves away from the approximation of the single judge model and significantly increases the burden on lower courts that are required to follow its decisions. Consequently, it becomes "impossible to avoid something in the nature of arbitrary rules to meet cases in which several judgments are delivered."[43] The *Marks* "narrowest grounds" doctrine is such an arbitrary rule, adopted to approximate the precedential effect of an Opinion of the Court. To operate successfully, the *Marks* rule must be universally applicable and involve the same analytical approach as that used to interpret single majority opinions. Part II considers whether the *Marks* doctrine can satisfy these requirements.

II. THE *MARKS* "NARROWEST GROUNDS" DOCTRINE

The *Marks* "narrowest grounds" doctrine represents an effort to reconcile the problems created by a fragmented multi-member Court with the potential advantages of a single majority opinion.[44]

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40. Although most of the Circuit Courts of Appeals have more members than the Supreme Court, these courts normally sit in panels of three. When one of these courts sits *en banc*, the problems described in this Section are even more evident.

41. *See* Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 192–93 (1959).

42. *See, e.g.*, CROSS & HARRIS, *supra* note 3, at 84–85; Neil MacCormick, *Why Cases Have Rationes and What These Are*, *in* PRECEDENT IN LAW, *supra* note 31, at 153, 170–71; Paton & Sawer, *supra* note 3, at 483–85.

43. CROSS & HARRIS, *supra* note 3, at 85.

44. The Supreme Court's fragmented decisions leave lower courts with little guidance,

To perform this reconciliation, the *Marks* rule should employ the same type of interpretive tools used by Wambaugh and Goodhart.[45] The *Marks* "narrowest grounds" rule should also be universally applicable, accounting for decisions in which there is agreement upon a particular line of reasoning, as well as those decisions in which such consensus is lacking. Further, any doctrine for interpreting plurality decisions should provide guidance for those cases in which the Justices do not even address the same issues, because such cases frequently lack the consensus necessary to create an Opinion of the Court.

This Part evaluates the *Marks* "narrowest grounds" doctrine against these standards. Section A discusses the analytical foundations of the *Marks* rule and concludes that it is unsound. Section B finds that the *Marks* rule does not satisfy the standard of universal applicability. It presents, in particular, cases in which the Justices do not even address the same issues. The *Marks* approach provides no useful guidance to lower courts tasked with interpreting these difficult decisions. Section C discusses the consequences of the *Marks* rule's shortcomings.

A. *Justifications for the "Narrowest Grounds" Doctrine*

Two justifications for the "narrowest grounds" rule are frequently put forth. One justification, which this Note calls the "implicit consensus" model, looks for implicit agreement or logical connection between the reasoning contained in the opinions of the concurring Justices.[46] The rationale underlying this justification is that "it constitutes a least common denominator upon which all of the Justices in the majority agree, even though some would support the decision on broader grounds."[47] The second distinct justi-

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leading to inconsistent treatment of similar issues by these courts. *See infra* subsection II(A)(1) and Section II(B). Further, Supreme Court plurality decisions produce breaks in authority when a later Court adopts a new position upon reconsideration of the issue that was before the plurality Court. *See infra* subsection II(A)(2). These results produce uncertainty, inhibit reliance, and undermine respect for the judicial system. *See, e.g.*, Davis & Reynolds, *supra* note 2, at 66–75; Note, *supra* note 1, at 1128–30. Decisions containing an Opinion of the Court are less likely to lead to similar problems.

45. *See supra* Section I(A).

46. The distinction between reasoning and result must be emphasized. Agreement on the result is not a valid indicator of agreement on the reason for that result. In the extreme case, the concurring Justices may consider completely different issues dispositive. *See infra* note 134.

47. State v. Novak, 318 N.W.2d 364, 368 (Wis. 1982) (footnote omitted).

fication, which this Note calls the "predictive" model, is based on the idea that "[t]he principle objective of this *Marks* rule is to *promote predictability* in the law by ensuring lower court adherence to Supreme Court precedent."[48]

This Section presents a closer examination of these models, and concludes that neither is supportable as a justification for the *Marks* rule.[49] First, it discusses the "implicit consensus" model and cases that rely on this justification. Examining the Supreme Court's development of the *Marks* "narrowest grounds" doctrine, it demonstrates that the *Marks* Court misconstrued prior precedent and inadequately considered the problematic nature of plurality decisions. This Section then discusses the "predictive" model for the "narrowest grounds" doctrine. The failure of the "predictive" model is due primarily to the Supreme Court's refusal to apply the *Marks* rule when addressing its own fragmented decisions.

1. *The "Implicit Consensus" Model.* The "implicit consensus" justification of the "narrowest grounds" rule maintains that there is a common thread running through the reasoning of the concurring opinions in a plurality decision. This "least common denominator" indicates implicit agreement among the Members as to the grounds for the result and allows a lower court to impute consensus on the reasoning employed, thereby lending the imprimatur of an Opinion of the Court to the "narrowest grounds" opinion.[50] Nevertheless, when such agreement actually exists, there is no need to apply the *Marks* doctrine; any *ratio decidendi* endorsed by a majority of the Court is binding.[51] Moreover, when genuine accord is lacking, the "implicit consensus" model degenerates into a "constructive consensus" model; use of the "narrowest grounds" doctrine in such cases will often associate Justices with

48. Planned Parenthood of Southeastern Pa. v. Casey, 947 F.2d 682, 693 (3d Cir. 1991) (emphasis added), *aff'd in part and rev'd in part*, 112 S. Ct. 2791 (1992).

49. The analytical underpinnings of the *Marks* doctrine are commonly relegated to a footnote. The justifications for the rule are important, however, as they frequently form the starting point for a lower court's search for the "narrowest ground." Unfortunately, many courts simply make passing reference to the *Marks* rule and then indiscriminately apply the technique.

50. *See, e.g.*, King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 3054 (1992).

51. Applying the *Marks* rule to such "false plurality" decisions will point to the *ratio decidendi*. This results because the narrowest opinion will define the outer limits of the majority agreement. *See infra* subsection III(B)(2).

propositions they expressly rejected. The *Marks* Court attempted to avoid this problem by arguing that the "narrowest ground" is logically enveloped by broader positions. However, an examination of cases in which the "implicit consensus" justification of the "narrowest grounds" doctrine *seems* valid will illustrate the falsity of this assertion.

a. Marks *and* Memoirs.[52] The *Marks* Court used the "narrowest grounds" technique to determine the governing rule of law from a line of badly splintered decisions on the constitutional definition of obscenity.[53] Two decades earlier, in *Roth v. United States*,[54] the Court had declared that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."[55] With this declaration, the Court began a decade-and-a-half-long process of attempting to provide useful guidance on what constitutes obscenity.[56]

In *Memoirs*, the Court held, in a 6–3 decision, that the book at issue, *Fanny Hill*,[57] was not obscene, and therefore must be protected by the First Amendment. The Court disagreed, however, on why this book was protected by the First Amendment. Justice Brennan, writing for a three-Member plurality, adopted a three-part test for obscenity.[58] This standard was based on the

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52. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass., 383 U.S. 413 (1966) [hereinafter *Memoirs*].

53. Marks v. United States, 430 U.S. 188, 192–94 (1977). The question before the *Marks* Court was whether or not the *Memoirs* plurality had changed the definition of obscenity for First Amendment purposes. The Supreme Court used the "narrowest grounds" doctrine to determine the governing definition of obscenity from *Memoirs*. This application is seldom questioned; in fact, *Memoirs* is frequently used as a benchmark case to support the "implicit consensus" justification of the "narrowest grounds" approach. However, *Memoirs* marked the height of the Court's division on the question of obscenity.

54. 354 U.S. 476 (1957).

55. *Id.* at 484.

56. The Court finally resolved this issue in Miller v. California, 413 U.S. 15 (1973), which established the following obscenity standard:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citation omitted).

57. JOHN CLELAND, MEMOIRS OF A WOMAN OF PLEASURE (Peter Sabor ed., 1985) [hereinafter FANNY HILL].

58. The *Memoirs* test provided that the following "three elements must coalesce" for

plurality's interpretation of the Court's earlier obscenity cases, particularly the *Roth* decision.[59] As *Fanny Hill* did not satisfy the plurality's rigorous obscenity test, these Members of the Court concluded that the book must be protected by the First Amendment. Concurring in the result, Justices Black and Douglas each rejected the plurality's approach and instead took an absolute view of the First Amendment: *Fanny Hill* was protected by the First Amendment whether it had any redeeming social value or not.[60] Justice Stewart articulated a third view: equating obscenity, for First Amendment purposes, with hard-core pornography,[61] he found that *Fanny Hill* was not obscene, and therefore agreed that it should receive First Amendment protection. The three dissenters would have each applied a less stringent obscenity standard than that of the plurality.[62]

Applying the "narrowest grounds" doctrine to the *Memoirs* decision, the *Marks* Court declared: "The view of the *Memoirs* plurality therefore constituted the holding of the Court and provided the governing standards."[63] Although the Supreme Court has since provided little explanation of the *Marks* "narrowest grounds" approach, several lower courts have referred to the various opin-

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material to be found obscene:

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

Memoirs, 383 U.S. at 418 (Brennan, J., concurring, joined by Warren, C.J., and Fortas, J.).

59. "Under [the *Roth*] definition, as elaborated in subsequent cases, three elements must coalesce . . . ." *Id.*

60. *Id.* at 431–33 (Douglas, J., concurring); *id.* at 421 (Black, J., concurring) (citing Ginzburg v. United States, 383 U.S. 463, 476 (1966) (Black, J., dissenting); Mishkin v. New York, 383 U.S. 502, 515 (1966) (Black, J., dissenting)). Justices Douglas and Black read the First Amendment literally—"Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." This interpretation does not allow any content-based governmental regulation of printed materials. Therefore, these Justices disagreed with the Court's decision in *Roth* to deny obscenity, however defined, First Amendment protection. *See, e.g.*, Roth v. United States, 354 U.S. 476, 508–14 (1957) (Douglas, J., dissenting); William W. Van Alstyne, FIRST AMENDMENT 5–6 (1991) (discussing the absolute view of the First Amendment).

61. *Id.* at 421 (Stewart, J., concurring) (citing *Ginzburg*, 383 U.S. at 497 (Stewart, J., dissenting); *Mishkin*, 383 U.S. at 518 (Stewart, J., dissenting)).

62. *Id.* at 441–45 (Clark, J., dissenting); *id.* at 456–60 (Harlan, J., dissenting); *id.* at 461–62 (White, J., dissenting).

63. *Marks*, 430 U.S. at 194.

ions in *Memoirs* as supporting the "implicit consensus" justification.[64] However, the two First Amendment absolutists—Justices Black and Douglas—would never have accepted the plurality's three-part obscenity test, or any other obscenity test for that matter. The conflict between Justice Stewart's "hard-core pornography" approach and the plurality's multi-part analysis is less conspicuous but still problematic. Although the outcomes of these approaches may sometimes coincide,[65] the attempt to reconcile the reasoning underlying these approaches strains the credibility of the "implicit consensus" model. There was no majority consensus, explicit or implicit, in *Memoirs*, concerning the appropriate obscenity standard.

