

## Plurality Decisions in the Supreme Court of the United States: A Reexamination of the *Marks* Doctrine After *Rapanos v. United States*

“First thing I want you kids to learn is how to count to five.”<sup>1</sup>

### I. INTRODUCTION

Although the Supreme Court of the United States almost never has trouble counting to five with respect to the ultimate disposition of a case,<sup>2</sup> the Court often stumbles when attempting to agree on the appropriate rationale.<sup>3</sup> If not resolved, this disagreement will lead to the Court’s announcing a plurality decision.<sup>4</sup> The Court has handed down a steadily increasing number of

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1. Response, *Professor Laurence Tribe’s Response*, 28 PEPP. L. REV. 537, 541 (2001) (recounting Justice Brennan’s famous quip to his law clerks). This quotation is Professor Tribe’s formulation of Justice Brennan’s view that the most important thing a United States Supreme Court Justice or her law clerks can do is to learn to count to five. *Id.*; see also Anthony Lewis, In Memoriam, *William J. Brennan, Jr.*, 111 HARV. L. REV. 29, 32 (1997) (“Justice Brennan used to joke that a critical talent for a Supreme Court Justice was the ability to count to five.”); Abner Mikva, *The Scope of Equal Protection*, 2002 U. CHI. LEGAL F. 1, 8 (2002) (“[A]s the late Justice Brennan used to say, the first rule of the Supreme Court is that you have to be able to count to five.”).

2. See Maxwell L. Stearns, *Should Justices Ever Switch Votes?: Miller v. Albright in Social Choice Perspective*, 7 SUP. CT. ECON. REV. 87, 110 (1999) (explaining Court rarely faces impasse when deciding on judgment). In cases where the Court must choose among three possible judgments—affirm, reverse, or remand—there is a risk that no judgment will receive a majority of five votes. See *id.* Nevertheless, the Court has avoided this potential problem because at least one Justice has almost always been willing to switch her vote to produce a majority with respect to the judgment. *Id.* & n.76. See generally H. Ron Davidson, *The Mechanics of Judicial Vote Switching*, 38 SUFFOLK U. L. REV. 17 (2004) (analyzing cases in which one Justice switched vote to achieve majority consensus regarding disposition).

3. See generally John F. Davis & William L. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59 (1974) (cataloguing and criticizing Supreme Court plurality decisions); Adam S. Hochschild, Note, *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective*, 4 WASH. U. J.L. & POL’Y 261 (2000) (arguing Court should return to pre-Marshall-era modesty to avoid plurality decisions); Ken Kimura, Note, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 CORNELL L. REV. 1593 (1992) (criticizing plurality decisions and proposing new interpretive model); Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756 (1980) (noting value of plurality decisions and discussing several interpretive techniques); Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127 (1981) [hereinafter *Plurality Decisions*] (arguing “value-laden” reasoning increases number of Court’s plurality decisions); Comment, *Supreme Court No-Clear-Majority Decisions: A Study in Stare Decisis*, 24 U. CHI. L. REV. 99 (1956) [hereinafter *A Study in Stare Decisis*] (examining lower courts’ citation of Supreme Court plurality decisions); Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419 (1992) (analyzing plurality decisions and proposing alternative to *Marks* doctrine); Douglas J. Whaley, Comment, *A Suggestion for the Prevention of No-Clear-Majority Judicial Decisions*, 46 TEX. L. REV. 370 (1968) (advocating per se rule making plurality opinion binding precedent).

4. See Novak, *supra* note 3, at 756 n.1 (describing plurality decisions). For the purposes of this Note, “plurality decision” refers to the situation in which a majority of the Court agrees upon the judgment but not upon a single rationale, such that the Court disposes of the case with no opinion of the Court. See, e.g.,

plurality decisions throughout its history.<sup>5</sup> Commentators have suggested a number of factors that might account for this increase, including ideological splits among the Justices,<sup>6</sup> an increasingly heavy workload,<sup>7</sup> more cases presenting socially volatile issues,<sup>8</sup> a lack of leadership on the Court,<sup>9</sup> and an increase in “substantive” reasoning in the Court’s decisions.<sup>10</sup> Whatever the root causes might be, plurality decisions have become an undeniable part of the Supreme Court’s jurisprudence.<sup>11</sup>

Given this observation, many commentators have called attention to the

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Rapanos v. United States, 126 S. Ct. 2208 (2006) (circumscribing Army Corps of Engineers’ jurisdiction over wetlands under Clean Water Act); Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (establishing due process requirements for United States citizens detained as enemy combatants); Pennsylvania v. Del. Valley Citizens’ Council for Clean Air, 483 U.S. 711 (1987) (construing fee-shifting provision of Clean Air Act); *see also* Novak, *supra* note 3, at 756 n.1 (defining “plurality decision”). “Plurality opinion,” on the other hand, refers to the one concurring opinion that is joined by more Justices than any other concurring opinion. *See, e.g., Rapanos*, 126 S. Ct. at 2214-35 (plurality opinion); *Hamdi*, 542 U.S. at 509-39 (plurality opinion); *Del. Valley*, 483 U.S. at 713-31 (plurality opinion). *But see* Novak, *supra* note 3, at 756 n.1 (defining “plurality opinion” as lead opinion regardless of number of votes garnered).

5. *See* Davis & Reynolds, *supra* note 3, at 59-61 (noting increase in plurality decisions); Novak, *supra* note 3, at 756 & n.2 (discussing increase and providing data); *Plurality Decisions*, *supra* note 3, at 1127 & n.1 (observing increase with particular emphasis on Burger Court); *A Study in Stare Decisis*, *supra* note 3, at 99-100 (noting increase and providing data); Whaley, *supra* note 3, at 370 (recognizing plurality decisions have “grow[n] stronger through the years”). *But see* STEPHEN BREYER, *ACTIVE LIBERTY* 110 (2005) (emphasizing Supreme Court decides forty percent of its cases unanimously).

6. Davis & Reynolds, *supra* note 3, at 77 (arguing ideological splits lead to “polarized decisions”); Novak, *supra* note 3, at 759 (suggesting combination of volatile social issues and ideological splits causes plurality decisions).

7. Davis & Reynolds, *supra* note 3, at 77-80 (concluding increased workload one cause of upsurge in plurality decisions); Novak, *supra* note 3, at 759 (suggesting heavier workload reduces time Justices spend building consensus). This factor probably does not explain the Rehnquist or Roberts Courts’ plurality decisions because the Supreme Court’s caseload diminished substantially under Chief Justice Rehnquist and continues to decline under Chief Justice Roberts. *See* Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403 (1996) (examining Chief Justice Rehnquist’s effect on Court’s docket size); David Von Drehle, *Inside the Incredibly Shrinking Role of the Supreme Court*, TIME, Oct. 22, 2007, at 44 (noting Supreme Court decided only sixty-eight cases in October Term 2006, fewer than any term since 1953); Tony Mauro, *Reading the Roberts Court*, LAW.COM, Aug. 17, 2007, <http://www.law.com/jsp/article.jsp?id=1187168522747#> (providing data and discussion of Roberts Court’s docket size).

8. Davis & Reynolds, *supra* note 3, at 80-81 (suggesting increase in volatile social issues and ideological splits generate more plurality decisions); Novak, *supra* note 3, at 759 & n.15 (noting increase in volatile social issues before the Court).

9. Novak, *supra* note 3, at 759 (highlighting Chief Justice’s duty to promote compromise). Chief Justice Roberts certainly recognizes the important role the Chief Justice is expected to play in achieving majority consensus on the Court. *See Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring) (“It is unfortunate that no opinion commands a majority of the Court . . .”); Reynolds Holding, *In Defense of Dissents*, TIME, Feb. 26, 2007, at 44 (acknowledging Chief Justice Roberts’s “push for unanimity”). Thus far, however, the Roberts Court has not been defined by unanimity. *See* Mauro, *supra* note 7 (observing high percentage of five-to-four decisions and low percentage of unanimous decisions, but noting fewer plurality decisions than modern historical average).

10. *Plurality Decisions*, *supra* note 3, at 1140-46 (arguing “substantive” and value-laden reasoning leads to disagreement).

11. *See supra* note 5 and accompanying text (observing steady increase in Supreme Court plurality decisions).

obvious problems that plurality decisions create.<sup>12</sup> Plurality decisions provide lower courts and litigants with very little guidance as to the state of the law.<sup>13</sup> Even more troubling is that plurality decisions can erode public confidence in the Supreme Court, as a result of the Court's inability to render authoritative decisions.<sup>14</sup> Not surprisingly, many of these critics argue that the Court must do more to produce opinions that achieve majority consensus.<sup>15</sup>

Nevertheless, several commentators have argued that plurality decisions are not without value.<sup>16</sup> For example, when the Justices fundamentally disagree about a legal principle, it might be best for them to express their individual views and not to "insist on superficial agreement."<sup>17</sup> First, this practice can actually provide increased guidance to lower courts and litigants because it reveals a position that might eventually prevail.<sup>18</sup> Second, both the Justices and lower courts are freer to indulge "innovative and creative" solutions to novel legal issues after a plurality decision than they would be after a majority decision.<sup>19</sup> Since plurality decisions are accorded a lower degree of stare decisis value within the Court,<sup>20</sup> the Justices can continue to explore new rationales until one achieves majority support.<sup>21</sup> Similarly, lower courts have more opportunity to distinguish future cases and develop alternative rationales.<sup>22</sup> This process of "issue percolation" in the lower courts can be helpful to the Supreme Court the next time it confronts the issue.<sup>23</sup>

12. See, e.g., Hochschild, *supra* note 3, at 261 ("[P]lurality decision[s] hold[] ambiguous precedential value."); *Plurality Decisions*, *supra* note 3, at 1128-30 (describing harmful consequences of plurality decisions); Thurmon, *supra* note 3, at 419 (noting plurality decisions often do more harm than good).

13. See Kimura, *supra* note 3, at 1594 (labeling plurality decisions "most unstable form of case law").

14. Whaley, *supra* note 3, at 371 (arguing divided decisions could diminish Court's legitimacy and authority). But see Earl M. Maltz, *The Function of Supreme Court Opinions*, 37 HOUS. L. REV. 1395, 1397-1400 (2000) (concluding result affects public opinion far more than rationale).

15. Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 804 (1982) (noting arguments of Court's critics).

16. See *id.* at 810-11; Novak, *supra* note 3, at 760; see also Holding, *supra* note 9, at 44 (criticizing Chief Justice Roberts's push for unanimous decisions and emphasizing value of concurrences and dissents). "[E]xpression of differences in view or even in emphasis converging toward the same result makes for the clarity of candor and thereby enhances the authority of the judicial process." John M. Rogers, "I Vote This Way Because I'm Wrong": *The Supreme Court Justice as Epimenides*, 79 KY. L.J. 439, 447 n.22 (1991).

17. Novak, *supra* note 3, at 760.

18. Easterbrook, *supra* note 15, at 810-11 (arguing plurality decisions reveal "position[s] that may prevail after repeated litigation").

19. Novak, *supra* note 3, at 760.

20. See *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (declining to treat Justice Powell's opinion in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), as binding precedent).

21. See Novak, *supra* note 3, at 760.

22. Novak, *supra* note 3, at 760. This is particularly true in cases in which the *Marks* doctrine fails to locate the Court's holding. See *infra* Part III.D (explaining *Marks* doctrine's limitations). Lower courts will be most likely to distinguish these cases and develop new rationales. See *id.*

23. See Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 54-61 (1994) (offering normative analysis of power diffusion within judicial hierarchy); Novak, *supra* note 3, at 760 (noting value of lower courts' ability to explore alternative rationales).

The normative value of plurality decisions aside, they have become a conspicuous part of the Supreme Court's jurisprudence.<sup>24</sup> Consequently, the Supreme Court articulated a rule for interpreting plurality decisions in *Marks v. United States*.<sup>25</sup> The *Marks* Court announced: "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 . . .'"<sup>26</sup> While this rule—called the "*Marks* doctrine" or "narrowest grounds doctrine"<sup>27</sup>—resolved some of the interpretive problems unique to plurality decisions,<sup>28</sup> it has proved to be "more easily stated than applied,"<sup>29</sup> and has created disagreement among courts and commentators about when and how the rule should apply.<sup>30</sup>

Accordingly, this Note explores the narrowest-grounds doctrine in an attempt to resolve some of the conflict and confusion that *Marks* has engendered.<sup>31</sup> This Note begins by addressing the factors that prompted the Supreme Court to pronounce an interpretive rule for plurality decisions.<sup>32</sup> After

24. See *supra* note 5 and accompanying text (observing steady increase in Supreme Court plurality decisions).

25. 430 U.S. 188, 193 (1977). The *Marks* Court was interpreting one of its prior plurality decisions that defined "obscenity." See *id.* at 193-94; see also *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen. of Mass.*, 383 U.S. 413, 413-41 (1966) [hereinafter *Memoirs v. Massachusetts* or *Memoirs*] (plurality decision construed in *Marks*).

26. *Marks*, 430 U.S. at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell & Stevens, JJ.)).

27. Maxwell L. Stearns, *The Case for Including Marks v. United States in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321, 322 n.2 (2000) (noting "*Marks* doctrine" and "narrowest grounds doctrine" interchangeable terms).

28. See Stearns, *supra* note 27, at 322-23 (explaining when *Marks* doctrine does and does not work); Thurmon, *supra* note 3, at 421 (observing *Marks* doctrine does not always work); see also *infra* Part III.D (observing *Marks* doctrine's limited applicability).

29. *Nichols v. United States*, 511 U.S. 738, 745 (1994) (attempting to apply *Marks* to *Baldasar v. Illinois*, 446 U.S. 222 (1980)); see also *Rapanos v. United States*, 126 S. Ct. 2208, 2236 (2006) (Roberts, C.J., concurring) (intimating *Marks* may be difficult to apply to *Rapanos*); *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (declining to apply *Marks* to *Bakke*); *United States v. Johnson*, 467 F.3d 56, 65-66 (1st Cir. 2006) (collecting cases in which Supreme Court arguably "moved away from . . . *Marks* formula"), *cert. denied*, 76 U.S.L.W. 3186 (U.S. Oct. 9, 2007) (No. 07-9).

30. See *infra* Part II.C (exploring conventional and social choice approaches to *Marks* doctrine). See generally W. Jesse Weins, Note, *A Problematic Plurality Precedent: Why the Supreme Court Should Leave Marks over Van Orden v. Perry*, 85 NEB. L. REV. 830 (2007) (exploring *Marks* doctrine generally and analyzing its application to *Van Orden v. Perry*, 545 U.S. 677 (2005)).

