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Modeling Narrowest Grounds

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Abstract

The Supreme Court's doctrinal statements governing nonmajority opinions demonstrate inconsistencies and confusion belied by the Justices' behaviors modeling the narrowest grounds doctrine. And yet, lower courts are bound by stated doctrine, beginning with Marks v. United States*, not rules of construction inferred from judicial conduct. This Article simplifies the narrowest grounds rule, reconciling doctrinal formulations with observed behaviors, avoiding the implicit command: "Watch what we do, not what we say."*

The two most recent cases considering Marks, Ramos v. Louisiana *and* Hughes v. United States*, obfuscate three central features: (1) when the doctrine does or does not apply; (2) how it applies in proper cases; and (3) the precedential status of narrowest grounds opinions in the Supreme Court. Individual Supreme Court Justices capture discrete doctrinal elements; none convey a general theoretical understanding of the rule's scope and meaning. In* Ramos*, the more recent of the two cases, six Justices invite lower courts to treat fractured Supreme Court cases as overruling past majority opinions. Three Justices convey that a single Justice cannot control on narrowest grounds. Two Justices treat narrowest grounds opinions as precedent in the Supreme Court. Each proposition is in tension with observed behaviors in other cases even in the* Ramos *term.*

In June Medical Services v. Russo*, Chief Justice Roberts alone issued a controlling narrowest grounds opinion, with none of the Justices raising a fuss. By declining to join Roberts's opinion, the four liberal Justices ensured a fractured ruling, thereby preserving a broader 2016 abortion precedent. In* Bostock v. Clayton County*, the same cohort joined Justice Gorsuch's strained textualist construction of Title VII, forging a majority embracing sexual orientation and transgender status within the meaning of sex. These rulings convey that a single Justice can control under* Marks *and that majority opinions hold precedential status beyond narrowest grounds decisions in the Supreme Court.*

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This Article models narrowest grounds, introducing the essential doctrinal element of dimensionality. A simple model, comporting with behavioral modeling by the Justices themselves, reveals that fractured cases with opinions aligned along one relevant dimension necessarily yield a narrowest grounds opinion, and fractured cases implicating more than one relevant dimension do not. The analysis unlocks each of the preceding questions and resolves several additional puzzles. Modeling narrowest grounds provides clarity for lawyers, scholars, and jurists, off and on the Supreme Court.

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Introduction

Under *Marks v. United States*,[1] lower courts are instructed that when the Supreme Court decides a case in which no opinion captures a majority of votes, the opinion consistent with the judgment that resolves the case on narrowest grounds states the holding.[2] The Supreme Court's doctrinal statements seeking to clarify the construction of nonmajority opinions demonstrate inconsistencies, even confusion.[3] By contrast, individual Justices exhibit a greater understanding when modeling their behavior in *Marks*'s shadow.[4] And yet lower courts are bound by stated doctrine, not rules of construction inferred from judicial conduct. This Article simplifies the narrowest grounds rule, reconciling doctrinal formulations with observed behaviors, thereby avoiding the implicit command: "Watch what we do, not what we say."

The confusion surrounding *Marks* was most evident in two recent cases.[5] The first, *Hughes v. United States*,[6] ultimately avoided applying

1 430 U.S. 188, 193 (1977).

2 *See id.* (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (expressing the narrowest grounds doctrine)).

3 *See infra* Part I (discussing *Hughes v. United States*, 138 S. Ct. 1765 (2018), and *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020)).

4 *See infra* Section II.A (discussing judicial strategies in several high-profile cases, including two cases issued in the most recent Supreme Court term: *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020), and *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)).

5 As explained below, *June Medical Services* further implicated *Marks*, suggesting Justice Thomas was potentially open to Justice Gorsuch's construction set forth in *Ramos*, which called

Marks, and the second, *Ramos v. Louisiana*,[7] makes ongoing challenges related to *Marks* inevitable, emphasizing the need for a broad understanding of this important doctrine. Although *Hughes* was ultimately resolved on statutory grounds, the oral argument revealed conflicting claims concerning the scope of the narrowest grounds rule.[8] *Ramos* took on *Marks* directly, revealing no fewer than three camps, each taking a different view with none commanding a majority, concerning how the narrowest grounds rule applies to *Apodaca v. Oregon*.[9]

Justice Alito, dissenting in *Ramos*, noted that by avoiding the issue, the *Hughes* Court had left *Marks* intact, at least for now.[10] None of the *Ramos* Justices expressed an intent to displace the narrowest grounds rule, notwithstanding substantial academic criticism.[11] Alito further noted the irony that although struggling to construe *Marks*,

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for disallowing the narrowest grounds rule when the Court splits 4-1-4 and a single Justice issues the narrowest grounds opinion. *See June Med. Servs.*, 140 S. Ct. at 2148 n.4 (Thomas, J., dissenting).

6 138 S. Ct. 1765 (2018). The author submitted an amicus brief in *Hughes*, joined by several leading law professors with wide-ranging expertise in Supreme Court doctrines and decision-making processes. *See* Motion for Leave to File Amici Curiae Brief and Brief of Law Professors as Amici Curiae in Support of Neither Party, *Hughes*, 138 S. Ct. 1765 (No. 17-155), 2018 WL 637338 [hereinafter *Hughes* Amicus Brief].

7 140 S. Ct. 1390 (2020).

8 As one example, Justice Gorsuch, who delivered the *Ramos* judgment, inquired at the *Hughes* oral argument whether the problem implicated in construing *Freeman v. United States*, 564 U.S. 522 (2011), the fractured case at issue in *Hughes*, was sufficiently limited that resolving that case on separate grounds would avoid future *Marks* problems. *See* Transcript of Oral Argument at 47, *Hughes*, 138 S. Ct. 1765 (No. 17-155). Justice Ginsburg responded that counsel and two unnamed amici briefs, most likely those submitted by Professor Richard Re and this author, provide "lots of examples," implying a broader scope. *See id.* at 49. Justice Breyer best captured *Marks*'s inevitable limitations, observing that along with Justice Powell, who authored the *Marks* opinion, he likely could not come up with something better. *See id.* at 33. Even so, Justices Ginsburg and Breyer joined Justice Gorsuch's limiting construction of *Marks* set out in the *Ramos* plurality, claiming the doctrine does not apply when a single Justice issues a narrowest grounds opinion. *See Ramos*, 140 S. Ct. at 1403–04 (plurality opinion).

9 406 U.S. 404 (1972), *abrogated by Ramos*, 140 S. Ct. 1390.

10 *See Ramos*, 140 S. Ct. at 1425–40 (Alito, J., dissenting).

11 *See, e.g.*, Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. 1942, 1947 (2019) (advocating absence of precedential value and encouraging compromise rulings based on *Screws v. United States*, 325 U.S. 91 (1945)); Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 838–39 (2017) (proposing "shared agreement" rule through which lower courts would determine whether the judgment-supporting rationales in a fractured Supreme Court case produce the same judgment as applied to newly presented case facts). This Article's author has been described as a rare *Marks* apologist. *See* Joseph M. Cacace, Note, *Plurality Decisions in the Supreme Court of the United States: A Reexamination of the* Marks *Doctrine After* Rapanos v. United States, 41 SUFFOLK U. L. REV. 97, 100 (2007). Since then, a group of leading scholars joined his Amicus brief supporting the narrowest grounds rule in *Hughes*. *See Hughes* Amicus Brief, *supra* note 6, at 2.

the *Ramos* majority itself fractured, producing uncertainty as to the holding under the narrowest grounds rule.[12] The *Ramos* majority ultimately abandoned *Apodaca*, a fractured case permitting nonunanimous state criminal jury verdicts.[13] *Ramos* specifically split on how *Marks* applies to *Apodaca*.[14]

Ramos invites a metalevel *Marks* inquiry: Under *Marks*, which *Ramos* opinion, if any, expresses the holding as to how *Marks* properly applies? Resolving that convoluted inquiry ultimately proves less important than directly tackling three fundamental questions: (1) identifying the category of cases in which the *Marks* doctrine can, and cannot, properly be applied; (2) determining how to correctly apply *Marks* in appropriate cases; and (3) determining the precedential effect of narrowest grounds opinions, and nonmajority cases more generally, both horizontally, in the Supreme Court, and vertically, in lower federal courts and state courts.[15]

Supreme Court Justices are not alone in struggling formally to express the narrowest grounds doctrine. Several lower court opinions have made a hash of *Marks*,[16] and thoughtful legal scholars, frustrated by *Marks*, have not made the task easier.[17] The Justices exhibit greater clarity by modeling their conduct, which, even during the *Ramos* term, was in tension with how they framed the doctrine in their opinions.

In *June Medical Services v. Russo*,[18] Chief Justice Roberts alone issued a controlling narrowest grounds opinion, with none of the Justices raising a fuss.[19] By declining to join Roberts's opinion, the four liberal Justices, Breyer, Ginsburg, Sotomayor, and Kagan, ensured a fractured ruling, preventing *June Medical Services* from displacing *Whole Woman's Health v. Hellerstedt*,[20] a broader 2016 abortion ruling, as precedent on the Court itself.[21] In *Bostock v. Clayton County*,[22]

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12 *See Ramos*, 140 S. Ct. at 1432 n.17 (Alito, J., dissenting). For an account as to why the approaches taken in separate concurrences by Justices Kavanaugh and Sotomayor represent the narrowest grounds holding in *Ramos*, see *infra* Part II.

13 *See Ramos*, 140 S. Ct. at 1402–04 (plurality opinion).

14 *See id.*

15 This Article resolves several puzzles related to these fundamental inquiries. *See infra* Part III (evaluating various doctrinal *Marks* formulations, issue voting rule and vote switching, and whether *Marks* should be construed as a predictive or bargaining rule).

16 *See infra* Section III.A.

17 *See, e.g.*, Re, *supra* note 11; Williams, *supra* note 11.

18 140 S. Ct. 2103 (2020).

19 *See id.* at 2133 (Roberts, C.J., concurring in the judgment).

20 136 S. Ct. 2292 (2016).

21 Although one might claim no practical difference between a fractured ruling striking down the challenged Louisiana abortion statute and a narrowing majority opinion, failing to give Roberts's narrower concurrence in the judgment majority status had the practical effect of pre-

the same cohort joined Justice Gorsuch's narrow textualist construction of Title VII, without so much as a simple concurrence.[23] Doing so forged a majority opinion embracing sexual orientation and transgender status within the meaning of "because of sex."[24] These rulings imply that, despite contrary assertions in *Ramos*,[25] a single Justice can control under *Marks*, and that majority decisions generally hold greater precedential status than narrowest grounds opinions in the Supreme Court.

Properly expressing the narrowest grounds rule poses conceptual challenges because it requires a theoretical foundation extending beyond *Marks*. The missing element informing when *Marks* can and cannot be applied, and how it properly applies, is dimensionality.[26]

The narrowest grounds rule is no ordinary statement of judicial doctrine. The rule did not arise from construing an open-ended constitutional provision or from filling an interstitial statutory gap. Instead, the doctrine is a necessary, albeit partial, solution to an inevitable problem associated with decision making in an en banc court. Rather than expressing a new rule, *Marks* recognized an existing judicial norm or practice.[27] Although that norm fits broadly within the rubric of general federal common law, there are sightings in other pyramidal

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serving *Whole Woman's Health*. Overturning *Whole Woman's Health* would have required a majority opinion that engaged in two separate inquiries—one on the decision's precedential status and another on its merits. The fractured ruling in *June Medical Services* produced no majority opinion on either of these necessary inquiries. This generally aligns with the modeled behavior of Supreme Court Justices subject to one notable exception. *See infra* Section II.A.2.C (explaining that the narrowest grounds plurality in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 845–46, 858 (1992) (joint opinion), while declining to overturn *Roe v. Wade*, 410 U.S. 113 (1973), nonetheless overturned two other Supreme Court abortion cases).

22 140 S. Ct. 1731 (2020).

23 In contrast with a concurrence in the judgment, a simple concurrence means the author has joined the majority opinion but wishes to provide additional analysis. *See* BARRY FRIEDMAN, MARGARET H. LEMOS, ANDREW D. MARTIN, TOM S. CLARK, ALLISON ORR LARSEN & ANNA HARVEY, JUDICIAL DECISION-MAKING 561–62 (2020) (describing general concurrences as those that offer "supplemental analysis or explanation from a judge who joined the majority opinion, agreeing not only with the majority's judgment but also its reasoning," and describing a concurrence in the judgment as one produced by a judge who "agree[s] with the majority on the ultimate outcome or judgment but disagree[s] on the underlying reasons").

24 *Bostock*, 140 S. Ct. at 1747.

25 *See infra* Section II.A.

26 *See infra* Section II.B; *see also* Maxwell L. Stearns, Obergefell*,* Fisher*, and the Inversion of Tiers*, 19 U. PA. J. CONST. L. 1043, 1067–92 (2017) (introducing dimensionality analysis).

27 For an example in English practice, see Gold v. Essex CC (1942) 2 KB 293 at 298 (Eng.) (Lord Greene MR) ("[W]here two members of the court base their judgments, the one on a narrow ground . . . and the other on wide propositions . . . , and the third member of the court expresses his concurrence in the reasoning of both, I think it right to treat the narrower ground as the real ratio decidendi.").

judicial hierarchies. For example, although not constitutionally required to do so, several state judicial systems embrace the rule in construing their own fractured highest court rulings. In Appendix A, this Article provides the first comprehensive state-by-state data set showing which states embrace, reject, or have yet to decide whether to apply the narrowest grounds rule to their own highest courts.[28]

Writing for a unanimous Court on the issue, Justice Powell recognized a practice that the Supreme Court and lower federal courts had already observed. Construing *Memoirs v. Massachusetts*,[29] Justice Powell chided the U.S. Court of Appeals for the Sixth Circuit for standing alone among lower courts in failing to treat the narrowest grounds plurality opinion as controlling.[30] Justice Powell stated: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the

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28 *See infra* Appendix A (listing state-by-state authorities). Appendix A provides helpful data related to two separate questions arising from this Article: first, whether appointed or elected state judiciaries are more likely to apply the narrowest grounds doctrine to their own highest court, and second, whether, more generally, state courts perceive institutional benefits in applying the doctrine to their own highest court decisions.

On the first question, the author's initial hypothesis was that appointed judiciaries are more apt to apply the rule than elected judiciaries. The author reasoned that appointed jurists are likely more concerned about ensuring doctrinal consistency and predictability as a means of enhancing the prestige of the state judiciary as a whole, whereas elected jurists are likely more concerned with being unconstrained in their individual rulings, unless specifically bound by state highest court majority opinions. The data, while supportive, are inconclusive. Among elected judiciaries, five apply the rule, two do not apply the rule, and fourteen remain undecided. Among appointed judiciaries, eight apply the rule, one does not apply the rule, and twenty remain undecided. A higher percentage of states with appointed judiciaries than states with elected judiciaries apply the narrowest grounds rule to their state highest court decisions, 88.8% versus 71.4%, and a slightly higher percentage of states with elected judiciaries have resolved the question, 33.3% versus 31%. Among the states making the choice, the data are consistent with the hypothesis, but the data are insufficient at this point to draw a definitive conclusion.

On the second, more general question, the author's hypothesis was that state court systems, like the federal judiciary, would find the doctrine helpful in furthering predictability and thus the rule of law. This is consistent with viewing the narrowest grounds doctrine at the federal level as a feature of general federal common law rather than as one created from whole cloth in *Marks v. United States*, 430 U.S. 188 (1977), or *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). With respect to this question, the data are more broadly supportive. Among state judiciaries that have decided whether or not to apply the narrowest grounds rule to their state highest court decisions, both appointed and elected, an overwhelming majority, 81.25%, have chosen to apply it. Although only 32% of states thus far have resolved the question, the datum remains consistent with the Article's larger thesis that jurists, either implicitly or explicitly, perceive benefits to applying the narrowest grounds rule that seem often to have eluded the rule's critics.

29 383 U.S. 413 (1966) (plurality opinion).

30 *See* Marks v. United States, 430 U.S. 188, 193 (1977).

Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'"[31]

This statement of the narrowest grounds rule is in one respect imperfect and in another respect incomplete. Although the imperfection is easily remedied, even a perfectly expressed narrowest grounds rule cannot be successfully applied to all nonmajority opinions. The absence of a theoretical grounding concerning *Marks* has produced confusion in seeking to formalize the narrowest grounds rule in published opinions even as the Justices reveal a better understanding through their modeled behaviors.

Remedying Justice Powell's slight misstatement is easy, but inconsequential.[32] Identifying the rule's incompleteness, which implicates dimensionality, although critically important, requires a bit more effort.[33] Justice Powell hints at dimensionality, but the intervening decades have not produced a firmer theoretical foundation. In some respects, time has eroded core intuitions manifested through contemporaneous judicial behaviors in the period of *Marks* itself.[34] Providing this theoretical underpinning is essential to unpacking ongoing judicial and scholarly confusion and to reconciling how *Marks* is articulated on one side and modeled on the other.

The confusion respecting *Marks* primarily arises from failing to identify and distinguish structural characteristics of cases in which the narrowest grounds rule can, and cannot, properly be applied. The central characteristic is dimensionality. Dimensions are scales or mea-

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31 *Id.* (alteration in original) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

32 The formally articulated rule fails to recognize that in a 4-*1*-**1** opinion, with 3 in dissent, and in which the listed opinions align from broad to narrow, the bolded **1** satisfies the stated rule but the italicized *1* expresses the Court's median position. The case of *Fullilove v. Klutznick*, 448 U.S. 448 (1980), provides a rare illustration. For an analysis, see *infra* Section II.B.1.a. For data on how lower courts have treated *Fullilove* under the narrowest grounds rule, see *infra* Appendix B. The data support the intuition that lower courts generally infer that the narrowest grounds rule is intended to capture the median position in a nonmajority Supreme Court case resting along a single dimension, even if the case also includes a narrower concurrence in the judgment. Of twenty-four lower court opinions interpreting *Fullilove*, twenty-one sought to identify one or more opinions as controlling. Of that subset of twenty-one, nine identified the Burger opinion as controlling, five sought to reconcile Burger's opinion with Justice Powell's, and five sought to reconcile Burger's opinion with both Justice Powell's and Justice Marshall's. Only two lower court opinions out of those twenty-one treated Justice Powell's opinion as controlling.

33 The *Marks* doctrine's incompleteness relates to Arrow's Incompleteness Theorem, although understanding the theorem is not necessary to grasping the doctrinal incompleteness. For a general exposition relating Arrow's Theorem to Supreme Court decision making, see MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 41–97 (2002).

34 *See infra* Section II.B (discussing related cases).

sures along which virtually anything can meaningfully be expressed and compared.[35] Some comparisons can be assessed along a single dimension—large to small, tall to short, heavy to light, or broad to narrow. Other comparisons require more than one dimension. When assessing multiple means of transportation—a bicycle, car, and train—both size and weight positively correlate, with smaller modes of transportation weighing less and larger ones weighing more. Now add an aloft hot air balloon, larger than a car, yet lighter than a bicycle, or air itself, thus thwarting the prior assumption positively correlating size and weight. Adding the balloon requires that each dimension—size and weight—be separately assessed. Supreme Court cases likewise occasionally force more than one dimension. Relating *Marks* to dimensionality is essential in determining the rule's proper scope.

The underlying difficulty in ascertaining when and how *Marks* applies involves failing to distinguish two sets of nonmajority opinions. In the first set, when opinions implicate one relevant dimension, the narrowest grounds rule applies in a straightforward manner.[36] In the second set, when opinions implicate more than one relevant dimension,[37] the doctrine cannot be applied because the rule's underlying premise fails to hold. Failing to appreciate how *Marks* implicates dimensionality has invited creative judicial framings, or metaphors, designed to determine the rule's scope. These include: (1) least impact analysis; (2) lowest common denominator; (3) logical subset analysis; and, yes, even (4) Matryoshka, or Russian nested, dolls.[38] Such creativity should not obscure the inherent limitations of metaphors in place of essential analytical tools. With the proper toolkit these devices prove unnecessary, collapsing into a singular, comprehensive inquiry.[39]

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35 For a more detailed discussion and analysis of dimensionality and relating the concept to tiers of scrutiny, see Stearns, *supra* note 26.

36 Although identifying the narrowest grounds opinion in single dimension cases is straightforward, construing such opinions can be challenging for various reasons, including assessing holding and dictum, as also occurs with majority opinions. *See infra* Section III.A.

37 As explained *infra* Section II.A., for purposes of *Marks*, a dimension is not relevant if it results from an opinion that can be excluded, with the remaining opinions, including a group that forms a majority on the judgment, aligning on a single dimension. More simply, a dimension is irrelevant if the Justice forcing it is unnecessary to a majority on the judgment.

38 The U.S. Court of Appeals for the Seventh Circuit employed a ranking-over-opinions analysis closely corresponding with this Article's dimensionality analysis and the concept of a Condorcet winner. *See* United States v. Gerke Excavating, Inc., 464 F.3d 723, 724 (7th Cir. 2006) (per curiam) ("When a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome, lower-court judges are to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose.").

39 *See infra* Section III.A.

Understanding the role of dimensionality in applying the narrowest grounds rule makes applications both in *Apodaca* and *Ramos* straightforward. The analysis refutes Justice Alito's implicit claim that, as applied to *Ramos*, the rule is uncertain;[40] Justice Kavanaugh's claim that, as applied to *Apodaca*, it is difficult;[41] or Justice Gorsuch's more extreme claim that, as applied to *Apodaca*, it is impossible.[42] Dimensionality distinguishes when the narrowest grounds rule can and cannot be applied, avoiding judicial and scholarly confusion in claiming a general inability to apply *Marks* even in such straightforward cases. With one dimension, despite fractured majorities, there is inevitably and inexorably a narrowest grounds opinion.[43] With equal certainty, in cases implicating more than one relevant dimension, there is not.

Ascertaining when fractured cases implicate single or multiple dimensions requires nuance and skill. That is generally true when construing complex Supreme Court opinions and more so when reading several opinions to determine which, if any, controls. The task becomes simpler with the necessary tools. This Article provides those tools, offering a comprehensive exposition of the narrowest grounds rule that reconciles the behavior of Supreme Court Justices operating in *Marks*'s shadow.[44]

Applying the narrowest grounds rule to *Apodaca* and *Ramos* becomes intuitive once we recognize that *Marks* rests on a singular premise: the narrowest grounds doctrine applies when fractured Supreme Court cases implicate a single relevant dimension. The initial task when confronting a fractured case is determining whether that premise is, or is not, met. As demonstrated in Appendix A, a majority of state judiciaries that have considered the question also employ the narrowest grounds rule for their own state highest court nonmajority rulings.[45] As a result, the guidance offered here equally applies in state judicial contexts.

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40 *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1432 (2020) (Alito, J., dissenting) ("With no apparent appreciation of the irony, today's majority, which is divided into four separate camps, criticizes the *Apodaca* majority as 'badly fractured.'" (footnote omitted)).

41 *See id.* at 1416–17, 1416 n.6 (Kavanaugh, J., concurring in part).

42 *See id.* at 1403–04 (plurality opinion); *id.* at 1432 n.17 (Alito, J. dissenting).

43 As used here, separate opinions imply at least one concurrence in the judgment that avoids a majority expressing the holding. For an analysis of the potential implications under *Marks* when a Justice joining a majority opinion also writes a narrowing simple concurrence, see *infra* Part III.

44 *See infra* Part II. This alternative statement of the narrowest grounds rule is a modification of the version proffered in the author's amicus brief. *See Hughes* Amicus Brief, *supra* note 6, at 25–26.

45 *See infra* Appendix A (collecting state-by-state data); *supra* note 28 (reviewing data to

Although this Article is about the narrowest grounds rule, its implications are broad, affecting salient doctrines including affirmative action, the individual mandate, abortion, and more. This Article resolves several specific questions implicated in *Ramos*, along with additional open questions concerning the narrowest grounds rule.[46] Modeling narrowest grounds promises clarity for lawyers, scholars, and jurists, off and on the Supreme Court.

Part I reviews two cases implicating both the incorporation doctrine and the narrowest grounds rule: *Ramos*, resting on a single relevant dimension, and *McDonald v. City of Chicago*,[47] resting on two relevant dimensions. The analysis demonstrates the importance of dimensionality in applying the narrowest grounds rule and exposes problematic understandings expressed in the separate *Ramos* opinions. Part II contrasts the formal articulation of the narrowest grounds rule with judicial behaviors modeling narrowest grounds. This Part provides a theoretical account of *Marks* grounded in dimensionality, integrating stated doctrine with observed judicial behaviors. This Part also provides a comprehensive statement of the narrowest grounds rule that reconciles stated doctrine with observed judicial behaviors. Part III considers several remaining puzzles associated with *Marks*, including assessing lower court doctrinal framings, issue voting and vote switching, and whether to treat the narrowest grounds rule as predictive or a bargaining rule.

I. Incorporating Dimensionality, and Justice Thomas's "One Less Traveled By"

Two roads diverged in a wood, and I—
I took the one less traveled by,
And that has made all the difference.

—Robert Frost[48]

This Part focuses on two cases, *Ramos* and *McDonald*. Each case resolved an important question arising under the incorporation doctrine.[49] Through that doctrine, the Supreme Court applies specified provisions of the Bill of Rights, which otherwise apply only to the fed-

test two hypotheses: first, whether appointed or elected state judiciaries are apt to apply the narrowest grounds rule to state highest court decisions, and, second, whether state courts more generally apply the narrowest grounds rule in that context).

46 *See infra* Part III.

47 561 U.S. 742 (2010).

48 Robert Frost, The Road Not Taken (1916), *reprinted in* 2 The Norton Anthology of American Literature 1099 (Nina Baym et al. eds., 3d ed. 1989).

49 *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020) (incorporating the Sixth Amend-

eral government, to states and localities.[50] Although the incorporation controversy, as it was sometimes called, dates back to the Black-Frankfurter debates, even today open questions remain.[51]

Ramos held that states must require unanimous jury verdicts to support criminal convictions,[52] abandoning the rule of *Apodaca*.[53] *McDonald* held that states and municipalities are subject to Second Amendment protections announced in *District of Columbia v. Heller*.[54] The *Ramos* and *McDonald* Courts fractured, preventing a majority opinion in each case from expressing the Court's holding. These cases implicate both incorporation and *Marks*.

In both *Ramos* and *McDonald*, Justice Thomas played a unique role, albeit with different consequences. Thomas disagreed in each case with the eight remaining Justices as to the textual hook upon which to hang the incorporation doctrine, even as he helped form a majority respecting the judgment that the claimed rights warranted incorporation.[55] Despite his concurring in the judgment in each case, the implications of Thomas's approach differed significantly across these cases under the narrowest grounds rule.

As shown below, the *Ramos* opinions implicate a single relevant dimension, and the two additional concurrences in the judgment by Justices Sotomayor and Kavanaugh express the *Ramos* Court's holding on narrowest grounds.[56] These opinions establish that although Justice Powell's *Apodaca* concurrence stated the narrowest grounds holding under *Marks*, and has the status of precedent, *Apodaca* is

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ment's jury unanimity requirement); *McDonald*, 561 U.S. at 791 (incorporating the Second Amendment right to keep and bear arms).

50 *See Ramos*, 140 S. Ct. at 1397 ("[I]ncorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government.").