A recent *en banc* decision by the Court of Appeals for the District of Columbia Circuit demonstrates the fallacy of applying the "implicit consensus" justification to *Memoirs*.[66] Judge Harry Edwards, writing for a seven-member majority, explained that "[i]n essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment."[67] The D.C. Circuit also noted that the various opinions of the *Memoirs* majority fit this model: "Because Justices Black and Douglas had to agree, as a logical consequence of their own position, with the plurality's view that anything with redeeming social value is not obscene, the plurality of three in effect spoke for five Justices: *Marks*' 'narrowest grounds' approach yielded a logical result."[68] But surely the D.C. Circuit could not have believed that Justices Black and Douglas considered the plurality's test to be logically consistent with their own absolute views of the First Amendment—especially when both of these Justices dissented from the seminal *Roth* decision, which held that obscenity was outside the reach of the First Amendment.[69] The *Memoirs* decision provides

64. *See, e.g.*, King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 3054 (1992).

65. That is, items denied First Amendment protection by Justice Stewart's "hard-core pornography" standard might correspond to those materials denied protection by the *Memoirs* plurality's three-part test.

66. *King*, 950 F.2d 771.

67. *Id.* at 781.

68. *Id.*

69. Justice Brennan wrote the Opinion of the Court in *Roth* and believed his *Memoirs* position to be consistent with *Roth*. How can it be argued that Justices Black and Douglas, who also claimed to be adhering to their prior positions, agreed with a position

an excellent example of the type of "constructive consensus" that the *Marks* rule frequently creates.[70]

b. Delaware Valley II. A recent Supreme Court plurality decision that has led to frequent application of the *Marks* "narrowest grounds" doctrine is *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware Valley II)*.[71] Facing the question of whether or not federal fee-shifting provisions could be enhanced in contingency situations to compensate the prevailing attorney for the risk of loss, the Court decided 5–4 to disallow the enhancement at issue.[72] A four-Justice plurality held that such enhancements were "impermissible under the usual fee-shifting statutes."[73] However, in the final section of their opinion, in which they considered what standards should govern if other courts did not follow their absolute rejection of contingency enhancements, the plurality advised that such enhancements should be severely limited.[74] Justice O'Connor provided the deciding vote, but refused to rule out all enhancements.[75] Although she adopted a rigorous standard for awarding contingency enhancements that was similar to the plurality's proposal in the final section of their opinion, Justice O'Connor refused to join any part of

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in *Memoirs* that they rejected in *Roth*, not to mention that they expressly rejected the plurality's test in *Memoirs*?

70. *Memoirs* also illustrates the importance of the distinction between reasoning and result. It may be true that the *Memoirs* plurality's obscenity standard will produce "narrower" results than the Black/Douglas approach—i.e., fewer items will be protected by the First Amendment under the plurality's view. *See generally* VAN ALSTYNE, *supra* note 60, at 5–21 (discussing spheres of protection under the First Amendment). However, this fortuitous overlapping of results says nothing about the logical consistency of these Justices' views. Further, because of the disparities between the reasoning in the *Memoirs* opinions, it is risky to use any one of those rationales to predict the Supreme Court's position on analogous matters. For a more complete discussion of the *Marks* rule's inability to predict outcomes, see subsection II(A)(2). *See also* Miller v. California, 413 U.S. 15 (1973) (considering the constitutional definition of obscenity and rejecting all the concurring positions from *Memoirs*); *supra* note 56 (presenting the *Miller* standard); *infra* note 91 (discussing reasons for the *Miller* outcome).

71. 483 U.S. 711 (1987).

72. *Id.* at 729 (opinion of White, J., joined by Rehnquist, C.J., Powell, and Scalia, JJ.); *id.* at 731 (O'Connor, J., concurring).

73. *Id.* at 727 (opinion of White, J., joined by Rehnquist, C.J., Powell, and Scalia, JJ.).

74. *Id.* at 728.

75. *Id.* at 731 (O'Connor, J., concurring).

the plurality opinion.[76] The dissenting Members endorsed a more liberal test for awarding enhancements.[77]

Lower courts have consistently treated Justice O'Connor's concurrence in *Delaware Valley II* as the "holding" of the Court.[78] Those courts employing the *Marks* approach have based their adoption of Justice O'Connor's opinion on the apparent similarities between her position and the plurality opinion's final section.[79] However, when the plurality opinion is considered alone, its final section could be regarded as *dicta*, for the plurality did not rely on the reasoning in that section in rejecting the enhancements at issue in *Delaware Valley II*.[80] Therefore, applying the traditional methods of determining the *ratio decidendi* of a case[81] places the plurality's absolute rejection of contingency enhancements in sharp contrast with Justice O'Connor's limited acceptance of them.[82]

Delaware Valley II and *Memoirs* indicate that the *Marks* "narrowest grounds" doctrine cannot be justified by the "implicit consensus" model. In both cases, the "implicit consensus" justification

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76. *Id.* at 735–42.

77. *Id.* at 740 (Blackmun, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.).

78. *See* King v. Palmer, 950 F.2d 771, 776–77 (D.C. Cir. 1991) (en banc) (collecting cases that have followed Justice O'Connor's opinion from *Delaware Valley II* and noting: "In our prior opinions interpreting *Delaware Valley II*, we, like other circuit courts, have assumed that Justice O'Connor's concurrence controls."), *cert. denied*, 112 S. Ct. 3054 (1992). The D.C. Circuit, however, rejected this interpretation of *Delaware Valley II* by adopting the plurality's view that enhancements should be absolutely rejected. *Id.* at 784. In reaching this result, the court found the *Marks* rule inapplicable: "Because [Justice O'Connor's] answer to that question [of how to calculate an enhancement award] is so clearly at odds with that of the plurality, however, we are left without a controlling opinion or a governing test for awarding contingency enhancements under *Delaware Valley II*." *Id.* at 783.

79. *Id.* at 777 ("[S]everal of our sister circuits have read Justice O'Connor's concurrence as implicitly agreeing with the plurality's statement that contingency bonuses should be available only in 'exceptional cases.' ") (citations omitted); *see also* Islamic Ctr. of Miss. v. City of Starkville, 876 F.2d 465, 471 (5th Cir. 1989) (following Justice O'Connor's *Delaware Valley II* concurrence).

80. *Delaware Valley II*, 483 U.S. at 727–28 (opinion of White, J., joined by Rehnquist, C.J., Powell, and Scalia, JJ.).

81. The plurality's two positions—absolute rejection of contingency enhancement awards or a limitation of such awards to "exceptional cases"—could be viewed as alternative *rationes decidendi*. Under this analysis, *Delaware Valley II* may be characterized as a false plurality, with a majority adopting the "exceptional cases" limitation. *See infra* note 178 and accompanying text.

82. *See, King*, 950 F.2d at 777–78 (characterizing these views on the availability of contingency enhancement awards as " 'never!' for the plurality" and " 'hardly ever!' for Justice O'Connor").

seems valid; however, a closer examination reveals that it actually is not, for in truly fragmented decisions there is no consensus on the reasoning.

2. *The "Predictive" Model.* The "predictive" model offers a more enticing justification for the *Marks* "narrowest grounds" doctrine. This model maintains that "the controlling opinion in a splintered decision is that of the Justice or Justices who concur on the 'narrowest grounds,'" because this single legal standard may be used to accurately predict what the Court would do when faced with a similar factual situation.[83] Again turning to the *Memoirs* decision,[84] any material that fails to satisfy the plurality's stringent three-part obscenity test will be held protected by the First Amendment because the more absolute positions of the concurring Justices would necessarily protect such matter, thereby comprising a majority. If, on the other hand, material is determined to be obscene under the plurality's test, the dissenters would likely agree, thereby comprising a majority. Therefore, although the plurality's test in *Memoirs* was rejected by six Members of the Court, it was decisive, because it was the narrowest position necessary to form a majority, and thus should reliably forecast future results.

First, this subsection considers the analytical basis for the "predictive" model and concludes that it is flawed. Then it examines lines of cases in which the *Marks* "narrowest grounds" doctrine has failed to accurately predict the outcome of future Supreme Court decisions. This failure can lead to discontinuity and uncertainty regarding important legal principles because of the break between prior interpretations of Supreme Court decisions by lower federal courts and the Supreme Court's later, conflicting resolution.

a. Analytical basis for the "predictive" model. The analytical failure of this explanation is quite subtle, requiring a recognition of the distinction between result *stare decisis* and rationale *stare decisis*. Result *stare decisis* concerns only the specific outcome of a case, whereas rationale *stare decisis* lends authoritative weight to the *ratio decidendi*. In a clear-majority decision, both types of

83. Planned Parenthood of Southeastern Pa. v. Casey, 947 F.2d 682, 693 (3d Cir. 1991), *aff'd in part and rev'd in part*, 112 S. Ct. 2791 (1992).

84. *See supra* notes 57–62 and accompanying text.

stare decisis govern subsequent cases. According to the "predictive" model, the *Marks* "narrowest grounds" doctrine accurately predicts the results in future cases and in that sense is an unremarkable application of result *stare decisis*. However, the *Marks* rule takes this process one step further, affording full precedential weight to reasoning that did not enjoy majority assent. The difficulty with this step is that this reasoning may then be applied to situations that only partially resemble the matter that was before the plurality Court. In such situations, the predictive ability of the model fails, yet the reasoning will continue to be applied as a governing rule of law.[85]

The failure of the "predictive" model is also attributable to the Supreme Court's disregard for the "narrowest grounds" doctrine. The Court has cited *Marks* only four times for the "narrowest grounds" rule—three times in dissent.[86] This neglect is best explained by considering the notions of horizontal and vertical *stare decisis*.[87] Horizontal *stare decisis*—the precedential weight the Supreme Court ascribes to its own prior decisions—does not absolutely bind the Court.[88] However, lower courts are bound by ver-

85. *See, e.g.*, Santillanes v. United States Parole Comm'n, 754 F.2d 887 (10th Cir. 1985) (applying the *Baldasar* Court's analysis—*see infra* notes 117–26 and accompanying text—to a forfeiture of parole). It should be noted that applications of the reasoning from a prior case are necessarily by analogy; if the facts do not materially differ, the prior result would govern and the reasoning used to reach that result would be irrelevant.

86. Planned Parenthood of Southeastern Pa. v. Casey, 112 S. Ct. 2791, 2855 (1992) (Rehnquist, C.J., dissenting, joined by White, Scalia, and Thomas, JJ.); Franklin v. Lynaugh, 487 U.S. 164, 191 n.1 (1988) (Stevens, J., dissenting, joined by Brennan and Marshall, JJ.); City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 764 n.9 (1988) (referring to the *Marks* rule as "settled jurisprudence"); Celotex Corp. v. Catrett, 477 U.S. 317, 329 n.1 (1986) (Brennan, J., dissenting, joined by Burger, C.J., and Blackmun, J.). In *Casey*, the Court missed an opportunity to resolve the problems caused by the rigid *Marks* "narrowest grounds" doctrine. The Court of Appeals for the Third Circuit relied heavily on *Marks* to determine the governing standard for reviewing abortion regulations under Webster v. Reproductive Health Services, 492 U.S. 490 (1989). Planned Parenthood of Southeastern Pa. v. Casey, 947 F.2d 682, 693 (3d Cir 1991) (finding Justice O'Connor's "undue burden" standard the "narrowest grounds" in *Webster*), *aff'd in part and rev'd in part*, 112 S. Ct. 2791 (1992). Limiting its attention to the substantive issues, the Supreme Court failed to provide any further guidance on interpreting its plurality decisions. Given the intensity of the debate surrounding the abortion decisions, the Court's focus on these issues is understandable, but it is unfortunate that it let this chance to clarify legal issues slip by.

87. *Stare decisis* describes the obligation of a court to follow its own decisions and the decisions of its peer tribunals. BLACK'S LAW DICTIONARY 1406 (6th ed. 1990).