31. Additionally, the author of this Note hopes to educate the reader about interpreting Supreme Court plurality decisions with the help of the *Marks* doctrine. See generally Stearns, *supra* note 27 (arguing law schools should include *Marks* in constitutional law curricula). While preparing to write this Note, the author spoke to practicing attorneys, law professors, and law students about the *Marks* doctrine. Only two people—both law professors—had even heard of the *Marks* doctrine; hence this author's desire to raise awareness of the *Marks* doctrine within the legal community.

32. See *infra* Part II.A (discussing factors contributing to need for interpretive rule for Supreme Court plurality decisions).

discussing *Marks v. United States*,<sup>33</sup> this Note examines two competing approaches to the *Marks* doctrine.<sup>34</sup> Part II.C.1 describes the conventional approach, which views the *Marks* doctrine as an application of the principle of majoritarianism to Supreme Court plurality decisions.<sup>35</sup> Part II.C.2 discusses the more novel social choice approach, which deems the *Marks* doctrine an application of the Condorcet criterion to Supreme Court plurality decisions.<sup>36</sup> Part III of this Note analyzes these competing approaches in light of the Supreme Court's recent plurality decision in *Rapanos v. United States*.<sup>37</sup> This Note concludes that the conventional understanding of *Marks* as an application of the principle of majoritarianism is more normatively justifiable than the social choice view of *Marks* as an application of the Condorcet criterion.<sup>38</sup> Finally, this Note suggests a simple two-step process for lower courts to use when attempting to follow Supreme Court plurality decisions.<sup>39</sup>

## II. HISTORY

### A. Factors Contributing to the Need for an Interpretive Rule for Plurality Decisions

At least four factors contribute to the Supreme Court's need for an interpretive rule for its plurality decisions: the Court's outcome-focused voting protocol is inherently likely to produce plurality decisions;<sup>40</sup> the Court must produce "definitive statements of [its] reasoning" to fulfill its institutional role as the final interpreter of the Constitution and other federal laws;<sup>41</sup> the number of plurality decisions has increased steadily over the Court's history;<sup>42</sup> and lower courts have taken disparate approaches to interpreting the Court's plurality decisions.<sup>43</sup>

33. See *infra* Part II.B (recounting Supreme Court's decision in *Marks*).

34. See *infra* Part II.C (comparing conventional and social choice views of *Marks*).

35. See *infra* Part II.C.1 (describing conventional view of *Marks*).

36. See *infra* Part II.C.2 (explaining social choice approach to *Marks*).

37. 126 S. Ct. 2208 (2006); see *infra* Part III (analyzing competing approaches in light of *Rapanos*).

38. See *infra* Part III.C (analyzing conventional and social choice views of *Marks* and concluding conventional view more normatively justifiable).

39. See *infra* Part III.D (suggesting two-step interpretive approach).

40. See David Post & Steven Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 GEO. L.J. 743, 759 (1992).

41. See Maltz, *supra* note 14, at 1406.

42. See *supra* note 5 and accompanying text.

43. See Davis & Reynolds, *supra* note 3, at 71-75 (describing several methods lower courts have employed when interpreting plurality decisions); Hochschild, *supra* note 3, at 278-83 (noting various interpretive approaches even after *Marks*); Novak, *supra* note 3, at 758, 767-78 (analyzing interpretive approaches other than narrowest-grounds doctrine); Thurmon, *supra* note 3, at 419-46 (examining several interpretive approaches including some employed after *Marks*); Whaley, *supra* note 3, at 375-76 (observing various approaches to interpreting one plurality decision); cf. Kimura, *supra* note 3, at 1600-04 (describing several interpretive approaches suggested by commentators but not necessarily used by courts). See generally

### 1. Supreme Court's Voting Protocol

Although the Supreme Court's size has fluctuated between five and ten members throughout its history,<sup>44</sup> the makeup of the Court has remained steady at nine Justices since the passage of the Judiciary Act of 1869.<sup>45</sup> Its fluctuating size notwithstanding, the Court has always decided cases by simple majority vote.<sup>46</sup> The Court determines the ultimate judgment in a given case by aggregating the Justices' preferences for the *disposition* of the case, without regard to the *rationale* used to reach that outcome.<sup>47</sup> Outcome voting's focus on the majority's preferred judgment increases the likelihood that the Court will produce plurality decisions because two or more groups of Justices may favor the same result for wildly divergent reasons.<sup>48</sup> Thus, the inherent likelihood that the Court's outcome-voting protocol will produce plurality decisions is one factor suggesting the need for a rule to interpret those

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*A Study in Stare Decisis*, *supra* note 3 (exploring several approaches to interpreting plurality decisions).

44. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 216 (2005).

45. Laura Krugman Ray, *America Meets the Justices: Explaining the Supreme Court to the General Reader*, 72 TENN. L. REV. 573, 578 & n.25 (2005).

46. Caminker, *supra* note 23, at 15 & n.54; Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1068 (1988); Kimura, *supra* note 3, at 1596-98. In contrast, the Court only requires four votes to grant certiorari, and only three votes to postpone a decision on a petition for certiorari or a jurisdictional statement, pending the outcome of a case the Court has already taken. Revesz & Karlan, *supra*, at 1068.

47. See Saul Levmore, *Ruling Majorities and Reasoning Pluralities*, 3 THEORETICAL INQUIRIES L. 87, 95-96 (2002). The Justices do, of course, vote on the rationale by writing their own opinions or signing on to the opinions of others, but this process takes place separately from the ultimate vote on the judgment. See *Smith v. United States*, 30 U.S. (5 Pet.) 292, 303 (1831) (explaining vote on judgment separate from vote on rationale); see also Jonathan Remy Nash, *A Context-Sensitive Voting Protocol Paradigm for Multimember Courts*, 56 STAN. L. REV. 75, 85-86 (2003) (explaining difference between "voting practice" and "voting protocol"). At least one state court follows a different practice, whereby the court will not upset a judgment unless a majority agrees on the *rationale* used to reach the outcome. See *State v. Gustafson*, 359 N.W.2d 920, 921-23 (Wis. 1985) (citing *Frame v. Plumb (In re Will of McNaughton)*, 118 N.W. 997 (Wis. 1909)) (refusing to reverse without majority consensus for rationale and criticizing Supreme Court's practice).

48. See *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 664-87 (1981) (plurality and concurring opinions) (holding Iowa's ban on sixty-five-foot double trailers unconstitutional violation of Commerce Clause). *Kassel* is one example of a case in which the plurality and concurring opinions reached the same judgment by resolving two dispositive issues in precisely opposite ways. See *id.*; see also Stearns, *supra* note 27, at 335-38 (explaining opinions in *Kassel*). One issue in *Kassel* involved the appropriate standard of review, while the other dealt with the evidence a court could consider when reviewing the constitutionality of a state statute. Stearns, *supra* note 27, at 336 (articulating dispositive issues in *Kassel*). The *Kassel* plurality applied a somewhat stringent balancing test, but considered evidence offered for the first time at trial. *Kassel*, 450 U.S. at 678-79 (plurality opinion) (concluding Iowa statute failed balancing test based upon evidence presented at trial); Stearns, *supra* note 27, at 336 (evaluating plurality opinion in *Kassel*). Justice Brennan's concurrence applied the less stringent rational-basis test, but considered only the evidence that was before the state legislature when it enacted the statute. *Kassel*, 450 U.S. at 680-81, 686-87 (Brennan, J., concurring) (arguing Iowa legislature had no rational basis for enacting statute given evidence before it); Stearns, *supra* note 27, at 336 (explaining Justice Brennan's concurrence in *Kassel*). Another reason that outcome voting leads to plurality decisions may be that the Justices are free to decline to reach all of the issues presented, which increases the likelihood that multiple rationales will support the same judgment. See Post & Salop, *supra* note 40, at 759 (contending outcome voting produces more plurality decisions because judges can decline to reach all issues).

decisions.<sup>49</sup>

## 2. Supreme Court's Institutional Power

The role of the Supreme Court today is far more robust than it was at America's founding.<sup>50</sup> The power the Court now wields is due in large part to Chief Justice John Marshall's legacy.<sup>51</sup> Chief Justice Marshall bolstered the Court's authority by eliminating its practice of issuing seriatim opinions, and instituting a new practice of announcing the Court's judgment in a single opinion of the Court.<sup>52</sup> The combination of this new approach to opinion writing and the Court's willingness to issue some rather bold decisions<sup>53</sup> allowed the Court to assume a much more important role than it had at the Founding.<sup>54</sup> The significance of the Court's written opinions grew as they came to embody the final word on the meaning of the Constitution.<sup>55</sup> Thus, it

49. Cf. Nash, *supra* note 47, at 95-102 (showing outcome voting leads to "guidance problems" in context of "paradoxical" cases).

50. See AMAR, *supra* note 44, at 207-45 (contrasting Supreme Court's modest beginning with its powerful modern role).

51. AMAR, *supra* note 44, at 205 (crediting Chief Justice Marshall with beginning to increase Supreme Court's stature vis-à-vis other branches).

52. See Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 138 (1990) (describing Chief Justice Marshall's effect on Court's practice and prestige); Hochschild, *supra* note 3, at 263-71 (comparing Court's opinion-writing practices under Chief Justice Jay and Chief Justice Marshall); Kevin M. Stack, Note, *The Practice of Dissent in the Supreme Court*, 105 YALE L.J. 2235, 2238-39 (1996) (explaining Chief Justice Marshall introduced an "institutional approach" to the Court); Whaley, *supra* note 3, at 370 (observing Chief Justice Marshall "put an immediate end to" seriatim opinions). The term "seriatim opinions" refers to "[a] series of opinions written individually by each judge on the bench, as opposed to a single opinion speaking for the court as a whole." BLACK'S LAW DICTIONARY 1125 (8th ed. 2004). A single opinion of the Court is more powerful than a group of seriatim opinions because a single opinion gives "the Court an institutional voice . . . over and above that of its individual members." Stack, *supra*, at 2239.

53. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 317 (1819) (holding states have no power to burden operation of constitutional federal statutes); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 359 (1816) (establishing Supreme Court appellate review of state court decisions involving federal laws in civil cases); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-80 (1803) (establishing judicial review of congressional enactments by invalidating section 13 of Judiciary Act of 1789). But see AMAR, *supra* note 44, at 223, 229-33 (arguing *Marbury* Court less brazen than conventionally understood).

54. See AMAR, *supra* note 44, at 216-18 (highlighting several other factors that explain modern Court's power and influence).

55. AMAR, *supra* note 44, at 217 (noting Supreme Court majority opinions "widely viewed as the last word on the Constitution's meaning"). In fact, many commentators now view the Court as a lawmaking institution, rather than a law-interpreting institution. See, e.g., Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795, 795-97 (1983) (explaining Court's lawmaking function); Maltz, *supra* note 14, at 1401-14 (emphasizing Court's unique lawmaking function); Frederick Schauer, *Refining the Lawmaking Function of the Supreme Court*, 17 U. MICH. J.L. REFORM 1, 1-4 (1983) (asserting denial of Court's lawmaking function "conclusive evidence of professional incompetence"). Additionally, courts have begun to erode the distinction between holding and dicta in Supreme Court opinions by taking a broader view of what constitutes the Court's holding, thereby treating larger swaths of the Court's written opinions as "law." Charles A. Sullivan, *On Vacation*, 43 HOUS. L. REV. 1143, 1152-53 (2006) (observing Supreme Court and federal circuits "moved away from traditional view" of holding and dicta).

became important for the Court to announce its decisions in clear and well-reasoned opinions.<sup>56</sup> Plurality decisions that produced no opinion of the Court lacked the requisite clarity and presented difficult interpretive problems for those attempting to follow the law as construed by the Supreme Court.<sup>57</sup> Accordingly, while a Supreme Court rule for interpreting splintered decisions was unnecessary at the Founding, such a rule became indispensable as the Court's institutional influence—and corresponding duty to provide guidance for lower courts and other actors—expanded.<sup>58</sup>

### 3. Increasing Number of Supreme Court Plurality Decisions

The third factor leading to the need for an interpretive rule for plurality decisions is that over time the Court has handed down a growing number of plurality decisions.<sup>59</sup> Between 1800 and 1956, the Supreme Court rendered forty-five plurality decisions.<sup>60</sup> Thirty-five of these plurality decisions were handed down after 1900.<sup>61</sup> Furthermore, three-fourths of the thirty-five plurality decisions rendered between 1900 and 1956 came down after 1937.<sup>62</sup> Between 1955 and 1980, the Court issued 101 plurality decisions.<sup>63</sup> Therefore, by the time the Supreme Court decided *Marks* in 1977, the increasing prevalence of plurality decisions had transformed the phenomenon from an aberration that the Court could overlook to a recurring problem that the Court could no longer ignore.<sup>64</sup>

### 4. Divergent Interpretive Approaches in Lower Courts

At common law and throughout the nineteenth century, plurality decisions created binding precedent with respect to the result only.<sup>65</sup> Thus, the various rationales supporting the Court's judgment in a plurality decision carried no

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56. See *Plurality Decisions*, *supra* note 3, at 1128 (arguing Court "abdicates its [institutional] responsibility" when it renders plurality decisions).

57. See *A Study in Stare Decisis*, *supra* note 3, at 100 (indicating lack of clarity regarding precedential value of plurality decisions); see also *supra* notes 12-15 and accompanying text (explaining problems plurality decisions create).

58. See *A Study in Stare Decisis*, *supra* note 3, at 99-101 (explaining author's goal of discerning general rule for interpreting plurality decisions). This piece, published twenty-one years before *Marks* was decided, revealed the need for a Supreme Court rule for interpreting plurality decisions. See generally *id.* (noting disparity among lower courts' treatment of Supreme Court plurality decisions).

59. See *supra* note 5 and accompanying text.

60. *A Study in Stare Decisis*, *supra* note 3, at 99 n.4 (collecting plurality decisions).

61. *A Study in Stare Decisis*, *supra* note 3, at 99.

62. *A Study in Stare Decisis*, *supra* note 3, at 100.

63. Novak, *supra* note 3, at 756 n.2; see also *Plurality Decisions*, *supra* note 3, at 1127 n.1 (comparing quantity of plurality decisions rendered by Warren and Burger Courts).