51 *See* WALLACE MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT (2d ed. 1966); Sylvia Snowiss, *The Legacy of Justice Black*, 1973 SUP. CT. REV. 187, 206; Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 548–49 (1997).

52 *Ramos*, 140 S. Ct. at 1397.

53 *See id.* at 1404 (plurality opinion).

54 554 U.S. 570 (2008).

55 *See Ramos*, 140 S. Ct. at 1420–21 (Thomas, J., concurring in the judgment); McDonald v. City of Chicago, 561 U.S. 742, 805–06 (2010) (Thomas, J., concurring in part and concurring in the judgment).

56 *See Ramos*, 140 S. Ct. at 1408–10 (Sotomayor, J., concurring as to all but Part IV–A); *id.* at 1410–20 (Kavanaugh, J., concurring in part) (joining Justice Gorsuch's opinion as to Parts I, II–A, III, and IV–B–1). Although identified as partial concurrences, each opinion operates as a concurrence in the judgment given that Justice Gorsuch writes Part IV–A for a plurality.

overruled.[57] Although Justice Thomas resolved *Ramos* on alternative grounds, thus implicating a second dimension, that added dimension proved irrelevant to the judgment and to the application of *Marks*. Excluding Thomas, the four remaining opinions, capturing eight Justices, align along a single dimension, and five of those eight Justices resolved the case in the same manner, favoring incorporation.[58] Three of those five, joining Gorsuch's plurality opinion, did so on broader grounds than the two narrower controlling concurrences in the judgment issued by Justices Kavanaugh and Sotomayor.

In contrast with *Ramos*, where Thomas provided an optional sixth vote supporting the judgment, his vote in *McDonald* was the decisive fifth on the nine-member Court. Consequently, Justice Thomas's added dimension mattered in *McDonald*, undermining the narrowest grounds rule.[59] The added dimension is analogous to adding an aloft hot air balloon when ranking modes of transportation otherwise aligning on a single dimension capturing both size and weight. The resulting *McDonald* opinions likewise could not be captured from broad to narrow, thus preventing the application of *Marks* to *McDonald*.

The lesson is clear: in Supreme Court decision making, taking the "one less traveled by" makes "all the difference" only when doing so disallows a majority of five to reach a common destination.

A complete analysis extends beyond counting votes.[60] The question, for purposes of the narrowest grounds rule, is precisely when to count which votes. In *Ramos*, the Gorsuch plurality and the Kavanaugh concurrence in the judgment claimed that applying the narrowest grounds rule in *Apodaca*, permitting nonunanimous state criminal jury verdicts, was challenging, even impossible. These claims are mistaken. *Marks* applies straightforwardly in both *Ramos* and *Apodaca*, distinguishing those cases from *McDonald*.

After a brief introduction to the Incorporation Controversy, this Part reviews the separate *Ramos* and *McDonald* opinions. The analysis demonstrates how, despite Thomas's common role in each case, he thwarted the narrowest grounds rule only in *McDonald*.

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57 Although this is the *Ramos* holding, it rests upon a mistaken premise that narrowest grounds opinions are binding precedent in the Supreme Court. *See infra* Section II.A.2.

58 *See Ramos*, 140 S. Ct. at 1397 (majority opinion); *id.* at 1432 n.17 (Alito, J., dissenting).

59 *See McDonald*, 561 U.S. at 806 (Thomas, J., concurring in part and concurring in the judgment).

60 *See* Michael Abramowicz & Maxwell L. Stearns, *Beyond Counting Votes: The Political Economy of* Bush v. Gore, 54 VAND. L. REV. 1849 (2001) (demonstrating that a variation on *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam), risked operating in two dimensions).

A. *Incorporation in Context*

The Bill of Rights was, in an important respect, part of the Constitutional Convention's unfinished business.[61] Specifically, the Bill of Rights stands as a rejection of the view, most prominently associated with Alexander Hamilton, that listing rights risked implying general federal regulatory powers extending beyond those expressly, or impliedly, delegated.[62]

As early as *Barron v. Baltimore*,[63] the Supreme Court made plain that the listed Bill of Rights protections applied only against federal regulatory powers, not those of states or localities.[64] States, by contrast, held plenary regulatory powers, also called police powers, for which the most vital checks in late-eighteenth century jurisprudence were limited to the political realm.

In the aftermath of the Civil War, the Reconstruction Amendments recognized a shift in the presumption that states remained primary protectors of individual liberties, with federal courts more generally limited to checking against federal regulatory excesses in light of the latter's limited delegated functions.[65] The radical constitutional transformation following the Civil War included embedding within section 1 of the Fourteenth Amendment three substantive guarantees: protecting persons against state deprivations of due process; equal protection; and, by virtue of national citizenship, state infringements against privileges or immunities.[66] The specific scope of each clause was subject to future clarification—politically, pursuant to section 5, which provided for congressional enforcement authority,[67] and judicially, through substantive constructions of the relevant section 1 clauses.

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61 The compromise of approving for ratification and leaving the Bill of Rights as part of the First Congress's initial business is well documented. *See, e.g.*, Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 301–02. Other unfinished work includes the obvious compromise disallowing challenges to chattel slavery for a full twenty years and otherwise recognizing the institution of slavery, albeit without mentioning it by name, through the three-fifths and rendition clauses. *See, e.g.*, DANIEL FARBER & NEIL S. SIEGEL, UNITED STATES CONSTITUTIONAL LAW 279–346 (2019).

62 *See* THE FEDERALIST No. 84, at 513–14 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

63 32 U.S. (7 Pet.) 243 (1833).

64 *See id.* at 247–50.

65 *See* FARBER & SIEGEL, *supra* note 61, at 231–54.

66 U.S. CONST. amend. XIV, § 1.

67 U.S. CONST. amend. XIV, § 5.

One overriding question involved whether the Privileges or Immunities Clause[68] would ensure that following the Thirteenth Amendment, which had formally ended slavery, states were required to provide former slaves the same protections in the marketplace, voting, travel, and other domains as were provided to whites by virtue of freedmen's new status as U.S. citizens.[69]

A few additional observations will help before presenting *Ramos* and *McDonald.* In the *Slaughter-House Cases*,[70] the Supreme Court so narrowed the reach of the Privileges or Immunities Clause that jurists and legal scholars customarily declare the clause a virtual nullity.[71] The *Slaughter-House Cases* held that the Clause did not protect against the invasion of rights originating from states, rendering protection against a slaughter-house monopoly beyond the Clause's reach.[72]

The *Slaughter-House Cases* holds a special place in constitutional jurisprudence. Writing in dissent, Justices Field, Bradley, and Swayne derided Justice Miller's analysis in part for having the curious effect of rendering an operative provision in a recently enacted amendment a dead letter.[73] All rights claiming their origin in the Constitution or federal law were independently protected against state or local encroachment by virtue of the Supremacy Clause in Article VI.[74] Such rights did not include protection against a state-conferred monopoly. The Supreme Court has certainly issued its fair share of erroneous opinions,[75] and that alone would not give the *Slaughter-House Cases*

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68 U.S. CONST. amend. XIV, § 1, cl. 2.

69 *See* FARBER & SIEGEL, *supra* note 61, at 231–54, 427–54. In overruling *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (enslaved party), the first sentence of section 1 of the Fourteenth Amendment ensured state and federal citizenship to freedmen. *See* U.S. CONST. amend XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

70 *See* 83 U.S. (16 Wall.) 36 (1873).

71 *See* FARBER & SIEGEL, *supra* note 61, at 231–54, 347–76. This is slightly overstated as indicated by *Saenz v. Roe*, 526 U.S. 489 (1999), which relied on privileges or immunities to protect the right to travel, *id.* at 501–04, and by *McDonald* itself, which depended for its judgment on one Justice invoking the Privileges or Immunities Clause, *see* McDonald v. City of Chicago, 561 U.S. 742, 806 (2010) (Thomas, J., concurring in part and concurring in the judgment). For a more detailed discussion of *McDonald*, see *infra* Section I.C.

72 *See Slaughter-House Cases*, 83 U.S. (16 Wall.) at 78.

73 *See id.* at 83–111 (Field, J., dissenting); *id.* at 111–24 (Bradley, J., dissenting); *id.* at 124–30 (Swayne, J., dissenting).

74 U.S. CONST. art. VI, cl. 2.

75 *See, e.g.*, Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011) (including within the anticanon of constitutional jurisprudence *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954); *Lochner v. New York*, 198 U.S. 45 (1905), *overruled in part by* Ferguson v. Skrupa, 372 U.S. 726

special status. What makes the case special is that although the case is widely regarded as mistaken, so few seek to discard it.

Save a singular member—Clarence Thomas—the Supreme Court has been consistently unwilling to revisit the *Slaughter-House Cases*. Justice Hugo Black, often regarded as the Supreme Court's strongest advocate of incorporation,[76] originally sought to deploy the Privileges or Immunities Clause in a manner that would revive it, arguably without undoing Justice Miller's slaughtering. Although Miller made plain that the Privileges or Immunities Clause protected only federal rights,[77] Black claimed the substantive protections the Clause embraced were fully captured in the Bill of Rights, thereby applying those nationally derived rights to the states.[78]

Justice Black famously debated Justice Frankfurter, who rejected the idea that the Fourteenth Amendment applied the Bill of Rights to the states, and further rejected the notion that the substantive protections in the Bill of Rights constituted a listing of privileges or immunities.[79] Over several intervening decades, the incorporation debate shifted its focus to the Fourteenth Amendment Due Process Clause. This created its own problems, including the anomaly that two clauses with nearly identical wording, as set out in the Fifth and Fourteenth Amendments, expressed entirely different meanings.[80] In addition, as Justice Thomas has observed, it is arguably anomalous to rely upon a Clause that speaks to due *process* as a font of substantive rights.[81]

As *Ramos* and *McDonald* demonstrate, longstanding debates concerning the meaning of the Privileges or Immunities Clause and the scope of the Due Process Clause continue even today. As these cases further demonstrate, so too does the commitment among members of the present Supreme Court, except Justice Thomas, to retain-

(1963); and *Korematsu v. United States*, 323 U.S. 214 (1944), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018)).

76 *See* Tinsley E. Yarbrough, *Justice Black, the Fourteenth Amendment, and Incorporation*, 30 U. MIA. L. REV. 231, 238–40 (1976).

77 *See Slaughter-House Cases*, 83 U.S. (16 Wall.) at 78–79.

78 *See* Adamson v. California, 332 U.S. 46, 74–75 (1947) (Black, J., dissenting).

79 *See* Yarbrough, *supra* note 76, at 231, 239; Richard Boldt & Dan Friedman, *Constitutional Incorporation: A Consideration of the Judicial Function in State and Federal Constitutional Interpretation*, 76 MD. L. REV. 309, 319–20, 328–31, 358 (2017); *see also* Hugo L. Black, In Memoriam, *Mr. Justice Frankfurter*, 78 HARV. L. REV. 1521 (1965) (noting his disagreements with Justice Frankfurter).

80 *See* Yarbrough, *supra* note 76, at 234–35.

81 *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 811 (2010) (Thomas, J., concurring in part and concurring in the judgment) ("The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words.").

ing the *Slaughter-House Cases* as precedent despite ongoing doubts concerning its original merits.

B. Ramos v. Louisiana

Ramos v. Louisiana invites a meta-analysis of *Marks*. The case produced a total of four opinions consistent with the outcome in the case, either displacing or overturning *Apodaca v. Oregon*.[82] *Apodaca* had permitted convictions in state criminal trials based on nonunanimous jury verdicts.[83] The *Ramos* judgment demanded incorporating the full scope of the Sixth Amendment right to trial by jury, including unanimity, for state criminal trials.[84] Three Justices dissented, without claiming *Apodaca* was rightly decided, but concluding it should not be overturned.[85]

The *Ramos* lineup thwarted conventional ideological suppositions. Justice Gorsuch wrote an opinion in part for a majority and in part for a plurality of three.[86] The majority opinion was joined by Justices Ginsburg, Breyer, Sotomayor, and Kavanaugh, with the latter two splitting off most notably from Part IV–A.[87] That part assessed the implications both of the narrowest grounds rule and of stare decisis in construing *Apodaca*.[88] Justices Sotomayor and Kavanaugh each also separately concurred in the judgment, and Justice Thomas concurred in the judgment without joining any part of the Gorsuch opinion.[89] Justice Alito's dissent was joined by Chief Justice Roberts and Justice Kagan.[90] Each camp—the plurality, concurrences in the judgment, and dissent—had members associated with the Supreme Court's liberal and conservative wings.[91]

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82 One disagreement between the plurality and concurrences in the judgment concerned whether *Apodaca* is not precedent, and thus simply requires displacement, or is precedent, requiring overruling. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1402–04 (2020) (plurality opinion) (Part IV–A); *id.* at 1408–10 (Sotomayor, J., concurring as to all but Part IV–A); *id.* at 1410–20 (Kavanaugh, J., concurring in part).

83 *See* Apodaca v. Oregon, 406 U.S. 404, 405–06 (1972), *abrogated by Ramos*, 140 S. Ct. 1390.

84 *See Ramos*, 140 S. Ct. at 1402–04 (plurality opinion).

85 *See id.* at 1425–40 (Alito, J., dissenting).

86 *Ramos*, 140 S. Ct. at 1393.

87 *Id.*

88 *Id.* at 1402–04 (plurality opinion).

89 *See id.* at 1408 (Sotomayor, J., concurring as to all but Part IV–A); *id.* at 1410 (Kavanaugh, J., concurring in part); *id.* at 1420–21 (Thomas, J., concurring in the judgment); *id.* at 1432 n.17 (Alito, J., dissenting).

90 *Id.* at 1425 (Alito, J., dissenting).

91 The three three-member camps, with bold representing Justices generally regarded as conservative and italics representing Justices generally regarded as liberal, are as follows: plural-

Discerning the *Ramos* holding under *Marks* requires assessing how the various camps assess *Apodaca* under *Marks*. That task demands careful reading across opinions, including drawing the most plausible inferences when confronting inevitably incomplete text. Although this process risks implying speculation, as demonstrated below, a careful analysis cabins, rather than expands, speculative inferences.[92] The soundness of inferential reasoning when construing fractured opinions is a function of having identified the most plausible dimension or dimensions along which relevant opinions are expressed.

We begin with *Apodaca*, which, along with its companion case, *Johnson v. Louisiana*,[93] revealed several voting blocs. The *Ramos* Court assessed the *Apodaca* opinions to resolve three questions: (1) does *Marks* apply to *Apodaca*?; (2) if so, which opinion controls on narrowest grounds?; and (3) assuming *Marks* applies and yields a controlling opinion, what is *Apodaca*'s precedential status in the Supreme Court?[94] Although together *Apodaca* and *Johnson* produced several opinions, as suggested by Justice Gorsuch, we can simplify them into three blocs.

Writing for a plurality of four in *Apodaca*, Justice White applied a functionalist analysis of the jury right.[95] White argued that the historical justification for interposing the jury as a filter between a potentially overreaching prosecutor and criminal defendant is not meaningfully undermined by supermajority verdicts of ten-to-two or eleven-to-one as opposed to unanimous verdicts of twelve.[96] White balanced the claimed benefit of unanimity against the risk of hung juries, which sometimes produce problematic dismissals and other times result in costly retrials.[97] The plurality sustained the nonunanimous jury verdicts, implying that nonunanimity is permissible under the Sixth Amendment based on functional considerations.[98]

Justice Stewart's *Apodaca* dissent, for three, is sufficiently brief that the relevant part warrants quoting in full:

> In *Duncan v. Louisiana*, the Court squarely held that the Sixth Amendment right to trial by jury in a federal criminal

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ity (**Gorsuch**, *Ginsburg*, *Breyer*); concurrences in the judgment (**Thomas, Kavanaugh**, *Sotomayor*); dissent (**Roberts**, **Alito**, *Kagan*).

92 *See infra* Part II.

93 406 U.S. 356 (1972), *abrogated by Ramos*, 140 S. Ct. 1390.

94 *See Ramos*, 140 S. Ct. at 1403–04 (plurality opinion).

95 *See* Apodaca v. Oregon, 406 U.S. 404, 410 (1972), *abrogated by Ramos*, 140 S. Ct. 1390.

96 *See id.* at 407–10.

97 *See id.* at 410–11.

98 *See id.* at 407–14.

> case is made wholly applicable to state criminal trials by the Fourteenth Amendment. Unless *Duncan* is to be overruled, therefore, the only relevant question here is whether the Sixth Amendment's guarantee of trial by jury embraces a guarantee that the verdict of the jury must be unanimous. The answer to that question is clearly "yes," as my Brother Powell has cogently demonstrated in that part of his concurring opinion that reviews almost a century of Sixth Amendment adjudication.[99]

Because they construed the Sixth Amendment unanimity requirement both legally sound and as subject to incorporation based on *Duncan v. Louisiana*,[100] the four dissenters voted to overturn the nonunanimous conviction.[101]

As Justice Marshall observed in dissent, Justice Powell, concurring in the judgment and providing the fifth vote to sustain the conviction, reviewed the detailed history of the requirement of jury unanimity.[102] Powell determined that the Sixth Amendment was intended to embrace unanimity, but then set out his theory, now known as dual track incorporation.[103] That theory held that the Fourteenth Amendment Due Process Clause, through which substantive provisions of the Bill of Rights applied to the states, did not demand incorporation jot for jot.[104] As Justice Gorsuch noted in *Ramos*, "Justice Powell acknowledged that his argument for dual-track incorporation arrived 'late in the day.' "[105]

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99 *Id.* at 414 (Stewart, J., dissenting) (citation omitted).

100 391 U.S. 145 (1968).

101 *See Apodaca*, 406 U.S. at 414–15 (Stewart, J., dissenting). In addition to Justices Brennan and Marshall, who joined Stewart's dissent, and who wrote separate dissents, Justice Douglas also produced a dissenting opinion, and all of the opinions also accompanied *Apodaca*'s companion case *Johnson*. *See* Johnson v. Louisiana, 406 U.S. 356, 395 (1972) (Brennan, J., dissenting); *id.* at 399 (Marshall, J., dissenting); *id.* at 380 (1972) (Douglas, J., dissenting).

102 *See Johnson*, 406 U.S. at 400 (Marshall, J., dissenting).

103 *See id.* at 372–73 (Powell, J., concurring).

104 Powell stated:

> I am not in accord with a major premise upon which that judgment is based. Its premise is that the concept of jury trial, as applicable to the States under the Fourteenth Amendment, must be identical in every detail to the concept required in federal courts by the Sixth Amendment. I do not think that all of the elements of jury trial within the meaning of the Sixth Amendment are necessarily embodied in or incorporated into the Due Process Clause of the Fourteenth Amendment.

Id. at 369 (footnote omitted).

105 Ramos v. Louisiana, 140 S. Ct. 1390, 1398 (2020) (quoting *Johnson*, 406 U.S. at 375 (Powell, J., concurring) ("Although it is perhaps late in the day for an expression of my views . . . .")).

Until *Ramos*, and thus for fifty years, Justice Powell's *Apodaca* concurrence in the judgment was almost invariably deemed controlling on the narrowest grounds. That opinion intuitively occupied a middle ground between relaxing the jury unanimity requirement in federal and state criminal trials, embraced by Justice White for a plurality of four, and insisting upon jury unanimity in both federal and state criminal trials, embraced by Justice Stewart and three others in dissent. The preceding analysis is depicted visually in Table 1.

TABLE 1. *APODACA V. OREGON* IN ONE DIMENSION

Justice White (for 4)	**Justice Powell**	**Justices Stewart (for 3) and Douglas (dissenting)**
Unanimity not required under Sixth Amendment	Unanimity required under Sixth Amendment for federal cases, but not for state cases	Unanimity required under Sixth Amendment, with jot-for-jot incorporation
Lax Jury Trial Right ⟷ Strict Jury Trial Right		

As Table 1 shows, of the two opinions consistent with the judgment sustaining the petitioners' nonunanimous jury verdicts in *Apodaca*, Justice Powell's dual-track incorporation is narrower. Applying one common methodology to *Marks*, of the two opinions consistent with the judgment, Powell's has the "least impact" in terms of sustaining nonunanimous jury convictions. Whereas the plurality would allow nonunanimous verdicts in both federal and state criminal trials, Powell would cabin nonunanimous verdicts to state criminal trials. By contrast, the dissent would disallow them in both federal and state criminal trials and thus would overturn the petitioners' convictions in *Apodaca* along with others resting on less-than-unanimous jury verdicts.

Writing for the plurality of three in *Ramos*, Justice Gorsuch rejected the preceding analysis. Gorsuch claimed that no opinion expressed the *Apodaca* holding on narrowest grounds.[106] Justice Alito rejoined that this striking claim defies a half century of jurisprudence construing the Powell opinion as expressing the *Apodaca* holding.[107] Alito's account—along with that of Justices Sotomayor and Kavanaugh, who likewise regarded Powell's opinion as controlling—is consistent with the preceding analysis. Despite Gorsuch's analysis, a majority of the *Ramos* Court regarded Powell's *Apodaca* opinion as

106 *See id.* at 1403 (plurality opinion).

107 *See id.* at 1425 (Alito, J., dissenting).

controlling under *Marks*, even as a separate majority elected to supersede *Apodaca* in favor of the views of Justice Stewart's dissent requiring unanimity in both federal and state criminal trials.[108]

The *Ramos* opinions prove somewhat more challenging to align than those in *Apodaca*, largely as a consequence of Justice Thomas's outlier view of incorporation. Unlike the remainder of the *Ramos* Court, Thomas claimed the *Slaughter-House Cases* erred not only in failing to afford meaningful content to the Fourteenth Amendment Privileges or Immunities Clause but also in failing to recognize that Clause as the doctrinal source for incorporating the substantive provisions of the Bill of Rights and applying them to the states.[109] Because Thomas agreed that incorporation—albeit under a different Clause—is jot for jot, he helped form the majority on the judgment overturning Mr. Ramos's nonunanimous jury conviction. Thomas's analysis is orthogonal to that of the Court's remaining members. Identifying the narrowest grounds opinion in *Ramos* requires determining whether Thomas's alternative analysis prevents aligning the remaining opinions—capturing eight Justices—along a single dimension. The analysis to follow demonstrates that while Thomas's analysis does not undermine applying *Marks* to *Ramos*, it does undermine applying *Marks* to *McDonald v. City of Chicago*.

The *Ramos* opinions comprise four camps. Justice Gorsuch wrote in part for a majority of five, including Justices Breyer, Ginsburg, Sotomayor, and Kavanaugh, and in part for a plurality of three, joined only by Breyer and Ginsburg.[110] Part IV–A, for a plurality, assessed the implications of the narrowest grounds rule in construing *Apodaca* and in considering that case's precedential status.[111] Justices Sotomayor and Kavanaugh produced individual concurrences in the judgment, most notably parting company respecting Part IV–A.[112] Despite their differing approaches, Sotomayor and Kavanaugh each implicitly agreed on the implications of *Marks* for *Apodaca* and on *Apodaca*'s precedential status. By contrast, Justice Thomas, who also concurred in the judgment, took an altogether different view of incor-

108 *See id.* at 1403–04 (plurality opinion).

109 *See id.* at 1424 (Thomas, J., concurring in the judgment).

110 *See id.* at 1393 (majority opinion).

111 *See id.* at 1402–04 (plurality opinion). Justice Sotomayor joined Part IV–B of the Gorsuch opinion, which determined that reliance interests did not warrant failing to abandon the *Apodaca* judgment. *See id.* at 1404–07 (majority opinion); *id.* at 1407–08 (plurality opinion); *id.* at 1408–10 (Sotomayor, J., concurring as to all but Part IV–A).

112 *See id.* at 1408 (Sotomayor, J., concurring as to all but Part IV–A); *id.* at 1410 (Kavanaugh, J., concurring in part).

poration from the Court's remaining eight members.[113] Finally, Justice Alito produced a dissent joined by Chief Justice Roberts and Justice Kagan.[114]

The *Ramos* Court fractured on how to apply *Marks* to *Apodaca* and on identifying the textual foundation for incorporation. Although the latter split implicated two nominal dimensions, the resulting opinions can be cast along one *relevant* dimension, with Justices Sotomayor and Kavanaugh expressing the *Ramos* holding on narrowest grounds. To be clear, expressing the narrowest grounds holding is separate from the underlying merits. The analysis that follows reveals that although not entirely without precedent,[115] the controlling opinions misconstrue an important feature associated with a proper construction of the narrowest grounds rule.

1. Hughes*,* Freeman*, & Shifting Views on Narrowest Grounds*

The positions the *Ramos* Justices embraced concerning *Marks* have shifted over time. Before *Ramos*, the Supreme Court had last squarely addressed *Marks* in *Hughes v. United States*.[116] The *Hughes* Court confronted lower court disagreements in construing *Freeman v. United States*.[117] *Freeman* and *Hughes* presented questions of statutory interpretation involving when an offender who pled guilty in a Type C plea—involving an agreed-upon sentencing recommendation—could petition for sentencing reconsideration following a statutory diminution in sentencing for a relevant part of the offending activity. *Hughes* implicated *Marks* because the *Freeman* Court fractured into three relevant camps.

Justice Kennedy, writing for a plurality of four in *Freeman*, presumed that because plea bargains were informed by the sentencing guidelines, they were generally based on the guidelines for purposes of permissible sentencing reconsideration, rendering Mr. Freeman eligible.[118] In his dissent, Chief Justice Roberts reasoned that, in general, sentencing pursuant to a plea agreement is based not on the guidelines, but on the plea, thus making Freeman ineligible.[119] Justice

113 *See id.* at 1420–25 (Thomas, J., concurring in the judgment).

114 *See id.* at 1425–40 (Alito, J., dissenting). Justice Kagan declined to join Part III–D of Justice Alito's dissent. *Id.* at 1425.

115 *See infra* Section II.A.2.c (discussing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 845–46, 858 (1992) (joint opinion)).

116 138 S. Ct. 1765 (2018).

117 564 U.S. 522 (2011).

118 *See id.* at 534 (plurality opinion).

119 *See id.* at 544–51 (Roberts, C.J., dissenting).

Sotomayor, who had been a prosecutor,[120] concurred in the judgment, reasoning that, in general, sentencing pursuant to a plea agreement is based on the plea agreement not the guidelines, but also identifying specific circumstances in which the agreement itself provided objective evidence that it was based on the guidelines.[121] This included wording referring to or incorporating the sentencing guidelines. As applied to petitioner Freeman, her conditions were met, rendering him eligible.[122]

Most lower federal courts addressing the question determined that Sotomayor's *Freeman* concurrence in the judgment controlled on narrowest grounds.[123] Her approach, identifying specific conditions for when pleas were eligible, intuitively fell between presuming that virtually all pleas were eligible (Kennedy) and presuming that virtually none were eligible (Roberts).

The U.S. Court of Appeals for the Eleventh Circuit likewise identified Sotomayor's opinion as controlling in *Hughes.* In doing so, it denied relief to Hughes, whose plea agreement, it determined, failed to satisfy her specified eligibility requirements.[124] Applying Sotomayor's analysis, the court determined that Hughes's case differed from Freeman's in two respects.[125] First, Hughes's recommended sentence fell below the low end of the guidelines' sentencing range.[126] Second, the sentencing recommendation did not incorporate any of the criteria that Sotomayor had identified in her *Freeman* concurrence to refute the claim that the sentence was based on the plea, not the guidelines.[127] By contrast, under Kennedy's approach, the guidelines are presumed to have influenced Hughes's sentence, and thus to have provided the requisite statutory basis for resentencing. Whereas Kennedy would find Freeman and Hughes eligible for sentencing reconsideration, and Roberts would find neither eligible, Sotomayor would find Freeman eligible, but Hughes ineligible. Hughes appealed, claiming that the Eleventh Circuit had wrongly applied *Marks* to *Freeman*

120 Benjamin Weiser & William K. Rashbaum, *Sotomayor Is Recalled as a Driven Rookie Prosecutor*, N.Y. Times, June 8, 2009, at A13.