88. In fact, the Court's respect for its prior decisions varies with the issues involved, with constitutional holdings receiving less respect on *stare decisis* grounds than statutory

tical *stare decisis*; they must follow *all* Supreme Court decisions.[89] Similarly, the Supreme Court regards the *Marks* rule as binding lower courts, but does not believe that the "narrowest grounds" doctrine can prevent the Court from reconsidering the issues it addressed in its earlier plurality decision. This view is undoubtedly correct, for to bind the Court by its fragmented decisions while allowing it to freely reconsider clear-majority cases would be absurd. Nevertheless, the Court's disregard for the *Marks* rule is not without costs.

The Court's double-standard approach to the *Marks* rule undermines its predictive ability. When the Court reconsiders the issues it addressed in a prior fragmented decision, it seldom considers the merits of following the "narrowest grounds" position from that decision. If many of the same Justices who heard the earlier case are still on the Court, it is not difficult to understand

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interpretations due to the difficulty involved in altering a Supreme Court constitutional interpretation through the amendment process. *See* Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401 (1988) (erroneous constitutional precedents should be overruled unless "to do so would pitch the country into the abyss—if to do so would cause such harm to the body politic that, in a relative sense, it would be on the order of killing the body to save a limb"); James C. Rehnquist, Note, *The Power that Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. REV. 345 (1986) (calling for an abandonment of *stare decisis* in Constitutional adjudication); *see also* Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988) (discussing the conflict between originalism and *stare decisis*). *But see* Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422 (1988):

> For a long time judges have said that statutes are different from common law and constitutional law. Courts should attach a meaning to a statute, then let Congress act or not; a court could only confuse Congress and increase uncertainty by revisiting the subject; Congress can correct mistakes. I doubt that this is so.

Id. at 426 (footnote omitted). Judge Easterbrook also explains that judicial alteration of a statute—e.g., by finding certain provisions unconstitutional and letting other parts stand—may be difficult for Congress to undo. Various compromises and coalitions are involved in enacting a law; the provisions affected by the Court's interpretation may not have enough support to alter that interpretation. In this sense, he proposes that statutory interpretations by the Court be treated similarly to the Court's constitutional interpretations. *Id.* at 427–29.

89. "Vertical *stare decisis*" is a misnomer. Lower courts' obligation to follow the rulings of their superior tribunals derives from structural rules that are based on the hierarchical nature of the judicial system, not from the prudential considerations that underlie *stare decisis*. These rules require a court to follow *all* the decisions of its superior courts. On the other hand, "horizontal *stare decisis*" describes the obligation of a court to follow its own prior decisions. Only "horizontal *stare decisis*" is really *stare decisis*. *See, e.g.*, Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 177 n.1 (1989).

why the *Marks* technique is not used. Most Justices will simply adhere to their earlier positions.[90] On the other hand, if the Court has experienced turnover since its prior plurality decision, new Members, with several opinions from which to choose, frequently adopt a position that cannot be characterized as the "narrowest ground."[91] In either situation, the determination not to follow the *Marks* rule—not to allow, or even to encourage, the Court to reconsider its fragmented decisions—tends to perpetuate, not eliminate, the confusion caused by these divided cases.

b. Practical failures of the "predictive" model. *Elrod v. Burns*[92] and *Branti v. Finkel*[93] provide an example of the *Marks* rule's inability to predict the outcome of Supreme Court cases. In *Elrod*, the Supreme Court held that certain patronage hiring practices violated the First Amendment. The practices of the sheriff of Cook County, Illinois were at issue in *Elrod*. After defeating the Republican incumbent, the new sheriff, a Democrat, replaced many non-civil service employees with political patrons. Although the Court held that many of these dismissals violated the First Amendment, no new rule of law received majority assent. Justice Brennan, writing for a three-Member plurality, held that "the practice of patronage dismissals is unconstitutional under the First and Fourteenth Amendments . . . ."[94] Concurring, Justice Stewart would have limited the new rule to "nonpolicymaking, nonconfidential government employee[s]."[95] The dissenters rejected *any*

90. *See, e.g., supra* notes 60–61.

91. An excellent example of this result is presented by Miller v. California, 413 U.S. 15 (1973), in which a majority of the Court rejected the *Memoirs* plurality's three-part obscenity standard. A five-Justice turnover had occurred since *Memoirs* was decided; Justices Warren, Clark, Fortas, Black, and Harlan left the Court and were replaced by Justices Burger, Marshall, Blackmun, Powell, and Rehnquist, respectively. Four of the five new Justices (all but Justice Marshall) rejected the *Memoirs* plurality's obscenity test. *Id.* at 23. It is also interesting that the *Miller* majority claimed reliance on the *Roth* standards, just as the plurality had done in *Memoirs*. *Id.* at 36–37; *Memoirs*, 383 U.S. 413, 418 (1966).

92. 427 U.S. 347 (1976).

93. 445 U.S. 507 (1980).

94. *Elrod*, 427 U.S. at 373 (opinion of Brennan, J., joined by White and Marshall, JJ.). Earlier in his opinion, Justice Brennan had apparently accepted that certain policymaking employees might be properly dismissed on the basis of their party affiliation. He rejected the distinction, however, because "[n]o clear line can be drawn between policymaking and nonpolicymaking positions." *Id.* at 367.

95. *Id.* at 375 (Stewart, J., concurring, joined by Blackmun, J.).

nonstatutory limitation on patronage hiring practices, relying on the prevalence and acceptance of such activities throughout the nation's history,[96] and pointing out that the complaining parties in *Elrod* had received their jobs through the same type of partisan system.[97]

Lower courts initially had little difficulty applying the *Marks* rule to *Elrod*; they uniformly adopted Justice Stewart's concurrence as the "holding" of the *Elrod* Court.[98] Justice Stewart's "nonpolicymaking, nonconfidential" limitation narrowed the field of unconstitutional patronage employment practices from the plurality's more absolute position. Although it seemed that the "predictive" model of the *Marks* "narrowest grounds" doctrine would apply without problem in *Elrod*, the Supreme Court promptly intervened to return confusion to this area of the law.

Just four years after the *Elrod* decision, the Supreme Court, in *Branti v. Finkel*, again considered the constitutionality of politically motivated employment practices.[99] The plaintiffs in that case were assistant public defenders with political party affiliations different from the newly appointed public defender. The District Court for the Southern District of New York permanently enjoined the public defender from terminating the plaintiffs on the basis of their party affiliation.[100] The court noted that Justice Brennan's plurality opinion could be read as the authoritative opinion from *Elrod*, presenting three reasons why "*Elrod* need not be read so narrowly as the 'least common denominator' test would suggest it need be."[101] But this part of the district court's opinion

96. *Id.* at 375–76 (Burger, C.J., dissenting); *id.* at 376, 377–80 (Powell, J., dissenting, joined by Burger, C.J., and Rehnquist, J.).

97. *Id.* at 377.

98. *See, e.g.*, Stegmaier v. Trammell, 597 F.2d 1027, 1033–34 (5th Cir. 1979) (listing courts and commentators that have considered Justice Stewart's narrow position to be the holding in *Elrod*); Alfaro De Quevedo v. De Jesus Schuck, 556 F.2d 591, 592 (1st Cir. 1977) ("We need not pause long . . . to reflect upon the differences which separated the justices, for it is clear that the opinion of the Brennan plurality represents the outermost limit of the *Elrod v. Burns* restriction on partisan dismissals . . . ."); Loughney v. Hickey, 480 F. Supp. 1352, 1362 (M.D. Pa. 1979) ("Because the concurring opinion added the element of 'nonconfidential', most federal courts have regarded it as narrower than the plurality opinion and have followed it as the governing law."), *vacated*, 635 F.2d 1063 (3d Cir. 1980), *aff'd*, 673 F.2d 1300 (3d Cir. 1981).

99. 445 U.S. 507 (1980).

100. Finkel v. Branti, 457 F. Supp. 1284, 1293 (S.D.N.Y. 1978), *aff'd*, 598 F.2d 609 (2d Cir. 1979), *aff'd*, 445 U.S. 507 (1980).

101. *Id.* at 1289.

was *dicta*, as the court went on to find that the plaintiffs were not policymaking or confidential employees and therefore were covered by both the *Elrod* plurality and concurrence. The court held for the plaintiffs and the Second Circuit affirmed.[102]

On appeal, the Supreme Court also held for the plaintiffs. Rather than affirming the lower courts and thereby adopting their interpretation of the *Elrod* holding, the Court presented a new rule for patronage hiring cases. Justice Stevens, writing for the Court, stated that "party affiliation is not necessarily relevant to every policymaking or confidential position."[103] The Court rejected Justice Stewart's more narrow position in *Elrod*, but the opinion was not written as though it overruled a precedent.[104] Therefore, the Court implicitly rejected the *Marks* doctrine. More to the point, the Court's new interpretation created a break in authority with the lower federal courts' prevailing views of the Supreme Court's position, thereby denying the validity of the "predictive" justification of the *Marks* doctrine.

Teague v. Lane[105] provides another example of the *Marks* rule's predictive failure. At issue in *Teague* was the appropriateness of considering a changed procedural standard in a petition for a writ of habeas corpus. Petitioner claimed that the Court's decision in *Batson v. Kentucky*,[106] which altered the evidentiary standard required to establish an invalid use of peremptory challenges,[107] invalidated his trial; to allow the petitioner to claim the benefit of the procedural change would require its retroactive application to collateral review cases.[108] The Court divided over

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102. Finkel v. Branti, 598 F.2d 609 (2d Cir. 1979) (affirming without opinion), *aff'd*, 445 U.S. 507 (1980).

103. *Branti*, 445 U.S. at 518.

104. *Id.* at 516–20. Justice Stewart, however, viewed the majority opinion as rejecting his position from *Elrod*, and therefore dissented. *Id.* at 520–21 (Stewart, J., dissenting).

105. 489 U.S. 288 (1989).

106. 476 U.S. 79 (1986).

107. *Batson* held that "an inference that the prosecutor used that practice [peremptory challenges] to exclude the veniremen from the petit jury on account of their race" would support a prima facie case of racial discrimination under the Equal Protection Clause of the Fourteenth Amendment. A petitioner must also establish membership in "a cognizable racial group" and that the excluded veniremen were of the same group. *Id.* at 96.

108. The *Teague* plurality noted that if the new rule—based on petitioner's Sixth Amendment claim—were not retroactive, petitioner would benefit from it, while others similarly situated would not.

> We therefore hold that, implicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied ret-

the proper test for determining when retroactive application of a changed procedural standard is appropriate. Justice O'Connor, writing for the plurality, advanced a two-part test that would deny retroactive application in most collateral review cases.[109] Justice White based his concurrence on the more general principles governing retroactive application of new criminal procedures in cases on direct appeal, which, he concluded, did not mandate retroactive application in collateral review situations.[110] Joined by Justice Blackmun, Justice Stevens based his concurrence upon *stare decisis*; the Court had decided in *Allen v. Hardy*[111] that *Batson* "cannot be applied retroactively to permit collateral review of convictions that became final before it was decided."[112] These Justices rejected the plurality's attempt to define a far-reaching standard for all collateral review cases.[113]

Under the *Marks* "narrowest grounds" rule, "the concurrence by Justice Stevens and Justice Blackmun, stating a somewhat different test than the one formulated by the plurality, should be binding precedent."[114] Courts that have applied the *Marks* rule to *Teague* have generally followed Justice Stevens's concurrence.[115] But, disregarding the *Marks* rule, "the Supreme Court has adopted the *Teague* plurality's test as governing law . . . ."[116]

As the *Elrod* and *Teague* cases illustrate, the Supreme Court's disregard for the *Marks* "narrowest grounds" rule undermines its predictive ability. When the Supreme Court fails to follow the

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roactively to *all* defendants on collateral review through one of the two exceptions we have articulated.