64. See Thurmon, *supra* note 3, at 419-21 (explaining *Marks* Court's purpose for creating rule for interpreting plurality decisions).

65. Hochschild, *supra* note 3, at 278; *A Study in Stare Decisis*, *supra* note 3, at 100 & n.10; Thurmon, *supra* note 3, at 420 & n.3.



precedential weight, and lower courts only followed splintered decisions if a subsequent case involved very close factual similarities.<sup>66</sup> As the number of plurality decisions grew during the twentieth century, however, lower courts felt the need to rely on plurality decisions for more than just their results and began to explore new approaches to interpreting the rationales in splintered decisions.<sup>67</sup> These new approaches shared the same goal: to disentangle the Court's rationale, or ratio decidendi, from its obiter dictum.<sup>68</sup> Plurality decisions lack a single, clear ratio decidendi, so lower courts were left to their own devices when attempting to discern the Court's holding.<sup>69</sup> The methods that lower courts have employed when attempting to determine the Supreme Court's holding in plurality decisions include: following the plurality opinion as if it were a majority opinion;<sup>70</sup> limiting plurality decisions to their results in the traditional manner;<sup>71</sup> following the most persuasive opinion;<sup>72</sup> and cobbling together a majority consensus using ad hoc methods.<sup>73</sup> The inconsistency among lower courts' interpretive approaches to Supreme Court plurality decisions indicated to the Court in 1977 that it was time to end the confusion.<sup>74</sup>

66. Hochschild, *supra* note 3, at 278; *A Study in Stare Decisis*, *supra* note 3, at 100 & n.10; Thurmon, *supra* note 3, at 420 & n.3.

67. Thurmon, *supra* note 3, at 420, 448-50 (describing interpretive methods lower courts used when applying Supreme Court plurality decisions).

68. See Thurmon, *supra* note 3, at 422-27 (explaining distinction between ratio decidendi and obiter dictum). The terms "ratio decidendi" and "obiter dictum" are difficult to define. See generally Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953 (2005) (analyzing extensively difference between ratio decidendi and obiter dictum). Professors Abramowicz and Stearns offer helpful definitions of both terms, which they refer to as "holding" and "dicta" respectively. *Id.* at 1065. Abramowicz and Stearns write: "A holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment. If not a holding, a proposition stated in a case counts as dicta." *Id.*

69. See Davis & Reynolds, *supra* note 3, at 71 (noting plurality decisions lack single ratio decidendi).

70. See Novak, *supra* note 3, at 774-78 (observing lower courts following one opinion as authoritative); Thurmon, *supra* note 3, at 448-50 (indicating most lower courts followed plurality opinions immediately prior to *Marks*). See generally *A Study in Stare Decisis*, *supra* note 3 (collecting cases and analyzing lower court treatment of Supreme Court plurality decisions).

71. See Novak, *supra* note 3, at 769-74 (observing some lower courts followed traditional approach or "'result' stare decisis" prior to *Marks*); Thurmon, *supra* note 3, at 448-50 (noting traditional approach one among several that lower courts used). See generally *A Study in Stare Decisis*, *supra* note 3 (collecting cases and analyzing lower court treatment of Supreme Court plurality decisions).

72. See Novak, *supra* note 3, at 774-78 (observing lower courts following one opinion as authoritative). See generally *A Study in Stare Decisis*, *supra* note 3 (collecting cases and analyzing lower court treatment of Supreme Court plurality decisions).

73. See Davis & Reynolds, *supra* note 3, at 72 & n.66 (observing some lower courts search for "highest common denominator" among concurring opinions); Novak, *supra* note 3, at 767-69 (explaining interpretive approaches to "dual majority" cases); Thurmon, *supra* note 3, at 449-50 (analyzing interpretive approaches to "narrow minority" cases). See generally *A Study in Stare Decisis*, *supra* note 3 (collecting cases and analyzing lower court treatment of Supreme Court plurality decisions). Lower courts did not routinely look for the narrowest-grounds opinions until the Supreme Court endorsed this approach in *Marks*. Thurmon, *supra* note 3, at 450.

74. See Thurmon, *supra* note 3, at 420 (explaining *Marks* Court's purpose for creating rule for interpreting plurality decisions).

### B. *The Supreme Court's Solution: The Marks Doctrine*

The Supreme Court's only established rule for interpreting plurality decisions emerged from a case involving the Court's infamous definitions of "obscenity."<sup>75</sup> The five petitioners in *Marks v. United States* were charged with transporting "obscene" materials in interstate commerce and with conspiracy to do the same.<sup>76</sup> The petitioners' alleged conduct occurred after the Supreme Court had defined "obscenity" in *Memoirs v. Massachusetts*,<sup>77</sup> but before the Court redefined "obscenity" in *Miller v. California*.<sup>78</sup> The petitioners' trial, however, took place after the Supreme Court decided *Miller*, so the district court instructed the jury under the *Miller* standards.<sup>79</sup> The district court overruled the petitioners' objection to the jury instruction, and the jury convicted all five defendants.<sup>80</sup>

The petitioners then appealed their convictions to the Court of Appeals for

75. See *Marks v. United States*, 430 U.S. 188, 188-91 (1977) (describing issues presented on appeal); see also BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 231-46 (1979) (chronicling some cases in which Court struggled with definition of "obscenity"). "Obscene" materials are not protected under the First Amendment to the Constitution. See *Miller v. California*, 413 U.S. 15, 23 (1973).

76. 430 U.S. at 189.

77. 383 U.S. 413 (1966). *Memoirs* was a plurality decision. See *id.*

78. 413 U.S. 15 (1973); see also *Marks* 430 U.S. at 189-90 (providing factual background of appeal). The *Memoirs* test was based on the standards announced in *Roth v. United States*, 354 U.S. 476 (1957). The *Roth* test was as follows: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489. *Memoirs* modified this test by providing that "three elements must coalesce" before any material is deemed "obscene." *Memoirs*, 383 U.S. at 418 (plurality opinion). The plurality stated:

[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.

*Id.* *Memoirs* made obscenity prosecutions more difficult for the government because it added parts (b) and (c) to the *Roth* test. Stearns, *supra* note 27, at 324. Finally, in *Miller* the Court retooled the "obscenity" definition by providing the following guidelines:

(a) [W]hether "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.

413 U.S. at 24 (citations omitted) (quoting *Roth*, 354 U.S. at 489). The *Miller* Court specifically disavowed prong (c) of the *Memoirs* test. *Id.* at 24-25. This made obscenity prosecutions easier for the government because prong (c) under *Miller* "cast[] a significantly wider net" than prong (c) under *Memoirs*. *Marks*, 430 U.S. at 191.

79. *Marks*, 430 U.S. at 190-91.

80. *Id.* One petitioner was convicted of conspiracy only, while the other four were convicted of conspiracy and several substantive counts. *Id.* at 191 n.5.

the Sixth Circuit.<sup>81</sup> On appeal, the petitioners argued that the district court's jury instructions violated the Due Process Clause of the Fifth Amendment.<sup>82</sup> According to the petitioners, the district court should have instructed the jury under the *Memoirs* test because that case represented the law in effect when the conduct at issue occurred.<sup>83</sup> The petitioners argued further that *Miller* "cast[] a significantly wider net than *Memoirs*," such that applying *Miller* retroactively amounted to an unconstitutional punishment of conduct that was innocent when performed.<sup>84</sup> The Sixth Circuit disagreed and affirmed the convictions, holding that under either *Memoirs* or *Miller* the materials at issue were "obscene" and not protected by the First Amendment.<sup>85</sup> The Sixth Circuit reached this conclusion, however, by discounting or disregarding at least part of the *Memoirs* test and relying more heavily on the prior case of *Roth v. United States*.<sup>86</sup>

The petitioners sought relief from the Sixth Circuit's judgment in the Supreme Court of the United States.<sup>87</sup> In reviewing the Sixth Circuit's holding, Justice Powell, writing for the Court, inferred that the court of appeals misread *Memoirs* by "apparently conclud[ing]" that *Memoirs* was not binding law because it was a plurality decision.<sup>88</sup> If the Sixth Circuit's conclusion were correct, Powell explained, an appellate court reviewing the convictions in *Marks* would look not to *Memoirs*, but to *Roth v. United States*—the last case in which a majority agreed upon a definition of "obscenity"—to determine whether *Miller* expanded criminal liability for obscenity-related crimes.<sup>89</sup> If *Roth* in fact stated the law prior to *Miller*, Powell would agree with the court of appeals' conclusion that *Miller* did not substantially change prior obscenity

81. See *United States v. Marks*, 520 F.2d 913 (6th Cir. 1975) (upholding convictions), *rev'd*, 430 U.S. 188 (1977).

82. *Id.* at 919-20.

83. See *Marks v. United States*, 430 U.S. 188, 190-91 (1977) (noting "petitioners charted their course of conduct" according to *Memoirs*).

84. See *id.* The petitioners' argument was analogous to an ex post facto challenge to the retroactive application of a statute. *Id.* Although the Constitution's Ex Post Facto Clause "does not of its own force apply to the judicial branch," the Supreme Court has held that the Due Process Clause of the Fifth Amendment includes the right to fair notice, which is the principle underlying the Ex Post Facto Clause. *Id.* at 191-92. Therefore, "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law," and amounts to a violation of the Due Process Clause of the Fifth Amendment. *Id.* at 192 (internal quotation marks omitted) (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964)).

85. *United States v. Marks*, 520 F.2d at 921, 922.

86. 354 U.S. 476 (1957); see *United States v. Marks*, 520 F.2d at 915-22; see also *infra* notes 88-90 and accompanying text (explaining how Sixth Circuit's opinion discounted or disregarded at least prong (c) of *Memoirs* test).

87. *Marks*, 430 U.S. at 188-89.

88. *Id.* at 192. The Sixth Circuit's opinion did not clearly state that *Memoirs* never became the law by virtue of its being a plurality decision. See *United States v. Marks*, 520 F.2d 913, 915-22 (6th Cir. 1975), *rev'd*, 430 U.S. 188 (1977). The opinion does seem to suggest, however, that at least part (c) of the *Memoirs* "obscenity" test "had [no] meaning at all" because it "had never been approved by a plurality of more than three Justices at any one time." *Id.* at 919-20.

89. *Marks v. United States*, 430 U.S. 188, 192-93 (1977).

law.<sup>90</sup>

Justice Powell disagreed, however, with the Sixth Circuit's conclusions that the rationales in plurality decisions lack the force of law, and that *Miller* did not substantially change prior obscenity law.<sup>91</sup> After asserting that "the basic premise for [the Sixth Circuit's] line of reasoning is faulty," Powell announced the only rule that a majority of the Supreme Court has ever endorsed for interpreting plurality decisions.<sup>92</sup> Powell wrote: "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 . . .'"<sup>93</sup>

Applying this rule to *Memoirs*, Powell easily discerned the Court's holding from the four concurring opinions in that case.<sup>94</sup> The *Memoirs* Court held, by a

90. *Id.* at 193; *see also supra* note 78 (articulating standards in *Roth*, *Memoirs*, and *Miller*).

91. *See Marks*, 430 U.S. at 193-97 (reversing court of appeals and holding plurality decisions binding precedent for narrowest rationale).

92. *Id.* at 193; Kimura, *supra* note 3, at 1603 (indicating Supreme Court has only recognized narrowest-grounds doctrine as interpretative rule for plurality decisions).

93. *Marks*, 430 U.S. at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell & Stevens, JJ.)). The lead opinion in *Gregg* appears to be the first time any members of the Court acknowledged utilizing the narrowest-grounds approach. Novak, *supra* note 3, at 761. The *Gregg* Court was interpreting its prior plurality decision in *Furman v. Georgia*, 408 U.S. 238 (1972). *See Gregg*, 428 U.S. at 168-69 (opinion of Stewart, Powell & Stevens, JJ.); Novak, *supra* note 3, at 761. In doing so, the lead opinion in *Gregg* viewed the *Furman* Court's holding as the "position taken by those [Justices] who concurred in the judgments on the narrowest grounds—Mr. Justice Stewart and Mr. Justice White." *Gregg*, 428 U.S. at 169 n.15 (opinion of Stewart, Powell & Stevens, JJ.). One explanation for this approach is that Justice Stewart's and Justice White's opinions "were more restricted in scope and more closely tailored to the precise facts in *Furman*" than the other more general and widely applicable concurring opinions. Novak, *supra* note 3, at 761. Moreover, a majority of concurring Justices in *Furman* implicitly or explicitly supported the position that Justices Stewart and White adopted. *See King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc) (observing Justices Brennan, Douglas, and Marshall implicitly supported Justices Stewart and White's position); *see also infra* text accompanying notes 122-136 (examining *King* court's analysis of *Marks*). Ironically, *Gregg* was itself a plurality decision, so only three Justices expressly endorsed the narrowest-grounds approach in that case. *See Gregg*, 428 U.S. at 158-207 (opinion of Stewart, Powell & Stevens, JJ.); *id.* at 207-26 (White, J., concurring); *id.* at 226-27 (Burger, C.J. & Rehnquist, J., concurring); *id.* at 227 (Blackmun, J., concurring); *id.* at 227-31 (Brennan, J., dissenting); *id.* at 231-41 (Marshall, J., dissenting). In *Marks*, however, all nine Justices either explicitly or implicitly endorsed the narrowest-grounds doctrine. *See Marks*, 430 U.S. at 188-97 (majority opinion); *id.* at 197-98 (Brennan, J., concurring in part and dissenting in part); *id.* at 198 (Stevens, J., concurring in part and dissenting in part). Justice Powell wrote the opinion of the Court, which Chief Justice Burger, and Justices Blackmun, Rehnquist, and White joined. *Id.* at 188 (majority opinion). This group of five maintained that the court of appeals' judgment should be reversed and the case remanded for a new trial. *Id.* at 197. Justices Brennan, Marshall, Stevens, and Stewart were of the view that the court of appeals' judgment should be reversed but the case should *not* be remanded for a new trial. *Id.* at 197-98 (Brennan, J., concurring in part and dissenting in part); *id.* at 198 (Stevens, J., concurring in part and dissenting in part). This group of four endorsed the opinion of the Court except insofar as it remanded the case for a new trial. *Id.* at 197-98 (Brennan, J., concurring in part and dissenting in part); *id.* at 198 (Stevens, J., concurring in part and dissenting in part).