121 *See Freeman*, 564 U.S. at 534–44 (Sotomayor, J., concurring in judgment).

122 *See id.* at 535–36.

123 *See* Hughes v. United States, 138 S. Ct. 1765, 1771 (2018).

124 *See id.* at 1774.

125 United States v. Hughes, 849 F.3d 1008, 1015–16 (11th Cir. 2017), *rev'd and remanded*, 138 S. Ct. 1765.

126 *See id.*

127 *See id.*

and further claiming that *Marks* should not be relied upon as a rule of construction in fractured cases.[128]

As Justice Alito observed in his *Ramos* dissent, *Hughes* was resolved on separate statutory grounds,[129] thereby leaving the narrowest grounds rule intact, at least for now. Rather than have the *Hughes* Court resolve whether her *Freeman* opinion controlled under *Marks*, Justice Sotomayor joined a majority embracing Justice Kennedy's broader basis for presuming eligibility for sentencing relief.[130] She explained in a separate concurrence that although she continued to embrace the merits of the view she expressed in her *Freeman* concurrence in the judgment, her opinion had fractured the Court and, in doing so, compromised guidance to lower courts on an important issue of criminal sentencing.[131]

During the *Hughes* oral argument, Justices Breyer and Ginsburg expressed an understanding of *Marks* in some tension with their later decision to join Justice Gorsuch's *Ramos* opinion, including the part comprising a plurality of three. In the *Hughes* oral argument, Justice Gorsuch raised the possibility that the problems in construing *Freeman* under *Marks* were sufficiently uncommon that resolving *Hughes* on alternative grounds might avoid future difficulties.[132] Justice Ginsburg responded that the problem was more common, referring to cases cited in two amicus briefs.[133] Justice Breyer separately observed that despite its imperfections, the narrowest grounds rule is likely the best the Court can do in setting out helpful guiding principles.[134] Despite this, Justices Ginsburg and Breyer joined Justice Gorsuch's entire *Ramos* opinion, which expressed a very different conception of *Marks*.[135]

a. Justice Gorsuch's Marks *Deconstruction in* Ramos

In *Ramos*, Justice Gorsuch advanced three propositions implicating *Marks*.[136] First, he contended that *Apodaca* failed to provide an

128 *See* Brief of Petitioner at 37, 55, *Hughes*, 138 S. Ct. 1765 (No. 17-155), 2018 WL 565327, at *37, *55.

129 *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1430 (2020) (Alito, J., dissenting).

130 *See Hughes*, 138 S. Ct. at 1778–80 (Sotomayor, J., concurring).

131 *See id.*

132 *See* Transcript of Oral Argument, *supra* note 8, at 46–49.

133 *See id.* at 49–50. Most likely this referred to the commentary of Professor Re and this Article's author.

134 *See id.* at 53.

135 *See Ramos*, 140 S. Ct. at 1393–94 (majority opinion); *id.* at 1403–04 (plurality opinion).

136 *See id.* at 1403–04 (plurality opinion).

opinion resolving the case on narrowest grounds.[137] Second, he maintained that, as a result, *Apodaca* lacks precedential status.[138] Third, he concluded that *Apodaca* was mistaken and should be superseded, as opposed to overruled, thereby demanding unanimous jury verdicts both in federal and state criminal proceedings.[139]

Justice Gorsuch's determination that *Apodaca* lacked a controlling narrowest grounds opinion rested on two arguments. First, Justice Gorsuch effectively endorsed the part of Justice Powell's opinion construing the Sixth Amendment jury right to require unanimity as a matter of constitutional history, early English practice, and constitutional expectation notwithstanding that England itself later abandoned the unanimity requirement.[140] Second, Justice Gorsuch observed that for nearly one hundred years prior to *Apodaca*, the Court had recognized the unanimity requirement, eschewing an inquiry into a functionalist, or cost-benefit, analysis of the sort Justice White's plurality embraced.[141] Instead, Justice Gorsuch claimed that the Framers undertook whatever balancing was appropriate, and the modern Court's task was limited to honoring, not reassessing, that balance.[142]

Justice Gorsuch surveyed the law on incorporation, ultimately embracing the *Apodaca* dissent. Gorsuch maintained that the proper doctrinal approach had long been jot for jot, rendering Justice Powell's dual-track analysis not merely mistaken, but legally unavailable.[143] Justice Gorsuch determined that neither Justice Powell's dual-track analysis nor White's functionalist analysis could express the *Apodaca* Court's holding on narrowest grounds.[144] With respect to Justice Powell, Justice Gorsuch posited one more claim: a single Justice, whose view was rejected by eight out of nine members of the Court, cannot control under *Marks*.[145]

There are two important points to make regarding these claims. First, Justice Gorsuch's opinion does not represent the narrowest grounds position in *Ramos*. Second, on the merits, two centerpieces of

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137 *See id.*

138 *See id.*

139 *See id.* at 1404.

140 *See id.* at 1395–97 (majority opinion).

141 *See id.* at 1396, 1398.

142 *See id.* at 1402 (plurality opinion).

143 *See id.* at 1405 (majority opinion). For a similar claim in a fractured 4–1–4 context, with Justice Scalia claiming that the narrowest grounds position taken by Justice Kennedy was legally unavailable, see Vieth v. Jubelirer, 541 U.S. 267, 301 (2004); and *infra* Section II.A.1 (reviewing Justice Scalia's analysis).

144 *See Ramos*, 140 S. Ct. at 1405 (majority opinion).

145 *See id.* at 1403–04 (plurality opinion); *id.* at 1404–05 (majority opinion).

the analysis are notably flawed whereas a third, although rejected by a majority of the Court, is sound. Before evaluating the *Ramos* concurrences in the judgment, it is helpful to consider Justice Alito's dissent. Justice Alito clarifies some aspects of the narrowest grounds rule while complicating others in an opinion that contains an apparent internal inconsistency.[146]

b. Justice Alito's Ramos *Dissent*

Contrary to Justice Gorsuch, Justice Alito recognized that a single Justice can control on narrowest grounds:

> An initial question is whether, in a case where there is no opinion of the Court, the position taken by a single Justice in the majority can constitute the binding rule for which the decision stands. Under *Marks*, the clear answer to this question is yes. The logic of *Marks* applies equally no matter what the division of the Justices in the majority, and I am aware of no case holding that the *Marks* rule is inapplicable when the narrowest ground is supported by only one Justice. Certainly the lower courts have understood [*Marks* to] apply in that situation.[147]

Justice Alito recognized *Apodaca* as precedent, including in the Supreme Court.[148] And yet, despite recognizing that even one Justice can control under *Marks*, Justice Alito qualified his conclusion, stating no one ever imagined that Justice Powell's solo opinion was binding on the Court.[149] This might imply that although Justice Alito regards fractured rulings as binding precedent on the Supreme Court, thereby requiring an overruling to displace, such rulings do not obligate the Court to embrace the rationale in any nonmajority opinion, including the narrowest grounds opinion.

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146 The author has alerted the Clerk of the Court as to the seeming inconsistency.

147 *Ramos*, 140 S. Ct. at 1431 (Alito, J., dissenting).

148 *See id.* at 1427–28 ("Consider what it would mean if *Apodaca* was never a precedent. It would mean that the entire legal profession was fooled for the past 48 years."); *id.* at 1429 ("The idea that *Apodaca* was a phantom precedent defies belief.").

149 Justice Alito stated:

> The final question is whether Justice Powell's reasoning in *Apodaca*—namely, his view that the Fourteenth Amendment did not incorporate every aspect of the Sixth Amendment jury-trial right—is a binding precedent, and the answer to that question is no. When, in the years after *Apodaca*, new questions arose about the scope of the jury-trial right in state court—as they did in cases like *Apprendi v. New Jersey* and *Blakely v. Washington*—nobody thought for a second that *Apodaca* committed the Court to Justice Powell's view . . . .

Id. at 1431 (citations omitted) (first citing Apprendi v. New Jersey, 530 U.S. 466 (2000); and then citing Blakely v. Washington, 542 U.S. 296 (2004)).

Setting aside the claimed obligation to formally overrule nonmajority Supreme Court cases, this reading largely comports with the analysis that follows. That analysis demonstrates that the precedential status of a narrowest grounds opinion differs in lower courts as compared with the Supreme Court, binding the former not the latter. The difficulty is that Justice Alito then introduces uncertainty with an admittedly ambiguous passage that appears to contain an internal inconsistency:

> The next question is whether the *Marks* rule applies any differently when the precedent that would be established by a fractured decision would overrule a prior precedent. Again, the logic of *Marks* dictates an *affirmative* answer, and I am aware of no case holding that the *Marks* rule applies any differently in this situation. But as far as the present case is concerned, this question is academic because *Apodaca* did not overrule any prior decision of this Court.[150]

This passage makes the most sense if we assume the italicized "affirmative" was intended as "negative." It is problematic to claim no case holds that *Marks* applies differently when "a fractured decision would overrule a prior" Supreme Court precedent, or to state that the resolution is academic because *Apodaca* did not purport to overturn a prior ruling, *unless* a nonmajority case has the potential to overturn a past majority ruling.[151] Although not without exception, this reading of the narrowest grounds rule is in tension with the history of *Marks* itself and with how Justices have generally operated in *Marks*'s shadow.[152]

c. The Sotomayor & Kavanaugh Partial Concurrences in the Ramos *Judgment*

Of the three *Ramos* concurrences in the judgment, Kavanaugh and Sotomayor can be grouped together, whereas Thomas requires separate consideration. Justices Sotomayor and Kavanaugh rejected

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150 *Id.* (emphasis added).

151 *Id.*

152 *See infra* Section II.A.2.a (discussing *Miller v. California*, 413 U.S. 15 (1973); Justice Scalia's voting strategy in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); and the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (joint opinion)). Justice Alito further rejected Justice Sotomayor's claim that nonunanimous juries were a relic of Jim Crow, given their more modern reenactments, *Ramos*, 140 S. Ct. at 1426–27 (Alito, J., dissenting), and Justice Kavanaugh's claim that the Court's holding created potentially onerous administrative burdens, responding that *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion), limits the retroactivity of nonwatershed rules, *Ramos*, 140 S. Ct. at 1437 (Alito, J., dissenting).

Justice Gorsuch's analysis claiming that a single Justice cannot create binding precedent under the narrowest grounds rule and that *Apodaca* lacks precedential status. For Sotomayor and Kavanaugh, *Apodaca* is precedent that each concludes should be overruled.[153]

Justice Sotomayor also reviews the racial history of nonunanimous jury verdict laws, describing them as a relic of Jim Crow.[154] Nonmajority jury verdicts let a majority suppress a minority—historically a racial minority—of jurors who exhibit a visceral distrust of police and prosecutorial behaviors respecting members of their community.[155] In Sotomayor's view, laws whose origins are associated with a motivation to suppress the voices of African Americans must be assessed in light of that history and deserve no lawful place in our jurisprudence.[156]

Justice Kavanaugh devoted much of his opinion to reconceptualizing the criteria for evaluating when Supreme Court precedents warrant overruling.[157] This has been a focal point of landmark Supreme Court cases, including the narrowest ground plurality in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[158] which declined to overturn *Roe v. Wade*,[159] and *Lawrence v. Texas*,[160] which overturned *Bowers v. Hardwick*.[161]

Kavanaugh tackled *Marks* in a detailed footnote, stating that when the Court fractures, its rulings bind state and federal courts, including the Supreme Court.[162] As shown below, this is in tension with how Justices have modeled their behavior in the shadow of *Marks* and with the position taken by Justice Gorsuch for a plurality of three.[163] Kavanaugh further noted that although *Marks* generally applies in a straightforward manner, that is not always the case. He explained: "On very rare occasions, as in *Apodaca*, it can be difficult to discern which opinion's reasoning has precedential effect under *Marks*."[164] Kavanaugh further observed: "As I read the Court's various opinions

153 *See Ramos*, 140 S. Ct. at 1409–10 (Sotomayor, J., concurring as to all but Part IV–A); *id.* at 1410 (Kavanaugh, J., concurring in part).

154 *See id.* at 1410 (Sotomayor, J., concurring as to all but Part IV–A).

155 *See id.* at 1394 (majority opinion).

156 *See id.* at 1410 (Sotomayor, J., concurring as to all but Part IV–A).

157 *See id.* at 1411–16 (Kavanaugh, J., concurring in part).

158 505 U.S. 833 (1992) (joint opinion).

159 410 U.S. 113 (1973).

160 539 U.S. 558 (2003).

161 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. 558.

162 *See Ramos*, 140 S. Ct. at 1416 n.6 (Kavanaugh, J., concurring in part).

163 *See infra* Section II.A.

164 *Ramos*, 140 S. Ct. at 1417 n.6 (Kavanaugh, J., concurring in part).

today, six Justices treat the result in *Apodaca* as a precedent for purposes of stare decisis analysis. A different group of six Justices concludes that *Apodaca* should be and is overruled."[165]

Justice Kavanaugh's characterization is largely sound, yet it requires slight amending. Justice Gorsuch, writing for a plurality of three, did not treat *Apodaca* as binding precedent. As a result, although he concluded the case should be superseded, he did not determine that this required the case to be overruled. Modifying Kavanaugh's statement to assert that six Justices regard *Apodaca* as precedent, and another six Justices believe *Apodaca* should either be superseded or overruled, better captures the opinions.

2. *Justice Thomas's* Ramos *Concurrence in the Judgment*

Because Justice Thomas's concurrence in the judgment did not focus on the narrowest grounds rule, and because it implicates the earlier discussion as to the original meaning of the Privileges or Immunities Clause, we can present it fairly briefly.[166] Justice Thomas rejected the premise on which the Court has, now for decades, rested its fundamental rights and incorporation jurisprudence. Although commentators acknowledge the anomaly of relying upon the Fourteenth Amendment Due Process Clause to perform this work, the Court's members have long been unwilling to change that approach.[167] The exception is Justice Thomas. Notably Justice Scalia, widely associated with originalist jurisprudence, was unwilling to revisit the *Slaughter-House Cases* as the basis for incorporating the Second Amendment right to states and municipalities, set out in his earlier majority opinion in *Heller*[168] in his concurring opinion in *McDonald.*[169]

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165 *Id.*

166 *Id.* at 1420 (Thomas, J., concurring). In *June Medical Services*, Justice Thomas observed that Chief Justice Roberts's solo opinion in that 4-1-4 case appeared to express the holding on narrowest grounds, adding in a footnote that based on Justice Gorsuch's *Ramos* plurality analysis, Roberts's opinion might be ineligible for narrowest grounds status. *See* June Med. Servs. LLC v. Russo, 140 S. Ct. 2103, 2148 n.4 (2020) (Thomas, J., dissenting); *see also infra* Section II.A.1 (discussing *June Medical Services*).

167 A turning point for incorporation was *Duncan v. Louisiana*, 391 U.S. 145 (1968), with Justice White reasoning that abstract inquiries into whether the absence of a claimed right is consistent with an Anglo-American scheme of ordered liberty proves less valuable than specific inquiries grounded in the Bill of Rights, given that virtually all state criminal law systems have come close to replicating the federal criminal justice system. *See id.* at 148–56, 149 n.14 ("Of each of these determinations that a constitutional provision originally written to bind the Federal Government should bind the States as well it might be said that the limitation in question is not necessarily fundamental to fairness in every criminal system that might be imagined but is fundamental in the context of the criminal processes maintained by the American States.").

168 *See* District of Columbia v. Heller, 554 U.S. 570, 614–20 (2008).

Thomas's revisiting privileges or immunities based on original meaning runs up against settled precedent affecting a host of doctrinal domains, including privacy, same sex marriage, the Second Amendment, and the broad swath of incorporation cases. One implication of reconsidering these cases, as Thomas has observed, is that the Privileges or Immunities Clause protects the rights of citizens whereas the Due Process and Equal Protection Clauses more broadly protect persons.[170] Some rights, such as those associated with the Second Amendment, for example, might make more sense with a citizenship limitation, and one might advance similar claims respecting certain procedural rights.[171]

Whatever the merits of Justice Thomas's position as an original matter, or even respecting the balance struck between honoring precedent and correcting past jurisprudential error, it is clear that the doctrinal implications of Justice Thomas's view are quite different from those of Justices Kavanaugh and Sotomayor. For example, if the Court were to declare that the basis for incorporation rests on privileges or immunities, not due process, the reach of the holding is potentially extremely broad, inviting challenges to any number of past precedents resting on due process. Alternatively, the effect could be to narrow the reach of past rights vindicated under due process that fit less comfortably with privileges or immunities. Simply put, there is no obvious assessment of Thomas's approach that aligns along the dimension of breadth versus narrowness as compared with the remaining opinions. Thomas's view, seeking to upend decades of due process jurisprudence not necessarily limited to incorporation, is orthogonal to those of the remaining Justices on the *Ramos* Court.

3. Aligning the Remaining Ramos *Opinions*

Recall that Justice Alito observed the apparent irony of failing to recognize the effect of the *Ramos* breakdown in assessing *Apodaca.* The meta-analysis entails ascertaining which of the various opinions in *Ramos* on the narrowest grounds analysis of *Apodaca* expresses the *Ramos* holding on narrowest grounds. Despite the seeming risk of infinite regress, applying *Marks* in *Ramos*, as in *Apodaca*, is straightforward as the opinions align along a single relevant dimension.

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169 *See* McDonald v. City of Chicago, 561 U.S. 742, 791–805 (2010) (Scalia, J., concurring).

170 *See Ramos*, 140 S. Ct. at 1423–24 (Thomas, J., concurring); *McDonald*, 561 U.S. at 815–19 (Thomas, J., concurring).

171 *See, e.g.*, Randy E. Barnett, We the People*: Each and Every One*, 123 YALE L.J. 2576, 2579–91 (2014).

TABLE 2. *RAMOS V. LOUISIANA* IN ONE DIMENSION

(A) Justice Gorsuch (for 3)	**(B) Justices Sotomayor and Kavanaugh**	**(C) Justice Alito (for 3)**
Apodaca not precedential, no narrowest grounds opinion, case is superseded with requirement of jury unanimity in state criminal trials	*Apodaca* is precedential; Powell's opinion expresses holding on narrowest grounds; case is overruled, requiring jury unanimity in state criminal trials	*Apodaca* is precedential, although Powell's opinion expresses the holding on narrowest grounds it does not bind the Supreme Court, *Apodaca* should be retained as precedent
Lax treatment of *Apodaca* as precedent ⟷		Strict treatment of *Apodaca* as precedent

Although the narrowest grounds analysis of *Apodaca* implicates three discrete issues—*Apodaca*'s precedential status, identifying the controlling opinion, and deciding whether *Apodaca* should be superseded or overruled, on one side, or retained, on the other—these issues align along one dimension. That dimension captures how lax or strictly the Supreme Court treats *Apodaca* as precedent. The eight Justices who agreed to this framing expressed or joined opinions aligning consistently along this dimension from left to right for each issue.[172] Those who believe that the case is not precedential believe it should be overruled; those who believe it is precedential split on whether it should be overruled, with those taking the stricter view of precedent choosing to retain it. Between these extremes lie the two concurrences in the judgment. Justices Sotomayor and Kavanaugh each regard the case as precedent, treat Powell's opinion as expressing the *Apodaca* holding on narrowest grounds, and conclude *Apodaca* warrants overruling. Finding that *Apodaca* is precedent warranting overruling (B) fits logically between not finding the case precedential and allowing it to be superseded with no need to overrule (A) and finding it as precedent that should be retained (C).

Although Table 2 presents the views of eight of the nine deciding Justices, the two largely aligned narrowest ground opinions capture the median members of the *Ramos* Court. Excluding Thomas yields a 3-2-3 line-up, meaning that the narrowest grounds position coincides with the median Justice, whether Sotomayor or Kavanaugh.[173] That is

172 As explained *infra* Part II, this is consistent with recognizing that the number of issues or data bear no correlation to the number of dimensions along which they are assessed. *See* Stearns, *supra* note 26.

173 *See supra* note 32 (presenting the median position as one way to express the narrowest grounds rule).

because six Justices agree that *Apodaca* should be superseded or overturned, rendering the sui generis position expressed by Justice Thomas unnecessary in applying *Marks* to *Ramos*. If Thomas's opinion had been crucial to forming a majority of the *Ramos* Court, the analysis would be more complex, as the following discussion demonstrates.

C. McDonald v. City of Chicago*: Incorporation in Two Dimensions*

The Second Amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[174] In the 1939 decision, *United States v. Miller*,[175] the Supreme Court rejected a Second Amendment defense to a prosecution for possession of a sawed-off shotgun, declaring that the Amendment does not protect an individual right.[176] The scope of the Second Amendment right to keep and bear arms has long been a source of contention. In *District of Columbia v. Heller*, the Supreme Court, with Justice Scalia writing, abandoned *Miller*'s narrow reading, which had construed the protection as inherently tied to state militias based on the prefatory clause.[177]

Justice Scalia began his analysis with the operative clause, construing "the people" to imply an individual right, and "keep and bear arms" as not expressing an idiomatic meaning associated with a military context on the ground that when so used, "bear arms" is coupled with "against" followed by an identified enemy.[178] Scalia further construed "arms" to imply weapons commonly in use among the general population, eliminating any specific military connection.[179]

Upon revisiting the prefatory clause, Scalia determined that the framers included it because it conveyed the motivating context, fearing the federal government might aggrandize its power by, among other means, removing privately held weapons.[180] For Scalia, this implied that the prefatory clause signaled a benign check but did not express a source of limitation on the identified right.

Scalia acknowledged that the Amendment's framers could not have imagined certain weaponry that might be used in a modern military setting, rendering such weapons unsuitable for common usage in

174 U.S. CONST. amend II.

175 307 U.S. 174 (1939).

176 *See id.* at 178.

177 *See* District of Columbia v. Heller, 554 U.S. 570, 582–83 (2008).

178 *See id.* at 576–92.

179 *See id.* at 581–92.

180 *See id.* at 595–98.

the modern age.[181] He recognized that this analysis allowed some regulation of, including banning, particular weapons that did not correspond to weaponry commonly employed at the time the Second Amendment was ratified.[182] Scalia acknowledged the potentially ironic effect of disallowing private possession (keep) and use (bear) of arms suitable to the militia context while protecting access to weaponry (handguns and hunting rifles) with no modern military benefit.[183] Despite this irony, Scalia reasoned that the prefatory clause's disjuncture with the scope of the modern right was not a basis of limitation on that right.[184]

Although the path of litigation began in the District of Columbia, which is subject to federal regulation, the larger stakes were states and localities, which carry the bulk of gun regulations. *McDonald v. City of Chicago* presented the question whether the right announced in *Heller* was incorporated, thus applying against a handgun ban in the City of Chicago.[185] The *McDonald* Court divided into three camps. A plurality of four determined that the Second Amendment right declared in *Heller* is incorporated through the Fourteenth Amendment Due Process Clause.[186] Justice Thomas rejected the Due Process Clause analysis as the basis for incorporation, but reasoned that the right falls within the scope of the Fourteenth Amendment Privileges or Immunities Clause, an argument the plurality rejected.[187] Justice Stevens, dissenting for four Justices, rejected both bases for incorporation, finding that the Second Amendment right was neither included under the Due Process Clause nor protected under the Privileges or Immunities Clause.[188]

In contrast with the opinions in *Apodaca* and *Ramos*, the *McDonald* opinions cannot be expressed along a single dimension. As shown in Table 3, assessing these three opinions implicates two separate dimensions.

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181 *See id.* at 582.

182 *See id.* at 627–29.

183 *See id.* at 627–28.

184 *See id.*

185 *See* McDonald v. City of Chicago, 561 U.S. 742, 749–50 (2010).

186 *See id.* at 748–49; *id.* at 758–59 (plurality opinion).

187 *See id.* at 806 (Thomas, J., concurring in part and concurring in the judgment).

188 *See id.* at 858–61 (Stevens, J., dissenting).

TABLE 3. *MCDONALD V. CITY OF CHICAGO* IN TWO DIMENSIONS

	Incorporate Under Privileges or Immunities	**Do Not Incorporate Under Privileges or Immunities**
Incorporate Under Due Process		Plurality (4)
Do Not Incorporate Under Due Process	Thomas (1)	Dissent (4)

The narrowest grounds rule provides that in a nonmajority case, the opinion consistent with the judgment that resolves the case on the narrowest grounds expresses the holding.[189] Although the *Marks* formulation does not employ the term "dimension," the rule's framing implies dimensionality. Positing that the opinion consistent with the outcome decided on narrowest grounds is controlling implies at least one other opinion consistent with the outcome that would resolve the case on broader grounds. The framing further implies a dissenting opinion would resolve the case on grounds so narrow as to produce a contrary judgment. This framing suggests that in a paradigmatic fractured panel ruling, there would be at least three relevant positions—*broader* (not controlling), *narrowest consistent with the judgment* (controlling), *so narrow as to dissent* (not controlling)—aligned on a single dimension of relative breadth. Because a majority is required to issue a judgment, the narrowest opinion comporting with the judgment would almost invariably capture the median position of the deciding Court.

Although *Ramos* is more complex than *Apodaca*, the preceding analysis explains why the doctrine applies in a straightforward manner there as well. Justice Thomas's added dimension can be disregarded while still casting the remaining opinions along one dimension, with the result that the two median Justices—Sotomayor and Kavanaugh—express the holding on narrowest grounds. By contrast, the analysis further demonstrates why *Marks* is thwarted in *McDonald*. To see why, consider what it means for an opinion to be so narrow as not to support the judgment.

In a case that accepts a constitutional challenge, the opinion consistent with the grant of relief that would allow the fewest challenges to succeed going forward is the narrowest grounds opinion. By contrast, an opinion that would deny relief is so narrow that it would not support the judgment. Alternatively, in a case that rejects a constitu-

189 *See* Marks v. United States, 430 U.S. 188, 193 (1977).

tional challenge, the opinion consistent with the denial of relief that would allow the most challenges going forward to proceed is the narrowest grounds opinion. By contrast, an opinion that would allow the raised challenge to proceed is so narrow that it would not support the judgment. Thus, in cases granting relief, the opinion consistent with the judgment granting the least relief is the narrowest grounds opinion. In cases denying relief, the opinion consistent with the denial that allows the greatest relief is the narrowest grounds opinion.

In terms of nomenclature, it might seem anomalous to label an opinion that would *grant* relief, when the Court has denied it, as narrow. But the dimension of broad to narrow assesses the bases for the Court's judgment regardless of what that judgment is. A broad ruling denying relief would deny relief across the board; a narrow ruling denying relief would allow some other claims beyond the immediate one for which relief is denied to proceed; and finally, a ruling that would so narrowly construe the bases for denying relief as to confer relief in the immediate case emerges as a dissent.