Id. at 316 (plurality opinion).

109. The Court's new approach was to deny retroactive application of new constitutional rules of criminal procedure unless: (1) the new rule "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,'" *Teague*, 489 U.S. at 311 (quoting Mackey v. United States, 401 U.S. 667, 672 (1971) (Harlan, J., concurring in judgment in part and dissenting in part)), or (2) failure to retroactively apply the new rule would "seriously diminish the likelihood of obtaining an accurate conviction." *Id.* at 315.

110. *Id.* at 316–17 (White, J., concurring).

111. 478 U.S. 255 (1986) (per curiam).

112. *Teague*, 489 U.S. at 322 (Stevens, J., concurring, joined by Blackmun, J.).

113. *Id.* at 318–22.

114. Elortegui v. United States, 743 F. Supp. 828, 830 n.5 (S.D. Fla. 1990), *aff'd*, 943 F.2d 1317 (11th Cir.), *cert. denied*, 112 S. Ct. 1229 (1992).

115. *See, e.g., id.* (citing Eleventh Circuit decisions regarding the Stevens concurrence from *Teague* as governing).

116. *Id.* (citing Saffle v. Parks, 494 U.S. 484 (1990), and Butler v. McKellar, 494 U.S. 407 (1990) as endorsing the plurality approach from *Teague*).

result predicted by the *Marks* rule, it overrules a precedent, at least from the perspective of the lower courts, which must attempt to follow *all* of the High Court's decisions, even its plurality decisions. In contrast, the Supreme Court takes the view that it may abandon the "narrowest ground" position without according that position the deference normally provided a Supreme Court precedent. Lower courts should take the Supreme Court's rejection of the *Marks* rule as an invitation to follow suit.

B. *Universal Application of the* Marks *Rule*

In addition to having unsound analytical justifications, the *Marks* "narrowest grounds" doctrine is not universally applicable. *Marks* provides no useful guidance in those cases in which different Justices take different approaches to the issues. Such decisions cannot be forced into the *Marks* "narrowest grounds" mold because of the absence of any logical connection between the concurring opinions. This shortcoming is perhaps the most significant practical problem of the *Marks* technique; courts unable to find any logical connection between the opinions of the concurring Justices in the Court's most fragmented decisions have taken a random and unguided approach to plurality decisions that produce widely varying results. This Section examines *Baldasar v. Illinois*,[117] which provides a particularly powerful illustration of this problem.

In *Baldasar*, the Court addressed a unique application of the right to counsel doctrine: whether or not a prior uncounseled conviction could trigger a recidivist provision[118] and thereby expose the defendant to an enhanced prison term. Baldasar, after a second conviction for misdemeanor theft, faced an Illinois recidivist statute that treated subsequent offenses as felonies and subjected Baldasar to a sentence of one to three years imprisonment, as compared to the one year maximum for misdemeanor theft. Although Baldasar had no counsel at his first trial, his conviction was upheld, because he had only been fined, and governing Supreme

117. 446 U.S. 222 (1980). This *per curiam* decision, with three concurrences and a dissent, is properly considered a plurality, because none of the rationales presented in the concurrences received the assent of a majority of the Court.

118. A recidivist law exposes a criminal defendant to a harsher penalty due to prior convictions. The term recidivist refers to "[a] habitual criminal; a criminal repeater." BLACK'S LAW DICTIONARY, *supra* note 87, at 1269.

Court decisions upheld uncounseled convictions unless the defendant received a prison sentence.[119] At his second trial for theft, Baldasar was appointed counsel and properly convicted.

The Supreme Court divided over whether or not to uphold Baldasar's increased sentence. Four Justices—two concurring opinions were joined by Justices Brennan and Stevens—agreed that application of the Illinois recidivist statute violated *Scott*. In his concurrence, Justice Stewart stated that he would have held that the increased sentence clearly violated the rule set down in *Scott v. Illinois*.[120] Justice Marshall elaborated on this position in his concurrence:[121] "That petitioner has been deprived of his liberty 'as a result of [the first] criminal trial' could not be clearer. If it had not been for the prior conviction, petitioner could not have been sentenced to more than one year for the present offense."[122] In a separate concurrence, Justice Blackmun relied on his dissenting position in *Scott*. He believed that counsel should be required anytime a "defendant is prosecuted for a non-petty criminal offense, that is, one punishable by more than six months' imprisonment,"[123] and that therefore, Baldasar's prior conviction was invalid and could not be used to activate Illinois' recidivist provision.[124] Although this position was accepted by no other Justice in *Scott* or *Baldasar*, Justice Blackmun did provide the necessary fifth vote in *Baldasar*, preventing the increased sentence.

The *Baldasar* dissent interpreted *Scott* as holding that any conviction not resulting in imprisonment is valid for all purposes, including the triggering of a recidivist law.[125] Therefore, Baldasar's prior conviction was properly used by the Illinois courts. To hold otherwise, the dissent argued, would only confuse the holding from *Scott* "that 'actual imprisonment [is] the line defining

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119. Scott v. Illinois, 440 U.S. 367 (1979) (holding that an indigent defendant may not be sentenced to imprisonment without the assistance of appointed counsel).

120. *Baldasar*, 446 U.S. at 224 (Stewart, J., concurring, joined by Brennan and Stevens, JJ.) (citing *Scott*, 440 U.S. at 367).

121. *See id.* at 224–29 (Marshall, J., concurring, joined by Brennan and Stevens, JJ.) (citing *Scott*, 440 U.S. at 367).

122. *Id.* at 226 (quoting *Scott*, 440 U.S. at 372).

123. *Id.* at 229 (Blackmun, J., concurring) (citing *Scott*, 440 U.S. at 389–90 (Blackmun, J. dissenting)). Misdemeanor theft was punishable by more than six months imprisonment in Illinois. *Id.* at 230.

124. *Id.* at 230.

125. *Id.* at 230–35 (Powell, J., dissenting, joined by Burger, C.J., White, and Rehnquist, JJ.).

the constitutional right to appointment of counsel.' "[126] This line served as clear notice to sentencing judges: if the defendant is not *actually imprisoned*, the conviction will stand with or without counsel. The dissent predicted that the Court's decision in *Baldasar* would only lead to confusion.

The dissent's prophecy could hardly have been more accurate. However, it is not the reasoning of the *Baldasar* opinions that has given the lower courts difficulty. Instead, the confusion begins when the lower courts attempt to apply the *Marks* "narrowest grounds" doctrine to the *Baldasar* opinions. What is the "least common denominator" from *Baldasar*? The concurrences of Justices Stewart and Marshall, which were joined by two other Justices, employed the same, or at least highly similar, logic. Their reasoning, however, was sharply opposed by the dissent. Therefore, to apply *Marks* properly, some common ground must be found between the concurring opinions of Justices Stewart and Marshall and the concurring opinion of Justice Blackmun. Imputing such consensus is problematic at best.

Although "there does not seem to be any such least common denominator among the *Baldasar* opinions,"[127] many lower courts have attempted to force *Baldasar* into the *Marks* mold. The poor fit is indicated by the different results reached. In *Santillanes v. United States Parole Commission*,[128] the Court of Appeals for the Tenth Circuit held that Justice Blackmun's opinion was the holding of the *Baldasar* Court. By respecting Justice Blackmun's attempt to cling to his *Scott* dissent, the Tenth Circuit, then, not only undermined the majority position from *Scott*, but adopted from *Baldasar* a position endorsed by only one Member of the Court.

An Alabama court reached a conclusion similar to the Tenth Circuit's, holding that Justice Blackmun "agreed with the concurring view" of Justice Marshall and that "this rule [Marshall's] can be carved out as the holding of the majority."[129] However, the Alabama court limited Justice Marshall's position to prior convictions punishable by less than six months' imprisonment, thereby grafting Justice Blackmun's position onto the position embodied in

126. *Id.* at 231 (quoting *Scott*, 440 U.S. at 373).

127. State v. Novak, 318 N.W.2d 364, 368 (Wis. 1982).

128. 754 F.2d 887, 889 (10th Cir. 1985). This position was also adopted by the North Dakota Supreme Court in State v. Orr, 375 N.W.2d 171, 176 (N.D. 1985).

129. Bilbrey v. State, 531 So. 2d 27, 32 (Ala. Crim. App. 1987).

Justice Stewart's and Justice Marshall's concurring opinions.[130] The Tenth Circuit and the Alabama court represent a minority view, however, as most courts have adopted Justice Marshall's concurrence from *Baldasar* as governing.[131] Yet Justice Marshall's opinion was joined by only two other Members of the Court. Even with Justice Stewart's concurrence, "the Court was evenly split four to four over whether an uncounseled conviction which was valid under *Scott* was valid for all purposes or invalid insofar as it provided the basis for incarceration upon a subsequent conviction."[132] In this sense, *Baldasar* could be treated as an affirmance by an equally divided Court.[133]

The inconsistent treatment of *Baldasar* is not unique; several other Supreme Court plurality decisions have created similar confusion.[134] These cases illustrate an important shortcoming of the

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130. *Id.*

131. *See, e.g.*, Addvensky v. Gunnell, 605 F. Supp. 334, 338 (D. Conn. 1983); People v. Olah, 298 N.W.2d 422, 422 (Mich. 1980), *cert. denied*, 450 U.S. 957 (1981).

132. State v. Novak, 318 N.W.2d 364, 368 (Wis. 1982).

133. *See* United States v. Pink, 315 U.S. 203, 216 (1942) (holding that an affirmance by an equally divided Court is of no precedential value). The Fifth and Seventh Circuits have taken essentially this approach, limiting *Baldasar* to its facts and relying primarily on *Scott v. Illinois*. United States v. Eckford, 910 F.2d 216, 220 (5th Cir. 1990); Schindler v. Clerk of Circuit Court, 715 F.2d 341, 345 (7th Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984); *see also* David S. Rudstein, *The Collateral Use of Uncounseled Misdemeanor Convictions after* Scott *and* Baldasar, 34 U. FLA. L. REV. 517, 529 (1982) (questioning the precedential value of *Baldasar*).

134. *See, e.g.*, Badham v. March Fong Eu, 694 F. Supp. 664 (N.D. Cal. 1988) (citing Davis v. Bandemer, 478 U.S. 109 (1986), which considered the constitutionality of state redistricting plans). *Badham* provides the following description of the *Bandemer* decision:

> Of the six justices who believed that partisan gerrymandering claims were justiciable, a plurality of four held that "a threshold showing of discriminatory vote dilution is required for a prima facie case of an equal protection violation." Two justices dissented, expressing the view that "a state legislature violates the Equal Protection Clause by adopting a redistricting plan designed solely to preserve the power of the dominant political party." Three justices concurred in the result on the ground that partisan gerrymandering claims were simply non-justiciable.

Id. at 668 (citations omitted). It is difficult to find a logical connection between the plurality and concurring views from *Bandemer*, as described in *Badham* above. *See also* Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 884 (2d Cir. 1981) (citing First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972) (Citibank I), and stating, "the divergent views of the majority appear to provide no common ground from which we may articulate a *Citibank I* rationale"). *See generally* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989); and their progeny. As the Fifth Circuit quipped, "We frankly admit that we are not entirely sure what to make of the various *Bakke* opinions. In over one hundred and fifty pages of United States Reports, the Justices have told us mainly that they have agreed to disagree." United States v. City of Miami, 614 F.2d 1322, 1337 (5th Cir.