94. *See Marks*, 430 U.S. at 193-94 (applying narrowest-grounds rule to *Memoirs*); *Memoirs v. Massachusetts*, 383 U.S. 413, 413-41 (1966) (concurring opinions); Stearns, *supra* note 27, at 326. *Memoirs* also included three dissenting opinions authored by Justices Clark, Harlan, and White. *Memoirs*, 383 U.S. at

vote of six to three, that the materials at issue were not “obscene” and must be accorded First Amendment protection.<sup>95</sup> Justices Black and Douglas—the First Amendment absolutists—each concurred on the grounds that the government could never censor speech.<sup>96</sup> Justice Stewart concurred on the grounds that the government could only censor “hard-core” pornography, and that the materials at issue in *Memoirs* were not “hard-core.”<sup>97</sup> Finally, Justice Brennan wrote for a plurality of three Justices who adopted a new test for “obscenity,” which provided that “three elements must coalesce” before any material is deemed “obscene.”<sup>98</sup> The plurality stated:

[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.<sup>99</sup>

Without much elaboration, Justice Powell stated that the *Memoirs* plurality was based on the narrowest grounds, and therefore constituted the Court’s holding.<sup>100</sup>

Having discerned the Court’s holding in *Memoirs*, Powell announced that “*Memoirs* . . . was the law” prior to *Miller*.<sup>101</sup> Powell then compared the *Miller* test to the *Memoirs* test, noting that part (c) of the *Miller* test was broader in scope than part (c) of the *Memoirs* test.<sup>102</sup> Part (c) of the *Miller* test—which labeled materials “obscene” if they “lack[ed] serious literary, artistic, political,

441-62 (dissenting opinions). Justice Clark adhered to the *Roth* standard for obscenity. *Id.* at 441-43 (Clark, J., dissenting). Justice White also applied the *Roth* obscenity standard. *Id.* at 460-62 (White, J., dissenting). Finally, Justice Harlan endorsed a rational-basis test. *Id.* at 458 (Harlan, J., dissenting).

95. See *Memoirs*, 383 U.S. at 413-41 (concurring opinions); see also Thurmon, *supra* note 3, at 430 (describing Court’s holding in *Memoirs*).

96. See *Memoirs*, 383 U.S. at 421 (Black, J., concurring); *id.* at 424-41 (Douglas, J., concurring); see also *Marks v. United States*, 430 U.S. 188, 193 (1977) (indicating Justices Black and Douglas’s “well-known position”); WOODWARD & ARMSTRONG, *supra* note 75, at 152, 232 (pointing out Justices Black’s and Douglas’s absolutist First Amendment views); Thurmon, *supra* note 3, at 432 (acknowledging Justices Black’s and Douglas’s absolutist First Amendment stances).

97. See *Memoirs*, 383 U.S. at 421 (Stewart, J., concurring) (citing *Ginzburg v. United States*, 383 U.S. 463, 497-501 (1966) (Stewart, J., dissenting) and *Mishkin v. New York*, 383 U.S. 502, 518 (1966) (Stewart, J., dissenting)); see also Stearns, *supra* note 27, at 326 (indicating Justice Stewart’s position); Thurmon, *supra* note 3, at 431 (articulating Justice Stewart’s view).

98. *Memoirs*, 383 U.S. at 418 (plurality opinion).

99. *Id.*

100. *Marks*, 430 U.S. at 193-94. Justice Powell also noted that every federal court of appeals that considered the question—except the Sixth Circuit in *Marks*—had treated the *Memoirs* plurality as controlling. *Id.* at 194.

101. *Id.* at 194.

102. *Marks v. United States*, 430 U.S. 188, 194 (1977).

or scientific value”<sup>103</sup>—expanded criminal liability by labeling a broader swath of materials as “obscene” than part (c) of the *Memoirs* test—which labeled materials “obscene” only if they were “utterly without redeeming social value.”<sup>104</sup> Accordingly, the Supreme Court reversed the Sixth Circuit’s judgment and remanded the case for a new trial,<sup>105</sup> holding that the convictions violated the Due Process Clause of the Fifth Amendment because “*Miller* undeniably relaxe[d] the *Memoirs* restrictions.”<sup>106</sup> Finally, the Court noted that at their new trial the petitioners would be entitled to jury instructions under the *Memoirs* plurality’s three-part test.<sup>107</sup>

In sum, the byproduct of the Court’s decision in *Marks* was the establishment of the Supreme Court’s only rule for interpreting its plurality decisions.<sup>108</sup> The Court adopted the narrowest-grounds doctrine without explanation or justification,<sup>109</sup> leaving further clarification and analysis to lower courts and commentators.<sup>110</sup>

### C. The Marks Doctrine Examined

#### 1. The Conventional View of the Marks Doctrine: Marks as an Application of Majoritarianism to Supreme Court Plurality Decisions

Most scholars and lower courts that have analyzed the *Marks* doctrine have criticized the rule’s perceived analytical shortcomings, argued that it should not be widely applicable, or both.<sup>111</sup> Most courts and commentators would agree

103. *Id.* (quoting *Miller v. California*, 413 U.S. 15, 24 (1973)).

104. *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966) (plurality opinion).

105. *Marks*, 430 U.S. at 197.

106. *Id.* at 195.

107. *Id.* at 196.

108. See *Marks v. United States*, 430 U.S. 188, 193 (1977). Although the *Marks* rule applies only to the interpretation of divided United States Supreme Court decisions, several state courts have borrowed the *Marks* doctrine to aid in the interpretation of split state court decisions. See, e.g., *Cote-Whitacre v. Dep’t of Pub. Health*, No. 04-2656, 2006 Mass. Super. LEXIS 670, at \*8-10 (Mass. Super. Ct. Sept. 29, 2006) (using *Marks* doctrine to interpret split decision of Supreme Judicial Court of Massachusetts); *Morgan v. City of Ruleville*, 627 So. 2d 275, 278 (Miss. 1993) (employing *Marks* doctrine to discern holding in fragmented decision of Supreme Court of Mississippi); *Davidson v. Hensen*, 954 P.2d 1327, 1335 (Wash. 1998) (applying *Marks* doctrine to divided decision of Supreme Court of Washington).

109. See *Marks*, 430 U.S. at 188-97 (providing no reasoning for narrowest-grounds rule).

110. See Novak, *supra* note 3, at 761-62 (observing Court did not explain or justify using narrowest-grounds doctrine in *Gregg* or *Marks*); Rafael A. Seminario, Comment, *The Uncertainty and Debilitation of the Marks Fractured Opinion Analysis—The U.S. Supreme Court Misses an Opportunity*: *Grutter v. Bollinger*, 2004 UTAH L. REV. 739, 759-62 (highlighting confusion in lower courts due to Supreme Court’s failure to clarify *Marks* doctrine); Thurmon, *supra* note 3, at 431-32 (indicating lower courts have attempted to explain *Marks* doctrine with little guidance from Supreme Court).

111. See, e.g., *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc) (holding *Marks* works only when “one opinion is a logical subset of . . . broader opinions”); Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 45-48 (1993) (arguing *Marks* doctrine only works when concurring rationales “fit[] within each other like Russian dolls”); Thurmon, *supra* note 3, at 428-42 (discussing and rejecting two potential justifications for *Marks* doctrine).

that the narrowest-grounds opinion is the concurring opinion “that is most nearly confined to the precise fact situation before the Court, rather than [a concurring opinion] that states more general rules.”<sup>112</sup> Another way of stating this definition is that the narrowest-grounds opinion is “the rationale offered in support of the result that would affect or control the fewest cases in the future.”<sup>113</sup> Moreover, virtually all courts and commentators would require the narrowest-grounds opinion to have at least the implicit support of a majority of Justices concurring in the judgment.<sup>114</sup> Finally, many courts and commentators circumscribe the *Marks* doctrine’s reach by deeming it applicable only when “one opinion is a logical subset of . . . broader opinions,”<sup>115</sup> such that the concurring rationales “fit[] within each other like Russian dolls.”<sup>116</sup>

The Supreme Court itself seems to take a limited view of the *Marks* doctrine’s applicability, with various Justices indicating their disapproval of *Marks* and even suggesting alternative approaches in several cases.<sup>117</sup> As the First Circuit recognized in *United States v. Johnson*,<sup>118</sup> at least some members of the Court have indicated that it may be permissible for lower courts to “examine the plurality, concurring and dissenting opinions to extract the

112. *United States v. Martino*, 664 F.2d 860, 872-73 (2d Cir. 1981); see also Tyson Snow, Note, *Adding Marks to the Mix of an Already Muddled Decision Regarding Public Forums and Freedom of Speech on the Internet*, 19 BYU J. PUB. L. 299, 304 (2004) (quoting *Martino* to define “narrowest grounds”).

113. Novak, *supra* note 3, at 764; see also *Martino*, 664 F.2d at 873 (adopting Novak’s definition); Snow, *supra* note 112, at 304 (quoting *Martino* to define “narrowest grounds”). This means that if the judgment upholds a law against constitutional attack, the narrowest-grounds opinion is the one that would uphold the fewest other laws. Kornhauser & Sager, *supra* note 111, at 47; Stearns, *supra* note 27, at 326-27 n.23. Conversely, if the judgment strikes down a law on constitutional grounds, the narrowest-grounds opinion is the one that would strike down the fewest other laws. Kornhauser & Sager, *supra* note 111, at 47; Stearns, *supra* note 27, at 326-27.

114. See *King*, 950 F.2d at 781 (arguing narrowest-grounds opinion must represent “common denominator” with implicit approval of at least five concurring Justices); Caminker, *supra* note 23, at 33 n.120 (maintaining *Marks* applicable only if one concurrence has implicit assent of at least five Justices); Hochschild, *supra* note 3, at 280 (arguing “majority agreement[]” required for *Marks* doctrine to function properly); Kimura, *supra* note 3, at 1603-04 (explaining and criticizing *Marks* doctrine’s demand for implicit consensus); Seminario, *supra* note 110, at 761 (defining “narrowest grounds” as “common denominator”); Snow, *supra* note 112, at 305-06 (explaining most courts and commentators require some common reasoning shared by “narrowest” and other concurrences); Thurmon, *supra* 3, at 429-35 (criticizing implicit consensus justification for *Marks* doctrine).

115. *King*, 950 F.2d at 781.

116. Kornhauser & Sager, *supra* note 111, at 45-48; see also Melissa M. Berry, *Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes “Clearly Established” Law Under the Antiterrorism and Effective Death Penalty Act*, 54 CATH. U. L. REV. 747, 815 & nn.473-74 (2005) (stating *Marks* can only be applied when one concurrence logically fits within another broader concurrence); Novak, *supra* note 3, at 767 (arguing *Marks* doctrine applies only when concurring opinions occupy “broader-narrower” relationship); *A Study in Stare Decisis*, *supra* note 3, at 140 (discussing “narrow minority” cases in which one concurrence analytically “telescoped” within another).

117. See *United States v. Johnson*, 467 F.3d 56, 65-66 (1st Cir. 2006) (collecting Supreme Court cases in which Justices have analyzed methods of interpreting plurality decisions), *cert. denied*, 76 U.S.L.W. 3186 (U.S. Oct. 9, 2007) (No. 07-9).

118. 467 F.3d 56 (1st Cir. 2006), *cert. denied*, 76 U.S.L.W. 3186 (U.S. Oct. 9, 2007) (No. 07-9).

principles that a majority has embraced” in any plurality decision.<sup>119</sup> In other words, the Court appears to have sanctioned head-counting across all of the opinions as a “method of aggregating [the] individual Justices’ votes.”<sup>120</sup> Therefore, the Court seems to have taken the position that majoritarianism should govern the interpretation of plurality decisions in lower courts.<sup>121</sup>

At least one lower court has reached a similar conclusion by exhaustively analyzing the *Marks* doctrine.<sup>122</sup> In *King v. Palmer*,<sup>123</sup> the Court of Appeals for the District of Columbia Circuit examined the Supreme Court’s application of the narrowest-grounds rule and concluded that the narrowest-grounds opinion puts forth a test with which a majority of the Court “must necessarily agree as a logical consequence of [their] own, broader position[s].”<sup>124</sup> For example, recall from the discussion of *Marks* that there were four concurring opinions in *Memoirs*: Justices Black, Douglas, and Stewart each wrote individual concurrences, and Justice Brennan wrote for a plurality of three Justices.<sup>125</sup> These four opinions boiled down to three separate views: obscenity could never be banned (Justices Black and Douglas);<sup>126</sup> only “hard-core” pornography could be banned (Justice Stewart);<sup>127</sup> and only material that is “utterly without redeeming social value” could be banned (three-Justice plurality).<sup>128</sup> The *King* court deemed both Justice Stewart’s concurrence and the plurality opinion logical subsets of Justices Black and Stewart’s absolutist position, with which Justices Black and Stewart necessarily had to agree as a logical consequence of their view.<sup>129</sup> Ultimately, the court found the plurality opinion controlling under *Marks*, however, because “the plurality of three in effect spoke for five Justices,”<sup>130</sup> and Justice Stewart’s opinion “would only have spoken for three.”<sup>131</sup> Thus, the court concluded that an opinion is only eligible for holding status under *Marks* if it commands an “implicit majority of

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119. *Id.* at 65-66.

120. Caminker, *supra* note 23, at 65.

121. *Cf.* *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc) (concluding narrowest-grounds opinion under *Marks* “must embody a position implicitly approved by at least five Justices who support the judgment”).

122. *See King*, 950 F.2d at 780-85 (holding *Marks* works only when narrowest opinion “implicitly approved by at least five Justices who support the judgment”).

123. 950 F.2d 771 (D.C. Cir. 1991) (en banc).

124. *Id.* at 781-82.

125. *See supra* notes 95-99 and accompanying text (describing opinions in *Memoirs*).

126. *Memoirs v. Massachusetts*, 383 U.S. 413, 421 (1966) (Black, J., concurring); *id.* at 433 (Douglas, J., concurring); *King*, 950 F.2d at 781; *see also supra* note 96 and accompanying text (describing view of Justices Black and Douglas).

127. *Memoirs*, 383 U.S. at 421 (Stewart, J., concurring); *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc); *see also supra* text accompanying note 97 (explaining Justice Stewart’s position).

128. *Memoirs*, 383 U.S. at 419 (plurality opinion); *King*, 950 F.2d at 781; *see also supra* text accompanying notes 98-99 (outlining plurality opinion).

129. *King*, 950 F.2d at 781 & n.6.

130. *Id.* at 781.