The preceding discussion is suitably captured within the framing of "least impact analysis."[190] And yet, as explained in the next Part, once we recognize that the proper construction of the narrowest grounds rule requires assessing the opinions based on dimensionality, it is clear that this is merely one of several alternative framings capturing a singular consistent insight.

For now, consider applying least impact analysis to *McDonald*. There are two ways to grant relief: (1) find that the *Heller* Second Amendment right applies to states via the Fourteenth Amendment Due Process Clause, or (2) find that the *Heller* Second Amendment right applies to the states via the Fourteenth Amendment Privileges or Immunities Clause. Two camps grant relief on each of these alternative bases; the narrower opinion along each dimension would grant less relief. Along each dimension, one opinion satisfies this test of being narrower, but in each instance that opinion would deny relief altogether, thereby emerging as a dissent. The plurality would grant relief based on due process, but not privileges or immunities; the concurrence in the judgment would grant relief on privileges or immunities but not due process. By contrast, the dissent would grant relief on neither, achieving an opposite judgment. Although the dissent is narrower along each dimension, under *Marks*, that opinion is ineligible for holding status because it is opposite the case judgment.

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190 *See* sources cited *infra* note 342.

This analysis reveals another way to express the *McDonald* anomaly. The two opinions consistent with the judgment, each incorporating the *Heller* Second Amendment right, resolve each of the two controlling issues in the case in opposite fashion. Neither can be classified as narrower than the other. Thomas is narrower on the question of whether due process provides a basis for relief, and the plurality is narrower on the question of whether privileges or immunities provides a basis for relief. These orthogonal opinions cannot be ranked broad to narrow.

This explains why an impressive group of scholars has advocated, however problematically, for a variety of proposals allowing separate counts on each dispositive issue to control the case outcomes, rather than basing outcomes on a tally of each deciding Justices' determination concerning the ultimate case disposition in two dimensional cases.[191] As applied to *McDonald*, this would result in five Justices rejecting the due process basis for incorporation (Thomas plus the dissenters) and eight Justices rejecting the privileges or immunities basis for incorporation (the plurality plus the dissenters). With this case-disposition rule, the *Heller* ruling would not be incorporated against states and localities, leaving it in place only as applied to federal regulations. This result would lend support to Justice Powell's now-discredited dual-track approach to incorporation.

D. Summary

The preceding analysis has demonstrated that the *Ramos* Justices each capture a slice of the dynamics associated with the proper application of the narrowest grounds rule announced in *Marks*. A proper application of the rule implicates dimensionality. A dimension is a spectrum along which innumerable criteria can be expressed and compared. Not all dimensions are necessarily relevant in applying the nar-

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191 For proposals to implement issue voting, see, for example, Jonathan Remy Nash, *A Context-Sensitive Voting Protocol Paradigm for Multimember Courts*, 56 STAN. L. REV. 75, 78 (2003) (proposing outcome voting for issues of law and issue voting for issues of fact); Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CALIF. L. REV. 1, 30 (1993) (proposing a "metavote" to determine whether to employ outcome or issue voting); David Post & Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 GEO. L.J. 743, 745 (1992) (finding outcome voting "deeply flawed" and proposing tallying results per issue); and David G. Post & Steven C. Salop, *Issues and Outcomes, Guidance, and Indeterminacy: A Reply to Professor John Rogers and Others*, 49 VAND. L. REV. 1069, 1069–70 (1996) (refining authors' original issue voting protocol). For a critical assessment of issue voting proposals, see STEARNS, *supra* note 33, at 99–124; and for a review of the literature, see MAXWELL L. STEARNS, TODD J. ZYWICKI & THOMAS J. MICELI, LAW AND ECONOMICS: PRIVATE AND PUBLIC 888–91 (2018).

rowest grounds rule. Whereas *Apodaca* and *Ramos* present straightforward applications, despite some contrary claims among the Justices, *McDonald* thwarts the rule by invoking a second dimension. This is so even though Justice Thomas introduced a second dimension in both *Ramos* and *McDonald*, resting on privileges or immunities, and rejecting due process, as the basis for applying substantive protections in the Bill of Rights to states and localities.

Because five *Ramos* Justices agree on the relevant dimension, despite disagreeing as to where along that dimension the case judgment is best expressed, Thomas's added dimension in *Ramos* proved irrelevant to aligning the remaining opinions on one dimension. By contrast, because Thomas provided the critical fifth vote for the *McDonald* judgment, his introduction of a second dimension thwarted the application of *Marks* to the resulting *McDonald* opinions. Unlike *Ramos*, *McDonald* contains no opinion expressing the holding on narrowest grounds.

The next Part provides two complementary means of modeling the narrowest grounds rule. It will first demonstrate that despite the stated confusion in the various *Ramos* opinions, the Court's members have better exemplified the meaning of *Marks* with their conduct. It then generalizes several of the preceding points, providing a theoretical analysis that recasts the narrowest grounds rule. This avoids a technical defect in the present wording, albeit one with little practical consequence, and precisely cabins the limited category of cases in which the rule cannot be applied.

II. Modeling Narrowest Grounds

This Part provides two complementary analyses, each modeling narrowest grounds. The first involves specific manifestations of behavior among Supreme Court Justices, including during the *Ramos* term, that appear in tension with formal statements in *Ramos* concerning *Marks*. The second more rigorously introduces dimensionality and provides a basis both for generalizing observed judicial behaviors and for more precisely expressing the narrowest grounds rule.

A. Modeling Narrowest Grounds I: Judicial Behavior

The first part of the analysis unpacks the three problematic posits in *Ramos* concerning how *Marks* applies: (1) Does *Marks* disallow a single Justice from controlling on narrowest grounds?; (2) Are narrowest grounds opinions precedent in the Supreme Court that can overturn past majority opinions?; and (3) Does abandoning a narrow-

est grounds opinion require overruling? Despite the contrary assertions among the *Ramos* opinions, the conduct of the Justices contemporaneous with *Marks*, and even during the *Ramos* term, generally suggest negative answers to each question. Because the second and third inquiries are closely related, they are treated together.

1. Can Solo Opinions Control on Narrowest Grounds?

Beginning with *Davis v. Bandemer*,[192] a divided Supreme Court considered whether the extreme use of redistricting practices known as stacking, packing, and cracking might violate equal protection by providing disproportionate representation to the party in power in comparison with electoral demographics.[193] The phenomenon arises largely in consequence of winner-take-all districted elections. Through these combined practices, the controlling party renders the electoral districts of the out-of-power party unnecessarily dense (packed); divides voters in districts they might otherwise control among other districts, rendering them minority voters (cracked); and consolidates disconnected voters from racial minority communities with other communities, producing minority-majority districts in which outcomes are controlled by elites (stacked).[194] These practices entrench the party in power. Despite the troublesome nature of these practices, a conservative bloc of Justices had long taken the view that partisan gerrymandering, as such claims are called, is a nonjusticiable political question.[195] Ultimately, after Justice Kennedy retired and was re-

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192 478 U.S. 109, 116–17 (1986) (plurality opinion), *abrogated by* Rucho v. Common Cause, 139 S. Ct. 2484, 2491 (2019).

193 *See id.* at 113–18.

194 *See, e.g.*, Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 849–50 (2015); Russell C. Weaver, *Gerrymandering Politics Out of the Redistricting Process: Toward a Planning Revolution in Redrawing Local Legislative Boundaries*, 25 BERKELEY PLAN. J. 98, 101 (2012).

195 *See, e.g.*, *Davis*, 478 U.S. at 144 (O'Connor, J., concurring in judgment) ("I would hold that the partisan gerrymandering claims of major political parties raise a nonjusticiable political question that the judiciary should leave to the legislative branch as the Framers of the Constitution unquestionably intended."); Vieth v. Jubelirer, 541 U.S. 267, 281 (2004) (plurality opinion) ("[W]e must conclude that political gerrymandering claims are nonjusticiable . . . ."); *id.* at 306 (Kennedy, J., concurring in the judgment) ("A decision ordering the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process. . . . I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases."); *see also Rucho*, 139 S. Ct. at 2491 ("This Court has not previously struck down a districting plan as an unconstitutional partisan gerrymander, and has struggled without success over the past several decades to discern judicially manageable standards for deciding such claims.").

placed by Brett Kavanaugh, the conservatives gained the necessary five votes to declare this body of law nonjusticiable.[196]

In the second major Supreme Court decision to address the issue, *Vieth v. Jubelirer*,[197] Justice Kennedy rejected the immediate partisan gerrymandering claim, and like Justice White, who wrote the narrowest grounds plurality decision in *Davis*, Kennedy was also unwilling to disallow such claims to proceed altogether.[198] Unlike Justice White, however, who had advanced the consistent degradation standard in assessing future claims,[199] Justice Kennedy rejected that standard along with those advanced by the parties and the dissenters who would have allowed the immediate case to proceed.[200] Instead, Kennedy maintained that a claim might proceed if a future litigant advances a meaningful standard against which such claims might be assessed.[201]

Like Justice Powell in *Apodaca*, Justice Kennedy stood alone, between two groups of four Justices each. The conservatives sought to jettison partisan gerrymandering claims entirely, declaring them a nonjusticiable political question, and the liberals wanted to permit such claims, including granting relief in the immediate case, offering myriad doctrinal formulations, each of which Kennedy found wanting.[202] Justice Scalia, who joined in denying relief and claiming such claims are nonjusticiable, did not object that Justice Kennedy stood alone in issuing the narrowest grounds opinion. Instead, Scalia maintained that Justice Kennedy's position, leaving open a constitutional claim yet failing to specify how it might be met, was "not legally available."[203]

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196 *See Rucho*, 139 S. Ct. at 2508 ("[W]e have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide us in the exercise of such authority."). The analysis that follows is not focused on the merits of particular partisan gerrymandering rulings, but rather with how the Justices have treated the *Marks* rule as applied to solo opinions expressing the holding on narrowest grounds.

197 541 U.S. 267 (2004) (plurality opinion).

198 *See id.* at 306 (Kennedy, J., concurring in the judgment).

199 *See Davis*, 478 U.S. at 132 ("Rather, unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole.").

200 *See Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment).

201 *See id.* at 311–317 ("That no such standard has emerged in this case should not be taken to prove that none will emerge in the future. . . . If workable standards do emerge to measure these burdens, however, courts should be prepared to order relief.").

202 *See id.* at 305 (plurality opinion); *id.* at 323–27 (Stevens, J., dissenting); *id.* at 346–47 (Souter, J., dissenting); *id.* at 309–17 (Kennedy, J., concurring in the judgment).

203 *Id.* at 301 (plurality opinion).

Although taking somewhat differing approaches, both Justice Gorsuch in *Ramos* and Justice Scalia in *Vieth* conflate the legal soundness of an opinion with whether that opinion is controlling under *Marks*. Justice Gorsuch took the analysis one step further, claiming a categorical ban if the apparent narrowest grounds opinion is expressed by a single Justice.

Supreme Court Justices routinely dispute the merits of each other's opinions. Fractured rulings appear especially prone to such critiques. Even so, determining which opinion controls is necessarily distinct from assessing an opinion's merits. Poorly reasoned opinions, arguably including those rejecting longstanding historical norms or that leave open a governing legal standard, can control on narrowest grounds if they otherwise satisfy *Marks*.

Justice Gorsuch's blanket rule prohibiting solo narrowest grounds concurrences in the judgment from controlling is analytically problematic. When the underlying opinions align on a single dimension with a 4-1-4 breakdown, although eight Justices disagree with the solo concurrence in the judgment, the four Justices occupying either side disagree with the solo opinion for opposing reasons. One side contends the median position goes too far (or is too broad); the other side contends the median position does not go far enough (or is too narrow). Rather than explaining that *Marks* fails to apply, this is why the Justices routinely treat such opinions as controlling, even including Justice Gorsuch.

During the very term in which Justice Gorsuch proposed that the narrowest grounds rule does not apply in the 4-1-4 context, the Court issued *June Medical Services v. Russo*, a major abortion ruling.[204] The case produced a 4-1-4 split, like *Apodaca*, with Chief Justice Roberts producing the narrowest grounds concurrence in the judgment.[205] None of the three Justices who joined the plurality, including Justice Gorsuch himself, raised the possibility that the Chief Justice's narrowest grounds opinion might not control.

June Medical Services presented a challenge to a Louisiana abortion statute that the majority of the deciding Court regarded as materially indistinguishable from a Texas statute invalidated in the 2016 decision, *Whole Woman's Health v. Hellerstedt*.[206] Both statutes demanded that abortions be performed only by a physician with admitting privileges at a hospital within thirty miles of where the procedure

204 *See* June Med. Servs. LLC v. Russo, 140 S. Ct. 2103 (2020) (plurality opinion).

205 *See id.* at 2133–42 (Roberts, C.J., concurring in the judgment).

206 *See id.* at 2112–13 (plurality opinion).

is to be performed.[207] The effect in each case was to markedly diminish access to qualified physicians performing such procedures for women of childbearing age throughout the two states.[208]

Justice Breyer, who had written for the *Whole Woman's Health* majority in striking down the Texas statute,[209] wrote for a plurality of four in *June Medical Services*.[210] In the latter case, Breyer reiterated the *Whole Woman's Health* rationale on its merits.[211] In dissent, Justice Alito, also writing for four, claimed that the two cases were distinguishable, and that the Louisiana law should be sustained.[212] Chief Justice Roberts, alone concurring in the judgment, concluded that the two cases were indistinguishable and that based strictly on stare decisis, *Whole Woman's Health* controlled the outcome in *June Medical Services*, requiring that the challenged Louisiana statute be struck down.[213] Roberts further sought to narrow the reach of *Whole Woman's Health* and the earlier abortion ruling, *Planned Parenthood of*

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207 *See id.* at 2112 (stating that the Louisiana statute in question was "almost word-for-word identical to Texas' admitting-privileges law" in *Whole Woman's Health*). *Compare* TEX. HEALTH & SAFETY CODE ANN. § 245.010(a) (West 2019) (requiring facilities meet "minimum standards . . . equivalent to the minimum standards . . . for ambulatory surgical centers"), *and* TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a) (West 2019) (requiring that physicians "have active admitting privileges at a hospital . . . not further than 30 miles from the" facility), *with* LA. STAT. ANN. § 40:1061.10(A)(2)(a) (2020) (requiring a "physician performing or inducing an abortion" to "[h]ave active admitting privileges at a hospital that is located not further than thirty miles from the location at which the abortion is performed or induced and that provides obstetrical or gynecological health care services," defining "active admitting privileges" as being "in good standing of the medical staff of a hospital that is currently licensed by the department, with the ability to admit a patient and to provide diagnostic and surgical services to such patient").

208 In *Whole Woman's Health*, the Court cited the lower court's conclusions that there are "approximately 5.4 million" women of childbearing age in Texas; that the number of abortion clinics in Texas "dropped by almost half leading up to and in the wake of enforcement of the admitting-privileges requirement"; and that "[i]f the surgical-center provision were allowed to take effect, the number of abortion facilities . . . would be reduced further" to approximately seven or eight. *Whole Woman's Health*, 136 S. Ct. at 2301 (quoting Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 680–81 (W.D. Tex. 2014)). In *June Medical Services*, the Court cited the lower court's findings that the statute in question would "result in a drastic reduction in the number and geographic distribution of abortion providers, reducing the number of clinics to one, or at most two." *June Med. Servs.*, 140 S. Ct. at 2115 (quoting June Med. Servs. LLC v. Kliebert, 250 F. Supp. 3d 27, 87 (M.D. La. 2017)).

209 *See Whole Woman's Health*, 136 S. Ct. at 2300.

210 *See June Med. Servs.*, 140 S. Ct. at 2112 (plurality opinion).

211 *See id.* at 2120–32.

212 *See id.* at 2155, 2157–58 (Alito, J., dissenting) (maintaining that the cases are distinguishable because whereas *Whole Woman's Health* presented a pre-enforcement facial challenge, the immediate case was post-enforcement with evidence of the challenged law's effects).

213 *See id.* at 2133–34 (Roberts, C.J., concurring in the judgment).

Southeastern Pennsylvania v. Casey, by disallowing consideration of benefits in applying the undue burden test.[214]

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214 *See id.* at 2135–39. Although this placed Roberts's legal analysis closer to that of Justice Alito in dissent, Roberts's stare decisis analysis aligned him with Justice Breyer on the judgment. The benefits analysis, because unnecessary to his judgment vote, is arguably dictum. For a general discussion of how to distinguish holding and dictum, see Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953 (2005). As explained below, this issue became the focal point of a split among the U.S. Courts of Appeals respecting the interpretation of *June Medical Services*.

Professor Ryan Williams has criticized this author's earlier works advocating the approach more fully developed in this Article, which he describes as "the fifth vote approach." *See* Williams, *supra* note 11, at 813–17. Among other arguments, *see infra* note 290 (discussing role of dissenting Justices in identifying the narrowest grounds opinion); *infra* note 357 (discussing implications of incomplete information regarding dimensionality in identifying narrowest grounds opinion), Williams maintains this framing of the *Marks* rule requires accepting all propositions advanced in the opinion designated as controlling on narrowest grounds. *See* Williams, *supra* note 11, at 815 ("Perhaps most controversially, the fifth vote approach treats as binding all aspects of the opinion reflecting the median Justice's views, including propositions that no other participating Justice explicitly or implicitly assented to."). This is mistaken. Applying *Marks* in a case in which opinions align along a single dimension requires identifying which opinion occupies the Court's median position. Once that task is complete, however, those construing the controlling opinion are expected to undertake the same analysis that they would in construing any other Supreme Court opinion even if issued by a majority or unanimous Court. This includes distinguishing holding versus dictum. *See* David S. Cohen, *Why* Whole Woman's Health*'s Balancing Test Still Applies After* June Medical, HARV. L. & POL'Y REV.: NOTICE & COMMENT (Aug. 24, 2020), https://harvardlpr.com/2020/08/24/why-whole-womans-healths-balancing-test-still-applies-after-june-medical/ [https://perma.cc/9H42-XBDE] (applying this Article's framework in characterizing as dicta Chief Justice Roberts's assertion in *June Medical Services* that the undue burden test does not allow consideration of the absence of regulatory benefits, and concluding that although Roberts's opinion concurs in the judgment on the narrowest grounds, that opinion does not does displace the contrary holding in *Whole Women's Health*).

As this Article was going to press, the U.S. Courts of Appeals for the Seventh Circuit, on one side, and the U.S. Courts of Appeals for the Sixth and Eighth Circuits, on the other, split over the very question discussed in the text. The issue involved whether Chief Justice Roberts's concurring analysis in *June Medical Services*, which rejected the application of an absence of regulatory benefits in applying the undue burden test to an abortion restriction, is binding on lower courts under the narrowest grounds doctrine. *See* Planned Parenthood of Ind. & Ky., Inc. v. Box, No. 17-2428, 2021 WL 940125, at *1 (7th Cir. Mar. 12, 2021). In *Planned Parenthood of Indiana and Kentucky, Inc. v. Box*, Judge Hamilton, writing for a majority, embraced the position advocated here. *See id.* By contrast, Judge Kanne, writing in dissent, along with the Sixth and Eighth Circuits, took a contrary view. *See id.* at *13–15 (Kanne, J., dissenting); EMW Women's Surgical Ctr. P.S.C. v. Friedlander, 978 F.3d 418, 437 (6th Cir. 2020); Little Rock Fam. Plan. Servs. v. Rutledge, 984 F.3d 682, 687 n.2 (8th Cir. 2021); Hopkins v. Jegley, 968 F.3d 912, 915 (8th Cir. 2020) (per curiam).

In a remand from the Supreme Court in light of the *June Medical Services* ruling, the Seventh Circuit reconsidered this question as applied to an Indiana parental notice requirement for a minor pursuing a judicial bypass in seeking an abortion, where the notice was independent of a best interests inquiry. *See Planned Parenthood of Ind. & Ky.*, 2021 WL 940125, at *1 (majority opinion). Writing for the Seventh Circuit majority, Judge Hamilton reviewed several leading articles considering the narrowest grounds rule, including an earlier work by this author. *See id.* at *6 n.6 (citing Maxwell L. Stearns, *The Case for Including* Marks v. United States *in the Canon*

Applying *Marks* to *June Medical Services* is straightforward. The opinions align on a single dimension, from broad to narrow protection of abortion rights. Along that dimension, Justice Breyer embraces *Whole Woman's Health* on its merits and as precedent; Chief Justice Roberts embraces *Whole Woman's Health* only as precedent, without considering the merits beyond narrowing the undue burden test; and Justice Alito seeks both to cabin *Whole Woman's Health*, and to find that it does not control the immediate case. Chief Justice Roberts's opinion controls because it goes less far in the protection of abortion rights than the plurality, yet farther than the dissent.

The same analysis applies in *Vieth*. There, the conservatives believed Kennedy went too far in allowing the possibility of a successful partisan gerrymandering claim, and the liberals believed that Kennedy did not go far enough by having rejected the immediate claim. The same analysis holds in *Apodaca*. Justice Stewart determined Powell went too far in allowing states to have nonunanimous convictions; Jus-

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of Constitutional Law, 17 CONST. COMMENT. 321 (2000)). Judge Hamilton reasoned that although Chief Justice Roberts's opinion expressed the holding on narrowest grounds, Roberts's rejection of the benefits inquiry in applying the undue burden test was dictum and thus nonbinding:

> Applying *Marks*, the best way to understand the two opinions together is that the plurality's adoption of Proposition B and the concurrence's adoption of Proposition Not-B are both obiter dicta. They were not necessary to the actual judgment striking down the new Louisiana law on stare decisis grounds, Proposition A, for which there were five votes. There was no majority to overrule *Whole Woman's Health*, so that precedent stands as binding on lower courts unless and until a Court majority overrules it.

Id. at *8. By contrast, Judge Kanne, writing in dissent, along with the Sixth and Eighth Circuits, treated this aspect of the Roberts's *June Medical Services* concurrence as binding. Judge Kanne reasoned that to do otherwise fails to provide that case legal effect. *See id.* at *10–11 (Kanne, J., dissenting).

As explained in the body of this Article, this aspect of the Seventh Circuit reading of the narrowest grounds rule is superior for three reasons: (1) it follows the formally stated doctrine as expressed in *Marks*, which ensures that lower courts follow the holding expressed in narrowest grounds opinions; (2) it is consistent with the weight of historical practice, which generally disallows nonmajority Supreme Court opinions to overturn past majority Supreme Court rulings; and (3) it encourages Supreme Court Justices to consider relevant tradeoffs in choosing whether to forge a majority, as required to overturn an earlier precedent, or to express a preferred alternative rule, with more limited effect, in a narrower concurrence in the judgment. The Seventh Circuit analysis also avoids the ironic consequence of requiring lower courts to give greater doctrinal status to dictum expressed in a narrowest grounds opinion than to dictum in a majority or even unanimous ruling. The disagreement between Justice Breyer, writing for the *June Medical Services* plurality, and the Chief Justice, writing in concurrence, concerning whether the absence of regulatory benefits is relevant in applying the undue burden test to a challenged abortion restriction was unnecessary in resolving *June Medical Services*. As a result, Judge Hamilton correctly determined that this aspect of Roberts's opinion, which separately rested on stare decisis, was nonbinding dictum.

tice White believed Powell did not go far enough in maintaining that the same balance could not be struck in federal criminal trials.

In *Vieth*, *Apodaca*, and *June Medical Services*, Justice Kennedy, Justice Powell, and Chief Justice Roberts, each writing alone, nonetheless occupied the Court's median position, while expressing the holding consistent with the judgment on narrowest grounds. In each instance, the eight remaining Justices modeled the narrowest grounds rule by demonstrating that the solo concurrence in the judgment controlled. Capturing the median position, which itself implies a single dimension along which values are assessed, is one of several means of expressing the narrowest grounds rule. And as Justice Alito observed in his *Ramos* dissent, there are several bodies of precedent in which a single Justice has expressed the Court's holding on narrowest grounds.[215]

2. *Do Narrowest Grounds Opinions Bind the Supreme Court & Can They Overturn Past Majority Decisions?*

On behalf of the *Ramos* plurality, including Justices Ginsburg and Breyer, Justice Gorsuch claimed that Justice Powell's narrowest grounds opinion in *Apodaca* was not binding precedent in the Supreme Court. The plurality superseded, without overruling, *Apodaca*. By contrast, Justices Sotomayor and Kavanaugh, separately concurring in the *Ramos* judgment, and Justice Alito, writing in dissent for three, maintained that *Apodaca* was precedent, and therefore that abandoning it required a stare decisis analysis.[216] Justice Thomas did not address this specific issue.

Once more, the behavior of Supreme Court Justices proved more helpful in modeling this aspect of *Marks* than the formally expressed *Ramos* opinions. The analysis that follows focuses on three lines of cases. The first, which includes *Marks* itself, implicates the prosecutorial standards in obscenity prosecutions.[217] The second,

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215 *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1431 n.14 (2020) (Alito, J., dissenting) (listing lower court cases assuming a single Justice can control on narrowest grounds).

216 As previously explained, Justice Alito was not altogether consistent in his analysis. *See supra* Section I.B.1.b.

217 For a more detailed analysis of this line of cases, see *Hughes* Amicus Brief, *supra* note 6; Maxwell L. Stearns, *The Case for Including* Marks v. United States *in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321 (2000). The relevant case analysis demonstrates that the *Marks* Court did not anticipate that narrowest grounds opinions would bind the Supreme Court. At most, the *Marks* Court anticipated that nonmajority opinions would bind the Supreme Court as to the judgments, not with respect to the holding as expressed in the narrowest grounds opinion.

which includes *Adarand Constructors, Inc. v. Pena*,[218] involves the equal protection limits on the benign reliance on race in government contracting.[219] Together these cases support the argument that although narrowest grounds opinions are precedential in lower courts, in this instance, Justice Gorsuch is correct. Based on how Supreme Court Justices have modeled *Marks* with their behavior, narrowest grounds opinions are not precedential in the Supreme Court itself. The third, *Casey*, arises between these two other lines of cases and presents a very specific instance of a plurality overturning two post–*Roe v. Wade* Supreme Court abortion precedents, while retaining and revising *Roe* itself.[220] Although *Casey* demonstrates that Supreme Court Justices have not been entirely consistent in their modeled behaviors, the better reading of this larger corpus of case law treats *Casey* as an outlier, with the cases arising before and after *Casey* better capturing the meaning of the narrowest grounds rule.

a. Marks v. United States *in Doctrinal Context*

Marks was decided in the context of three prior Supreme Court precedents, each centered on the federal prosecutorial standard for obscenity. The 1957 case, *Roth v. United States*,[221] adopted a relatively lenient multipart test that devolved to contemporary community standards.[222] In the fractured case, *Memoirs v. Massachusetts*, decided in 1966, a narrowest grounds plurality elevated the standard to "utterly without redeeming social value," which most commentators determined was nearly impossible for a prosecutor to satisfy.[223] Finally, in the 1973 case, *Miller v. California*,[224] a majority reverted to a slightly modified version of the earlier *Roth* test.[225]

Marks overturned a conviction based upon conduct that took place between the issuance of *Memoirs* and *Miller*. The underlying criminal activity occurred shortly before *Miller* was decided, and the district court based its jury instruction on that later majority opinion.[226] *Marks* held that the government could not, as a matter of due

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218 515 U.S. 200 (1995).

219 *See id.* at 204–05.

220 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870, 881–84 (1992) (plurality opinion).

221 354 U.S. 476 (1957).