Marks "narrowest grounds" doctrine: When concurring opinions do not address the same issues, there can be no common ground on those issues. This obvious conclusion is of little consolation to lower courts faced with the Supreme Court's rigid mandate: Thou shalt find the "narrowest ground" in our decisions, even if we ourselves were unable to do so.

C. *Consequences of the Failures of the* Marks *Rule*

The preceding analysis illustrates the failures of the *Marks* rule. It produces inconsistent results in those cases that appear amenable to the "narrowest grounds" technique.[135] It also fails to reliably predict the outcome of Supreme Court decisions, largely because of the Court's disregard for the *Marks* dictate.[136] Finally, in the large number of fragmented decisions with no logical overlap among their concurring opinions ("no common ground" cases), the rule effectively leaves lower courts without guidance.[137]

The *Marks* doctrine's practical and analytical shortcomings undermine its ability to approximate the precedential effect of an Opinion of the Court. Although there is a gain in efficiency when lower courts agree on a "narrowest ground," it comes at the price of stability. As the *Elrod* and *Teague* examples illustrate,[138] an opinion's logical scope is not a reliable indicator of its ability to garner the support needed to form a majority. Therefore, simply following a narrow opinion does not enhance certainty or reliability. Further, the inconsistent application of the *Marks* rule undermines the integrity of the legal system. Courts recognizing these shortcomings face an even more troublesome dilemma than that caused by the fragmented decision: They can either perpetuate the *Marks* legal fiction, recognizing that it provides only limited practical improvement over a complete lack of guidance, or go their own way, disregarding the dictate of a clear majority of the Court.

1980).

135. *See supra* subsection II(A)(1).

136. *See supra* subsection II(A)(2).

137. *See supra* Section II(B).

138. *See supra* notes 92–116 and accompanying text.

III. AN ALTERNATIVE TO THE *MARKS* "NARROWEST GROUNDS" DOCTRINE

The *Marks* rule fails to eliminate the problems caused by Supreme Court plurality decisions. The Court's continual disregard of the *Marks* procedure not only creates doubt about its viability, but also undermines any stability and predictability it might produce. Moreover, many courts have recognized the limited applicability of the *Marks* rule and have refused to apply it to cases in which they can find no "narrowest ground."[139] These courts should reject such a counterproductive and arbitrary judicial tenet rather than perpetuate this legal fiction and the problems it creates.

This Part presents an alternative method for identifying the governing rationale in the Supreme Court's fragmented cases. Section A discusses the development of the various methods used historically to interpret plurality decisions. Section B introduces a hybrid approach to interpreting plurality decisions, which integrates the different methods explained in Section A. This alternative to the *Marks* "narrowest grounds" doctrine is based on traditional notions of precedent, tempered by the hindsight gained through study of the "narrowest grounds" approach. It is intended to provide a universally applicable, coherent set of groundrules for finding the authority in fragmented cases. Directed at the inferior tribunals tasked with interpreting these plurality decisions, this approach is a form of damage control rather than a corrective measure. The responsibility for avoiding such "juridical cripples" lies with the Supreme Court.[140] Finally, Section C compares the

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139. *See, e.g.*, King v. Palmer, 950 F.2d 771, 781–82 (D.C. Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 3054 (1992).

140. *See* Davis & Reynolds, *supra* note 2, at 59 (noting problems produced by fragmentation of the Court, the causes of this division, and possible ways the Supreme Court could avoid these difficulties); Douglas J. Whaley, Comment, *A Suggestion for the Prevention of No-Clear-Majority Judicial Decisions*, 46 TEX. L. REV. 370 (1968) (also focusing on the reasons for such decisions and ways to avoid them); Note, *supra* note 1, at 1140–46 (attributing the frequent division on the Court to excessive value-oriented substantive reasoning).

The Court might also utilize the *certiorari* process to reduce the number of plurality decisions rendered. In many of these cases, different Justices simply address different issues. For an example, see the discussion of Baldasar v. Illinois, 446 U.S. 222 (1980), *supra* Section II(B). This problem could be partially avoided by narrowing the questions before the Court through the *certiorari* process. As a corollary to this point, it is also recommended that the Justices abandon the practice of adhering to their dissents from

hybrid approach to the *Marks* rule as analyzed in Part II, and concludes that this alternative method avoids many of the shortcomings of the *Marks* rule.

A. *Methods Used to Interpret Plurality Decisions*

The *Marks* "narrowest grounds" doctrine was a break from the approach used by most lower courts to interpret Supreme Court plurality decisions; prior to *Marks*, most lower courts treated the Court's plurality opinions as authoritative.[141] Following plurality opinions from the Court's fragmented cases was itself a break from the traditional approach, which limited plurality decisions to their results.[142] This Section discusses the development of these different approaches to Supreme Court plurality decisions.

The traditional view, which limited no-clear-majority decisions' precedential value to their results—and the movement away from the traditional view—is illustrated by the following excerpt from an early empirical study by the University of Chicago Law School:

> In summary, the "coordinate opinion" cases[143] have been cited predominately for their general results. As has been suggested, this is perhaps due to the presence of conflicting majority views of approximately equal strength and the consequent absence of a basis for choice between these views. Occasionally, however, the presence of unequal numerical alignments appears to have caused later courts to use the cited decision for the view stated in the plurality opinion. In this situation, there is of course some basis for choice.[144]

As divided cases became more common, more courts adopted plurality opinions as binding.[145] In fact, the courts in the numerous cases cited by the *Marks* Court in support of their "narrowest grounds" interpretation of the *Memoirs* decision had adopted the *Memoirs* plurality opinion as binding with little or no explana-

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certiorari petitions. Once an issue has been properly brought before the Court, the Justices should forsake their views on the propriety of addressing that issue in order that the matter be resolved. *See supra* note 134 (describing Davis v. Bandemer, 478 U.S. 109 (1986)).

141. *See* Novak, *supra* note 12, at 774–75.

142. *See supra* note 3 and accompanying text.

143. "Each of these cases contains more than one majority concurring opinion." These opinions adopt distinctly different rules of law. Comment, *supra* note 1, at 101.

144. *Id.* at 114.

145. *See* Novak, *supra* note 12, at 774–75.

tion.[146] The implicit assumption of the traditional view is that an opinion's precedential authority is directly proportional to the number of Justices that join it.

The Chicago study also noted that plurality opinions in "relative disparity" cases, which were "characterized by an inequality of scope between concurrences," were frequently followed.[147] Although such cases arguably contain a "narrowest ground," the Chicago study indicates that these cases were cited either for their results, in accordance with the traditional view, or for their plurality opinions.[148] No cases were found that were cited for their "narrowest grounds" opinions *per se*; in other words, when a "narrowest grounds" opinion was followed, it was not for the scope of its reasoning, but only for its having received more support than the broader concurring opinions.[149] Courts that broke with the traditional approach of limiting the Supreme Court's no-clear-majority decisions to their results rationed precedential authority to opinions in proportion to the number of Justices that joined them.

The trend toward following plurality opinions is even more strongly illustrated by the Chicago study's "narrow minority" subgrouping of cases, which were "characterized by the presence of a minority concurring opinion which is analytically not in conflict with the plurality opinion, except insofar as the plurality is broader than the minority."[150] These cases present the sharpest rejection of a "narrowest grounds" approach; the study found only

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146. *Marks*, 430 U.S. at 194 n.8; *see* Books, Inc. v. United States, 358 F.2d 935, 937 (1st Cir. 1966) (stating simply that obscenity determinations must be "[g]uided by the controlling opinions of the justices in the majority in the three cases decided March 21, 1966 in the Supreme Court of the United States [of which *Memoirs* was one] . . . as well as [by] earlier cases such as *Roth*") (citations omitted), *rev'd*, 388 U.S. 449 (1967); United States v. 35 Mm. Motion Picture Film, 432 F.2d 705, 713 (2d Cir. 1970) (noting that the film in question "cannot be proscribed as obscene within the meaning of *Roth* as explicated in *Memoirs*"); United States v. Ten Erotic Paintings, 432 F.2d 420, 421 (4th Cir. 1970) (*per curiam* decision with passing reference to *Memoirs*); Huffman v. United States, 470 F.2d 386, 393 (D.C. Cir. 1971) (referring to the obscenity test as "The *Roth-Memoirs* Obscenity Standard"); Southeastern Promotions, Ltd. v. Oklahoma City, 459 F.2d 282, 283 (10th Cir. 1972) (*per curiam* decision noting that the obscenity standard is to be found in *Roth* and *Memoirs*); United States v. Groner, 479 F.2d 577 (5th Cir. 1973) (en banc) (although plurality rejected *Memoirs* plurality's obscenity standard, the majority of judges—dissenters and a concurring judge—endorsed the *Memoirs* plurality as consistent with the *Roth* principles).

147. Comment, *supra* note 1, at 124 (footnote omitted).

148. *Id.* at 124–53.

149. *Id.*

150. *Id.* at 140.

one case that was cited for its "narrow minority" position from these decisions.[151] Most courts adopted the plurality opinions of these cases as binding, or following the traditional approach, limited these cases to their results. Although the "narrow minority" cases had "narrowest grounds" positions by definition, lower courts remained reluctant to impute consensus on the basis of the logical connection between opinions. Numerical support, not logical scope, determined the precedential respect accorded the opinions in the Supreme Court's fragmented cases. Not until the Court endorsed the "narrowest grounds" approach in *Marks* did lower courts routinely begin to look for coalitions that the Justices had refused to form.

Courts have used at least three distinct methods for interpreting plurality decisions: (1) the traditional approach, which limits plurality decisions to their results; (2) the method of according plurality opinions full precedential respect, a trend noted in the University of Chicago study; and (3) the *Marks* "narrowest grounds" approach.[152] Although there is merit to each of these views, none of them work well in all situations. The traditional view provides lower courts with too little guidance, especially in those situations in which the only relevant Supreme Court cases are plurality decisions. By limiting such cases to their results, lower courts would be disregarding the only Supreme Court analysis on point. A lower court should not completely disregard the logic of those decisions. The trend toward following plurality opinions noted in the Chicago study and the *Marks* "narrowest grounds" rule fail primarily due to indiscriminate application. A more comprehensive approach to the Court's fragmented decisions is needed—one that will both exploit and limit these competing interpretive techniques.

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151. *Id.* at 141–42. The case cited was Northern Security Co. v. United States, 193 U.S. 197 (1904). Its "narrow minority" position was followed in State v. Virginia-Carolina Chemical Co., 51 S.E. 455, 463 (S.C. 1905). The study noted 53 citations to *Northern Securities*'s general result and 31 citations to its plurality opinion. Comment, *supra* note 1, at 141–42. The study also noted two citations to another "narrow minority" decision, Haley v. Ohio, 332 U.S. 596 (1946), that appeared to look for agreement between the plurality and minority opinion. However, one of these citations occurred in a dissenting opinion and the other was not used to reach the result in the citing case. Comment, *supra* note 1, at 145 & n.237.

152. The preceding discussion of the *Baldasar* case sbows that each of these methods may be applied to the same decision by different courts. *See supra* notes 127–31 and accompanying text.