131. *Id.* at 781 n.6.



the Court.”<sup>132</sup> Consequently, the court held that “*Marks* is workable . . . only when one opinion is a logical subset of other, broader opinions,” such that an “implicit majority” can be cobbled together in support of a narrow legal proposition.<sup>133</sup>

When, however, one opinion supporting the judgment does not fit entirely within a broader circle drawn by the others, *Marks* is problematic. If applied in situations where the various opinions supporting the judgment are mutually exclusive, *Marks* will turn a single opinion that lacks majority support into national law. When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be.<sup>134</sup>

In the end, the *King* court read the *Marks* doctrine merely as an application of the principle of majoritarianism to one specific category of Supreme Court plurality decisions: those in which the concurring opinions are logically nested within one another like “Russian dolls.”<sup>135</sup> So viewed, the *Marks* doctrine is merely a tool that helps lower courts ascertain the narrow legal proposition that is supported by a majority and that is consistent with the disposition of the case.<sup>136</sup>

## 2. *Social Choice Theory and the Marks Doctrine: Marks as an Application of the Condorcet Criterion to Supreme Court Plurality Decisions*

At least one commentator has presented a slightly more nuanced view of the *Marks* doctrine using social choice theory.<sup>137</sup> Professor Maxwell L. Stearns has

132. *Id.* at 781-82. The *King* court also analyzed the application of the narrowest-grounds rule in *Gregg*, and concluded that its application to *Furman* was “unproblematic” because it selected an opinion that had the implicit support of a majority of the Court. *Id.* at 781.

133. *King v. Palmer*, 950 F.2d 771, 781-82 (D.C. Cir. 1991) (en banc).

134. *Id.* at 782.

135. *See id.* at 781 (“[T]he narrowest opinion . . . must embody a position implicitly approved by at least five Justices who support the judgment.”); *see also* Caminker, *supra* note 23, at 15 (“[A] decision establishes a legal rule with precedential status only if a majority of judges invoke the same dispositional rule to justify the same disposition . . . .”); Kimura, *supra* note 3, at 1596-98 (discussing fundamental jurisprudential principle of majoritarianism); *A Study in Stare Decisis*, *supra* note 3, at 99 (“One of the basic postulates of the American case-law system is that the decision of a majority determines the result and establishes a precedent for use in subsequent adjudications.”).

136. *See King*, 950 F.2d at 781 (“[T]he narrowest opinion must . . . embody a position implicitly approved by at least five Justices who support the judgment.”).

137. *See generally* MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING (2000) [hereinafter STEARNS, CONSTITUTIONAL PROCESS] (analyzing Supreme Court’s decisional rules using social choice theory); Stearns, *supra* note 2 (applying social choice theory to vote-switching cases and discussing *Marks* doctrine); Stearns, *supra* note 27 (explaining in lay terms how social choice theory applies to *Marks*); Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219 (1994) [hereinafter Stearns, *The Misguided Renaissance*] (comparing Supreme Court and congressional voting procedures and rules using social choice theory).

normatively defended the application of the *Marks* doctrine to the “vast majority” of plurality decisions,<sup>138</sup> including most cases in which the concurring opinions do not fit within one another like “Russian dolls.”<sup>139</sup> Accordingly, the balance of this section will examine the *Marks* doctrine through the lens of social choice theory.

*a. Introduction to Social Choice Theory*

Social choice theory is the study of “collective decision-making processes,” or the ways in which individual preferences or judgments are aggregated to form collective preferences or judgments.<sup>140</sup> One can trace the origin of social choice theory to the Marquis de Condorcet, a French philosopher and mathematician who developed a theory—called the Condorcet criterion—for aggregating individual preferences into “group preferences in the absence of a first-choice majority candidate.”<sup>141</sup> Professor Stearns states the Condorcet criterion as follows: “Condorcet proposed that in groups of three or more persons choosing among three or more options, in the absence of a first-choice majority winner, the outcome chosen should be that which defeats all other available options [by majority vote] in direct pairwise contests.”<sup>142</sup> Such an option is called a Condorcet winner, and rules that ensure that Condorcet winners prevail satisfy the Condorcet criterion.<sup>143</sup>

Professor Stearns designed an illustrative example that is helpful in understanding how the Condorcet criterion operates.<sup>144</sup> Suppose three persons are asked to choose among three options—A, B, and C—which can represent, for example, three different rationales in support of the outcome of a given case.<sup>145</sup> Suppose further that all three persons rank the choices in order from the most appealing to the least appealing, as follows: Person 1 ranks the options A, B, C; Person 2 ranks the options B, C, A; and Person 3 ranks the options C, B, A.<sup>146</sup> These ordinal rankings can be depicted as follows:

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138. STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 105.

139. See, e.g., STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 130-33 (applying narrowest-grounds doctrine to *Bakke*); Abramowicz & Stearns, *supra* note 68, at 964 n.38 (same); Stearns, *supra* note 27, at 329-31 (same).

140. See Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2124 (1990) (defining social choice theory). Whether adjudication involves preference or judgment aggregation depends upon one’s theoretical view of adjudication. See generally Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 89, 92-97 (1986) (describing theories of adjudication).

141. STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 44-45; Stearns, *supra* note 2, at 105; Stearns, *The Misguided Renaissance*, *supra* note 137, at 1253-54.

142. See STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 45.

143. See STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 45.

144. See STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 45.

145. See STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 45.

146. See STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 45.

Table 1

Decision Makers	Ordinal Rankings
Person 1	A, B, C
Person 2	B, C, A
Person 3	C, B, A

None of the three options has majority support as a first-choice candidate, so the group tries to satisfy the Condorcet criterion by selecting a winner through a series of pairwise contests, hoping that this will reveal a dominant second-choice candidate.<sup>147</sup> These contests can be illustrated as follows:

Table 2

Pairwise Comparison	Winner of Pairwise Comparison
A v. B	B
A v. C	C
B v. C	B
<b>Condorcet Winner</b>	<b>B</b>

In the contest between A and B, B wins because Persons 2 and 3 chose B over A.<sup>148</sup> In the contest between B and C, B wins because Persons 1 and 2 chose B over C.<sup>149</sup> The winner of the contest between A and C is irrelevant because B defeats both A and C in direct pairwise contests.<sup>150</sup> Accordingly, the voting rules that the group used satisfy the Condorcet criterion because the rules identify B—the option that defeats all other available options in direct pairwise contests—as the winner.<sup>151</sup>

Social choice scholars place confidence in rules that identify Condorcet winners because these rules ensure that the will of the majority is not thwarted when no first-choice majority winner exists.<sup>152</sup> Many social choice scholars believe that if there is no first-choice majority winner, it is inappropriate to simply deem the candidate with a plurality of votes the winner.<sup>153</sup> These

147. See STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 45.

148. See STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 45.

149. See STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 45.

150. See STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 45.

151. See STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 45.

152. See Jeffrey C. O'Neill, *Everything That Can Be Counted Does Not Necessarily Count: The Right to Vote and the Choice of a Voting System*, 2006 MICH. ST. L. REV. 327, 337 (2006) ("Condorcet voting is widely accepted as the best generalization of majority rule to more than two candidates.")

153. See STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 45-46 (implying plurality voting systems

scholars reason that “when an alternative opposed by a majority wins, quite clearly the votes of some people are not being counted the same as other people’s votes.”<sup>154</sup> Unlike plurality voting rules, Condorcet-producing voting rules are consistent with “the notion of equality and ‘one man, one vote,’” because they do not permit an option disfavored by a majority to become a winner.<sup>155</sup> Instead, the group’s collective dominant second choice emerges as the winner—a result that is more consistent with the goal that each person should have equal voting power.<sup>156</sup>

There are two significant defects, however, with rules that satisfy the Condorcet criterion.<sup>157</sup> First, such rules do not account for the intensity of individuals’ preferences.<sup>158</sup> Second, as the Condorcet paradox illustrates, a Condorcet winner will not exist in every case.<sup>159</sup> Returning to Stearns’s example, suppose the same three persons are asked to choose among A, B, and C, but suppose that in this case they rank their choices as follows: Person 1 ranks the options A, B, C; Person 2 ranks the options B, C, A; and Person 3 ranks the options C, A, B.<sup>160</sup> These ordinal rankings can be shown as follows:

**Table 3**

<b>Decision Makers</b>	<b>Ordinal Rankings</b>
Person 1	A, B, C
Person 2	B, C, A
Person 3	C, A, B

None of the three options has majority support as a first-choice candidate, so the group again decides to select a winner by taking a series of pairwise contests, hoping that this will reveal a dominant second-choice candidate.<sup>161</sup>

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undermine notion of majority rule); *see also supra* note 152 (observing many social choice scholars disfavor plurality voting systems and prefer Condorcet-producing voting regimes). *But see* Saul Levmore, *More Than Mere Majorities*, 2000 UTAH L. REV. 759, 770-71 (2000) (arguing Condorcet Jury Theorem suggests plurality opinion should determine precedential value in split decisions).

154. STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 46 (quoting WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE 100 (1982)).

155. STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 46 (quoting WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE 100 (1982)).

156. STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 46.

157. STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 46.

158. STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 46; *see also* Stearns, *The Misguided Renaissance*, *supra* note 137, at 1255-56 (arguing failure to account for intensity of preferences not utility maximizing).

159. *See* STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 46.

160. *See* STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 44-45.

161. *See* STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 45.

These contests can be demonstrated as follows:

**Table 4**

<b>Pairwise Comparison</b>	<b>Winner of Pairwise Comparison</b>
A v. B	A
A v. C	C
B v. C	B
<b>Condorcet Winner</b>	<b>?</b>

In the contest between A and B, A wins because Persons 1 and 3 chose A over B.<sup>162</sup> In the contest between A and C, C wins because Persons 2 and 3 chose C over A.<sup>163</sup> In the contest between B and C, B wins because Persons 1 and 2 prefer B to C.<sup>164</sup> No Condorcet winner, or dominant second choice, emerges because the group does not prefer any one choice to all the others in direct pairwise contests.<sup>165</sup> This example demonstrates the Condorcet paradox: A dominant second-choice candidate will not always exist because group preferences are not always transitive.<sup>166</sup>

*b. Social Choice Theory and the Marks Doctrine*

With this background, it is appropriate to examine the *Marks* doctrine through the lens of social choice theory. Professor Stearns has normatively defended the *Marks* doctrine as a Condorcet-producing rule that “restores the Court’s rationality by singling out as the holding that opinion which is a Condorcet winner.”<sup>167</sup> Recall that according to Justice Powell, the narrowest-grounds opinion in *Memoirs* was Justice Brennan’s plurality.<sup>168</sup> Professor Stearns has demonstrated that Justice Brennan’s plurality opinion also emerges as the Condorcet-winning opinion in *Memoirs* if the opinions are subjected to

162. See STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 45.

163. See STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 45.

164. See STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 45.

165. See STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 45. The absence of a Condorcet winner gives rise to a phenomenon that social choice theorists call “cycling,” in which a group employing a Condorcet-producing rule is unable to select a stable winner. See *id.* at 46-47.

166. See STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 45 (explaining possibility of intransitivity shown by Condorcet paradox lies at core of social choice theory).

167. STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 133; see also Tracey E. George & Robert J. Pushaw, Jr., *How is Constitutional Law Made?*, 100 MICH. L. REV. 1265, 1270 (2002) (book review) (describing Stearns’s analysis of *Marks* as “primarily normative” and “not explanatory”).

168. See *supra* notes 94-100 and accompanying text (describing Justice Powell’s analysis of *Memoirs* concurrences).

direct pairwise contests.<sup>169</sup> Professor Stearns labels the opinions in *Memoirs* as follows: A (Douglas and Black concurrences),<sup>170</sup> B (Stewart concurrence), C (Brennan plurality), and D (Clark, Harlan, and White dissents).<sup>171</sup> To simplify the presentation, Stearns treats the A and B opinions as a single opinion, designated as the A/B opinion, which leaves three choices for indicating the Justices' preferences: A/B, C, and D.<sup>172</sup> Accordingly, the ordinal rankings of the A/B group are A/B, C, D, and the rankings of the D group are D, C, A/B.<sup>173</sup> The C group's rankings are immaterial because the outcome is the same whether they are C, A/B, D or C, D, A/B: option C (the Brennan plurality) becomes the Condorcet winner.<sup>174</sup> This result can be illustrated as follows:

Table 5

Decision Makers	Ordinal Rankings
Douglas/Black/Stewart (A/B)	A/B, C, D
Brennan Plurality (C)	C, ?, ?
Dissenters (D)	D, C, A/B

Table 6

Pairwise Comparison	Winner of Pairwise Comparison
A/B v. C	C
A/B v. D	?
C v. D	C
<b>Condorcet Winner</b>	<b>C</b>

From this analysis, Stearns concludes that the *Marks* doctrine “is best understood as an application of the Condorcet criterion to fractured panel

169. STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 128-29 (performing direct pairwise comparison of opinions in *Memoirs*).

170. STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 128 & tbl.3.5. Stearns groups Justices Douglas and Black together because they both wrote that the government could not regulate speech at all. *See supra* note 96 and accompanying text (explaining position of First Amendment absolutists).

171. STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 128 & tbl.3.5. Stearns groups the three dissenters together for ease of presentation because none of their positions is eligible for holding status under *Marks*, and their ordinal rankings of the opinions in *Memoirs* would likely be the same. *See id.* at 127-28.

172. STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 128. Stearns combines the A and B opinions because this creates three groups, any two of which contain enough votes to form a majority. *Id.*

173. STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 128.

174. STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 128-29.

Supreme Court decisions.”<sup>175</sup>

Professor Stearns has further observed that, like Justice Brennan’s opinion in *Memoirs*, almost every opinion that the *Marks* doctrine identifies as the narrowest-grounds opinion also emerges as a Condorcet winner.<sup>176</sup> By locating the Condorcet-winning opinion, “the narrowest grounds doctrine identifies as the opinion stating the holding that opinion which represents a dominant, and thus stable, second choice.”<sup>177</sup> Professor Stearns also takes a rather optimistic view of the *Marks* doctrine by concluding that it can apply to at least some cases in which the concurring opinions do not fall neatly within each other like “Russian dolls.”<sup>178</sup> In fact, unlike many other scholars,<sup>179</sup> Stearns maintains that the *Marks* doctrine will only produce indeterminate holdings in a very small category of plurality decisions—those that exhibit the Condorcet paradox, in which no Condorcet winner exists.<sup>180</sup> Stearns provides a taxonomy of Supreme Court plurality decisions using three paradigms that “embrace every conceivable” plurality decision.<sup>181</sup> The three paradigms are: cases with a unidimensional issue spectrum;<sup>182</sup> cases with a multidimensional issue spectrum and symmetrical preferences;<sup>183</sup> and cases with a multidimensional issue spectrum and asymmetrical preferences.<sup>184</sup> According to Stearns, the

175. STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 129.

176. See STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 124-33 (demonstrating narrowest-grounds opinions in three plurality decisions also Condorcet-winning opinions); Stearns, *supra* note 2, at 110-21 (demonstrating narrowest-grounds opinions in two plurality decisions also Condorcet-winning opinions); Stearns, *supra* note 27, at 327-35 (demonstrating narrowest-grounds opinions in four plurality decisions also Condorcet-winning opinions). Stearns does acknowledge that the *Marks* doctrine increases the probability, but does not guarantee, that the narrowest-grounds opinion will also be the Condorcet winner. See STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 98, 154 (discussing ability of *Marks* doctrine to identify Condorcet winner).

177. STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 105; see also Michael Abramowicz & Maxwell L. Stearns, *Beyond Counting Votes: The Political Economy of Bush v. Gore*, 54 VAND. L. REV. 1849, 1931 n.309 (2001) (stating narrowest-grounds doctrine ensures that if Condorcet winner exists, that winner will constitute Court’s holding).

178. See STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 130-33 (applying *Marks* to *Bakke*); Stearns, *supra* note 27, at 330-31 (same); see also *infra* notes 181-186 and accompanying text (describing Stearns’s three-paradigm taxonomy of Supreme Court plurality decisions).

179. See *supra* note 116 and accompanying text (observing most courts and commentators deem *Marks* applicable in very limited circumstances).

180. See STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 99, 105 (explaining *Marks* functions in all cases except those involving “multidimensional issue continuum” and “asymmetrical preferences”); Levmore, *supra* note 47, at 103 (labeling *Marks* doctrine “incoherent” when no Condorcet winner exists).

181. Stearns, *supra* note 2, at 110-23; see also STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 71 *passim* (explaining taxonomy and applying it to plurality decisions).

182. STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 124-30; Stearns, *supra* note 2, at 111; see, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Furman v. Georgia*, 408 U.S. 238 (1972); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).

183. STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 130-33; Stearns, *supra* note 2, at 111; see *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

184. STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 99-106; Stearns, *supra* note 2, at 111; see, e.g., *Miller v. Albright*, 523 U.S. 420 (1998); *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662 (1981); *Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949).

narrowest-grounds doctrine identifies as the Court's holding the Condorcet-winning opinion in cases within the first and second paradigms.<sup>185</sup> The *Marks* doctrine only fails to identify a holding in those rare cases that fall within the third paradigm because they represent Condorcet paradoxes—that is, they do not contain discernable Condorcet-winning opinions.<sup>186</sup> Professor Stearns completes his normative defense of the *Marks* doctrine by concluding that it ensures a holding in the “maximum number” of plurality decisions; it ensures that the holding is most likely to be a stable, Condorcet-winning opinion if one exists; and it promotes principled decision-making on the Court.<sup>187</sup>

Viewing the *Marks* doctrine as a Condorcet-producing rule, however, it also becomes necessary to consider the two defects inherent in rules that satisfy the Condorcet criterion.<sup>188</sup> Recall that the first defect is that such rules do not take into account intensities of preference.<sup>189</sup> This defect may be less applicable to the Supreme Court than to other contexts since Supreme Court Justices typically explain their reasoning, thereby potentially accounting for their intensities of preference.<sup>190</sup> The second defect with rules that satisfy the Condorcet criterion is that a Condorcet winner will not always exist.<sup>191</sup> The impact of this deficiency is mitigated by the fact that “in the vast majority of fractured panel cases” a Condorcet winner does exist.<sup>192</sup> Therefore, these two defects appear to have limited deleterious effects upon the operation of the *Marks* doctrine.<sup>193</sup>

The *Marks* doctrine, as understood through Professor Stearns's social choice framework, appears to be an extraordinarily effective means of identifying the

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185. See STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 105 (maintaining *Marks* functions well in “vast majority” of plurality decisions without “multidimensionality and asymmetry”); Stearns, *supra* note 2, at 110-28 (arguing *Marks* functions properly except when applied to cases with multidimensional issue spectrum and asymmetrical preferences).

186. See STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 105 (suggesting *Marks* “doctrine’s assumptions break down” in cases with multidimensionality and asymmetry); Stearns, *supra* note 2, at 110-28 (arguing narrowest-grounds doctrine fails only in cases with multidimensional issue spectrum and asymmetrical preferences); Stearns, *supra* note 27, at 338 (explaining multidimensional and asymmetrical cases like *Kassel* provide no way of identifying Condorcet-winning opinion).

187. STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 135-36 (outlining normative justifications for *Marks* doctrine). But see Levmore, *supra* note 153, at 770-71 (using social choice theory to argue plurality opinion, not “narrowest” opinion, should bind lower courts).

188. See *supra* text accompanying notes 157-166 (explaining two defects with rules that satisfy Condorcet criterion).

189. See *supra* note 158 and accompanying text (noting one defect with Condorcet criterion-satisfying rules).

190. See Maltz, *supra* note 14, at 1395 (explaining Supreme Court opinions describe reasons for agreement or disagreement with disposition).

191. See *supra* text accompanying notes 159-166 (demonstrating Condorcet paradox).

192. See STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 105 (arguing *Marks* works in most cases); Stearns, *supra* note 27, at 335 (discussing “rare” plurality decisions in which *Marks* does not work).

193. See STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 135 (stating *Marks* ensures holding in “maximum number” of plurality decisions).



holding in plurality decisions.<sup>194</sup> According to Professor Stearns's social choice framework, the narrowest-grounds doctrine would seem to be an interpretive rule that lower courts can and should employ when following nearly all plurality decisions.<sup>195</sup>

#### D. Evaluating the Competing Visions of Marks After *Rapanos v. United States*

Given the incompatibility of the conventional and social choice views of the *Marks* doctrine, an analysis of the two approaches is necessary to determine which is preferable. Part III of this Note provides a normative analysis of the two discordant approaches to *Marks* by engaging in a case study of the consequences of applying each to *Rapanos v. United States*. *Rapanos* is a recent Supreme Court plurality decision in which the putative narrowest-grounds opinion "does not fit entirely within a broader circle drawn by the" plurality.<sup>196</sup> Therefore, *Rapanos* is an ideal case with which to test the two competing views of the *Marks* doctrine outlined above, and identify which is more normatively justifiable.<sup>197</sup> Before examining these competing visions of the *Marks* doctrine, however, an overview of the Supreme Court's decision in *Rapanos* is in order.

In *Rapanos* the Court was asked to decide whether four wetlands were subject to federal regulatory jurisdiction as "waters of the United States" under the Clean Water Act.<sup>198</sup> In a five-to-four decision, the Court vacated the judgment below and remanded the case for further proceedings consistent with the new standards announced in the Court's opinions.<sup>199</sup> The opinions included a four-Justice plurality by Justice Scalia, a single-Justice concurrence by Justice Kennedy, and a four-Justice dissent by Justice Stevens.<sup>200</sup> Justice Scalia's

194. See STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 105 (stating premises underlying *Marks* doctrine hold in "vast majority" of plurality decisions).

195. See STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 105 (indicating *Marks* functions properly in "vast majority" of plurality decisions).

196. *King v. Palmer*, 950 F.2d 771, 782 (D.C. Cir. 1991) (en banc); see *infra* notes 213-214 and accompanying text (explaining concurring opinions in *Rapanos* not nested like "Russian dolls"). See generally Bradford C. Mank, *Implementing Rapanos—Will Justice Kennedy's Significant Nexus Test Provide a Workable Standard for Lower Courts, Regulators, and Developers?*, 40 IND. L. REV. 291 (2007) (exploring problems with applying *Marks* to *Rapanos*); Matthew A. Macdonald, Comment, *Rapanos v. United States and Carabell v. United States Army Corps of Engineers*, 31 HARV. ENVTL. L. REV. 321, 327-29 (2007) (analyzing plurality opinion and Justice Kennedy's concurrence in *Rapanos*); Posting of Amy Howe to SCOTUSblog, [http://www.scotusblog.com/movabletype/archives/2006/06/discussion\\_boar\\_1.html](http://www.scotusblog.com/movabletype/archives/2006/06/discussion_boar_1.html) (June 19, 2006, 13:30 EST) (attributing posting to Richard Lazarus and generating discussion of potential problems with applying *Marks* to *Rapanos*). In criticizing *Rapanos*, Professor Richard Lazarus lamented that "[e]nvironmental [l]aw now has its own *Bakke*." Posting of Amy Howe to SCOTUSblog, [http://www.scotusblog.com/movabletype/archives/2006/06/discussion\\_boar\\_1.html](http://www.scotusblog.com/movabletype/archives/2006/06/discussion_boar_1.html) (June 19, 2006, 13:30 EST) (attributing posting to Richard Lazarus).

197. See *supra* Part II.C (discussing competing visions of *Marks* doctrine).

198. *Rapanos v. United States*, 126 S. Ct. 2208, 2219 (2006) (plurality opinion) (framing issue).

199. *Id.* at 2235 (announcing judgment).

200. See *id.* at 2214-35; *id.* at 2236-52 (Kennedy, J., concurring); *id.* at 2252-65 (Stevens, J., dissenting).

plurality opinion provided that “waters of the United States” are “only relatively permanent, standing or flowing bodies of water.”<sup>201</sup> With respect to wetlands, Justice Scalia wrote that “*only* those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right . . . are . . . covered by the Act.”<sup>202</sup> Justice Kennedy’s standard for federal jurisdiction over wetlands was more malleable in that he rejected the plurality’s requirement of a continuous surface connection and would require, instead, that a wetland possess a “‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.”<sup>203</sup> Finally, Justice Stevens’s dissent would have upheld the exercise of federal jurisdiction in *Rapanos* as reasonable and consistent with the purposes of the Clean Water Act.<sup>204</sup>

Applying the narrowest-grounds rule to *Rapanos*, Justice Kennedy’s opinion appears to emerge as the holding of the Court.<sup>205</sup> Recall that under the *Marks*

Chief Justice Roberts signed on to Justice Scalia’s plurality opinion but also filed a separate concurrence. *See id.* at 2214-35 (plurality opinion); *id.* at 2235-36 (Roberts, C.J., concurring). Justice Breyer signed on to Justice Stevens’s dissent but also filed his own dissenting opinion. *See id.* at 2252-65 (Stevens, J., dissenting); *id.* at 2266 (Breyer, J., dissenting). This Note, however, will focus only on Justice Scalia’s plurality opinion, Justice Kennedy’s concurrence, and Justice Stevens’s dissent because Chief Justice Roberts’s and Justice Breyer’s individual opinions do not affect the substance of the other opinions. *See id.* at 2214-66 (various opinions).

201. *Id.* at 2221 (plurality opinion).

202. *Rapanos*, 126 S. Ct. at 2226 (plurality opinion).

203. *Id.* at 2236 (Kennedy, J., concurring) (citing *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng’rs (SWANCC)*, 531 U.S. 159, 167, 172 (2001)). A “significant nexus” is established when the water or wetland “significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” *Id.* at 2248.

204. *Rapanos v. United States*, 126 S. Ct. 2208, 2252-65 (2006) (Stevens, J., dissenting). Although the dissent is not eligible for holding status under *Marks*, it is helpful to understanding why Justice Kennedy’s opinion is the Condorcet winner. *See infra* notes 228-235 and accompanying text (illustrating Justice Kennedy’s opinion is Condorcet winner).

205. *See* S.F. Baykeeper v. Cargill Salt Div., 481 F.3d 700, 707-08 (9th Cir. 2007) (following Justice Kennedy’s “controlling” opinion in *Rapanos*); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724 (7th Cir. 2006) (per curiam) (holding Justice Kennedy concurred on narrowest grounds but noting voting anomaly); *N. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023, 1029 (9th Cir. 2006) (following Justice Kennedy’s “significant nexus” test); *United States v. Fabian*, No. 2:02-CV-495, 2007 U.S. Dist. LEXIS 24254, at \*27-31 (N.D. Ind. Mar. 29, 2007) (following *Gerke* by holding Justice Kennedy concurred on narrowest grounds but noting voting anomaly); *United States v. Pozsgai*, No. 88-6545, 2007 U.S. Dist. LEXIS 23450, at \*4 (E.D. Pa. Mar. 8, 2007) (applying Justice Kennedy’s test); *Env’tl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 469 F. Supp. 2d 803, 823 (N.D. Cal. 2007) (following *Healdsburg* and applying Justice Kennedy’s “significant nexus” test); Jonathan H. Adler, *Reckoning with Rapanos: Revisiting “Waters of the United States” and the Limits of Federal Wetland Regulation*, 14 MO. ENVTL. L. & POL’Y REV. 1, 11 (2006) (concluding Justice Kennedy’s concurrence and “grounds of agreement” with plurality constitute Court’s holding under *Marks*); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 405 n.51 (2007) (indicating “significant nexus” standard as Court’s holding); Ilya Somin, *Gonzales v. Raich: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL’Y 507, 523 (2006) (concluding Justice Kennedy “almost certainly” concurred on narrowest grounds); Maxwell L. Stearns, *The New Commerce Clause Doctrine in Game Theoretical Perspective*, 60 VAND. L. REV. 1, 5 n.21, 53 & n.231 (2007) (concluding Justice Kennedy’s opinion states the holding in *Rapanos*); Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 540 (2006) (referring to Justice Kennedy’s “controlling” opinion in *Rapanos*); *The Supreme Court, 2005 Term—Leading Cases*, 120 HARV. L. REV. 351, 356 & n.63 (2006) (observing Justice

doctrine the Court's holding is the concurring opinion that will affect or control the fewest cases in the future.<sup>206</sup> Thus, whichever concurrence will be more likely to sustain federal jurisdiction over wetlands in future cases will be controlling.<sup>207</sup> Between the two concurring opinions, Justice Kennedy's more flexible "significant nexus" test will sustain federal jurisdiction more often than Justice Scalia's rigid test requiring a physical connection, so Justice Kennedy's concurrence appears to be the narrowest-grounds opinion.<sup>208</sup>