222 *See id.* at 489, 492.

223 *See* Memoirs v. Massachusetts, 383 U.S. 413, 419 (1966) (plurality opinion).

224 413 U.S. 15 (1973).

225 *See id.* at 24–25.

226 *See* Marks v. United States, 430 U.S. 188, 189–91 (1977).

process, retroactively diminish the prosecutorial standard on which a jury instruction is based even when the earlier claimed standard is the product of a narrowest grounds opinion in a nonmajority Supreme Court ruling that was later superseded by a majority Supreme Court opinion.[227]

The *Marks* holding was fairly limited; it established that Mr. Marks could rely, as a matter of due process, on the *Memoirs* narrowest grounds holding as the basis for charting his alleged criminal activities.[228] As a result, the district court erred in retroactively lowering the prosecutorial standard from that announced by a narrowest grounds plurality in *Memoirs* to that set out by a majority in *Miller*.[229] The Sixth Circuit decision in *Marks*, which the Supreme Court reversed, stood alone among federal circuit courts in failing to recognize the *Memoirs* narrowest grounds plurality as controlling precedent.[230]

Resolving the dispute between Justice Gorsuch's *Ramos* plurality, on one side, and the remaining Justices who addressed the issue, on the other, as to whether *Apodaca* is precedent in the Supreme Court requires careful analysis of what *Marks* did *not* say. Although Justice Powell, for the *Marks* Court, chided the Sixth Circuit for alone failing to afford the *Memoirs* narrowest grounds plurality controlling status, he nowhere implied that the *Miller* Court had erred in failing to treat *Memoirs* as binding precedent.[231] And notably, in *Miller*, Chief Justice Burger nowhere stated or implied that *Memoirs* was a precedent that required overruling.[232]

With respect to *Memoirs*, the *Miller* Court stated: "Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what

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227 *See id.* at 191–97. *Marks* relied, by analogy, on *Bouie v. City of Columbia*, 378 U.S. 347 (1964), to hold that due process disallows retroactively lowering the prosecutorial standard as applied to a criminal statute. *See Marks*, 430 U.S. at 196. Analogous to a violation of the Ex Post Facto Clauses, U.S. CONST. art. I, § 9, cl. 3; *id.* § 10, cl. 1—which prohibit retroactively criminalizing activity—*Bouie* construes due process to disallow retroactively lowering a prosecutorial standard, with the effect of criminalizing previously noncriminal activity. *See Bouie*, 378 U.S. at 350; *Marks*, 430 U.S. at 192. *Marks* involved an impermissible diminution in the prosecutorial standard based on a retroactively applied change in Supreme Court caselaw from *Memoirs* to *Miller*. *See Marks*, 430 U.S. at 189–91.

228 *See Marks*, 430 U.S. at 196.

229 *See id.*

230 *See id.* at 189 n.1, 191.

231 *See id.* at 192–93.

232 *See* Miller v. California, 413 U.S. 15, 21–22 (1973).

constitutes obscene, pornographic material subject to regulation under the States' police power."[233]

After observing that Justice Brennan, who authored the *Memoirs* plurality, subsequently abandoned the "utterly without redeeming social value" test, Chief Justice Burger noted: "[T]oday, for the first time since *Roth* was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment."[234] Although the *Miller* Court observed that the decision represented the first case since *Roth* in which a majority agreed upon a governing rationale, it did not see any need to overrule *Memoirs*.

The implication of these passages is clear: With respect to the Supreme Court itself, Chief Justice Burger, writing for the *Miller* majority, presumed that only majority opinions, not narrowest grounds opinions, hold precedential status in the Supreme Court itself. None of the remaining opinions refuted *Miller* on this important point.[235] And nothing in *Marks* suggests a change concerning how narrowest grounds opinions are regarded in terms of precedent in the Supreme Court, as opposed to in lower courts.

The *Miller* Court had no need to overrule *Memoirs* for one reason: although the narrowest grounds rule was already understood to apply in lower federal courts, even before *Marks*, which explained the decision to reverse the Sixth Circuit and to commend the approach of all other circuits to address the issue, narrowest grounds opinions were never regarded as precedent in the Supreme Court itself. The Justices in *Miller* and in *Marks* modeled this understanding with their contemporaneous conduct in the shadow of the narrowest grounds rule. Although a majority of five took a different view on this issue in *Ramos*, Justice Gorsuch was correct that superseding *Apodaca* did not require overruling.

b. Adarand Constructors, Inc. v. Pena *& Overruling a Supreme Court Precedent*

The 1995 decision *Adarand Constructors, Inc. v. Pena*[236] not only supports the understanding that narrowest grounds opinions are not

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233 *See id.* at 22.

234 *See id.* at 23 & n.4, 29, 36–37.

235 Neither Justice Douglas nor Justice Brennan discussed the precedential nature of majority versus narrowest grounds opinions in their dissenting opinions. *See id.* at 37–47 (Douglas, J., dissenting); *id.* at 47–48 (Brennan, J., dissenting).

236 515 U.S. 200 (1995).

precedent in the Supreme Court itself, but a critical aspect of the case would otherwise be nonsensical if narrowest grounds opinions were precedent. In *Adarand*, Justice Scalia joined as the critical fifth vote in Justice O'Connor's majority opinion.[237] That opinion overturned the part of *Metro Broadcasting, Inc. v. FCC*[238] that had relied upon intermediate scrutiny to sustain a racial preference for government licensing that benefitted minority business enterprises.[239]

Although the Court Reporter's statement of the vote lineup is not a formal part of the published opinion, this specific passage is important to the analysis that follows: "Justice O'Connor announced the judgement of the Court and delivered an opinion with respect to Parts I, II, III–A, III–B, III–D, and IV, which is for the Court except insofar as it might be inconsistent with the views expressed in Justice Scalia's concurrence . . . ."[240]

In Part III–D, Justice O'Connor reiterated her longstanding refutation of the view that "strict scrutiny is 'strict in theory, but fatal in fact.'"[241] Justice Scalia, by contrast, took the view that, with a single exception not relevant to *Adarand*,[242] strict is invariably fatal.[243] Despite joining Part III–D, Justice Scalia's disagreement with O'Connor mattered. In the ordinary course, Scalia likely would have issued a partial concurrence in the judgment, declining to join part of an opinion with which he strongly disagreed. Without Scalia's joining Part III–D, O'Connor would have lacked the requisite five votes in *Adarand* to overturn *Metro Broadcasting*, and to declare that contrary to that earlier case, the relevant equal protection standard for the benign use of race was strict scrutiny, whether the challenged regime is state or federal.[244] Justice Scalia in *Adarand*, like Chief Justice Burger

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237 *See id.* at 204.

238 497 U.S. 547 (1990), *overruled by Adarand*, 515 U.S. 200.

239 *See Adarand*, 515 U.S. at 225–27; *Metro Broad.*, 497 U.S. at 564–65.

240 *Adarand*, 515 U.S. at 204.

241 *Id.* at 237 (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980)).

242 *Id.* at 239. Justice Scalia cites to his earlier concurrence in *City of Richmond v. J.A. Croson Co. See id.*; *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., concurring in the judgment) ("At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates–—can justify an exception to the principle embodied in the Fourteenth Amendment that '[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens.'" (quoting Plessy v. Ferguson, 163 U.S. 537 (1896) (Harlan, J., dissenting) (alteration in original) (citations omitted))).

243 *See Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment).

244 The Supreme Court had already insisted upon strict scrutiny in state-based contracting set-asides in *J.A. Croson Co.*, 488 U.S. at 493–507.

in *Miller*, assumed that when the Supreme Court fractures, its rulings bind lower courts but are not precedential in the Supreme Court.

The dispute over whether strict scrutiny was necessarily fatal formed the basis for a subsequent, far more significant, ruling squarely placing these two Justices on opposing sides. Justice O'Connor's hedging language in *Adarand* established the foundation for her later majority codification of the *Regents of the University of California v. Bakke*[245] narrowest grounds ruling in *Grutter v. Bollinger*.[246] *Bakke* was another 4-1-4 decision, with Justice Powell controlling on narrowest grounds.[247]

In the 2003 *Grutter* decision, Justice O'Connor provided a refined version of Justice Powell's *Bakke* analysis majority status. Although he invalidated the affirmative action program used by the Medical School of the University of California at Davis, Justice Powell permitted reliance upon race as one factor among many in a combined admissions regime, subject to strict scrutiny.[248] Powell viewed diversity in higher education as a compelling state interest, provided the school did not, as U.C. Davis had, employ a quota or racially segregate admissions files.[249]

In *Grutter*, Justice O'Connor sustained the University of Michigan Law School's affirmative action program, which, like the plan Powell endorsed in *Bakke*,[250] treated race as a plus factor in a combined set of admissions processes.[251] She further joined Chief Justice Rehnquist in striking down the University of Michigan's undergraduate admissions program in *Gratz v. Bollinger*.[252] The undergraduate program, in contrast with the law school, had employed a fixed point system for race, which, the Court determined, too closely resembled a prohibited quota.[253]

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245 438 U.S. 265 (1978).

246 539 U.S. 306, 322–25 (2003).

247 *See Bakke*, 438 U.S. at 269–70, 272; *Grutter*, 539 U.S. at 323 ("Since this Court's splintered decision in *Bakke*, Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies.").

248 *See Bakke*, 438 U.S. at 317–18.

249 *See id.* at 314–16.

250 Powell explained that he favored an integrated approach, with race as a soft variable, as employed by Harvard University, and he included that plan as an appendix to his opinion. *See id.* at 316–17.

251 *See Grutter*, 539 U.S. at 334.

252 539 U.S. 244, 251 (2003).

253 *See id.* at 270–72.

c. An Exception: The Planned Parenthood v. Casey *Plurality*

There is a notable exception to the preceding analysis. From its inception, *Roe v. Wade*, which recognized a fundamental right to terminate an unwanted pregnancy, was subject to a campaign to have the case overruled.[254] Although there had been earlier cases that seemed likely to produce that result,[255] *Casey* presented what many regarded until then as the very strongest opportunity. The *Casey* Court included seven out of nine Justices appointed by Republican Presidents, with Justice Harry Blackmun, who authored *Roe*, the sole remaining member of that Court still supporting the result.[256] The two other remaining members of the *Roe* Court—Justice Rehnquist, later elevated to Chief Justice, and Justice White—had dissented in *Roe*.[257]

Casey presented a challenge to a Pennsylvania abortion statute with five provisions: (1) an informed consent provision requiring that a pregnant woman seeking to terminate her pregnancy be provided detailed disclosures twenty-four hours prior to the procedure; (2) a parental notification provision for minors seeking an abortion, subject to a "judicial bypass" if the young woman was deemed sufficiently informed and mature to make her own judgment or if the court determined that the decision was in her best interest; (3) a requirement that a married woman seeking an abortion notify her husband except in cases of previously documented abuse; (4) exemptions to the preceding requirements for medical emergencies; and (5) reporting requirements for facilities where abortions were performed.[258]

The *Casey* Court divided into three camps. Justices Blackmun and Stevens sought to retain the original *Roe v. Wade* formulation and voted to strike down all the provisions except the exemption for medical emergencies.[259] Chief Justice Rehnquist, and Justices White, Scalia, and Thomas, would have overturned *Roe* and sustained all of the challenged provisions.[260] The controlling narrowest grounds opinion,

254 410 U.S. 113, 153 (1973).

255 *See, e.g.*, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989); Kathryn Kolbert, Webster v. Reproductive Health Services*: Reproductive Freedom Hanging by a Thread*, 11 WOMEN'S RTS. L. REP. 153 (1989).

256 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 923 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

257 *See Roe*, 410 U.S. at 171 (Rehnquist, J., dissenting); Doe v. Bolton, 410 U.S. 179, 221 (1973) (White, J., dissenting) (applying to both *Roe* and *Doe*).

258 *See Casey*, 505 U.S. at 844 (joint opinion).

259 *See id.* at 934 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 911–14 (Stevens, J., concurring in part and dissenting in part).

260 *See id.* at 944 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

coauthored by Justices O'Connor, Kennedy, and Souter, declined to overturn *Roe v. Wade*, yet revised the *Roe* opinion in two notable ways.[261] First, the joint authors relaxed *Roe*'s trimester framework, considering it inessential to *Roe*'s central holding, and second, they maintained that *Roe* provided insufficient regulatory latitude to states seeking to demonstrate respect for the potentiality of human life embodied in the fetus.[262] This more deferential approach to abortion required reclassifying abortion from a fundamental right to a lesser protected liberty interest,[263] and it entailed replacing strict scrutiny with the newly minted undue burden test.[264] The joint authors defined undue burden as a shorthand for ensuring the absence of substantial obstacles placed in the path of a woman seeking to terminate an unwanted pregnancy.[265]

Applying the revised doctrinal framework, the joint authors, whose opinion controlled on narrowest grounds,[266] sustained all of the provisions of the Pennsylvania statute, save one. The plurality struck the spousal notification provision, holding that a husband may not exercise dominion over his wife as parents do over their children.[267] In reaching this judgment, the plurality, while declining to overturn *Roe v. Wade*, confronted two earlier Supreme Court abortion rulings that had struck down similar twenty-four hour disclosure provisions similar to that which the joint authors sustained.[268] Thus, the *Casey* plurality announced overturning two preceding abortion rulings[269]: *City of Akron v. Akron Center for Reproductive Health Inc.*,[270] and *Thornburgh v. American College of Obstetricians and Gynecologists*.[271]

This aspect of *Casey*, with a narrowest grounds opinion announcing the overruling of two Supreme Court precedents, is out of keeping with Supreme Court practice contemporaneous with *Marks*, specifi-

261 *See id.* at 846 (joint opinion).

262 *See id.* at 873, 885 (plurality opinion).

263 *See Casey*, 505 U.S. at 847–50 (joint opinion); *id.* at 953 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

264 *See id.* at 876 (plurality opinion).

265 *Id.* at 877.

266 For a related analysis, see STEARNS ET AL., *supra* note 191, at 883–87 (reviewing *Casey* and providing graphical depiction aligning opinions along one dimension).

267 *See Casey*, 505 U.S. at 898 (joint opinion).

268 *See id.* at 881–82 (plurality opinion); *see also id.* at 954 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

269 *See id.* at 870 (plurality opinion).

270 462 U.S. 416 (1983), *overruled by Casey*, 505 U.S. 898.

271 476 U.S. 747 (1986), *overruled by Casey*, 505 U.S. 898.

cally *Miller*, which superseded, but did not overrule *Memoirs*.[272] It is also inconsistent with the later Supreme Court understandings as indicated by Justice Scalia's decision to join Justice O'Connor in forging a majority, despite his disagreement on a critical part of her analysis, in *Adarand* to overturn *Metro Broadcasting*.[273]

A possible account of *Casey* involves its very specific doctrinal context. Public attention concerning *Casey* centered on *Roe* itself, a case many treated as having the status of super precedent.[274] The *Casey* plurality's overturning of two lesser abortion precedents embedded in a decision formally retaining, yet modifying, *Roe* might have been regarded a necessary accommodation. Alternatively, this aspect of the *Casey* plurality opinion, and more specifically its implications for *Marks*, might simply have escaped notice given the importance of the case in other respects, despite the earlier modeled behavior in *Miller*, and the later modeled behavior in *Adarand*. More generally, *Casey* does not appear to have affected the understanding that overturning a Supreme Court majority precedent requires a majority opinion.

3. Summary

The preceding analyses of *Apodaca*, *Ramos*, *Adarand*, and *McDonald* help to explain the judicial configurations in nonmajority cases to which the narrowest grounds rule can or cannot be applied. The preceding analysis further considered two questions. First, whether a majority opinion is required to overturn a majority Supreme Court precedent, and second, the converse inquiry, whether abandoning a nonmajority Supreme Court ruling requires formal overruling. The analysis reveals that the Justices' modeled behaviors generally support requiring a majority opinion to overrule a past precedent and generally do not require that nonmajority rulings be formally overruled to be abandoned.

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272 *See supra* Section II.A.2.a.

273 *See supra* Section II.A.2.b.

274 *See, e.g.*, Jeffrey Rosen, *So, Do You Believe in 'Superprecedent'?*, N.Y. TIMES (Oct. 30, 2005), https://www.nytimes.com/2005/10/30/weekinreview/so-do-you-believe-in-superprecedent.html [https://perma.cc/AR3W-JNFF]. The term "super-precedent" has recently been used during Senate Judiciary Committee hearings for now-Justice Amy Coney Barrett. *See* Aaron Blake, *Amy Coney Barrett's Most Telling Exchange on Abortion and Roe v. Wade*, WASH. POST (Oct. 13, 2020, 4:30 PM), https://www.washingtonpost.com/politics/2020/10/13/amy-coney-barretts-most-telling-exchange-abortion-roe-v-wade/ [https://perma.cc/4KCK-C3ZA].

B. Modeling Narrowest Grounds II: Dimensionality

A more formal model of the narrowest grounds rule supports how individual Justices generally express their understanding through their observed behaviors operating in *Marks*'s shadow. The concept of dimensionality is intuitively familiar. At the same time, its more precise elements find their roots in the study of group decision making. This Section presents a broader theoretical analysis of dimensionality, which provides the basis for a clearer articulation of the narrowest grounds rule.

Dimensionality is a critical concept in assessing and comparing innumerable data. A single dimension can account for literally infinite data, even as some small data sets cannot be accommodated along one dimension. The preceding discussions of *Apodaca*, *Ramos*, and *McDonald* explained this intuitively. This Section provides a more formal structure, generalizing earlier insights.

The benefit of the theoretical overlay is twofold. First, it demonstrates that the observed phenomena in fractured Supreme Court decision making are part of a more general set of problems associated with aggregating collective preferences. This implies that legal scholars who perceive inevitable imperfections with the narrowest grounds rule as a basis for abandonment risk ignoring broader insights from the study of collective choice that should first be taken into account. Second, identifying the theoretical underpinnings of the narrowest grounds rule, including its imperfections, allows for more targeted correction, rather than abandonment. Specifically, it allows for recasting *Marks* in a manner that avoids exacerbating the difficulties associated with Supreme Court decision making, while improving lower court guidance.

1. From Hot Air Balloons to Learning to Count

The analysis to follow integrates understandings from two related disciplines, game theory and social choice. These vast literatures offer fascinating insights that are often expressed with complex mathematics.[275] Although the analysis that follows uses numbers, the analysis requires only distinguishing among three categories of integers (whole numbers) and counting.

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275 The analysis that follows, including Table 4, is adapted from the lengthier discussion and analysis set out in Stearns, *supra* note 26, at 1067–68.

TABLE 4. DIMENSIONALITY IN CATEGORIZING INTEGERS

	Odds	**Evens**
Primes	**3**, 5, 7 . . .	**2**
Non-Primes	9, 15, 21 . . .	**4**, 6, 8 . . .

Table 4 presents an elementary exercise in counting integers that possess two sets of dichotomous characteristics: (1) whether integers are odd or even, and (2) whether integers are prime or nonprime. Even numbers yield integers when divided by two. Odd numbers are those, other than one, that do not. A prime number cannot be divided by any integer other than itself and 1 without yielding a fraction. Whereas 9, an odd integer, can be divided by 3, yielding 3, 7, also an odd number, can only be divided by itself or 1 without yielding a fraction.

Rotating counterclockwise from the upper left of Table 4, and stopping with the lower right, each box captures an infinite sequence of integers satisfying the combined criteria. There is an infinite sequence of odd primes, odd nonprimes, and even nonprimes, with the earliest entries listed and with ellipses signaling an endless sequence. Notice that each box contains not one, but two characteristic attributes that array endlessly along a single dimension from the left, implying a low number, to the right, implying a high number. The number of data being sorted bears no correlation to the number of dimensions along which sorting takes place.

Now try to array a minuscule sequence, three consecutive integers sorted by two dichotomous criteria: (1) prime or nonprime; and (2) odd or even. This three-digit sequence, depicted in bold, cannot be assessed along a single dimension because of the anomalous number 2, the sole even-prime. Arraying this sequence implicates two dimensions, not one, forcing the split between the dimensions of prime/nonprime and odd/even.

The number of data and the number of dimensions required to sort those data are orthogonal, implying no correlation. In some circumstances, comparing large numbers of data implicates one, or more than one, dimension, and in others, comparing relatively small numbers of data implicate one, or more than one, dimension. The preceding analysis cleanly expresses this, devoid of extraneous detail. Even so, it is simple enough to express the insight without numbers.

This Article opened with an example that included a hot air balloon. Assume that each of the following means of transit are succes-

sively larger and heavier: skateboard, bicycle, motorcycle, car, bus, and airplane. Table 5 depicts these six modes of transportation along a single dimension, from low to high, capturing both size and weight.

TABLE 5. TRANSIT VEHICLES IN ONE DIMENSION

Skateboard	Bicycle	Motorcycle	Car	Bus	Airplane
Low ◄					► High

Now interject an aloft hot air balloon, between the size of a car and a bus. Because the balloon is lighter than air, or even a skateboard, including it breaks down the single dimension that, in its absence, succeeded in capturing the size and weight inquiries. To simplify, assume a dividing line that separates transit vehicles along the size and weight dimensions, with scooter, bicycle, and motorcycle classified as small and light, and with car, bus, and plane classified as large and heavy.[276] Assume the aloft hot air balloon is larger than a car and smaller than a bus. Because the hot air balloon is both light and large, it forces a split across the size/weight dimensions, as shown in Table 6.

TABLE 6. TRANSIT VEHICLES IN TWO DIMENSIONS

	Small	**Large**
Light	scooter, bicycle, motorcycle	hot air balloon
Heavy		car, bus, airplane

Although these categorical assessments, odd/even, prime/nonprime, large/small, and heavy/light, are simpler than complex legal line drawing, they are no different in terms of dimensionality. Once more, incorporation is instructive. Before the Supreme Court largely settled upon incorporation based on provisions embedded within the Bill of Rights, the Justices split over two approaches, with Justices Frankfurter and Cardozo inquiring whether the claimed right was sufficiently fundamental that one could not conceive an Anglo-American scheme of ordered liberty without it, whether or not the right happened to appear in the Bill of Rights.[277] This approach recognized that

276 Although arbitrary, the dividing line is also irrelevant; the analysis holds wherever the line is drawn.

277 *See* Rochin v. California, 342 U.S. 165, 169 (1952) (Frankfurter, J.) ("Due process of law . . . [protects] those personal immunities which . . . are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or are 'implicit in the concept of ordered liberty.'" (citations omitted) (first quoting Snyder v. Massachusetts, 291 U.S. 97, 105

not all claimed rights carry equal weight, implying a spectrum, with some relatively easy and other relatively hard cases. Indeed, even as the Court increasingly settled upon incorporation as its dominant approach,[278] as *Ramos* and *McDonald* demonstrate, disputes remained as to whether, based on the importance of the claimed right, incorporation was jot for jot.

However difficult particular cases might be, assessing claimed substantive rights along a single dimension capturing importance to our overall scheme or ordered liberty is intuitive. In *Apodaca*, for example, Justice White concluded that, on balance, the Sixth Amendment unanimity requirement was not sufficiently important to be constitutionally mandated, even at the federal level.[279] By contrast, Justice Stewart found the claimed right sufficiently important that it must be fully afforded at the federal level and incorporated jot for jot.[280] And Justice Powell found that although unanimity warrants inclusion in federal criminal trials, it is insufficiently important to warrant jot for jot incorporation as applied to states.[281] Again, these competing views align along one dimension: lax (White) to strict (Stewart) protection of the claimed Sixth Amendment right, with Justice Powell assuming an intermediate position between the extremes.

Ramos did not consider the underlying merits of the claimed unanimous jury right in the first instance. Rather, it construed *Apodaca*, including determining which opinion controls, whether the case is precedential, and whether, if precedential, it should be superseded or overruled.[282] These three issues likewise align along a single dimension, from a strict to lax understanding of the status of *Apodaca*. Justice Gorsuch, who rejected *Apodaca*, took the extreme view that there is no narrowest grounds opinion, it is not precedent, and it should be superseded.[283] Alito took the opposite extreme view: *Apodaca* is precedent, Powell's opinion states the holding, and the

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(1934), *overruled in part by* Malloy v. Hogan, 378 U.S. 1 (1964); and then quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969))).

278 *See* Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968); *see also supra* note 167 (quoting *Duncan* as focusing identification of incorporated rights on the Bill of Rights given that state systems of criminal justice largely replicate the federal system).

279 *See* Apodaca v. Oregon, 406 U.S. 404, 410–11 (1972) (plurality opinion), *abrogated by* Ramos v. Louisiana, 140 S. Ct. 1390 (2020) (plurality opinion).

280 *See id.* at 414 (Stewart, J., dissenting).

281 *See* Johnson v. Louisiana, 406 U.S. 356, 372–73 (1972) (Powell, J., concurring in the judgment).

282 *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1403–04 (2020) (plurality opinion).

283 *See id.* at 1403.

case should be retained.[284] Setting aside Justice Thomas, the remaining concurrences in the judgment, Kavanaugh and Sotomayor, took the view that *Apodaca* is precedent, Powell's opinion controls, and *Apodaca* should be overruled.[285] Each of the three issues align along the same dimension, and each bloc votes consistently with a characterization from the far left (Gorsuch for a plurality of 3), to the median (Sotomayor and Kavanaugh), to the far right (Alito dissenting for 3). Once more, the number of data or issues do not correlate with the number of dimensions.

Finally, consider *McDonald*. Although Thomas took the same approach in *Ramos* and *McDonald*, the dimensional split mattered only in the latter. Because there are two ways to arrive at the result of incorporating the *Heller* Second Amendment right, with one group accepting due process and rejecting privileges or immunities, and with Justice Thomas doing the opposite, the case presents like sorting the three integers—2, 3, and 4—along two dimensions: odd/even and prime/non-prime. Justice Thomas's position corresponds to the integer 2 in Table 4 and to the hot air balloon in Table 6. Sorting his opinion, plus the others in *McDonald*, implicates two dimensions. By contrast, despite the large number of opinions and issues involved, *Ramos* implicates only one relevant dimension. Five Justices implicitly agree concerning how the dimension is defined even as they disagree as to where along it the case should be resolved. Again, the number of issues, opinions, or data bear no correlation to the number of dimensions along which they are sorted.

The central problem with the scholarly literature on *Marks* is failing to appreciate the central role of dimensionality in assessing the narrowest grounds rule.[286] As previously noted there are two problems with the *Marks* formulation of the narrowest grounds rule, one that is easily fixed, but unimportant, and one that cannot be fixed and that matters a lot. Life is like that sometimes. Let us start with the easy one. Imagine an opinion, similar to *Ramos*, with a plurality of three, three separate concurrences in the judgment, and three in dissent. Unlike *Ramos*, however, imagine that the opinions discretely align along a single dimension, such that in the 3-**1**-1-*1*-3 line-up, the bolded concurrence in the judgment is the broadest, albeit less broad than the plurality, and the italicized concurrence in the judgment is

284 *See id.* at 1425 (Alito, J., dissenting).

285 *See id.* at 1410–20 (Kavanaugh, J., concurring in part); *id.* at 1402–10 (Sotomayor, J., concurring as to all but Part IV–A).

286 *See infra* note 357.

the narrowest opinion consistent with the outcome, and thus closest to the dissent.