B. *An Alternative to* Marks*—The Hybrid Approach*

The *Marks* rule should be replaced by a hybrid approach which incorporates aspects of each of the competing practices within a framework defined by traditional notions of precedential authority. This hybrid approach proceeds in three distinct steps:

> *Step 1.* Identify the *rationes decidendi.* The traditional rules discussed in Part I are used to find the *ratio decidendi* of each opinion.
>
> *Step 2.* Identify the imperative authority. The *rationes* from step one are compared to distinguish plurality decisions from majority decisions. Plurality decisions' imperative authority is limited to their specific results. This step also identifies two forms of majority decisions that are frequently mistaken for plurality decisions: "false plurality" decisions[153] and "dual majority" decisions.[154] The *Marks* rule is applied to "false pluralities." Propositions singled out by applying the "narrowest grounds" approach to these decisions represent actual majority holdings. "Dual majority" decisions are treated like all other majority decisions.
>
> *Step 3.* Identify and rank the persuasive authority. This step ranks plurality decisions' *rationes decidendi* according to the number of Justices that support each rationale. Although a *ratio decidendi* that does not receive the support of a majority of the Supreme Court is *dictum*, its principles are persuasive authority and may be dispositive, absent contrary imperative authority.

This approach is more complex than the *Marks* "narrowest grounds" doctrine. However, the *Marks* rule's simplicity is deceptive; it masks the extensive problems created by the rule as well as the unresolved confusion in those cases in which the *Marks* technique is clearly inapplicable. A workable approach to the inherently complex problems of fragmented Supreme Court decisions will be proportionally demanding. Utilizing the principles discussed in

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153. These cases take the same form as true plurality decisions, but contain consensus on one or more *ratio decidendi. See* Note, *supra* note 1, at 1130–31.

154. These cases involve two distinct majorities: one group of Justices agrees on the result and a different group concurs on the *ratio decidendi. See* Novak, *supra* note 12, at 767–68; Comment, *supra* note 1, at 115. Because the result will dictate the positioning of the Justices—i.e., concerning concurring or dissenting opinions—dissenting Justices might make up part of the majority supporting the *ratio decidendi.* Traditionally, dissenters' votes did not count in determining which rationales received majority support. This view should be rejected. *See infra* subsection III(B)(2).

the preceding parts of this Note, each step of the proposed alternative to the *Marks* rule—the hybrid approach—is considered in detail in this Section.

1. *Identifying the* Rationes Decidendi. The first step of the hybrid approach requires the separation of *rationes decidendi* from *obiter dicta.* The *ratio decidendi* for each opinion is determined according to the principles of Goodhart and Wambaugh.[155] Every proposition "expressly or impliedly treated by the judge [or Justice] as a necessary step in reaching his conclusion"[156] is a *ratio decidendi.* Wambaugh's technique serves as a reliable check on propositions that have been preliminarily selected as the *ratio* of various opinions. His method involves inserting a term that would reverse the meaning of the chosen proposition and then determining whether the converse of this proposition would change the outcome. If this reversal would not change the result of the opinion, the selected proposition is not a *ratio decidendi.*[157]

2. *Identifying the Imperative Authority.* The second step of the hybrid approach requires a separation of imperative and persuasive authority. Imperative authority absolutely binds lower courts. The notion of persuasive authority recognizes that a decision's precedential value is not strictly limited to its *ratio decidendi* and result. This understanding is particularly important when there is no single *ratio decidendi* for the case, as in true plurality decisions. Proper use of the hybrid approach requires recognition of the varying levels of persuasive *dictum,* as well as an examination of classical concepts of precedential authority, to determine which propositions constitute imperative authority.[158]

Once the *ratio decidendi* for each opinion has been determined, they are compared. The extent of agreement among the Justices that support each *ratio* is noted. If a majority of the Justices agree on one or more *rationes,* the decision is not a plurality as to that issue. It is possible, even likely, that many decisions will contain majority agreement on some points and lack that level of

155. *See supra* Section I(A).

156. CROSS & HARRIS, *supra* note 3, at 72.

157. *See supra* note 20.

158. *See* Appendix A for a graphical representation of imperative and persuasive authority.

consensus on other issues. Only by parsing the decision into all of its *rationes decidendi* and noting their respective support can these *rationes* be separated into imperative and persuasive authority.

This step of the hybrid approach properly identifies "false plurality" decisions. Frequently misinterpreted,[159] "false plurality" decisions are majority decisions, and their *rationes* constitute imperative authority. However, determining the extent of the majority agreement in these cases requires a comparison of the various opinions' scope. When a majority of the Supreme Court agrees on one *ratio*, another Justice cannot limit the decision's imperative authority simply by writing a narrow concurrence. In contrast, when a narrow concurrence provides the necessary vote or votes to constitute majority assent, the *Marks* "narrowest grounds" doctrine is used to find the case's imperative authority. The *Marks* approach works in this situation because the "narrowest grounds" opinion will represent the outer limit of the majority agreement. "False plurality" decisions that do not depend on the vote of a "narrowest grounds" concurrence, should be treated as any other majority decision.

"Dual majority" cases present a unique problem.[160] Although there is majority assent on a particular *ratio*, some of the Justices in that majority may not have agreed with the case's result and therefore wrote or joined a dissenting opinion. Traditional conceptions of the *ratio decidendi* preclude use of any proposition taken by dissenting Justices to form a majority. This view has been attributed to the requirement that the *ratio decidendi* be the most narrow proposition necessary to reach the result. Positions taken by dissenting judges cannot be characterized as necessary to the result and therefore can never constitute the *ratio decidendi*. However, this distinction is meaningless because the models used to develop these notions of precedent presupposed the existence of a single judge. The presence of a multi-member Court alters this analysis. The reasons for the limitation of the *ratio* to those propositions necessary to the result hold the key to this quandary.

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159. Many courts have failed to adequately scrutinize these cases and have treated them as true plurality decisions. This treatment can lead to an unconscious rejection of a Supreme Court majority decision. Under the traditional approach to plurality decisions, the majority's reasoning would receive no weight if the case were mistaken for a true plurality decision. *See* Note, *supra* note 1, at 1130–32.

160. See Appendix B for a comparison of dual majority and true plurality decisions.

Several explanations have been offered in support of this limitation. The most widely accepted view is that the *ratio* of a case is limited by principles of judicial restraint.[161] A judge may not establish propositions unnecessary to decide the actual case, as this would constitute legislating from the bench. A more fundamental reason for this principle of restraint is that adjudication on the basis of hypotheticals or unproven propositions is insufficiently supported by the factual record and the arguments presented. This type of judicial legislation would be imprudent, because the arguments supporting and opposing these propositions may be incomplete. Only when the interests of the parties before the court are at stake can it be assumed that the court has heard all the relevant arguments on the matter.[162]

Affording imperative authority to propositions advanced by dissenting judges is consistent with these considerations. The fortuity of the alignment of the judges does not alter the exhaustive nature of the arguments presented to the court. Nor does it make sense to argue that dissenting judges have not considered their positions as carefully as the judges that vote with the majority. The same standards for determining the *ratio decidendi* of each majority opinion should be applied to dissenting opinions. Any resulting proposition that is supported by a majority of the members of a court should be considered imperative authority.[163] However, if the traditional approach is followed, dissenting judges' propositions must be considered *dicta*. Adhering to the traditional view would not significantly alter the operation of the hybrid approach to fragmented cases.[164]

The hybrid approach limits Supreme Court plurality decisions to their results. Any line of reasoning that does not receive the assent of a majority of the Justices should not constitute imper-

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161. CROSS & HARRIS, *supra* note 3, at 40–43; Collier, *supra* note 28, at 801, 824; *supra* notes 20–22 and accompanying text.

162. WAMBAUGH, *supra* note 3, at 10–11.

163. Comment, *supra* note 1, at 115–24 (referring to dual majority cases as having "two majorities—the plurality and minority as to result, and the minority and dissent as to the reasoning"); Novak, *supra* note 12, at 767–69 (stating, with respect to dual majority cases, that "the technical alignment of the Justices is irrelevant; what is important is the presence of agreement by an actual majority of the Court").

164. "*Dicta* of the highest degree of persuasiveness may often, for all practical purposes, be indistinguishable from pronouncements which must be treated as *ratio decidendi* . . . ." CROSS & HARRIS, *supra* note 3, at 77; *see also infra* subsection III(B)(3).

ative authority.[165] This position creates a seemingly anomalous situation when the plurality Court reaches a result inconsistent with the reasoning of prior Supreme Court decisions. A lower court is only required to follow the plurality decision when faced with the same fact pattern.[166] Otherwise, the lower court must follow the reasoning of the earlier Supreme Court majority decision, which can lead to a result that appears to be inconsistent with the Court's more recent ruling. This outcome is correct, however, because the lower court found a material difference between its facts and those relied upon by the plurality Court.[167]

3. *Identifying and Ranking the Persuasive Authority.* Once the hybrid model has identified a case as a true plurality, the decision's *dicta* is ranked. This weighting essentially follows the numbers and the trend toward following plurality opinions noted by the Chicago study. The persuasive authority of a proposition is proportional to the number of Justices supporting that view. Plurality opinions are assigned the highest level of persuasiveness,[168]

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165. This approach embraces, albeit implicitly, the principle that a fragmented Court cannot overrule a majority holding. Several courts have taken this position. *See, e.g.*, Martin v. Dugger, 891 F.2d 807, 809 (11th Cir. 1989), *cert. denied*, 111 S. Ct. 222 (1990); Bratton v. Detroit, 704 F.2d 878, 886 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); United States v. Groner, 479 F.2d 577 (5th Cir.) (en banc), *vacated and remanded*, 414 U.S. 969 (1973); Messer v. Kemp, 647 F. Supp. 1035, 1040 (N.D. Ga. 1986).

166. That is, a factual situation that does not differ in any material way from that before the plurality Court.

167. A fragmented Supreme Court opinion can lead to conflicting results in another setting. Consider the hypothetical in which the Court holds 6–3 that given facts A and B, result X is required. In a later case, the same facts are implicated, but result X was not reached by the court below. The lower court did not apply the earlier holding of the Court because of a procedural irregularity. On appeal, three Justices from the earlier majority vote to dismiss the appeal, relying on the procedural issue. These Members do not address the merits of the claim. The remaining Justices, all reaching the merits, follow their positions from the earlier decision. The outcome is now the reverse of the prior decision. What is the proper interpretation of this conflict? The *ratio decidendi* of the prior majority decision—given facts A and B, the proper result is X—is still binding authority. This follows from the proposition that a plurality cannot overrule a majority holding. The precedential value of the hypothetical plurality decision is limited to those situations in which the same procedural questions accompany facts A and B. "It is important to note that when a case is used merely as an analogy, and not as a direct binding precedent, the reasoning by which the court reached its judgment carries greater weight than the conclusion itself." Goodhart, *supra* note 18, at 181 n.73.

168. However, if the traditional view is followed, and dissenting votes are not counted toward majority consensus on a proposition, such alignments would constitute the highest level of persuasive authority. *See* Appendix A.

followed by propositions supported by an equal number of Justices. *Rationes* that receive equal support should be ranked according to their consistency with prior majority decisions. When all other considerations are equal, principles supported by Justices voting with the majority should be given greater weight. Appendix A provides a graphical representation of this ranking of persuasive authority.

Proper use of the hybrid approach requires an understanding of the distinction between refining and rejecting prior authority. A later refinement of Supreme Court doctrine cannot alter the principles of an earlier case, but can lead to results that appear to be inconsistent with prior cases.[169] As long as the subsequent position can be fairly characterized as consistent with the earlier majority holding, the seemingly contradictory results are attributable to incorrect interpretation of those standards by lower courts.[170] Under the hybrid approach, plurality decisions that refine prior majority holdings are followed, but propositions from plurality decisions that break with imperative authority are not followed. In the latter setting, the prior positions must be considered rejected, which can only be done by a majority of the Court.