Nevertheless, two Justices expressed disapproval of this analysis.<sup>209</sup> Chief Justice Roberts filed a brief concurrence in which he bemoaned the situation in *Rapanos*.<sup>210</sup> The Chief Justice wrote that lower courts interpreting *Rapanos* "will now have to feel their way on a case-by-case basis."<sup>211</sup> Justice Stevens authored a dissent in which he directed that in the future "the United States may elect to prove jurisdiction under *either* [Justice Scalia's or Justice Kennedy's] test."<sup>212</sup> Both Chief Justice Roberts and Justice Stevens seem to have recognized that in some rare circumstances Justice Scalia's test will be satisfied while Justice Kennedy's test will not.<sup>213</sup> If, for example, a wetland shares a "slight surface hydrological connection" with a "water[] of the United States," but the connection is so insubstantial that the wetland does not share a "significant nexus" with the covered waterway, Justice Scalia's test will be met, while Justice Kennedy's will not.<sup>214</sup> In this situation, Justice Stevens

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Kennedy concurred on narrowest grounds); Garrett W. Johnson, Note, *Constitutional Limits to Federal Environmental Regulation: The Commerce Clause Challenge to the Safe Drinking Water Act*, 10 QUINNIPIAC HEALTH L.J. 77, 106 n.195 (2006) (noting Justice Kennedy concurred "on narrower grounds" than plurality). See generally James Murphy, *Muddying the Waters of the Clean Water Act: Rapanos v. United States and the Future of America's Water Resources*, 31 VT. L. REV. 355 (2007) (analyzing *Rapanos* and concluding lower courts should follow Justice Kennedy's concurrence). But see *Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring) (intimating *Marks* might not apply neatly to *Rapanos*); *id.* at 2265 & n.14 (Stevens, J., dissenting) (arguing lower courts can follow whichever test sustains jurisdiction); *United States v. Johnson*, 467 F.3d 56, 62-66 (1st Cir. 2006) (following Justice Stevens's direction to apply either test), *cert. denied*, 76 U.S.L.W. 3186 (U.S. Oct. 9, 2007) (No. 07-9); *United States v. Cundiff*, 480 F. Supp. 2d 940, 944 (W.D. Ky. 2007) (same); *Simsbury-Avon Pres. Soc'y, LLC v. Metacon Gun Club, Inc.*, 472 F. Supp. 2d 219, 225-30 (D. Conn. 2007) (same); *United States v. Evans*, No. 3:05-cr-159(S3)-J-32MMH, 2006 U.S. Dist. LEXIS 94369, at \*64-65 (M.D. Fla. July 14, 2006) (same); *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 612-13 (N.D. Tex. 2006) (grappling with concurring opinions in *Rapanos* and looking to Fifth Circuit precedent for guidance).

206. See *supra* note 113 and accompanying text (explaining operation of narrowest-grounds rule).

207. See *supra* note 113 (clarifying operation of narrowest-grounds rule).

208. See *Gerke*, 464 F.3d at 724-25 (reasoning Justice Kennedy's test narrower because more likely to uphold federal jurisdiction).

209. See *Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring) (intimating *Marks* might not apply neatly to *Rapanos*); *id.* at 2265 & n.14 (Stevens, J., dissenting) (arguing lower courts can follow whichever test sustains jurisdiction).

210. *Rapanos v. United States*, 126 S. Ct. 2208, 2236 (2006) (Roberts, C.J., concurring).

211. *Id.*

212. *Id.* at 2265 & n.14 (Stevens, J., dissenting) (emphasis added).

213. See *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724-25 (2006) (per curiam) (explaining Justice Scalia's test might be satisfied when Justice Kennedy's would not).

214. See *id.* But see Adler, *supra* note 205, at 19 (arguing plurality's test likely not satisfied whenever

advised, it would be appropriate for a lower court to uphold jurisdiction because the four dissenters in *Rapanos* would join the plurality in sustaining federal jurisdiction.<sup>215</sup> Thus, Chief Justice Roberts and Justice Stevens both suggested that when lower courts interpret *Rapanos* they should not feel bound in all cases to follow Justice Kennedy's concurrence under the *Marks* doctrine.<sup>216</sup>

### III. ANALYSIS

#### A. *Rapanos and the Conventional View of Marks*

The *Marks* doctrine is essentially inapplicable to *Rapanos* under the conventional view. Recall that the conventional view maintains that *Marks* is only applicable when the concurring opinions are logically nested within one another like "Russian dolls," such that an explicit or implicit majority supports a narrow legal proposition consistent with the Court's judgment.<sup>217</sup> As Chief Justice Roberts and Justice Stevens realized, the plurality opinion and Justice Kennedy's concurrence in *Rapanos* do not fit within one another like "Russian dolls"; that is, Justice Kennedy's concurrence is not a logical subset of the plurality opinion.<sup>218</sup> Thus, conventionalists would deem *Marks* inapplicable to *Rapanos* because no legal proposition enjoys the support of a majority of the Court.<sup>219</sup> Consequently, under the conventional view, *Rapanos* does not establish any binding legal principles; instead, the precedential value of *Rapanos* lies only in its result.<sup>220</sup> Lower courts adhering to the conventional view should follow Justice Stevens's instruction to uphold federal jurisdiction under *Rapanos* if either the plurality's or Justice Kennedy's test is satisfied.<sup>221</sup>

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Justice Kennedy's test not met).

215. *Rapanos*, 126 S. Ct. at 2265 & n.14 (Stevens, J., dissenting); see *Gerke*, 464 F.3d at 725 (explaining Justice Kennedy would be outvoted eight to one).

216. See *supra* note 209 (recognizing Chief Justice Roberts's and Justice Stevens's views).

217. See *supra* text accompanying notes 122-136 (explaining conventional view of *Marks* doctrine).

218. See *supra* text accompanying notes 209-216 (describing Chief Justice Roberts's and Justice Stevens's views).

219. Cf. *King v. Palmer*, 950 F.2d 771, 784 (D.C. Cir. 1991) (en banc) (holding *Marks* inapplicable to *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987)).

220. Cf. *id.* (citing *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 655 (1949) (Frankfurter, J., dissenting)) (noting result binding even if no majority agreement on rationale).

221. See *supra* text accompanying notes 212-216 (laying out Justice Stevens's directive). In fact, many lower courts interpreting *Rapanos* have followed Justice Stevens's approach. See *United States v. Johnson*, 467 F.3d 56, 62-66 (1st Cir. 2006) (following Justice Stevens's direction to apply either test), *cert. denied*, 76 U.S.L.W. 3186 (U.S. Oct. 9, 2007) (No. 07-9); *United States v. Cundiff*, 480 F. Supp. 2d 940, 944 (W.D. Ky. 2007) (following Justice Stevens's direction to apply either test); *Simsbury-Avon Pres. Soc'y, LLC v. Metacon Gun Club, Inc.*, 472 F. Supp. 2d 219, 225-30 (D. Conn. 2007) (following Justice Stevens's direction to apply either test); *United States v. Evans*, No. 3:05-cr-159(S3)-J-32MMH, 2006 U.S. Dist. LEXIS 94369, at \*64-65 (M.D. Fla. July 14, 2006) (following Justice Stevens's direction to apply either test). But see *S.F. Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 707-08 (9th Cir. 2007) (following Justice Kennedy's "controlling" opinion in

Conversely, if neither the plurality's nor Justice Kennedy's test is satisfied, lower courts must deny federal jurisdiction.<sup>222</sup>

### B. *Rapanos and the Social Choice View of Marks*

Under the social choice view, however, *Marks* is applicable to *Rapanos*, and Justice Kennedy's opinion is controlling.<sup>223</sup> Recall that social choice scholars are of the view that the *Marks* doctrine is a normatively defensible interpretive rule for plurality decisions because *Marks* identifies as the holding of the Court the opinion most likely to be a Condorcet-winning opinion, if one exists.<sup>224</sup> Social choice theorists favor the *Marks* doctrine because in cases in which none of the Justices' first-choice options commands a majority, the group's collective dominant second choice will likely emerge as the Court's holding under *Marks*.<sup>225</sup> Accordingly, social choice adherents would support the application of *Marks* to *Rapanos* if the narrowest-grounds opinion also emerges as the Condorcet-winning opinion in that case.<sup>226</sup> As explained above, Justice Kennedy's opinion appears to be the narrowest-grounds opinion in *Rapanos*.<sup>227</sup> The analysis that follows illustrates that social choice theorists would support the application of *Marks* to *Rapanos* because Justice Kennedy's opinion also emerges as the Condorcet winner in that case.<sup>228</sup>

All three opinions in *Rapanos* can be cast along a unidimensional issue continuum according to the breadth of the standards in each for limiting federal jurisdiction over wetlands.<sup>229</sup> For purposes of illustration, a letter will be

*Rapanos*); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724 (7th Cir. 2006) (per curiam) (holding Justice Kennedy concurred on narrowest grounds but noting voting anomaly); *N. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023, 1029 (9th Cir. 2006) (following Justice Kennedy's "significant nexus" test); *United States v. Fabian*, No. 2:02-CV-495, 2007 U.S. Dist. LEXIS 24254, at \*27-31 (N.D. Ind. Mar. 29, 2007) (following *Gerke* by holding Justice Kennedy concurred on narrowest grounds but noting voting anomaly); *United States v. Pozsgai*, No. 88-6545, 2007 U.S. Dist. LEXIS 23450, at \*4 (E.D. Pa. Mar. 8, 2007) (applying Justice Kennedy's test); *Env'tl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 469 F. Supp. 2d 803, 823 (N.D. Cal. 2007) (following *Healdsburg* and applying Justice Kennedy's "significant nexus" test). See generally Murphy, *supra* note 205 (analyzing *Rapanos* and concluding lower courts should follow Justice Kennedy's concurrence).

222. See *Rapanos v. United States*, 126 S. Ct. 2208, 2265 n.14 (2006) (Stevens, J., dissenting) (concluding lower "courts should . . . uphold the Corps' jurisdiction" only if "either test" is satisfied).

223. See Stearns, *supra* note 205, at 5 n.21, 53 & n.231 (concluding Justice Kennedy's opinion states the holding in *Rapanos*).

224. STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 135.

225. STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 45-46.

226. See STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 135 (defending *Marks* as Condorcet-producing rule).

227. See *supra* text accompanying notes 205-208 (demonstrating Justice Kennedy appears to have concurred on narrowest grounds).

228. Cf. STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 128-29 (showing Brennan plurality Condorcet winner in *Memoirs*).

229. Cf. STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 127-29, 128 tbl.3.5 (casting opinions in *Memoirs* along unidimensional issue continuum). From broadest to narrowest, the *Rapanos* opinions would be arranged as follows: Justice Scalia's plurality, Justice Kennedy's concurrence, Justice Stevens's dissent. See *Rapanos v. United States*, 126 S. Ct. 2208, 2214-35 (2006) (plurality opinion); *id.* at 2236-52 (Kennedy, J.,

assigned to each opinion as follows: A (Scalia plurality), B (Kennedy concurrence), C (Stevens dissent).<sup>230</sup> Again, to determine the Condorcet winner, one must first rank the opinions in order of preference for the A, B, and C positions.<sup>231</sup>

Table 7

Decision Makers	Ordinal Rankings
Scalia Plurality (A)	A, B, C
Kennedy Concurrence (B)	B, ?, ?
Stevens Dissent (C)	C, B, A

The A (Scalia) camp would rank its preferences A, B, C, and the C (Stevens) camp would rank its preferences C, B, A.<sup>232</sup> The B (Kennedy) position's rankings are irrelevant because whether they are B, C, A or B, A, C, the result is the same.<sup>233</sup> If one takes direct pairwise comparisons of the available options, option B (the Kennedy concurrence) emerges as the Condorcet winner just as option B became the Condorcet winner in the illustration in Part II.C.2.a above.<sup>234</sup>

Table 8

Pairwise Comparison	Winner of Pairwise Comparison
A v. B	B
A v. C	?
B v. C	B
<b>Condorcet Winner</b>	<b>B</b>

concurring); *id.* at 2252-65 (Stevens, J., dissenting).

230. *Cf.* STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 128 & tbl.3.5 (assigning letters to opinions in *Memoirs*).

231. *Cf.* STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 128-29 (ranking opinions in *Memoirs*).

232. *Cf.* STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 128 (ranking opinions in *Memoirs*). Both the A (Scalia) camp and the C (Stevens) camp would most likely prefer the B (Kennedy) position's rationale to each other's because Kennedy's "significant nexus" test represents a middle ground between the Scalia and Stevens rationales. *See supra* text accompanying notes 198-204 (reviewing opinions in *Rapanos*); *see also supra* note 229 (casting *Rapanos* opinions along unidimensional issue continuum from broadest to narrowest).

233. *Cf.* STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 128-29 (reviewing rankings in *Memoirs*).

234. *Cf.* STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 129 (indicating Condorcet winner in *Memoirs*); *see also supra* text accompanying notes 144-151 (illustrating selection of Condorcet winner).

Thus, the *Marks* doctrine identifies as the holding in *Rapanos* the stable and dominant second choice, or Condorcet-winning opinion.<sup>235</sup> As a result, social choice theorists would support the application of *Marks* to *Rapanos*.

*C. A Normative and Positive Analysis of the Competing Visions of Marks as Applied to Rapanos*

Professor Stearns's expansive vision of the *Marks* doctrine as an application of the Condorcet criterion to Supreme Court plurality decisions is appealing. Under Stearns's social choice theory of *Marks*, the narrowest-grounds rule identifies the Supreme Court's holding in virtually all plurality decisions.<sup>236</sup> This result is desirable not only because it means that *Marks* is widely applicable, but also because *Marks* appears to be normatively justifiable.<sup>237</sup> According to Stearns, the *Marks* doctrine is a normatively justifiable interpretive rule for Supreme Court plurality decisions primarily because *Marks* singles out as the Court's holding the opinion that emerges as the Condorcet winner.<sup>238</sup> As explained above, social choice theorists favor voting systems that select Condorcet winners because these systems ensure that the will of the majority is not thwarted when no first-choice majority winner exists; instead, the group's collective dominant second choice is selected as the winner.<sup>239</sup>

The fact that the *Marks* doctrine satisfies the Condorcet criterion, however, is an insufficient justification for the narrowest-grounds rule.<sup>240</sup> After all, one might object that a second-choice opinion should never be accorded precedential value; that is, before an opinion becomes binding law, it should be endorsed as the first choice of a majority of Justices.<sup>241</sup> Ultimately, the problem with Stearns's social choice justification for the *Marks* doctrine is that it assumes that it is necessary, or at least desirable, to select one opinion as a "winner" in Supreme Court plurality decisions.<sup>242</sup> In other words, defending

235. Cf. STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 129 (concluding *Marks* doctrine satisfies Condorcet criterion in *Memoirs*).