In this analysis, the Roman typeface 1 concurring in the judgment represents the median position in the nine-member Court. In social choice theory, absent a first-choice majority winner, the option that would defeat all others in binary comparisons holds special status because it possesses an important attribute corresponding to majority rule. To illustrate, consider another famous Supreme Court decision, *Regents of the University of California v. Bakke*, which split 4-1-4.[287] Eight out of nine Justices disagreed with two arguments that Powell presented only for himself—diversity is a compelling government interest in higher education admissions, and while race can be used as a plus factor, it cannot be used in the form of a quota.[288] The two groups of four Justices who declined to join Powell's analysis disagreed for opposing reasons. Those joining Justice Brennan viewed Powell as insufficiently accommodative of racial considerations, and those joining Justice Stevens viewed Powell as excessively accommodative of racial considerations.[289]

The statement that eight Justices rejected Powell's view is not merely unhelpful; it is misleading. The better analysis recognizes that if we align the opinions Brennan (A), Powell (B), and Stevens (C), along a dimension capturing lax-to-strict permissibility of the use of race in higher education admissions, the A camp intuitively prefers B to C and the C camp intuitively prefers B to A.[290] Contrary to Justice

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287 *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

288 *See id.* at 314–18 (Powell, J.).

289 *See id.* at 324–26 (Brennan, J., concurring in the judgment in part and dissenting in part); *id.* at 408–11 (Stevens, J., concurring in the judgment in part and dissenting in part).

290 This mechanism was employed in *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724 (7th Cir. 2006) (per curiam). *See supra* note 38. Professor Ryan Williams, who has criticized earlier versions of the arguments more fully developed in this Article, *see supra* note 214 and sources cited *infra* note 357, maintains that one troubling feature of this approach is that it affords the views of dissenting Justices a role in identifying the opinion designated as controlling on narrowest grounds. *See* Williams, *supra* note 11, at 815 ("The fifth vote approach also implicitly accords weight to the views of dissenting Justices by allowing their views to influence the identification of the median Justice's opinion."). Although some jurists or scholars might regard that feature as problematic, the criticism rests on a misunderstanding. It is true that the *Gerke* court considered the implicit consensus of those who take a broader and narrower view of the possible judgment-supporting rationales, including those in dissent, to identify the controlling narrowest grounds opinion. But this simply reflects the intuition that in identifying any median, for example the number five in an integer sequence from one to nine, one can count from one upwards, or from nine downwards, completing the task upon reaching five, the median, in either direction. The criticism does not undermine the argument advanced here; rather, it reveals an underlying confusion concerning an inevitable feature of data arrayed along a single dimension.

Gorsuch's claim that allowing a single Justice to control thwarts consensus on the Court, the analysis reveals the majoritarian underpinnings of the narrowest grounds rule even as applied in 4-1-4 rulings implicating a single dimension. In social choice theory, option B is referred to as a Condorcet winner, and rules producing such an option when it is available, meaning when options align on a single dimension, are said to satisfy the Condorcet criterion.[291]

The narrowest grounds rule intuitively embraces the Condorcet criterion. Consider that on a nine-member Supreme Court, as a general intuition, the median position generally correlates with where the Court is apt to settle on an upcoming and unresolved doctrinal question. Discerning the median position enhances the stability, and thus the value, of precedent by rendering future doctrinal outcomes more predictable based on decisions in the past. This helps to explain why, contrary to Justice Gorsuch and consistent with Justice Alito, 4-1-4 decisions that implicate one relevant dimension readily satisfy the narrowest grounds rule.

a. Imperfection

The minor defect in the *Marks* statement of the narrowest grounds rule is now apparent. The opinion consistent with the outcome that expresses the holding on narrowest grounds in the hypothetical 3-**1**-1-*1*-3 case is the italicized *1* (starting left, position 6), whereas the Condorcet winner, or median justice, is the Roman typeface 1 (starting left, position 5). In a nine-member Court, position 5, not 6, is the median. A majority comprising the plurality of 3, the bold **1**, and the Roman typeface 1 collectively prefer the position of the Roman typeface 1 to that of the italicized *1*. The formally stated *Marks* rule thus fails to capture precisely the intended majoritarian aspect of the narrowest grounds doctrine by risking vindicating *1* over 1.

Although rare, *Fullilove v. Klutznick*[292] is such a case. *Fullilove* concerned a challenge to a race-based set-aside program for federal

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291 The Condorcet winner is likewise a partial solution to the problem of collective preference aggregation. With preferences (1: ABC; 2: BCA; 3: CBA), B is a Condorcet winner. By contrast with preferences (1: ABC; 2: BCA; 3: CAB or 1: CBA, 2: BAC; 3: ACB) unlimited binary comparisons produce a cycle, ApBpCpA or CpBpApC, for the first and second set of listed rankings respectively. For a more detailed discussion and analysis, see STEARNS, *supra* note 33, at 41–97 (providing overview and collecting authorities); and Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219 (1994) (reviewing literature).

292 *See* 448 U.S. 448 (1980). The case is also particularly helpful in providing a limited em-

government contracting.[293] The case was decided two years after the fractured decision in *Regents of the University of California v. Bakke*, which itself came one year after Justice Powell's majority opinion in *Marks*.[294]

Bakke struck down an affirmative action program used by the Medical School of the University of California at Davis, with Justice Powell alone expressing the narrowest grounds holding.[295] Powell determined that although the Fourteenth Amendment Equal Protection Clause prohibited the medical school's selection process, which involved segregating files based on race and which set a specific quota of sixteen out of one hundred seats for specified minorities, some use of race was allowed.[296] Specifically, Powell determined that although the state medical school could not rely upon race to remedy the present effects of past discrimination, it could rely on race in a more limited way to promote its compelling interest in diversity in higher education.[297] To further that compelling interest, the admissions office could not employ a quota, although, as Harvard University had done, it could employ race as one plus factor among many in an integrated admissions regime.[298]

Fullilove presented the related question of how to assess a racial preference in the federal contracting context, with fifteen percent of contracts set aside for specified minorities.[299] Like the *Bakke* Court, the *Fullilove* Court fractured. In *Fullilove*, however, Justice Powell occupied the same unusual position as the theoretical italicized Justice in the preceding hypothetical. To illustrate, consider the breakdown in Table 7.

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pirical survey of the early understanding of *Mark*s. *See supra* Section II.A.2.a; *see also* Appendix B (reviewing cases and law review articles from 1980–1990 assessing *Fullilove*).

293 *See Fullilove*, 448 U.S. at 453 (plurality opinion).

294 *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

295 *See id.* at 269–72 (plurality opinion).

296 *See id.* at 279 (majority opinion).

297 *See id.* 269–72 (plurality opinion).

298 *See id.* at 316–17 (Powell, J.); *id.* at 321–24 (appendix to opinion of Powell, J.).

299 *See* Fullilove v. Klutznick, 448 U.S. 448, 453–54 (1980).

TABLE 7. *FULLILOVE V. KLUTZNICK* IN ONE DIMENSION

Marshall, Brennan, Blackmun (concurrence in the judgment)	**Burger, White, [Powell] (issuing judgment)**	**Powell (concurrence)**	**Stewart, Rehnquist, Stevens (dissenting)**
Sustain under intermediate scrutiny	Sustain under fact specific inquiry without electing either intermediate or strict scrutiny Narrowest grounds holding assuming *Marks* captures median voter along a single dimension	Sustain under strict scrutiny Narrowest grounds holding under the literal wording of *Marks*	Strike under fatal strict scrutiny (Stewart and Rehnquist) or based on inadequate congressional deliberation (Stevens)
Broad permissible use of race ⟷ Narrow permissible use of race			

For purposes of this presentation, it is easiest to divide *Fullilove* into four camps. Justice Marshall, joined by Justices Brennan and Blackmun, reiterated the view that Justice Brennan had expressed in *Bakke*. Specifically, this group of Justices reasoned that in the context of a benign race-based classification, operating in this case at the federal level, the appropriate standard of review was intermediate scrutiny.[300] Under that test, this group of Justices voted to sustain the program against the equal protection challenge.[301] At the opposite end, Justice Stewart, joined by Rehnquist, in dissent, applied strict scrutiny, voting to strike down the racial set-aside program.[302] Justice Stevens, in a sole-authored dissent, voted to strike down the set-aside program based upon concerns involving congressional deliberations.[303] In his sole-authored concurrence, Justice Powell reiterated his view in *Bakke* that the appropriate test for a benign race-based program was strict scrutiny, and because he determined federal policy met the test, he voted to sustain the program.[304] Finally, Chief Justice Burger authored a plurality opinion, which Powell also joined, issuing the Court's judgment.[305] Burger's fact-driven opinion, while sustaining

300 *See id.* at 519 (Marshall, J., concurring in the judgment).

301 *See id.* at 519–21.

302 *See id.* at 522–27 (Stewart, J., dissenting).

303 *See id.* at 532–36 (Stevens, J., dissenting). To simplify the presentation, without changing the analysis, the discussion will treat the dissent as a bloc of three voters: Stewart, Rehnquist, and Stevens.

304 *See id.* at 495–517 (Powell, J., concurring).

305 *See id.* at 453, 492 (plurality opinion).

the race-based set aside, declined to adopt either the intermediate or strict scrutiny test.[306] Removing Powell from the Burger opinion count, as signaled with bracketing, produces a **3**-2-*1*-3 lineup, with the Burger opinion occupying the median and the Powell opinion expressing the holding on narrowest grounds.

Fullilove provides a valuable opportunity for assessing early lower court and scholarly treatment of this unusual voting lineup because of the proximity to when *Marks* was issued and because the relevant window is limited to ten years. Nine years after *Fullilove*, the Supreme Court disallowed states to mimic the federal set-aside policy,[307] and ten years after *Fullilove*, in *Metro Broadcasting v. FCC*, the Supreme Court superseded *Fullilove*, embracing, for another five years, the intermediate scrutiny test.[308]

Although a survey of lower federal and state court decisions and law review articles construing *Fullilove* in that period does not provide a definitive answer, the data suggest that, in general, courts and commentators treated Burger's position as controlling or sought to reconcile outcomes with both the Burger and Powell opinions.[309] We have located only two of seventeen lower court cases that treat the Powell opinion in *Fullilove* as controlling.[310] Other lower courts generally treated Burger's opinion as controlling or sought to reconcile the two opinions, with a small number claiming to reconcile all three judgment-consistent opinions.[311] This general approach was also consistent with treatment in the Supreme Court itself and in contemporaneous law review articles, none of which treated Powell's narrower concurring opinion as controlling.[312] Together these data imply that despite *Marks*'s phrasing, with respect to *Fullilove*, lower courts and commentators generally grasped intuitively that in a single dimensional case, the narrowest grounds rule intends to capture the opinion that is joined by the Court's median Justice.

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306 *See id.* at 492 (plurality opinion).

307 *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 476–77 (1989); *id.* at 511 (plurality opinion).

308 *See* Metro Broad., Inc. v. FCC, 497 U.S. 547, 563–65 (1990). The Supreme Court then overturned *Metro Broadcasting*, insisting upon strict scrutiny, in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 225–27 (1995).

309 Those data are collected and presented *infra* Appendix B.

310 The data supporting the assertions in this paragraph are summarized in Appendix B.

311 *See infra* Appendix B.

312 *See infra* Appendix B.

b. Incompleteness

The second problem with the *Marks* rule is incompleteness.[313] This problem proves both inevitable and intractable. And unlike the wording imperfection, which is relatively unimportant and easily remedied, this one cannot be remedied yet matters a lot. Unpacking it, once more, implicates dimensionality.

Recall that when preferences align along a single dimension this implies that those embracing one extreme position prefer the median position to the opposite extreme position. As applied to *Bakke*, with Brennan (A); Powell (B); and Stevens (C), it is fair to assume that Brennan and Stevens (A and C) would prefer Powell's position (B) to each other's positions (C and A).[314] More formally, assume Brennan's preferences are ABC and Stevens's preferences are CBA. As *Bakke* revealed, no opinion has majority support. Whether Powell's preference rankings are BAC or BCA, if each participant votes sincerely when comparing A to B, B to C, or C to A, option B, which defeats A and C, will emerge the winner in a regime that allows all binary comparisons to be voted. By contrast, changing our assumptions such that either Brennan preferred C over B or Stevens preferred A over B thwarts the assumption that the preferences align on a single dimension, generating an outcome that cycles.

To illustrate, we now revisit the earlier table, presenting *McDonald v. City of Chicago*, reproduced as Table 8:

TABLE 8. *MCDONALD V. CITY OF CHICAGO* REVISITED

	Incorporate Under Privileges or Immunities	**Do Not Incorporate Under Privileges or Immunities**
Incorporate Under Due Process		Plurality (A)
Do Not Incorporate Under Due Process	Thomas (C)	Dissent (B)

A special feature reveals *McDonald* as a case implicating two dimensions. Discerning whether a case implicates two dimensions requires identifying the premise on which all Justices must logically

313 This phrasing is drawn from Arrow's Incompleteness Theorem, which demonstrates that any institution that avoids cycling in aggregating group preferences runs afoul of some other benign attribute that Arrow associated with rational and fair collective decision making. *See* STEARNS, *supra* note 33.

314 This analysis is simplified inasmuch as Justice Stevens rested his analysis on Title VI of the Civil Rights Act. For a more detailed analysis, see STEARNS, *supra* note 33, at 130–33.

agree. In *McDonald*, that premise follows: *Striking the Chicago handgun ban requires incorporating the* Heller *right under either due process or privileges or immunities, whereas sustaining the Chicago handgun ban requires failing to incorporate the* Heller *right under either due process or privileges or immunities*. Despite their disagreements concerning how to resolve the case, all Justices would logically embrace this proposition, which is consistent with each *McDonald* opinion. The Justices thus agree that there are two controlling issues: (1) Is the *Heller* right incorporated via the Due Process Clause?; and (2) is the *Heller* right incorporated via the Privileges or Immunities Clause? Although positions A and C incorporate *Heller*, they do so by resolving both questions in opposite fashion. By contrast, position B resolves one issue in favor of each camp, A and C, yet votes against incorporating the claimed right.

A Supreme Court opinion has two dimensions when separate opinions express opposite resolutions of controlling issues yet yield the Court's judgment, and a dissenting opinion, expressing a favorable resolution of a single controlling issue from the perspective of each of those opinions consistent with the judgment, yields the opposite result. Otherwise, the case implicates one dimension. Unlike a single dimensional case, when a case presents in two dimensions, there is no inherent reason to assume any particular ranking over any of the three expressed combined preferences within the opinions. We cannot know a priori that either A or C would prefer an opposing resolution of both underlying issues to a partly favorable resolution of one of the two issues that nonetheless leads to an opposing judgment. Likewise, we cannot know whether B would prefer, if forced to choose, yes on 1 and no on 2 *or* yes on 2 and no on 1.

There are different ways to express the conceivable preference rankings, and each requires specifying assumptions. If the preferences are Alito (plurality) (ABC), Stevens (dissent) (BCA), Thomas (concurrence in the judgment) (CAB), and if each camp votes sincerely, the rankings reveal a cycle, such that ApBpCpA, where p means preferred to by simple majority vote. Conversely if the preferences are Thomas (CBA), Stevens (dissent) (BAC), and Alito (ACB), on the same assumptions, the preferences generate the reverse cycle: CpBpApC. Although none of these rankings are inevitable, each is plausible. In fact, both presentations, the forward and reverse cycles, embed each of the two available rankings over the remaining opinions for each of the judicial camps. The point is not to defend any ranking about which we lack complete information. Instead, the analysis dem-

onstrates that unlike the one-dimensional case in which the simplest assumptions yield an implicit majority winner, or dominant second choice,[315] preferences implicating more than one dimension allow no such assumption.

Cases forcing a split across two dimensions thwart the premise on which the narrowest grounds rule rests. Although *Marks* itself fails to specify the rule's limitations, the narrowest grounds rule assumes a nonmajority case in which opinions align along a single dimension, but this cannot be guaranteed. The problem is not unique to Supreme Court decision making. It is endemic to, and thus inevitable in, group decision making. In the course of collective decision making, opinions often align along one dimension, but not always, and when they do not, the possibility of aggregation problems becomes inevitable. This is the focus of social choice, a major literature that has claimed at least two Nobel Laureates.[316]

2. Endogeneity & the Rules of the Game

Part of the problem with the narrowest grounds rule is that those trained in law are rarely exposed to social choice. And when judges and legal scholars come up against problems in aligning judicial opinions or aggregating preferences, they sometimes fail to recognize that the problem they are confronting is not special to the context of judicial decision making. A considerable literature has emerged identifying cases like *McDonald* and noting the divergence in such cases between outcomes and the logical progression of issue resolutions using existing protocols (which involve each jurist voting on the outcome and aligning rationales around the resulting opinions) and proposing various alternative voting protocols (which would instead base the case outcome on the results of separate tallies over controlling issues).[317]

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315 In social choice theory the option is referred to as a Condorcet winner. *See* Stearns, *supra* note 291, at 1252–57.

316 *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951); *Kenneth J. Arrow*, NOBEL PRIZE, https://www.nobelprize.org/prizes/economic-sciences/1972/arrow/biographical/ [https://perma.cc/3AA5-2LYF]; Amartya Sen, *The Possibility of Social Choice*, 89 AM. ECON. REV. 349 (1999); *Amartya Sen*, NOBEL PRIZE, https://www.nobelprize.org/prizes/economic-sciences/1998/sen/biographical/ [https://perma.cc/QD6Y-H8QK]; WILLIAM VICKREY, PUBLIC ECONOMICS (Richard Arnott et al. eds., 1994); *William Vickrey*, NOBEL PRIZE, https://www.nobelprize.org/prizes/economic-sciences/1996/vickrey/biographical/ [https://perma.cc/WYD5-3ZWJ]. Although William Vickrey earned his Nobel Prize in Economics for his work on auction theory, he too contributed substantially to social choice, including providing a simplified proof of Arrow's Impossibility Theorem. *See* STEARNS, *supra* note 33, at 81, 334–35 n.91.

317 *See* sources cited *supra* note 191.

The narrowest grounds doctrine proves central to these debates. What issue voting proposals miss is that the narrowest grounds rule is one piece in a larger complex puzzle implicating myriad features of decision making at the apex of a pyramidal judiciary. As with the clock that strikes thirteen, issue voting proposals, by ignoring this piece, raise concerns about what else is missing. Removing one piece while imagining all the rest will fit perfectly is problematic. Exacerbating the problem is an instinct that all problems are solvable when, in fact, some are not, at least not without risking other larger problems.[318]

The narrowest grounds rule is the flipside of the aggregation coin. We have two seemingly plausible methods of resolving appellate court cases: aggregating judicial resolutions per issue, producing a pathway to the judgment, or, as we actually observe, aggregating judicial resolutions on the judgment and reading across opinions to discern which opinion resolves the controlling issues. Although several leading scholars have advocated variations on issue voting, none have identified an appellate court, quite literally anywhere, that employs it.[319] This seemingly glaring datum has proved remarkable in its failure to signal the possibility of a missing piece of the puzzle.

Consider two economics jokes:

> *Joke one*:
> Two economists walk down a street. One says to the other, "There's a $20 bill. You should pick it up." The second says, "There can't be; if it were there, someone would have picked it up already."

> *Joke two*:
> An economist watches her lawyer friends playing a game and asks if it is the same game they played the prior week. One friend responds: "Same game, different rules."

The point is not to lament any discipline's distorted sense of humor. Rather, each joke provides a relevant insight into the problem at hand. Economists sometimes imagine all valuable opportunities having been taken, which, if true, would leave no space for entrepreneurs.[320] Legal scholars tend toward the opposite fallacy, imaging that an immediate creative spark confronts few, if any, theoretical obsta-

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318 This is perhaps *the* central insight of the literature on social choice. *See supra* note *290; sources cited supra* note 316.

319 *See* sources cited *supra* note 191.

320 For a paper that explores this puzzle, see Henry G. Manne, *Resurrecting the Ghostly Entrepreneur*, 27 REV. AUSTRIAN ECON. 249 (2014).

cles, failing to search out that missing piece. The truth, of course, lies somewhere in between. Creative minds certainly can improve the state of the world but only after truly grappling with what might be missing in their proposals. Not all $20 bills have been taken, but as obvious a proposal as shifting voting protocols to avoid the intractable, if occasional, judicial voting anomaly almost surely would, by now, have been tried somewhere in the world.[321] What appears to be missing is a problem that economists refer to as endogeneity, or, as the second joke implies, failing to recognize that changing the rules *is* changing the game.[322]

Advocates of issue voting imagine that the preferences over issues, or even the very statements of issues expressed across opinions, will remain unaffected by a change in judicial voting protocol. But changing voting protocols changes the institutional context in which both aspects of decision making—identification of issues and their resolution—takes place. Judicial opinions are *endogenous to*, meaning a function of, the decision making rules used to decide cases. Changing those rules will affect incentives respecting these vital aspects of issue identification and resolution. So what is missing?

The present system of voting encourages Justices to produce the most persuasive opinions they can devise in the hope of forming and retaining a majority coalition.[323] A majority coalition holds particular value *provided* majority opinions have greater status than nonmajority opinions, including narrowest grounds opinions. Historically that has been well understood.[324] Contrary to Justice Alito in *Ramos*, narrowest grounds opinions have generally not been understood to overturn past majority decisions.[325] Similarly, as previously shown, they have

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321 This seems especially likely when we consider that social choice dates at least as far back as the Constitution itself and likely earlier. *See* Stearns, *supra* note 291, at 1221–25. And, of course, various manifestations of common law decision making likewise have ancient origins. *See generally* Ephraim Glatt, *The Unanimous Verdict According to the Talmud: Ancient Law Providing Insight into Modern Legal Theory*, 3 PACE INT'L L. REV. ONLINE COMPANION 316 (2013) (examining Talmud's unanimous decision rules in evaluating ancient origins of common law decision making); Charles Auerbach, *The Talmud—A Gateway to the Common Law*, 3 CASE W. RSRV. L. REV. 5 (1951) (examining parallels among common law and Talmudic jurisprudence).

322 Endogeneity implies that outcomes are a function of the rules generating them. *See* STEARNS ET AL., *supra* note 191, at 895 (defining endogeneity).

323 *See* Maxwell L. Stearns, *How Outcome Voting Promotes Principled Issue Identification: A Reply to Professor John Rogers and Others*, 49 VAND. L. REV. 1045, 1050 (1996).

324 *See supra* Section II.A.2.b (providing examples illustrating that when the Supreme Court supersedes a fractured ruling, it does so without the need to overrule).

325 *See supra* Section I.B.1.b (discussing Justice Alito's *Ramos* dissent); *see also supra* Section II.A.2.a–.c (reviewing three case studies implicating Justice Alito's analysis: *Miller v. Cali-*

not generally been construed to produce binding precedent in the Supreme Court, as opposed to among lower courts.[326]

Majority opinions are the Supreme Court's brass ring, the essential means by which Justices can place their imprimaturs on controlling doctrine, at least presumptively. Such opinions force upon future Supreme Courts seeking to displace the resulting precedent not one barrier, but two: a stare decisis inquiry and a merits inquiry. An important distinction in *Ramos* between the Gorsuch approach and those of Alito, Kavanaugh, and Sotomayor, is that Gorsuch rightly recognized that, unlike a majority opinion in the Supreme Court, a narrowest grounds opinion only implicates the merits inquiry as such opinions bind only lower courts, not the Court itself.

Issue voting would allow Justices to work toward splintering off colleagues who might otherwise have helped form a contrary majority coalition. The change would blend the status of an actual majority ruling, earning the twin benefits of having to withstand a stare decisis and merits analysis to overrule, with happenstances majority agreements on any controlling issues. In cases where the judgment matters more than specific issues, the protocol change would encourage Justices to forge favorable voting paths, cobbling separate issue majorities capable of producing a preferred result. Switching to issue voting risks such incentives in cases presently implicating a single dimension and even resolved by majority opinions.[327] Justices are highly intelligent and motivated actors, and changing the rules changes the game. With a rule change to issue voting, talented Justices will no longer continue behaving as if operating under outcome voting.

Under the present outcome voting protocol, once the opinions are aligned, the narrowest grounds doctrine comes into play. Supreme Court opinions divide into four general categories: (1) unanimous opinions, (2) majority opinions, (3) fractured opinions, and (4) three-judgment cases. Under outcome voting, *Marks* only comes into play in fractured opinion cases, comprising a small subset of the Court's overall case output. When the Court is unanimous, or when there is a majority opinion, there is no collective preference aggregation problem.[328] The entire Court, or a majority, aligns along one dimen-

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fornia, *Adarand Constructors, Inc. v. Pena*, and *Planned Parenthood of Southeastern Pennsylvania v. Casey*).

326 *See supra* Section II.A.

327 For a discussion about the resulting risks this protocol change would bring about, see Stearns, *supra* note 323, at 1059–61 (illustrating with variation on *National Mutual Insurance v. Tidewater Transfer Co.*, 337 U.S. 582 (1949)).

328 *See* Maxwell L. Stearns, *Should Justices Ever Switch Votes?:* Miller v. Albright *in Social*

sion, expressing the Court's dominant position in the controlling opinion. As a practical matter, the Court has always resolved three-judgment cases—split over reverse, remand, or affirm—with one or more Justices changing from their preferred judgment typically toward the remand, providing the lower court with necessary guidance.[329]

The combined effect of the above analysis cabins the collective preference aggregation problem to fractured cases. Within that subset, we must further subdivide cases implicating one or more than one dimension. The conventional understanding of the narrowest grounds rule implicitly construes it to resolve fractured cases implicating one dimension. If lower courts, and the Supreme Court, better understood how to discern when fractured opinions so align, identifying the smaller, problematic subset of cases in which *Marks* fails to apply would be simplified. When there is one relevant dimension in a fractured case, there is *always* a narrowest ground opinion. Rather than speculative, as Professor Re has claimed, this follows axiomatically from foundational social choice insights.[330] By contrast, when there is more than one relevant dimension in a fractured case, there is *never* a narrowest grounds opinion. The same tools also reveal this as non-speculative and axiomatic.

The question then becomes how to discern when there is one or more relevant dimensions. The following restatement of the narrowest grounds rule is consistent with the conventional understanding, yet offers critical guidance in making these assessments:

> When the Supreme Court issues a nonmajority decision, lower courts should presume that the opinions can be expressed along a single dimension. In such circumstances, when all Justices are participating, lower courts should apply that opinion representing the deciding Court's median position. This will generally coincide with the position closest to dissent for each separate judgment. In the rare circumstance in which there is an even narrower concurrence in the judgment, placing it closer to the dissent, lower courts should nonetheless treat the opinion that coincides with the Court's median position as controlling. When two or more opinions consistent with the judgment resolve controlling issues in op-

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Choice Perspective, 7 SUP. CT. ECON. REV. 87, 110 (1999) (categorizing Supreme Court opinions based on degrees of consensus).

329 *See* STEARNS, *supra* note 33, at 153–54 (collecting cases).

330 *See* Re, *supra* note 11, at 1979 (describing as "worrisomely speculative" and "inefficient" drawing inferences that necessarily correlate to opinions aligning on a single dimension).