C. *A Comparison of the Hybrid Approach and the* Marks *Rule*

The hybrid approach avoids the shortcomings of the *Marks* "narrowest grounds" rule. This alternative approach does not rely on "implicit consensus,"[171] and should be a better predictor of future Supreme Court decisions.[172] Rather than force a lower court to find consensus in all plurality decisions, as the *Marks* rule does, the hybrid approach carefully looks for actual agreement. When consensus does exist, this approach will recognize that consensus and accord such majority assent full precedential authority. Moreover, when genuine consensus is lacking, the hybrid approach provides a lower court with a reasoned method of assigning persua-

169. *See infra* Section IV(A) (applying the hybrid model to the *Memoirs* decision).

170. That is, lower courts that fail to recognize the reconciliation between the two Supreme Court decisions. When the later decision by the Supreme Court merely refines the principles of its earlier decision, lower courts should be able to reach results that are consistent with both decisions. Any interpretation of this situation that finds that the later Supreme Court decision has broken from the prior doctrine has misunderstood the earlier position.

171. *See infra* Section IV(A).

172. *See infra* Sections IV(C)–(D).

sive authority to a decision's propositions. In no case will the hybrid approach require a lower court to "construct" consensus.

This alternative to the *Marks* doctrine should also avoid the "narrowest grounds" rule's predictive failures. Under the hybrid approach, persuasive authority is allocated in accordance with the number of Justices that support a certain *ratio*. This allocation is consistent with the trend noted by the Chicago study toward following plurality opinions from the Supreme Court's fragmented cases. If the Court seeks to follow an opinion from an earlier plurality decision, it should employ the same criteria used by lower courts. More importantly, however, numerical alignment is a more reliable prognosticator than logical scope. A position that was supported by four Justices seems much more likely to garner the additional support needed to form a majority than a position taken by a single Justice. Following the position advanced by the largest number of Justices would enhance certainty, by more accurately predicting the outcome of future Supreme Court decisions. Improving predictability would minimize the breaks in authority that occur when the Supreme Court takes a view inconsistent with the "narrowest grounds" position of its prior fragmented case.[173]

Moreover, the hybrid alternative is universally applicable. It addresses clear-majority cases, false pluralities, dual majority cases, and true plurality decisions. Most importantly, the hybrid approach covers those decisions in which the Justices do not address the same issues, such as the *Baldasar* case.[174] The imperative authority of these cases is limited to their results, with the positions supported by the most Justices receiving the most persuasive authority. The flexibility provided by the multi-step process and multiple interpretive techniques of the hybrid approach is a significant improvement on the rigid, limited *Marks* "narrowest grounds" doctrine.

IV. CASE STUDIES UNDER THE HYBRID APPROACH

Using the hybrid model developed in Part III, this Part reconsiders the cases interpreted in Part II under the *Marks* "narrowest grounds" doctrine. The results of this exercise will be compared to those produced by the *Marks* rule.

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173. *See supra* subsection II(A)(2)(b).
174. *See supra* Section II(B).

A. Memoirs

Application of the hybrid model to the *Memoirs* decision[175] is straightforward. At step one, the *rationes decidendi* are identified. Step two compares these *rationes*, leading to the conclusion that *Memoirs* is a true plurality decision. According to this step of the hybrid, *Memoirs*'s imperative authority is limited to its result that *Fanny Hill* is not obscene. The final step of the hybrid approach ascribes maximum persuasive authority to the *Memoirs* plurality opinion. The plurality opinion must be applied in light of the imperative authority from the earlier Opinion of the Court in *Roth*. If a court agrees with the *Memoirs* plurality's characterization of their three-part test as consistent with the *Roth* principles, the plurality's standard should be followed. If, however, the plurality position is seen as a significant break with *Roth*, the *Roth* standard should continue to be applied.[176] Given the reasoning of the plurality in *Memoirs*, it seems fair to characterize that opinion as a refinement of *Roth*.

The hybrid approach produces a similar result to that reached in the *Marks* decision using the "narrowest grounds" doctrine. Under both techniques, the *Memoirs* plurality opinion is recognized as the most authoritative. However, under the hybrid approach, a plurality opinion can constitute only persuasive authority. This distinction is important, because the *Marks* rule would allow a plurality—or even a single Justice—to overrule previous clear-majority decisions, as long as that opinion provided the "narrowest grounds" for the decision. Only when a majority of the Justices actually agreed on a position will the hybrid approach recognize that position as imperative authority.

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175. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass., 383 U.S. 413 (1966). The *Memoirs* Court held that the book, *Fanny Hill*, was not obscene and, therefore, protected by the First Amendment. However, the Justices were unable to agree on a definition of obscenity. A plurality of three Members endorsed a three-part test for obscenity. Two Justices agreed with the result—that *Fanny Hill* was protected by the First Amendment—because they believed that all speech was protected, even obscenity. The sixth Justice concurring in the result would have equated obscenity with "hard-core" pornography. Three Justices dissented and offered a more restricted definition of obscenity. *See supra* notes 57–65 and accompanying text.

176. Miller v. California, 413 U.S. 15 (1973), now controls this issue. Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 124–26 (1989); *see supra* note 56.

B. Delaware Valley II

Delaware Valley II[177] presents a good example of the importance of the hybrid approach's first step and shows how this approach fills a void left by the *Marks* "narrowest grounds" doctrine. Under the traditional *ratio decidendi* test, the plurality opinion may contain alternative rationales.[178] Neither position—neither the absolute rejection of enhancement awards nor the restrictive approach to such awards—is more necessary to the plurality's result than the other. A comparison of the plurality's more lenient position with that of Justice O'Connor's opinion is, therefore, appropriate and indicates majority support for the common principles. In this sense, *Delaware Valley II* may be characterized as a false plurality case; step two of the hybrid approach would apply the *Marks* "narrowest grounds" rule to find the extent of the majority agreement.

On the other hand, *Delaware Valley II* may be regarded as a true plurality case, with the plurality rejecting all contingency enhancement awards.[179] Under this view, the final section of the plurality's opinion is *dictum*. That section's acceptance of enhancement awards in extreme situations is not necessary to reject the enhancement at issue in *Delaware Valley II*. If this interpretation of *Delaware Valley II* is adopted, the hybrid approach would limit the case's imperative authority to its result.

The hybrid approach's ranking of persuasive authority is only needed when the case is a true plurality. Therefore, if *Delaware Valley II* is viewed as a false plurality—i.e., majority agreement that enhancement awards should be available, but limited to extreme situations—the case's persuasive authority need not be ranked because the majority's position is imperative authority.

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177. Pennsylvania v. Delaware Valley Citizens Council for Clean Air, 483 U.S. 711 (1987). *Delaware Valley II* considered the availability of contingency enhancement awards under federal fee shifting statutes. A plurality of four Justices would have rejected such awards in all cases. However, the plurality went on to state that if their absolute rejection of enhancement awards was not accepted, these awards should be limited to extreme cases. Justice O'Connor concurred in the result and took a position somewhat similar to the plurality's "extreme cases" rationale. *See supra* notes 71–77 and accompanying text.

178. "The adoption of one line of reasoning by the judge is not incompatible with his adopting a further line of reasoning. Allowance must be always made for the fact that a case may have more than one *ratio decidendi*." CROSS & HARRIS, *supra* note 3, at 72 n.75.

179. *See supra* note 82.

Under the alternative view—that the plurality opinion's *ratio decidendi* is the rejection of all enhancement awards—there is no majority consensus. A court that adopts this view of *Delaware Valley II* must use step three of the hybrid approach to rank the decision's persuasive authority. The hybrid approach would assign maximum persuasive authority to the plurality's position that contingency enhancements were "impermissible under the usual fee-shifting statutes."[180] This position would govern absent contrary imperative authority.

The hybrid approach offers two possible results, depending on the interpretation of the *Delaware Valley II* plurality opinion.[181] The *Marks* rule treats Justice O'Connor's opinion as governing.[182] If the plurality's two positions are considered alternative *rationes decidendi*, the hybrid approach produces the same result as the *Marks* doctrine. However, if a court does not accept that interpretation of the plurality opinion, *Marks* leaves them without guidance. The hybrid would fill that void, by treating the *Delaware Valley II* plurality opinion as governing absent contrary imperative authority. The Court of Appeals for the District of Columbia Circuit, sitting *en banc*, recently adopted this interpretation of *Delaware Valley II*.[183] The D.C. Circuit majority also expressly called on the Supreme Court to resolve this confusion.[184]

C. Elrod

In *Elrod v. Burns*,[185] the Court rejected certain political patronage hiring practices as unconstitutional under the First Amendment.[186] The hybrid approach compares the *Elrod* plurality's absolute rejection of this practice, with Justice Stewart's view that patronage dismissals were unconstitutional only when they involved

180. *Delaware Valley II*, 483 U.S. at 727 (opinion of White, J., joined by Rehnquist, C.J., Powell, and Scalia, JJ.).

181. The author expresses no view as to which of these analyses is more reasonable.

182. *See supra* note 78 and accompanying text.

183. King v. Palmer, 950 F.2d 771, 784 (D.C. Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 3054 (1992).

184. "We have done our best to apply *Delaware Valley II* but have been unable to derive a governing rule from the opinion. Considering our struggle to understand and apply [it] as well as the difficulties our sister circuits have experienced, we urge the Supreme Court to clarify its position." *Id.* at 785.

185. 427 U.S. 347 (1976).

186. *See supra* notes 92–97 and accompanying text.

"nonpolicymaking, nonconfidential government employee[s]."[187] These two views do not contain the agreement necessary to call either proposition the *ratio decidendi* of the case.[188] The hybrid approach therefore considers *Elrod* a plurality decision and limits that case's imperative authority to its result.

Step three of the hybrid approach ranks the persuasive authority and deems the *Elrod* plurality opinion the most authoritative. There was no contrary imperative authority on point, as *Elrod* was a case of first impression. Therefore, lower courts should have followed the *Elrod* plurality. This is a different result than that produced by the "narrowest grounds" doctrine, which would require a lower court to follow Justice Stewart's concurrence. It should be noted, however, that the Supreme Court rejected his concurrence in *Branti v. Finkel.*[189] This example illustrates the hybrid approach's superior predictive ability.[190]

D. Teague

Analyzing the divergent opinions in *Teague v. Lane*[191] provides an excellent example of the hybrid analysis.[192] The Court divided over the resolution of Teague's third claim,[193] which concerned the Sixth Amendment's fair cross-section requirement.[194] The plurality did not consider the merits of this claim, because it failed to satisfy their new retroactivity standard. Justices Stevens and Blackmun, together with the two dissenting Justices, reached the merits and would have found petitioner's Sixth Amendment claim valid. These four Justices also opposed the plurality's new

187. *Elrod,* 427 U.S. at 375 (Stewart, J., concurring, joined by Blackmun, J.).

188. There was some agreement on the invalidity of patronage dismissals. It seems questionable, however, that the plurality implicitly agreed with the limitations placed on their position by the concurring Justices. To the extent that this interpretation is accepted *Elrod* should be interpreted as a false plurality.

189. 445 U.S. 507 (1980).

190. *See supra* Section III(C).

191. 489 U.S. 288 (1989).

192. *See supra* notes 105–11 and accompanying text.

193. A majority of the Court rejected Teague's first two claims, which involved other reasons for granting his petition for a writ of habeas corpus. 489 U.S. at 294–99.