236. See *supra* notes 180-187 and accompanying text (explaining Professor Stearns's view that *Marks* functions properly in "vast majority" of plurality decisions).

237. See *supra* text accompanying note 187 (outlining Professor Stearns's three-part normative justification of *Marks* doctrine).

238. See *supra* text accompanying note 167 (indicating Professor Stearns's classification of *Marks* as Condorcet-producing rule).

239. See *supra* text accompanying notes 152-156 (accounting for confidence social choice scholars place in Condorcet-producing rules).

240. See *supra* text accompanying note 187 (outlining Professor Stearns's three-part normative justification for *Marks*). Even Professor Stearns does not rely solely on the Condorcet criterion to justify *Marks*, and instead provides an intriguing justification for the *Marks* doctrine by arguing that it promotes "principled decision making" and "limits strategic voting" on the Court. STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 135-39.

241. See Caminker, *supra* note 23, at 15 (describing "conventional model" which provides only majority's first choice establishes binding legal precedent).

242. See *supra* Part II.C.2.b (discussing social choice theory and *Marks* doctrine).

the *Marks* doctrine as a Condorcet-producing rule does justify the “winners” that *Marks* selects, but does not justify the act of selecting a “winner” in the first place.<sup>243</sup>

Assuming that it is necessary or desirable to select one opinion as a “winner” in plurality decisions, the Condorcet criterion provides a valid and indeed a very persuasive normative justification for the *Marks* doctrine.<sup>244</sup> Cases like *Rapanos* illustrate, however, that the assumption that lower courts must select one opinion as a “winner” in plurality decisions is tenuous at best. This assumption is flawed because selecting a “winner” can actually thwart the will of a majority of the Court—the very result the Condorcet criterion aims to avoid.<sup>245</sup> For example, the social choice view would justify applying *Marks* to *Rapanos* and selecting Justice Kennedy’s concurrence as the sole “winner” and only binding opinion in *Rapanos*.<sup>246</sup> This approach would produce absurd results in cases in which the plurality’s surface-water connection test is satisfied, but Justice Kennedy’s “significant nexus” test is not. In such a case, a lower court applying *Marks* to *Rapanos* would have to invalidate federal jurisdiction under the Clean Water Act, even though an eight-to-one *Rapanos* majority would have upheld jurisdiction.<sup>247</sup> There is no good reason to select one concurring opinion as the single “winner” when, as in *Rapanos*, a majority of the Court has explicitly or implicitly rejected that opinion’s approach.<sup>248</sup> As the *King* court recognized, “When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be.”<sup>249</sup> Accordingly, Justice Stevens’s head-counting approach in *Rapanos* is more normatively justifiable than simply deeming Justice Kennedy’s opinion the holding of the Court because Justice Stevens’s approach ensures that the outcome preferred by an actual majority of Justices is given effect in future

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243. See *supra* Part II.C.2.b (discussing social choice theory and *Marks* doctrine). Professor Stearns does posit that *Marks* “ensur[es] an identifiable holding in the maximum number of fractured panel decisions,” which implies that *Marks* serves the adjudicatory function of lower courts by supplying them with one clear holding from most plurality decisions. STEARNS, CONSTITUTIONAL PROCESS, *supra* note 137, at 135. Stearns does not, however, adequately explain why the certainty inherent in his approach to *Marks* outweighs the fact that a majority of Justices might actually oppose the Court’s “holding” under his approach. See *infra* text accompanying notes 244-250 (arguing against selecting one opinion as “winner” when majority of Justices reject its reasoning).

244. See *supra* Part II.C.2.b (outlining normative defense of *Marks* using social choice theory framework).

245. See *supra* text accompanying notes 152-156 (justifying Condorcet criterion as consistent with notions of equality and majority rule).

246. See *supra* Part III.B (applying social choice view of *Marks* to *Rapanos*).

247. See *supra* text accompanying notes 213-216 (highlighting Chief Justice Roberts’s and Justice Stevens’s recognition of voting anomaly in *Rapanos*).

248. See *King v. Palmer*, 950 F.2d 771, 782 (D.C. Cir. 1991) (en banc) (“*Marks* [must not be permitted to] turn a single opinion that lacks majority support into national law.”).

249. *Id.*; see also Weins, *supra* note 30, at 859 (recognizing “primary problem” with *Marks* is its ability to allow “one Justice [to] mak[e] binding law”).



cases.<sup>250</sup>

Moreover, as a positive matter, it seems likely that when the *Marks* Court first adopted the narrowest-grounds rule the Justices grounded their decision on the conventional view rather than on the social choice view.<sup>251</sup> After all, Supreme Court Justices are generally not social choice scholars, and it is reasonable to assume that the Justices who decided *Marks* were not even aware of such an esoteric theory as the Condorcet criterion.<sup>252</sup> It is much more likely that the principle of majoritarianism was at the forefront of the Justices' minds when they adopted the narrowest-grounds rule in *Marks*.<sup>253</sup> Thus, it is more appropriate to understand *Marks* under the conventional theory than under the social choice theory.

#### D. The Marks Doctrine's Limited Applicability

Having concluded that *Marks* is best understood as an application of the principle of majoritarianism to Supreme Court plurality decisions, it becomes necessary to clearly identify the *Marks* doctrine's limitations. As explained above, *Marks* can only apply to those plurality decisions in which "one opinion is a logical subset of . . . broader opinions,"<sup>254</sup> such that the concurring rationales "fit[] within each other like Russian dolls."<sup>255</sup> The reason for this limitation is that a concurring opinion's narrow legal proposition in a plurality decision will have the implicit support of a majority of Justices concurring in the judgment *only* if the concurring opinions of a majority are nested in this

250. See *supra* text accompanying notes 212-216 (explaining Justice Stevens's directive to lower courts interpreting *Rapanos*). The principle of majoritarianism is not without its critics in some contexts. See Levmore, *supra* note 153, at 770-71 (arguing Condorcet Jury Theorem suggests plurality opinion should determine precedential value in split decisions). Nevertheless, the prevailing view is that majority rule should govern the interpretation of Supreme Court precedent, most likely as a result of the intuition that a rule or an outcome that a majority of the Court opposes should not become binding law throughout the United States. See, e.g., *Rapanos v. United States*, 126 S. Ct. 2208, 2265 & n.14 (2006) (Stevens, J., dissenting) (directing lower courts to follow outcome supported by majority of Justices); *King*, 950 F.2d at 782 (arguing *Marks* should not "turn a single opinion that lacks majority support into national law"); Caminker, *supra* note 23, at 15, 33 & n.120 (characterizing "[m]ultimember courts [as] majoritarian" and explaining *Marks* as application of majoritarianism).

251. See generally *Marks v. United States*, 430 U.S. 188 (1977). Unfortunately, one can only speculate because the *Marks* Court did not explain why it adopted the narrowest-grounds rule. See *supra* note 110 and accompanying text (observing lack of explanation in *Marks* for adoption of narrowest-grounds rule).

252. A LexisNexis search of the "U.S. Supreme Court Cases, Lawyers' Edition" database revealed that no United States Supreme Court case had ever explicitly discussed social choice theory or the Condorcet Criterion as of October 20, 2007.

253. See, e.g., Caminker, *supra* note 23, at 15 ("[A] decision establishes a legal rule with precedential status only if a majority of judges invoke the same dispositional rule to justify the same disposition . . ."); Kimura, *supra* note 3, at 1596-98 (discussing fundamental jurisprudential principle of majoritarianism); *A Study in Stare Decisis*, *supra* note 3, at 99 ("One of the basic postulates of the American case-law system is that the decision of a majority determines the result and establishes a precedent for use in subsequent adjudications.").

254. *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc).

255. Kornhauser & Sager, *supra* note 111, at 45-48.

way.<sup>256</sup> When, as in *Rapanos*, the concurring opinions do not form a logical set and subset, the *Marks* doctrine is inapplicable.<sup>257</sup> Unfortunately, this means that *Marks* only functions properly in a limited number of Supreme Court plurality decisions.<sup>258</sup>

Partly as a response to the *Marks* doctrine's limited applicability, some commentators have offered more complete systems of interpretive rules for plurality decisions.<sup>259</sup> The most persuasive suggestions establish rather comprehensive approaches to interpreting splintered decisions.<sup>260</sup> While it is beyond the scope of this Note to examine these alternatives thoroughly, it is worth noting that lower courts might find it helpful to refer to these frameworks when attempting to decipher Supreme Court plurality decisions.<sup>261</sup>

Alternatively, and perhaps more simply, lower courts interpreting plurality decisions should engage in a two-step process that will produce results consistent with either the preferred rationale or the preferred outcome of a majority of Justices.<sup>262</sup> First, a court should decide if *Marks* applies by determining whether the concurring opinions are nested in such a way that an implicit majority exists for a narrow legal proposition that is consistent with the outcome.<sup>263</sup> If such a majority can be cobbled together, *Marks* directs lower courts to follow the narrow legal proposition that the majority has endorsed.<sup>264</sup> If there is no majority support among the concurring Justices for a narrow legal proposition, then *Marks* does not apply and lower courts should proceed to step two. At the second step, lower courts should treat plurality decisions as binding only for the result that a majority of the Court would support based upon their stated rationales.<sup>265</sup> This dispositional majority should be constructed by analyzing the reasoning in all of the opinions—including any

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256. See *supra* text accompanying notes 122-136 (explaining *Marks* doctrine's limited applicability).

257. See *supra* text accompanying note 134 (quoting *King* court's explanation of *Marks* doctrine's limited applicability).

258. See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966); *N. Sec. Co. v. United States*, 193 U.S. 197 (1904).

259. See, e.g., Hochschild, *supra* note 3, at 283-87 (calling for "development of sound jurisprudence to interpret plurality decisions"); Kimura, *supra* note 3, at 1610-25 (outlining "legitimacy model" as system of interpretive rules for plurality decisions); Thurmon, *supra* note 3, at 451-57 (suggesting "hybrid approach" for interpreting plurality decisions).

260. See Kimura, *supra* note 3, at 1610-25 (legitimacy model); Thurmon, *supra* note 3, at 451-57 (hybrid approach).

261. See Kimura, *supra* note 3, at 1610-25 (legitimacy model); Thurmon, *supra* note 3, at 451-57 (hybrid approach).

262. Cf. *supra* text accompanying notes 65-66 (discussing traditional approach to interpreting plurality decisions).

263. See *supra* Part II.C.1 (exploring conventional view of *Marks* doctrine).

264. See *supra* Part II.C.1 (exploring conventional view of *Marks* doctrine).

265. Cf. *supra* text accompanying notes 65-66 (discussing traditional approach to interpreting plurality decisions). Unlike the traditional approach, this Note endorses an examination of all of the opinions in a plurality decision to determine the result that a majority of the deciding Court would support, given their stated rationales. Cf. *supra* text accompanying notes 65-66 (noting traditional approach focuses on deciding Court's judgment regardless of rationale).

dissents—to determine the result that a majority of the deciding Court would support, given their stated rationales.<sup>266</sup> This process would permit lower courts interpreting plurality decisions to reach the common-sense conclusion that Justice Stevens endorsed in *Rapanos*: Where there is no majority support for a narrow legal proposition consistent with the outcome, lower courts should follow the result that a majority of the deciding Court would support.<sup>267</sup> Unless the Supreme Court reduces its output of plurality decisions, this sort of “head-counting will continue to be a practical and necessary form of judicial reasoning,”<sup>268</sup> as Justice Stevens recognized in *Rapanos*.<sup>269</sup>

#### IV. CONCLUSION

If history is any guide, the Supreme Court will continue to hand down a significant number of plurality decisions in the future. Lower courts, therefore, must clearly understand how to properly read and interpret Supreme Court plurality decisions. That understanding necessarily includes an appreciation for the limited applicability of the *Marks* doctrine. Although Professor Stearns provides an intriguing normative defense of the *Marks* doctrine using social choice theory, the prevailing view that *Marks* is simply an application of the principle of majoritarianism to Supreme Court plurality decisions seems preferable in light of *Rapanos*. Therefore, lower courts should take care to apply *Marks* only to those cases in which the concurring opinions are logically nested such that an implicit majority exists in support of a narrow legal proposition. Absent such majority support for a legal rule, lower courts should decline to apply *Marks* and should instead follow the result supported by a majority of the deciding Court. While many plurality decisions will fail to establish binding legal principles under this approach, the disposition endorsed by a majority of the Court will remain determinative in future cases. In the end, this result is more desirable because it gives effect to the first choice of a majority of Justices—with respect to either the rationale or the outcome—and

266. See *Rapanos v. United States*, 126 S. Ct. 2208, 2265 & n.14 (2006) (Stevens, J., dissenting) (directing lower courts to follow dispositional majority when construing *Rapanos*). If the dispositional majority is indeterminate, the plurality decision would have no binding precedential effect. Cf. *supra* text accompanying notes 65-66 (noting plurality decisions binding only in cases with very close factual similarities under traditional approach).

267. See *Rapanos*, 126 S. Ct. at 2265 & n.14 (Stevens, J., dissenting) (directing lower courts to uphold federal jurisdiction under either the plurality’s or Justice Kennedy’s test).

268. Caminker, *supra* note 23, at 65 (internal quotation marks omitted) (quoting David C. Bratz, Comment, *Stare Decisis in Lower Courts: Predicting the Demise of Supreme Court Precedent*, 60 WASH. L. REV. 87, 99 (1984)).

269. See *Rapanos*, 126 S. Ct. at 2265 & n.14 (Stevens, J., dissenting) (directing lower courts to follow dispositional majority when construing *Rapanos*). Although head-counting may be a coarse form of judicial reasoning, it does have its merits as a means of cobbling together majority support for various legal propositions or outcomes. See Caminker, *supra* note 3, at 65 (describing head-counting as “merely a method of aggregating individual Justices’ votes”).

does not transform “a single opinion that lacks majority support into national law.”<sup>270</sup>

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270. *King v. Palmer*, 950 F.2d 771, 782 (D.C. Cir. 1991) (en banc).