> posite fashion, yet reach the same judgment, and when the dissenting opinion resolves one or more issues favorably to each opinion consistent with the judgment, yet achieves an opposite judgment, the premise underlying the narrowest grounds rule fails to apply. This can also be determined when separately tallying majority resolutions of controlling issues supports the dissenting outcome. When making such assessments, lower courts should disregard opinions that, if removed, would not affect the ability to align the remaining opinions on one dimension, with a controlling narrowest grounds opinion emerging among the remaining opinions. Lower courts should not presume that one or more Justices embracing a broad rule, whether consistent with the judgment, or in dissent, prefers an opposing broad rule to an opinion consistent with the judgment that decides the case on narrowest grounds. Lower courts should assume Justices express their judgment preference through the opinion they join.[331]

The preceding analysis sets the foundation for this clarified statement of the narrowest grounds rule. In the single nonmajority Supreme Court case, *Fullilove*, although the opinions align on a single dimension, the narrowest grounds opinion is narrower than that embracing the position of the Court's median Justice. This restatement of the narrowest grounds rule accounts for that situation, admonishing lower courts to apply the position of the median Justice in this circumstance, consistent with prevalent lower court practice in construing *Fullilove*.[332]

In a minuscule subset of fractured cases implicating more than one dimension, one or more Justices has acquiesced to a contrary resolution on one dispositive issue, treating that issue as settled.[333] Doing so allows the Justice(s) to change the judgment vote, and along with it, the judgment for the Court as a whole. The final sentence acknowledges this rare possibility. More generally, the restatement admonishes lower courts to presume that when opinions resolve controlling issues in opposite fashion and reach opposing judgments, that suggests that the opinions align on a single dimension. Most importantly, avoiding this more plausible reading requires more—not fewer—ambitious leaps in construction, including drawing counterintuitive infer-

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331 This restatement is a refined presentation of that submitted in the author's *Hughes* amicus brief. *See Hughes* Amicus Brief, *supra* note 6, at 25–26.

332 *See infra* Appendix B (collecting authorities).

333 *See infra* Part III.B (providing examples).

ences concerning how Supreme Court Justices would align their preferences over the remaining opinions.[334] This restatement of the narrowest grounds rule instructs lower courts to avoid unnecessary inferences, demanding that before they draw counterintuitive inferences, they obtain express guidance by the relevant Justice. And when such guidance is provided, there is no need for tenuous or speculative constructions. The switched vote will generate a majority opinion, albeit one contrary to the logical progression of that Justice's internal resolution of the case based upon her or his independent assessment of controlling issues.

This restatement of the narrowest grounds rule clarifies, without changing, the rule's meaning. It identifies clearly the very limited circumstances in which the premise of the narrowest grounds rule fails to apply. This leaves open the question as to how the Supreme Court itself construes *Marks* as applied to past fractured rulings to which the *Marks* premise does not hold. The simplest rule of construction is that such cases establish a binding precedent on the overall case judgment in lower courts but leave open the resolution of the controlling questions necessary to achieve that judgment. Lower courts will inevitably struggle in absence of further guidance, but the relevant subset of cases is extremely limited. Incompleteness is not unique to the Su-

334 Although this rule of construction likely rests upon an inevitable inference from how the opinions in a fractured case relate, it can also be defended in terms of administrability. It is generally sounder as a matter of judicial administration to engage in a set of assumptions that lowers, rather than raises, the plausibility of ascribing multiple dimensions to a case. Barry Friedman and his coauthors, *see* FRIEDMAN ET AL., *supra* note 23, observe that "[m]ost accounts of judicial decision-making assume—implicitly or explicitly—that the median-justice theory is correct." *Id.* at 604. This insight is consistent with the proffered clarification of the narrowest grounds rule.

Friedman and his coauthors further posit that challenges to what they term the median-justice theory arise due to an overlooked tension in which Justices sometimes prioritize case outcomes over agreement with rules articulated in published opinions. *See id.* (citing Cliff Carrubba, Barry Friedman, Andrew D. Martin & Georg Vanberg, *Who Controls the Content of Supreme Court Opinions?*, 56 AM J. POL. SCI. 400 (2012)). As this Article demonstrates, although divergences between outcomes and stated rules might forge a problem of dimensionality, that is neither necessary nor inevitable. For example, *McDonald* implicates two dimensions based on the differing rationales that Justice Alito, for a plurality, and Justice Thomas, concurring in the judgment, provide while agreeing to the case outcome. *See supra* Section I.C (describing *McDonald*). Likewise, a Justice who cares more about the outcome than rationale may switch votes, subordinating the resolution of one dispositive issue to reach another that otherwise would be logically foreclosed. In doing so, the Justice produces a majority opinion in which the opinions then implicate a single relevant dimension. *See infra* Section III.B (illustrating with Justice White's vote in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), *overruled by* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996)).

preme Court; it is inevitable in any system of collective decision making.

3. Summary

The preceding analysis demonstrates that in fractured cases in which *Marks*'s underlying premise of a single dimension holds, there is always a narrowest grounds opinion, whereas for the smaller subset of fractured cases in which the *Marks* premise does not hold, there is never a narrowest grounds opinion. As a general proposition, as modeled by their behavior, Supreme Court Justices exhibit greater implicit understandings of the doctrine than when they seek to articulate those understandings in opinions. This is especially true in the context of fractured or potentially fractured single dimensional cases in which judgments concerning whether to join or not join a majority have potentially significant doctrinal consequences. Despite expressing uncertainty regarding the scope of *Marks*, the Justices modeled behavior demonstrates that the following represents the best reading of the narrowest grounds rule: (1) the rule applies even when a single Justice expresses the holding on narrowest ground; (2) narrowest grounds opinions bind lower courts, not the Supreme Court itself; and (3) narrowest grounds opinions may not overturn past majority decisions.[335]

In some respects, observing what the Justices do, rather than what they say, is more informative as to how the narrowest grounds rule is intended to function.[336] In actual cases, members of the Court pay for advancing their doctrinal understandings by forgoing alternative options. These include writing alone, expressing an ideal point, or joining with a majority, thereby gaining the benefit of a presumptively binding precedent on the Court itself. The preceding discussion pro-

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335 This analysis implies that adherence to the narrowest grounds rule might be construed as presenting a spectral rather than purely binary inquiry. Although this Article advocates strict adherence to these propositions, it is important to acknowledge that generally construing *Marks* consistently with these principles is preferable to routinely departing from them. As this Article has shown, lower courts and even Supreme Court Justices will occasionally misapply *Marks* simply due to the narrowest grounds rule's inevitable complexity or due to the complexity, or unique circumstances, of the relevant cases to which the doctrine is being applied. Occasional misreadings of the narrowest grounds rule should not be construed as permanent departures from this important core set of understandings.

336 For a related analysis linking the value of legislative history to whether the signal was "paid for" through various forms of bargaining and proposing that legislative history provides greater insight when "the observer can learn whether the informed party bore some cost to communicate the signal," see McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, LAW & CONTEMP. PROBS., Winter & Spring 1994, at 3, 8 (Professors Mathew McCubbins, Roger Noll, and Barry Weingast, writing collectively).

vides examples of strategies comporting with each of these understandings.

Along with legal scholars, members of the Court have done less well in appreciating the different implications of the narrowest grounds rule in cases implicating more than one dimension. This has resulted in failing to recognize the very limited circumstances in which *Marks* fails to apply. The dimensionality analysis demonstrates that this problem is not unique to the judicial context; it pervades all collective decision making. Modeling when the narrowest grounds rule can and cannot be applied helps to avoid overreaching claims of inapplicability, including in *Apodaca* and *Ramos*, with opinions aligning on one dimension. This Article's recasting of the narrowest grounds rule captures the modeled behavior of justices and grounds it in dimensionality.

III. Open Questions on Narrowest Grounds

A major benefit of modeling narrowest grounds is narrowing the scope of remaining policy questions. These include assessing: (1) various lower court formulations of the narrowest grounds rule and relating the analysis to holding versus dictum; (2) the implications of vote switching; and (3) whether *Marks* is best understood as a predictive or bargaining rule in cases where the choice affects attributing the holding. The discussion that follows takes up each of these questions.

A. Least Impact, Logical Subset, Lowest Common Denominator, & Matryoshka Dolls

Jurists and scholars construing fractured opinions have debated the merits of various formulations of the narrowest grounds rule as used to discern the holding in fractured Supreme Court cases.[337] The preceding analysis provides the basis for a reconciliation: *all* apply, leading to the same outcome, when opinions align along a single relevant dimension; *none* apply when the opinions implicate more than one relevant dimension. These verbal formulations—Least Impact, Logical Subset, Lowest Common Denominator, and Matryoshka Dolls—add little or nothing to the narrowest grounds inquiry. Each is a metaphor intended to capture a singular insight. Because none has the precision of a model, each has limited value.

Assuming the opinions in a fractured case align along a single relevant dimension, the opinion consistent with the outcome that re-

337 *See, e.g.*, Re, *supra* note 11; Williams, *supra* note 11.

solves the case on narrowest grounds is a median, dominant second choice, or Condorcet winner, each of which, once more, also expresses the same insight.[338] If either of the extremes prefers an opposite extreme to the median position, the opinions do not align on a single dimension. When a given jurist prefers one extreme position to the opposite extreme position to the median, for that jurist, the dimension being applied fails to capture the stakes.[339] If so, employing the term median, which implies a common dimension, is mistaken.

Consider this simple illustration: Imagine a legislative body choosing an adjournment date: Thanksgiving (T), Christmas (C), or New Year's Eve (N).[340] An intuitive dimension that captures these options is time, early to late: TCN. Assume member 1 prefers TCN, and member 2 prefers CNT or CTN. Now assume member 3 prefers NTC, on the ground that because she does not celebrate Christmas, she prefers breaking on either remaining date. For her, the time-based dimension fails to capture the stakes because she would prefer to work through Christmas, or break earlier on Thanksgiving, but not to suspend for a holiday she fails to observe.

When decision makers agree on a dimension, each extreme logically prefers the median to the opposite extreme. That follows directly from how dimension is defined.[341] Only when another dimension is implicated does the assumption concerning such intuitive rankings break down.

Now consider these alternative framings: Least Impact, Logical Subset, Lowest Common Denominator, and Matryoshka Dolls.[342] Each implies ranking options along a single dimension, although, as shown below, Lowest Common Denominator succeeds less well. As previously seen,[343] Least Impact implies a greater impact, leading to

338 *See supra* Section II.B.

339 In social choice, this can be expressed either as one member holding multipeaked preferences cast along a single dimension or as the aggregate members each holding single peaked preferences implicating more than one dimension. These two framings express an identical insight. For a more detailed analysis that explains the relationship between the two framings and that provides helpful graphics, see STEARNS ET AL., *supra* note 191, at 571–74.

340 *See id.*

341 *See supra* Section II.B.

342 *See, e.g.*, Re, *supra* note 11, at 1956–57 tbl.1 (collecting Supreme Court decisions most often interpreted by federal circuit courts with an explicit citation to *Marks*); *id.* at 1980–84 (discussing Logical Subset framing); Williams, *supra* note 11, at 806–19 (discussing lower court approaches to discerning precedential effect of U.S. Supreme Court plurality decisions, including Logical Subset, Lowest Common Denominator, and nesting—Matryoshka Doll—framings); Kornhauser & Sager, *supra* note 191, at 45–48 (discussing nesting—Matryoshka Doll—framing).

343 *See supra* Section I.C (applying least impact analysis to *McDonald v. City of Chicago*, 561 U.S. 742 (2010)).

the same judgment, or an impact so small as to disallow the judgment reached. Ranking based on degree of impact—greater to lesser—implies a single dimension along which options may be assessed and compared. This is also true for each remaining categorization.

Logical Subset analysis implies a universe from which a set is drawn.[344] From the set, a subset is drawn. Assume the set defines the conditions under which some believe a criminal conviction must be overturned. The logical subset implies that for a smaller group, a more stringent set of conditions is required before a conviction is overturned as compared with the larger set. The dissenters would deny relief to the full set, and thus also to the subset. Those preferring to grant relief to the full set (largest cohort) will prefer conferring relief to those in the logical subset (smaller cohort) as compared with a complete denial (smallest cohort). The dissenters, who prefer denying relief across the board (smallest cohort) will prefer conferring relief in the logical subset (smaller cohort) to conferring relief to the full set (largest cohort). Logical Subset analysis corresponds to a single dimension: full set (broadest relief), logical subset (narrower relief), and complete denial (narrowest and thus no relief).

Matryoshka Dolls are stackable, with smaller dolls fitting within larger ones in succession until the penultimate doll fits in the largest of all. This too implies one dimension, small to large, along which the options can be assessed and compared, with a line drawn anywhere separating those that correspond to a grant of relief, and the remaining dolls corresponding to a denial of relief.[345]

Finally, Lowest Common Denominator analysis conveys the same idea, but in a less helpful manner.[346] The intent is to capture fractions, i.e., nonintegers, permitting rankings from large to small. But the denominator captures only part of the relative valuation. Absent full information, including numerators, the data are incomplete. Even so, it is possible to show how this is intended to apply. Imagine a case with several possible factors potentially correlating with a grant of relief from a criminal conviction. The Justices embracing the broadest position consistent with the grant of relief would reverse the conviction if two out of three factors they identify are satisfied. The narrowest grounds concurrence would grant relief only after adding two additional factors and demanding that four out of the now five factors are

344 *See, e.g.*, United States v. Davis, 825 F.3d 1014, 1016–17 (9th Cir. 2016) (applying logical subset analysis to conclude *Freeman* lacks a controlling opinion); Re, *supra* note 11, at 1980–84.

345 *See, e.g.*, Kornhauser & Sager, *supra* note 191, at 45–47.

346 *See, e.g.*, Williams, *supra* note 11, at 806–19.

satisfied. The dissenters agree with the five factors but insist all five must be satisfied. Although it is easy enough to rank ordinally 2/3, 4/5, and 1, from small to large, we can also do so by finding the lowest common denominator, 15, and then ranking based on the corresponding numerator values: 10/15 12/15, 15/15. Either approach ranks the values from small to large, capturing broad to narrow bases for relief. And again, each characterization corresponds to a single dimension along which options can be assessed and compared.

These are metaphors each designed to capture the same essential insight. They are not alternative tests. A proper model, grounded in dimensionality, better expresses the point for which each metaphor is used.[347] With a proper model, these, or other, metaphors can be discarded because they are no longer necessary or helpful. The recast statement of the narrowest grounds rule does all the work of these metaphors, but it does so more comprehensively, capturing fully the core analytical insight. Applied correctly, none of these framings take us on "one less traveled by."[348] Instead, each leads us to the same place.

The preceding analysis also helps unpack the sometimes-confused relationship between narrowest grounds and holding versus dictum.[349] This issue arose with respect to Justice Sotomayor's narrowest grounds concurrence in the judgment in *Freeman v. United States*,[350] at issue in *Hughes v. United States*.[351]

Two federal circuit courts had devised hypotheticals intended to demonstrate that in some situations, Justice Kennedy's plurality opinion is narrower because whereas Justice Sotomayor would deny consideration for resentencing following a plea agreement, Justice Kennedy would grant it.[352] We need consider only one hypothetical to understand the underlying analytical problem:

> The sentencing court . . . might consider and reject the guideline range used by the parties, not because the court finds that a different guidelines range (such as the career offender range) applies, but because, having considered the applicable

347 *See supra* Section II.B.

348 *See* text accompanying *supra* note 48 (quoting Robert Frost).

349 Portions of this discussion are adapted from the author's *Hughes* amicus brief. *See Hughes* Amicus Brief, *supra* note 6.

350 *See* Freeman v. United States, 564 U.S. 522, 534–44 (2011) (Sotomayor, J., concurring in the judgment).

351 *See* Hughes v. United States, 138 S. Ct. 1765, 1771–72 (2018).

352 *See* United States v. Davis, 825 F.3d 1014, 1022–24 (9th Cir. 2016); United States v. Epps, 707 F.3d 337, 351 n.8 (D.C. Cir. 2013).

> guidelines range, the court rejects it as a matter of policy and selects its sentence without regard to it. If . . . the court decides for reasons unrelated to the guidelines range to impose the sentence the parties agreed upon, under the plurality's analysis, the defendant would not be eligible even if the guideline range is later reduced. Under Justice Sotomayor's analysis, however, the defendant would be eligible.[353]

This seemingly counterintuitive result follows from an anomaly in the wording of Justice Sotomayor's concurrence in the judgment in *Freeman*, which Chief Justice Roberts helpfully described:

> In the first half of the [Sotomayor] opinion, the inquiry properly looks to what the *judge* does: He is, after all, the one who imposes the sentence. After approving the agreement, the judge considers only the fixed term in the agreement, so the sentence he actually imposes is not "based on" the Guidelines.
>
> In the second half of the opinion, however, the analysis suddenly shifts, and focuses on the parties: Did *they* "use" or "employ" the Guidelines in arriving at the term in their agreement? But [the relevant statute] is concerned only with whether a defendant "has been *sentenced* to a term of imprisonment based on a sentencing range." . . . Only a court can sentence a defendant, so there is no basis for examining why the parties settled on a particular prison term.[354]

As applied to the petitioners in the *Freeman* and *Hughes* cases, the concern that Chief Justice Roberts raised respecting the analytical shift from lawyer to judge played no role. The facts in each case allowed for an application of *Freeman* to which the *Hughes* parties agreed: whereas Kennedy's analysis would have granted relief to both Freeman and Hughes, Sotomayor's opinion would have granted relief to Freeman but not to Hughes.

Although the hypothetical plea agreement bases sentencing on the guidelines, the judge instead imposes an identical sentence for alternative reasons independent of the guidelines. Sotomayor's opinion contained language suggesting an analytical shift implicating two separate bases for assessing the plea: that of the parties and that of the judge. That shift was not implicated in either *Freeman* or *Hughes*.

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353 *Epps*, 707 F.3d at 351 n.8 (first alteration in original) (quoting Reply Brief of Appellant at 9–10, *Epps*, 707 F.3d 337 (No. 11-3002), 2012 WL 170534, at *9–10).

354 *Freeman*, 564 U.S. at 547 (Roberts, C.J., dissenting) (quoting 18 U.S.C. § 3582(c)(2)).

Sotomayor's *Freeman* opinion could be construed to imply that whereas Justice Kennedy, for the plurality, presumes a sentence following a plea flows from the plea agreement, which is based on the guidelines, she demands objective evidence that the parties agreed on the rationale, later shared by the judge, specifically linking the sentence to the guidelines. Her disjunctive inquiry, separating the judge's and lawyers' reliance on the guidelines, gives rise to a potential—if attenuated—hypothetical. The hypothetical involves lawyers intending a sentence based on the guidelines, when that understanding as the basis for the sentence is not shared by the judge. By contrast, Justice Kennedy presumes a judicial intent to rely on the guidelines and leaves open the possibility that although the lawyers might intend the sentence as based on the guidelines, a judge might expressly state the sentence is not based on the guidelines.

Properly read, the hypothetical reveals language in the two opinions—Kennedy and Sotomayor—extending beyond what is necessary to resolve *Freeman* and *Hughes*. The hypothetical's attenuated nature is not the problem. Rather, the problem is that any judicial opinion, even if unanimous or for a majority, sometimes includes language inviting hypotheticals testing the outermost limits of its holding. When this occurs, the extraneous assertions fall within the category of dictum, here defined to mean assertions unnecessary to the case resolution.[355] Lower courts routinely confront challenges in sorting holding and dictum, but that task is independent of the *Marks* inquiry. The narrowest grounds rule designates the controlling opinion; it does not inform how to construe the outermost limits of the selected opinion's internal logic.[356] If the opinions align along one dimension, this implies that extraneous language that could be deployed to construct hypotheticals potentially subverting such intuitive relationships is dictum.[357]

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355 Of course, defining dictum is more complex, but those nuances are not implicated here. For a detailed analysis of the distinction between dictum and holding, see Abramowicz & Stearns, *supra* note 214. For a discussion related to a recent split between the U.S. Court of Appeals for the Seventh Circuit, adopting the approach advocated in this Article on the holding-versus-dictum distinction as applied to narrowest grounds opinions, and the U.S. Courts of Appeals for the Sixth and Eighth Circuits, taking a contrary view, *see supra* note 214 and cites therein.

356 *See supra* Section II.A.1 (explaining that Justice Powell in *Apodaca* and Justice Kennedy in *Vieth* expressed the holdings on narrowest grounds despite criticisms leveled against the merits of their analyses).

357 This analysis reveals the underlying analytical difficulties with proposals to abandon the narrowest grounds rule, including those advanced in Professor Re's and Professor Williams's

thoughtful consideration of *Marks*. *See* Re, *supra* note 11, at 1983–84; Williams, *supra* note 11, at 814–17.

Each of Professor Re's examples designed to demonstrate the elusiveness of a median position situated between opposing extremes interjects an option that changes dimensionality, thereby thwarting the premise on which median, middle ground, or any other proxy, is based. Each of Professor Re's examples fit the same pattern. Professor Re challenges logical subset analysis, relying on Justice Alito's hypothetical during the *Hughes* oral argument. *See* Re, *supra* note 11, at 1983 n.205. Alito posited a group of friends choosing whether to watch a romantic comedy or mystery, with a subset of those who preferred a romcom hoping to see a particular French romcom. *See* Transcript of Oral Argument, *supra* note 8, at 14–15. Alito and Re posit that those preferring a romcom might not consider those preferring the French romcom a logical subset. *See id.*; *Hughes* Amicus Brief, *supra* note 6, at 34. Yes, of course! But that merely demonstrates that sorting preferences of movie type (romcom or mystery) and language (English or French) forces a second dimension, just like sorting integers as odd/even and prime/nonprime. The example does not refute claims that preferences aligned on a single dimension possess a median, logical subset, or whichever other phrasing one prefers.

Professor Re's other examples suffer the same difficulty, including his ascription of the "fallacy of division," explaining that enjoying salt does not imply enjoying its components, sodium and chloride, the latter of which is toxic. *See* Re, *supra* note 11, at 1983 n.206. Again, yes, of course. It is commonplace that safe products include unsafe isolated components (consider lye in soap), or become unsafe in excess quantities (consider, but please do not take, the cinnamon challenge, *see, e.g.*, David Kroll, *5 Reasons Not To Take The Cinnamon Challenge*, FORBES (Apr. 23, 2013, 9:21 AM), https://www.forbes.com/sites/davidkroll/2013/04/23/5-reasons-not-to-take-the-cinnamon-challenge/#611d7ce76405 [https://perma.cc/Y3CN-H5ZL]; *see also* Michael Herz, *Justice Byron White and the Argument that the Greater Includes the Lesser*, 1994 BYU L. REV. 227, 243–49) (illustrating the fallacy of division with salt). None of this implies that persons preferring either extreme, a lot of salt or cinnamon, or no salt or cinnamon, would nonetheless prefer the opposite extreme, no salt or cinnamon or a lot of salt or cinnamon, respectively, to an intermediate quantity of salt or cinnamon.

Professor Re's claimed refutation of the plurality's "utterly without redeeming social value" test in *Memoirs v. Massachusetts*, 383 U.S. 413, 419 (1966), as expressing the holding on narrowest grounds also forces a second dimension beyond broad to narrow protection of allegedly obscene materials. The added dimension involves a concern of nonworkability or a preference for bright-line rules (really the same thing). Contrary to Professor Re, who claims that presuming preferences aligning on a single dimension yields a median or dominant second choice is "worrisomely speculative" or even "inefficient," Re, *supra* note 11, at 1950, 1979, conceiving an additional dimension to thwart finding a narrowest grounds opinion absent any specific evidence supporting an added dimension requires greater, not less, ambition in construing judicial preferences.

Professor Ryan Williams offers two challenges that collapse into one. The resulting challenge aligns with those of Professor Re. *See* Williams, *supra* note 11. Williams posits a suit by a foreign corporation, with the Supreme Court divided into three camps: one finding no personal jurisdiction but not reaching subject matter jurisdiction; one finding no subject matter jurisdiction but not reaching personal jurisdiction; and one finding personal and subject matter jurisdiction. *See id.* at 816. Williams separately maintains that the approach advanced in this author's earlier works and developed more fully here fails to identify a narrowest grounds opinion in cases presenting the "voting paradox." *See id.* at 815–16. The jurisdiction hypothetical is, or at least is potentially, a voting paradox, meaning it too implicates two dimensions. *See id.*

Williams's division into two arguments arises from assuming incomplete information for the two camps denying jurisdiction, with each argument failing to reach the alternative jurisdictional inquiry, as the first jurisdiction resolution renders the second unnecessary to the judgment each

B. Vote Switching in the Shadow of Marks

We have seen the relationship between Justice Scalia's *Adarand* strategy and the narrowest grounds rule.[358] In a critical respect, Justice Scalia represented the exception proving a more general rule concerning judicial strategy. With the narrowest grounds rule in place, in cases implicating a single relevant dimension, Supreme Court Justices are generally motivated to align themselves along that dimension in a manner corresponding to their preferred position, or what political scientists refer to as their "ideal point."[359] More simply, *Marks* encourages sincere judicial behavior. To illustrate, consider the perspective of those to the right or left of the Court's median position, for the controlling issue or issues and for the case as a whole. Although these jurists will not necessarily express the holding, since none is the median, by voting sincerely for their ideal point, they place the Justice occupying the median closer to their ideal point.

TABLE 9. DISCRETE JUDICIAL PLACEMENTS ALONG SINGLE DIMENSION

1	*2*	*3*	4	5	6	**7**	**8**	**9**
Liberal ◄								► Conservative

To illustrate, consider Table 9, presenting a hypothetical Supreme Court along a single dimension with *3* liberals, 3 moderates, and **3** conservatives, ranked from *1* on the far left to **9** on the far right. Imagine that within each three-Justice bloc, the members' rankings are

camp reaches. This means that one must make assumptions to ascertain whether the case is best understood as implicating one or more dimensions. Assuming the Justices declining jurisdiction on either basis would, if forced to resolve the issue, also decline jurisdiction on the alternative basis, then the Court would reach the same result, denying jurisdiction six to three. The dimensionality problem arises if, instead, we assume the Justices declining personal jurisdiction would grant subject jurisdiction, and vice versa. This plausible, although not inevitable, set of assumptions turns the hypothetical case into a voting paradox, meaning a case with two dimensions. Although two separate six-Justice majorities would find personal and subject matter jurisdiction, another six-Justice majority dismisses the suit for want of jurisdiction.

Contrary to Professor Williams, observing that the approach advanced here does not identify a narrowest grounds opinion in such a case, which implicates two dimensions, is not a criticism of the thesis. It *is* the thesis. And yet, this Article does not leave lower courts at a loss for guidance. As discussed below, the best approach in such a case is the most conservative. *See infra* paragraph accompanying note 371. Assume that jurisdiction is lacking on like facts and seek guidance elsewhere in the civil procedure canon if the underlying issues are separately presented.

358 *See supra* Section II.A.2.

359 *See* STEARNS ET AL., *supra* note 191, at 833 (defining ideal point and relating term to judicial decision making).

more finely grained from left to right. For any member of the Court, the incentive is to vote consistently with one's ideal point because doing so situates the median closer to that ideal point. Along a single dimension, voting contrary to one's ideal point has the undesirable effect of moving the Court's median further from one's preferred ideological position. If Justice 2 voted with the conservatives, position 6, rather than 5, emerges the median. If Justice 8 voted with the liberals, position 4, rather than 5, emerges the median. The observation that voting contrary to one's ideal point moves the median away from one's preferred resolution is generalizable in one dimension.