194. The "fair cross-section" requirement is normally traced to Glasser v. United States, 315 U.S. 60 (1942). *Glasser* requires that "the jury be a 'body truly representative of the community.' " *Id.* at 85 (quoting Smith v. Texas, 311 U.S. 128, 130 (1940)). *See generally* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 22.2(d) (2d ed. 1992) (discussing the fair cross-section requirement).

standard for retroactive application, which, they argued, was adopted "without benefit of oral argument on the question and with no more guidance from the litigants than a three-page discussion in an *amicus* brief."[195] Justice White did not address either the merits of this claim or the plurality's new retroactivity standard.

To properly assign precedential weight to these positions requires the hybrid's step-by-step approach. At step one, the *ratio decidendi* for each opinion is determined. Next, the propositions that satisfy this threshold standard are compared. The *Teague* plurality's new retroactivity test, when considered alone, satisfies the traditional *ratio decidendi* standards. As the issue was framed by the plurality, some standard was needed to determine whether or not Teague's Sixth Amendment claim would be applied retroactively. Therefore, the plurality's new retroactive application standard was necessary to their resolution of the case.[196] However, when this single *ratio decidendi* is compared with the *rationes* of the other opinions, it does not receive majority assent and must therefore be considered *dictum.* The concurring Justices' resolution of the Sixth Amendment claim on the merits fails the threshold *ratio decidendi* test. That conclusion was not necessary to their result, as they felt constrained by the prior holding in *Allen v. Hardy.*[197] The dissent's conclusion that there was merit to petitioner's Sixth Amendment claim satisfies the threshold *ratio* test, but did not receive majority assent, and is therefore also *dictum.*[198]

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195. *Teague,* 489 U.S. at 330.

196. *See supra* note 109 and accompanying text.

197. 478 U.S. 255 (1986) (holding that Batson v. Kentucky, 476 U.S. 79 (1986), "should not be applied retroactively on collateral review of convictions that became final before our opinion was announced").

198. *Teague* presents an interesting application of the approach advocated by this Note. When a concurring Justice endorses a proposition but does not rely on it—e.g., because of *stare decisis* constraints—that proposition cannot be considered a *ratio decidendi* of the concurring opinion. Therefore, the concurring Justice cannot be counted with dissenting Justices that took the same position in an effort to find majority assent. Although this may appear to be an anomalous result, it follows from aceepted principles of precedential authority. Determining the authority of the various propositions found in different opinions of a multi-member court is a procedure requiring several steps. At the first stage, each opinion's propositions are tested against the traditional *ratio decidendi* standard. Principles that fail this threshold test cannot be counted toward a majority holding. This does not mean that the Justices' views are inconsequential. For example, a proposition endorsed by three concurring and three dissenting Justices should be afforded significant persuasive authority. This situation, however, should be distinguished from a dual majority. In that setting, the concurring and dissenting Justices adopt and apply the same rule of law, but reach different results. In such a case, the principle in question

The hybrid approach, therefore, indicates that there is no imperative authority concerning Teague's Sixth Amendment claim. Nor does *Teague* provide an absolutely binding holding on retroactivity. Determining what the various *dicta* in *Teague* mean requires a ranking of the decision's persuasive authority. The plurality's retroactivity standard should receive the highest degree of persuasive authority, with the resolution of the Sixth Amendment claim by the dissenting and concurring Justices receiving somewhat less precedential value.[199]

Unlike the *Marks* rule, application of the hybrid approach produces a flexible set of principles from the *Teague* decision. As in *Elrod*, the Supreme Court adopted the *Teague* plurality's position in a later case.[200] If lower courts had followed the *Teague* plurality opinion, as the hybrid approach requires, they would have accurately predicted the Supreme Court's later decision. More importantly, however, this alternative method accounts for the other propositions found in the *Teague* decision. While this may lead to more detail in these fragmented decisions, it could avoid the confusion caused by cases like *Teague*, in which the Justices take entirely different approaches to the case. By ascribing less value to positions that were not addressed by all the Justices, the hybrid test encourages the Members to address the same issues.

E. Baldasar

Analysis of *Baldasar v. Illinois*[201] under the hybrid approach further illustrates this technique's universal applicability. Step one identifies three distinct *rationes decidendi*: the rationale of Justices Stewart and Marshall, the dissent's rationale, and Justice Blackmun's rationale.[202] Because there is no majority agreement

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will satisfy the threshold *ratio decidendi* standard for both the concurring and dissenting opinions. *See* Appendix B for an example of these two situations.

199. It could also be argued that the *Teague* plurality's retroactivity standard evenly divided the Court and should be treated as an affirmance by an evenly divided Court. *See supra* note 133. However, as the retroactivity issue was not raised in the court below, it would seem strange to call the Supreme Court decision an affirmance. Additionally, the Justices that opposed the plurality's new standard did so largely because they felt the issue was not properly before the Court. The Court's subsequent decisions, which endorsed the *Teague* plurality's retroactivity approach, make this argument moot. *See supra* note 116.

200. *See supra* note 116.

201. 446 U.S. 222 (1980).

202. Justices Stewart and Marshall wrote separate opinions, but used quite similar

on any of these *rationes*, *Baldasar* is a plurality decision,[203] and only its result is absolutely binding on lower courts. Step three of the hybrid approach ranks *Baldasar's* three *rationes*. The plurality's view receives the highest level of persuasive authority, followed by the dissent's position. Justice Blackmun's attempt to revive his position from *Scott v. Illinois*,[204] receives the least precedential respect.

It is difficult to compare the result of the hybrid analysis of *Baldasar* to that reached using *Marks*, because of the inconsistency the "narrowest grounds" rule has produced in the *Baldasar* progeny.[205] The potential improvement in consistency, however, is evident.[205]

V. CONCLUSION

The Supreme Court's efforts to eliminate the problems caused by their plurality decisions have failed. This Note discussed this failure and presented an alternative to the Court's "narrowest grounds" doctrine. Traditional *ratio decidendi* principles and several methods previously used for interpreting plurality decisions were utilized to develop a hybrid approach. This hybrid avoids the shortcomings of the *Marks* "narrowest grounds" approach to plurality decisions. Cases analyzed under both the *Marks* rule and the

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reasoning. Both opinions were joined by Justices Brennan and Stevens. These four Justices held that Illinois's use of Baldasar's earlier conviction violated the Court's previous right to counsel decisions. Justice Blackmun advanced an entirely different rule, but also voted to reverse Baldasar's conviction. The dissenters would have upheld the conviction. *See supra* notes 117–24 and accompanying text.

203. There was no plurality opinion in *Baldasar*, as the Stewart and Marshall concurrences received the same number of votes. However, these two opinions took essentially the same position and should be regarded as representing the views of four Justices. In this sense, the Stewart and Marshall concurrences may be read together, and treated as a plurality opinion. *See supra* notes 119–21 and accompanying text.

204. 440 U.S. 367 (1979).

205. *See supra* notes 119–24 and accompanying text.

206. It should also be noted that most courts following *Baldasar* have adopted the plurality view—i.e., the opinions of Justices Stewart and Marshall—as governing. *See supra* note 131. The hybrid approach would lead to a similar result. However, as in the discussion of *Memoirs*, the *Baldasar* plurality's position would only constitute persuasive authority and should only be followed when viewed as consistent with prior majority decisions. In this case, the comparison would be with *Scott v. Illinois*. *See supra* notes 119–21 and accompanying text. As in *Memoirs*, it seems fair to characterize the Stewart/Marshall position in *Baldasar* as consistent with *Scott*.

hybrid approach illustrated the improvements offered by the alternative method developed in this Note.

The hybrid model proposed by this Note is an improvement over, and should be used in place of, the *Marks* "narrowest grounds" doctrine. The *Marks* "narrowest grounds" approach is not universally applicable and is unable to promote stability, even when limited to those cases where the opinions arguably contain common ground. The hybrid approach is universally applicable and should lead to more consistent results than the *Marks* rule. Some inconsistent results will emanate, but that is a necessary concession to the complexity of the Supreme Court's fragmented decisions. Any additional gain in consistency will come at the expense of judicial integrity, a price we should not be willing to pay.[207] Although the responsibility for these "juridical cripples" remains with the Supreme Court, lower courts are tasked with finding the governing rules of law in these cases. The hybrid alternative developed in this Note will aid lower courts in their efforts to make sense of these fragmented decisions, for until a significant change in the Justices' conceptions of their obligations as members of the land's ultimate tribunal occurs, such fragmentation is inevitable.

207. A more rigid approach might produce greater consistency—e.g., a rule that requires plurality opinions to be treated as Opinions of the Court—but would lack the flexibility of the hybrid approach. As the *Teague* and *Baldasar* cases illustrate, this added flexibility can avoid the inconsistent results caused by the *Marks* rule's limited applicability. *See supra* Section IV(C). Furthermore, a more rigid approach would force judges to perpetuate legal fictions, which undermines the integrity of our judicial system. *See supra* Section II(C). Although the hybrid approach has not been thoroughly tested through empirical study, the hindsight gained through analysis of the *Marks* rule provides important insight into the potential pitfalls for an alternative to that technique. Further study of this hybrid model is, of course, in order.

APPENDIX A
HYBRID MODEL OF PLURALITY DECISIONS

Imperative Authority	(more)	Textual Sources (statutes and constitutions)
	(less)	Majority Opinions (clear majorities, false pluralities, dual majorities)*
Persuasive Authority	(more)	Majority Consensus Which Includes Dissenting Justices*
		Plurality Opinions
		Largest Numerical Block (includes dissents)
		Minority Opinions (concurrences)
	(less)	Dissenting Opinions

* Under the traditional view, dissenting votes may not contribute to the majority consensus required for imperative authority. If this approach is followed, such alignments, which occur in dual majority cases, should receive maximum persuasive authority. See Appendix B for an illustration of a dual majority case.

APPENDIX B
DUAL MAJORITY/PLURALITY DISTINCTION ILLUSTRATION

Hypothetical case 1:

- 4 Justices join plurality opinion, adopt rule A, and reach result X
- 2 Justices concur, reject rule A, adopt rule B, and reach result X
- 3 Justices dissent, reject rule A, adopt rule B, and reach result Y

This is a dual majority case, with a majority of the Justices reaching result X and another, different majority, adopting rule B. Under the hybrid approach presented in this Note, rule B would be imperative authority (see Appendix A). Rule B satisfies the threshold *ratio decidendi* test for the concurring and dissenting Justices. While these two groups reach a different result, each group found rule B necessary to reach its conclusion.

Hypothetical case 2:

- 4 Justices join plurality opinion, adopt rule A, and reach result X
- 2 Justices concur, reject rule A, endorse rule B, and result Y, but rely on *stare decisis* to reach result X
- 3 Justices dissent, reject rule A, adopt rule B, and reach result Y

This is not a dual majority case; it is a true plurality decision. The concurring Justices' rejection of rule A and their endorsement of rule B and result Y were not necessary to their conclusion. Therefore, none of these propositions satisfy the threshold *ratio decidendi* standard when applied to the concurring opinion. Under the hybrid approach, such an opinion provides no imperative authority (see Appendix A). Further, the hybrid approach would assign higher precedential weight to the plurality's adoption of rule A than to the concurring and dissenting Members' espousal of rule B. The reason for this anomalous result is that the concurring

Justices' reliance on an earlier decision undermines the value of their assertions concerning what rules of law would otherwise be appropriate.

Two additional points should be made. First, the prior holding followed by the concurring Justices probably opposes the adoption of rule B and result Y; if it did not, one may assume these Justices would have felt free to reach result Y. Secondly, the plurality's position is only accorded higher *persuasive* value than that endorsed by the other Justices. Such a position must be read in light of earlier majority holdings.