As a general matter, the same logic applies across two dimensions, with an important caveat captured in the restated narrowest grounds rule.[360] Consider two cases, *Pennsylvania v. Union Gas Co.*,[361] and *Seminole Tribe of Florida v. Florida*,[362] which overturned *Union Gas*. Both cases involve questions related to the abrogation of state sovereign immunity. Although the constitutional questions are complex, the nuances are less relevant here. There were two issues in *Union Gas*: (1) Does the amended Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") of 1980[363] allow a damages action in federal court against a state?; and (2) If so, is abrogating state sovereign immunity under the Commerce Clause[364] permissible or prohibited by the Eleventh Amendment?[365] The opinions, implicating two dimensions, are set out in Table 10.

TABLE 10. *PENNSYLVANIA V. UNION GAS CO.* IN TWO DIMENSIONS

	CERCLA Authorizes	**CERCLA Does Not Authorize**
Abrogation Falls Within Commerce Clause Power	Brennan, Marshall, Blackmun, Stevens [*White*]	[White moves left]
Abrogation Exceeds Commerce Clause Powers	Scalia	Rehnquist, O'Connor, Kennedy

Sustaining the suit against Pennsylvania requires that two conditions be met: (1) CERCLA must authorize the suit, and (2) abrogation of state sovereign immunity must fall within Congress's

360 *See supra* Section II.B.

361 491 U.S. 1 (1989), *overruled by* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

362 517 U.S. 44 (1996).

363 Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended in scattered sections of 26, 33, and 42 U.S.C.).

364 U.S. CONST. art. I, § 8, cl. 3.

365 U.S. CONST. amend. XI; *see Union Gas*, 491 U.S. at 5.

Commerce Clause powers, meaning it is not barred by the Eleventh Amendment. The absence of either congressional authorization or constitutional authority is fatal to permitting the suit against Pennsylvania to proceed. As Table 10 demonstrates, but for a change in Justice White's vote, the Court was split on both issues in a manner implicating two dimensions. Although separate majorities found that CERCLA authorized the suit (the left quadrants, totaling five Justices), and that doing so fell within congressional Commerce Clause powers (the top quadrants, totaling five Justices), only four justices determined, as their ideal point, that both necessary conditions to permitting the suit were satisfied. Had Justice White stuck with his ideal point, following outcome voting, *Union Gas* would have disallowed the suit.

Justice White's vote switch avoided that result. After observing that his view on the statutory issue had not prevailed, he acquiesced in the contrary majority resolution of that issue, thereby addressing the question of constitutional permissibility.[366] In doing so, he changed the judgment, thereby allowing the suit to proceed. Although this voting tactic is unusual, it is not unique,[367] nor limited to the Supreme Court.[368]

In *Seminole Tribe*, Chief Justice Rehnquist, writing for a majority, overturned *Union Gas*, stating:

> In the five years since it was decided, *Union Gas* has proved to be a solitary departure from established law. Reconsidering the decision in *Union Gas*, we conclude that none of the policies underlying *stare decisis* require our continuing adherence to its holding. The decision has, since its issuance, been of questionable precedential value, largely because a majority of the Court expressly disagreed with the rationale of the plurality.[369]

There are three important points to make about these combined cases. First, when opinions force two dimensions, there is a necessary divergence between the resolution of controlling issues on one side and the outcome resolution, based on each member's judgment vote, on the other. As shown in the discussion of *McDonald v. City of Chi-*

366 *See Union Gas*, 491 U.S. at 45 (White, J., concurring in the judgment in part and dissenting in part).

367 For a general discussion, see Stearns, *supra* note 328 (collecting and analyzing cases).

368 For an example of vote switching, including a judicial assessment of the judicial voting literature, see Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc., 806 F.3d 162, 190–92 (3d Cir. 2015); and *id.* at 204–10 (Greenberg, J., dissenting).

369 Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 66 (1996) (citation omitted).

cago, a careful analysis allows for constructing a singular proposition concerning which all members of the deciding Court necessarily agree respecting the case disposition.[370] The same analysis applies in *Union Gas*. Although the Justices disagreed on how the case should be framed and resolved, all Justices necessarily agreed that for the suit to proceed against Pennsylvania two conditions must be satisfied. First, amended CERCLA must abrogate state sovereign immunity, and second, the abrogation must be a constitutionally permissible exercise of Commerce Clause power. If either necessary condition to allowing the suit to proceed were not met, the suit must be dismissed.

Whereas the *McDonald* framing was disjunctive (either due process or privileges or immunities could allow incorporation), the *Union Gas* framing was conjunctive (both conditions must be met for the suit to proceed). Despite that difference, votes aligned such that the separate disjunctive elements failed in *McDonald* when aggregated separately, and the separate conjunctive elements *would have* failed in *Union Gas* when aggregated separately *but for* Justice White's decision to acquiesce to a majority's contrary resolution on the first issue, construing the amended CERCLA as abrogating state sovereign immunity. A critical step in identifying those cases to which *Marks* cannot be applied involves reading across the opinions, identifying the statement constituting common agreement respecting controlling issues, and then relating the resolution of those issues to the Court's judgment.

Second, when any of the articulated doctrinal formulations—Least Impact, Logical Subset, Lowest Common Denominator, Matryoshka Dolls, and also Dominant Second Choice, Median, or Condorcet winner—are properly applied, the *Marks* rule, coupled with outcome voting, encourages sincere voting with respect to issues along a single dimension. Likewise, outcome voting generally encourages sincere voting on controlling issues with more than one dimension in two ways.[371] It encourages Justices to devise the most persuasive analysis that will attract others to join the opinion with the hope of forming and retaining a successful majority coalition, and it avoids voting on issues based on strategic, rather than sincere, assessments as to how the separate resolutions of issues might affect the ultimate path toward the case resolution.

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370 *See supra* Section II.B.1 (setting forth *McDonald* proposition).

371 *See* Abramowicz & Stearns, *supra* note 60 (illustrating with a variation on *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam)).

The rule of law is intricately linked to providing meaningful guidance, allowing persons and institutions to rely on today's decisions in planning their future conduct. When jurists acquiesce in a contrary resolution respecting an issue, they compromise such reliance. A strategic vote, by definition, is not predicated upon Justices' sincere resolutions of the issue for which they defer to other Justices.

Third, although Chief Justice Rehnquist's decision to afford diminished precedential status to *Union Gas* is not itself precedential, it is informative in much the same way that judicial modeling of *Marks* is informative. His decision effectively signals an expectation of sincere voting, letting the chips fall where they may. This aligns with *Marks* properly construed.

Although Justices certainly have the power to engage in the sort of vote-switching behavior observed in *Union Gas*, doing so is rare.[372] This too is informative. This exception proves the general rule:

> Assume a single dimension unless and until a Justice gives a reason not to. And when opinions align along one dimension, do not construct an imaginary or hypothetical dimension. Assume those embracing opposing resolutions of issues leading to opposing judgments prefer a partially favorable opinion to one coming out the opposite way.[373]

This analysis also supports this limited rule of construction in cases implicating more than one dimension:

> When opinions force two relevant dimensions, assume the case stands for its judgment, no more, but no less. This is evident when separate opinions expressing opposite resolutions of controlling issues yield the Court's judgment, and when a dissenting opinion, expressing a favorable resolution of a single controlling issue from the perspective of each of those opinions consistent with the judgment, yields the opposite result. Do not assume such a case creates a binding precedent on either alternative rationale necessary for achieving that judgment.

Although there are exceptions, sometimes that is all that is needed. *McDonald* establishes that the *Heller* right is incorporated; for more on the doctrinal underpinnings of incorporation, look elsewhere in the canon.

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372 *See* Stearns, *supra* note 328 (reviewing cases).

373 As previously observed, *see supra* note 334, although this rule of construction derives from social choice insights respecting dimensionality, it is also independently grounded in sound principles of judicial administration.

This implicates a tiny subset of cases, a fraction (cases for which binary guidance is inadequate) of a fraction (cases thwarting one dimension) of a fraction (cases that fail to produce a majority opinion). As social choice demonstrates, no collective decision-making rule can solve all problems. But failing to recognize the problems existing rules already solve risks making matters worse, not better. Had a $20 bill been lying in the street, it might have been picked up by now. And if we are going to change the rules, we should acknowledge the risk that we might not enjoy the new game we will be playing.

C. Is Marks *a Prediction or Bargaining Rule?*

Consider two majority opinion cases aligned on a single dimension: *Washington v. Glucksberg*[374] and *Schlup v. Delo*.[375] In each case, Justice O'Connor, who joined the majority coalition, also issued a simple concurrence expressing her views on narrower grounds.[376] This raises the question whether the narrowest grounds rule is strictly limited to when the Supreme Court fails to issue a majority opinion, as *Marks* states, or applies more generally, capturing the position of the median Justice on the deciding Court. The practical consequences matter in each case. The answer turns on the resolution of yet another question: Is *Marks* purely a means of predicting the Supreme Court's median position, or is it a bargaining rule between or among separate blocs in a given case? The question is unresolved. For two reasons, the better construction treats *Marks* as a bargaining rule.

First, the bargaining construction requires Justices to trade off the price of strictly adhering to their ideal point on one side versus gaining the benefit of a majority precedent on the other. Overall, this reading is more consistent with *Marks*, which anticipates paying the price of foregoing a majority precedent to express the holding on narrowest grounds.[377] Otherwise, the narrowest grounds rule would not be ex-

374 521 U.S. 702 (1997).

375 513 U.S. 298 (1995).

376 *See Glucksberg*, 521 U.S. at 736 (O'Connor, J., concurring); *Schlup*, 513 U.S. at 332 (O'Connor, J., concurring).

377 This observation provides a theoretical basis for a convergent insight from the political science literature on Supreme Court bargaining. In an article written by Cliff Carrubba, Barry Friedman, Andrew D. Martin, and Georg Vanberg, the authors demonstrate that the median member of a majority coalition holds special bargaining prominence even as compared with the median member of the deciding Court. *See* Carrubba et al., *supra* note 334, at 407 ("Consistent with our theory's prediction, the median of the majority coalition (where that median differs from the median of the Court) concurs less often than the median of the Court. Further, concurrences generally increase as one moves away from the median of the coalition."). This empirical observation is consistent with the analysis in the text, demonstrating that the median Justice for

pressly limited in its wording to nonmajority cases. More importantly, were the rule otherwise, in the common single-dimension cases, there would never be an incentive to issue a narrowest grounds concurrence in the judgment. The wiser tactic for the median Justice would invariably be to join the majority opinion and then rewrite that opinion more narrowly in a simple concurrence, thereby claiming the benefit of a personally recrafted majority ruling. This is the judicial equivalent of having the cake you just enjoyed eating.[378]

Second, the bargaining rule construction of *Marks* provides an important, if partial, antidote to a widely accepted premise among Attitudinal judicial scholars.[379] Such scholars rightly claim that, in large numbers, the lineup of the Court's members, coupled with the ideological position of the Court's median jurist, proves robust in predicting case outcomes.[380] And yet, the model has two notable limitations. First, it falsely presumes that all cases align on a single dimension, which proves false both in individual cases and across bodies of caselaw.[381] Second, the model presumes that the median judicial position on any natural Supreme Court is the *fait accompli* outcome. In this analysis, Supreme Court Justices are passive participants in a process concerning which they have limited agency.

A better understanding conceives the Justices as members of discrete coalitions, less granular than discrete positions one through nine, from left to right.[382] Coalition members actively strategize along that dimension, bargaining over how far left or right to settle between two blocs whose members face tradeoffs that matter. These include rigidly insisting upon an ideal point versus making accommodations to forge a majority precedent.[383] If the median position always prevails, hold-

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the Court as a whole and those Justices forming coalitions on either side negotiate to determine where the doctrinal position settles, with accommodations that reflect necessary tradeoffs to ensure that the resulting opinion has the support, and stature, of a majority.

378 For a discussion of Professor Re's contrary claim concerning the strategies available to the median Justice under *Marks*, and why it has proved contrary to available empirical evidence, see *infra* note 383.

379 For a general introduction to the Attitudinal model, see JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

380 *See, e.g.*, *id.* at 86–114.

381 For an analysis demonstrating dimensionality across bodies of caselaw that include standing, the Commerce Clause, separation of powers, equal protection, and the First Amendment, see Maxwell L. Stearns, *Constitutional Law's Conflicting Premises*, 96 NOTRE DAME L. REV. 447 (2020); and Stearns, *supra* note 26 (reviewing special problem of dimensionality in race-based equal protection jurisprudence).

382 *See supra* Table 8.

383 This explains away a troubling datum for judicial politics and legal scholars who mistakenly predict that the "narrowest grounds rule" encourages fractured opinions. *See, e.g.*,

ing the status of a majority precedent, we gain little information concerning how such negotiations are resolved. No matter the outcome, the median controls. Conversely, if we treat *Marks* as a bargaining rule, we gain greater insight into which aspects of legal doctrine matter most to the deciding Justices. Specifically, we can infer what Justices were willing to sacrifice, revealed in past opinions they wrote or joined, as the price of effectuating a majority precedent. Justices are forward-thinking strategic actors, and a model giving them agency is certain to ensure a more robust understanding of their bargaining dynamics. With that, we gain a greater insight into the rule of law.

Glucksberg and *Delo* illustrate these points. *Glucksberg* differs from other cases we have considered in two respects. First, it is a majority decision, and second, although there were no dissents, it includes various simple concurrences and concurrences in the judgment.[384] *Glucksberg* presented a facial challenge to Washington State's statutory ban on physician-assisted suicide.[385] Chief Justice Rehnquist, for a majority, sustained the ban against a facial challenge resting on a line of cases implicating the right of privacy.[386] Justice

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Berkolow, *Much Ado About Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-Percolation After* Rapanos, 15 VA. J. SOC. POL'Y & L. 299, 352 (2008) (observing that positive political theory predicts a greater number of separate opinions under *Marks*); Frank B. Cross, *The Justices of Strategy*, 48 DUKE L.J. 511, 549 (1998) (reviewing LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998)) (suggesting that *Marks* encourages Justices who would express a narrowest grounds holding to avoid compromise as needed to form a majority); Re, *supra* note 11, at 1972 (positing that *Marks* discourages compromise by letting the median justice "hav[e] her cake and eat[] it too"). Professors James F. Spriggs and David R. Stras have shown that despite their own contrary predictions such claims are not supported empirically, with no statistical differences in the formation of fractured versus majority opinions before and after *Marks*. *See* James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 GEO. L.J. 515, 548 (2011) ("The data do not support our hypothesis that plurality decisions are more likely to result after *Marks*, as there is virtually no difference in the rate of plurality decisions before and after *Marks*."). The preceding analysis explains the difficulty. The predictions fail to consider the tradeoff between sticking with an ideal point versus gaining a majority precedent that presumptively binds the Supreme Court. Whereas Berkolow (Professors Melissa M. Berry, Donald J. Kochan, and Matthew Parlow, writing collectively) attributes this result to the unpredictability of *Marks*, Berkolow, *supra*, at 331–32, Professor Re surprisingly proposes that a danger of clarifying *Marks* might be to *encourage* more gamesmanship than is presently observed, Re, *supra* note 11, at 1974 n.170. The dimensionality analysis in this Article explains why *Marks* does not encourage fractured decisions, refuting Professor Re's dire prediction, already in tension with available empirical evidence.

384 *See* Washington v. Glucksberg, 521 U.S. 702, 70 (1997); *id.* at 736 (O'Connor, J., concurring); *id.* at 738 (Stevens, J., concurring in the judgments); *id.* at 752 (Souter, J., concurring in the judgment); *id.* at 789 (Ginsburg, J., concurring in the judgments); *id.* at 789 (Breyer, J., concurring in the judgments).

385 *See id.* at 705–07 (majority opinion).

386 *See id.* at 719–20.

O'Connor, one of five Justices comprising the majority, also produced a simple concurrence stating that nothing in the Court's opinion should be construed to affect the relevant standard of medical care for treating terminally ill patients in considerable pain. Under that standard of care, physicians assisting such patients prescribe pain-relieving medications that relieve suffering, often with the secondary effect of hastening death.[387] This is known as the double-effects doctrine, meaning that high doses of palliative medicines, such as morphine, can have two consequences—improving comfort and hastening death—and be permitted for the former without regard to the latter.[388]

As a matter of legal policy, Justice O'Connor's position is overwhelmingly compelling. Those concurring in the judgment would have gone further, expressing the view that although the facial challenge fails, an applied challenge might recognize a right to engage physicians in more active ways to hasten death, even beyond the double-effects doctrine.[389]

The *Glucksberg* opinions easily align on a single dimension, with the most restrictive understanding of due process embraced by the majority, the most expansive view embraced by those concurring in the judgment, and Justice O'Connor taking the median position. The unanswered question is whether her position, however compelling, expresses the holding in *Glucksberg* notwithstanding that she joined the majority opinion.[390]

The same issue arose in *Delo*, a more complex case involving successive petitions for habeas corpus relief, for which there is a longstanding policy based on a federal statute that presumes strongly against judicial discretion—let alone obligation—to entertain such petitions.[391] The case produced three opinions. Writing for a majority of five that included Justice O'Connor, Justice Stevens remanded a case that dismissed a successive habeas petition, holding that the procedu-

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387 *See id.* at 736–38 (O'Connor, J., concurring).

388 *See, e.g.*, Alison McIntyre, *Doctrine of Double Effect*, STAN. ENCYC. PHIL. (Dec. 24, 2018), https://plato.stanford.edu/entries/double-effect/ [https://perma.cc/ZP99-TH8J].

389 *See Glucksberg*, 521 U.S. at 738, 750–52 (Stevens, J., concurring in the judgments); *id.* at 789–92 (Breyer, J., concurring in the judgments).

390 Notably, Justice Ginsburg issued a concurrence in the judgment stating she had done so for the reasons expressed in Justice O'Connor's concurrence, possibly implying that she regarded treating Justice O'Connor's separate opinion as controlling in tension with O'Connor's having also joined the majority. *See Glucksberg*, 521 U.S. at 789 (Ginsburg, J., concurring in the judgments).

391 *See* Schlup v. Delo, 513 U.S. 298, 301 (1995). The statutory and caselaw history is nuanced and what follows is necessarily simplified, but it does not undermine the essential insight as it relates to *Marks*.

ral bar in entertaining such a petition based on cause and prejudice should not apply to a claim involving new evidence of innocence when failing to hear the petition risks a fundamental miscarriage of justice.[392] Writing in dissent, Justice Scalia chided the majority for relying upon equitable principles and caselaw in place of the relevant governing statute, 28 U.S.C. § 2244.[393] He construed the statute to preclude hearing a successive petition unless it is clear the petitioner has not withheld the new basis for the claim and the successive petition is not otherwise abusive.[394] Justice Scalia found no statutory basis for allowing a claim to proceed based on factual innocence or to avoid a fundamental miscarriage of justice.[395] Justice O'Connor, despite joining the majority, produced a simple concurrence expressing the view that although the district court applied an incorrect standard in dismissing the petition, she did not read the majority to remove discretion as to whether to entertain such successive petitions.[396]

In a footnote to his opinion, Justice Scalia stated the following:

> The claim that "the Court does not, and need not, decide whether the fundamental miscarriage of justice exception is a discretionary remedy," is not in my view an accurate description of what the Court's opinion says. Of course the concurrence's merely making the claim causes it to be an accurate description of what the Court today *holds*, since the narrower ground taken by one of the Justices comprising a five-Justice majority becomes the law.[397]

As a doctrinal matter, whether Justice Scalia is correct is unresolved. If we view the *Marks* doctrine as one piece in a larger, more intricate, puzzle, his reading seems problematic. The other pieces fit less well together, perhaps not at all, if there is no difference in the price paid by a median member of the Court in joining or not joining a majority opinion. We also gain less information from deciding Justices concerning which doctrinal differences mattered most, as we cannot observe what Justices might have willingly relinquished to advance a preferred ruling.

Treating *Marks* as a bargaining rule avoids these problems by recognizing that Justices are active participants—with agency—in a com-

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392 *See id.* at 316, 332.

393 *See id.* at 342–45 (Scalia, J., dissenting).

394 *See id.* at 344.

395 *See id.* at 342–51.

396 *See id.* at 332–34 (O'Connor, J., concurring).

397 *Id.* at 344 n.1 (Scalia, J., dissenting) (citation omitted) (quoting *id.* at 333 (O'Connor, J., concurring)) (citing Marks v. United States, 430 U.S. 188, 193 (1977)).

plex bargaining process. This more robust image of the Court as a whole leaves other aspects of the larger, complex puzzle intact, even as part of that very completeness involves acknowledging inevitable incompleteness as an endemic feature of Supreme Court decision making.

Conclusion

This Article advances a counterintuitive observation: sitting members of the Supreme Court better reveal their understanding of the narrowest grounds rule through modeled behaviors than in their written opinions. This claim becomes more intuitive when we recognize that at its core, the narrowest grounds rule represents a partial solution to a more complex problem associated with group decision making. Because some aspects of that larger problem prove intractable—impossible to resolve without creating other, potentially greater, difficulties—it might be less surprising that when their voting behaviors affect the designated holding, the Justices make more nuanced assessments than when considering the narrowest grounds rule in the abstract.

The narrowest grounds rule is an essential part of a nuanced system of Supreme Court decision making, also including outcome voting, strategic bargaining, precedent, holding versus dictum, and, on occasion, vote switching. Removing one piece risks making the others fit less well or not at all. Modeling narrowest grounds requires exploring the role of dimensionality in fractured Supreme Court cases. The implications are simpler when opinions align on a single dimension; problems arise when opinions implicate multiple dimensions. Failing to recognize this distinction, including by relying on imperfect metaphors rather than a model, encourages misguided claims of inapplicability, even in cases in which the narrowest grounds rule straightforwardly applies.

This Article provided a clarifying statement of the narrowest grounds rule that avoids these challenges and that forthrightly acknowledges the inherent limitations of even a perfectly crafted doctrine. Along the way, the Article offered insights into Supreme Court bargaining dynamics, related *Marks* to other doctrines, and offered a partial antidote to a premise respecting a dominant school of political science. A better understanding of the narrowest grounds doctrine promises to benefit lawyers, legal scholars, and perhaps most of all, judges and Justices, off or on the Supreme Court.

APPENDIX A: STATE COURT APPLICATIONS OF NARROWEST GROUNDS RULE TO STATE HIGHEST COURTS[398]

States	Relevant Authorities	Quotes/Descriptions	Y	N	U
Ala. (elect.)	*Ex parte* Ball, No. 1190842, 2020 WL 5742599, at *1 (Ala. Sept. 25, 2020) (Parker, C.J., concurring specially).	"[I]f, in the prior case, a particular rationale supporting the result was agreed with by majority of judges, even in separate opinions, the zone of their agreement constitutes binding precedent and thus a 'prior decision.' . . . Conceptually, that cobbled-majority effect is no different from what would have occurred if the old tradition of seriatim opinions had continued."			
	J.A.H. v. Calhoun Cnty. Dep't of Hum. Res., 865 So. 2d 1228, 1232 (Ala. Civ. App. 2003).	"[A]s this court noted in *K.W. v. J.G.*, . . . *Y.M.* was a plurality opinion." (citations omitted) (citing K.W. v. J.G., 856 So. 2d 859 (Ala. Civ. App. 2003); and then citing Y.M. v. Jefferson Cnty. Dep't of Hum. Res., 890 So. 2d 103 (Ala. Civ. App. 2003)).			
	Id. at 1233 (Crawley, J., concurring in the result).	"I disagree with the statements in the [majority] opinion indicating that the holding in *Y.M.* . . . is somewhat less than authoritative because *Y.M.* was a plurality opinion. See my opinion concurring specially in *E.W. v. Jefferson County Department of Human Resources*, . . . which explains my opinion that the legal principle . . . was agreed with by a majority of this court." (citations omitted) (citing *Y.M.*, 890 So. 2d 103; and then citing E.W. v. Jefferson Cnty. Dep't of Hum. Res., 872 So. 2d 167, 173 (Ala. Civ. App. 2003) (Crawley, J., concurring specially)).			
	E.W. v. Jefferson Cnty. Dep't of Hum. Res., 872 So. 2d 167, 170 (Ala. Civ. App. 2003) (per curiam)	"In *Y.M.*, two members of this court concurred in an opinion that concluded that certain DHR court reports contained hearsay that was inadmissible in a hearing on a petition to terminate a parent's parental rights. The parties in *Y.M.* did not argue or			

398 This Appendix provides data for all fifty states on whether the lower courts within each state apply the narrowest grounds rule to nonmajority decisions of the state highest court. State courts are not bound by *Marks v. United States*, 430 U.S. 188 (1977), to apply the narrowest grounds rule to state highest court rulings. Each listing is coded based upon whether the state judiciary is elected (elect.) or appointed (appt.). For each state, the table provides citations to relevant authorities and, as appropriate, case excerpts or synopses. For some states, the table provides helpful secondary authorities that inform how members of the bar have understood relevant aspects of state practice. At the end of each state listing appears a final classification coded as Y (yes), N (no), or U (unresolved), responding to the question: Do lower courts within the state apply the narrowest grounds rule to the state highest court's nonmajority decisions? Each entry is preceded by an explanation, including the basis for inevitable judgment calls for some states. The end of the table provides summary data as to how many states fall within each category and further subdivides based upon whether the state judiciaries are appointed or elected.

	(for 5 justices).	present evidence to support a conclusion that the reports at issue might be admissible under an exception to the hearsay rule, and the main opinion did not address that possibility. As Judge Crawley points out, in his special concurrence [in *E.W.*], the holding reached by the main opinion in *Y.M.* '"*may* be viewed as that position taken by those Members who concurred in the judgements *on the narrowest grounds*.'" However, the fact that three members of this court concurred in the result reached by the main opinion in *Y.M.* *may* also be viewed as indicating that under the narrow facts of that case, and based on the limited arguments presented to this court in that case, the judgment was due to be reversed. The vote line in *Y.M.* reveals that every judge on this court agreed to reverse the trial court's judgment because the court reports constituted inadmissible hearsay under the fact of that case; the vote line does not necessarily indicate that every judge on this court agreed with the rationale for that reversal. The fact that some judges concurred in the result in *Y.M.* did not necessarily foreclose the possibility that, under different facts or upon the presentation of other legal theories, those judges might reach a different result than they reached in *Y.M.* Rather, it is *possible* to interpret *Y.M.* as concluding that the trial court erred in admitting the court reports—*in that case*. We reiterate the conclusion of the Supreme Court of Alabama that '[t]he precedential value of the reasoning in a plurality opinion is questionable at best.' . . . Therefore, this court's plurality opinion in *Y.M.* does not definitively support the mother's hearsay argument. However, we need not reach that issue because we conclude that any error the trial court might have committed in admitting [the evidence] . . . was harmless [under ALA. R. APP. P. 45]." (second alteration in original) (citations omitted) (first quoting *E.W.*, 872 So. 2d. at 173 (Crawley, J., concurring specially); and then quoting *Ex Parte* Discount Foods, Inc., 789 So. 2d 842, 845 (Ala. 2001)) (citing *Y.M.*, 890 So. 2d 103).
	Id. at 173 (Crawley, J., concurring specially) (for 1 justice).	"Although the *Y.M.* *opinion* may have been that of a plurality of the court, the *result* (and therefore the *holding*, because there was only one issue raised and addressed) was *unanimous* . . . . The principle of law resulting from a plurality opinion is the narrowest holding agreed to by a majority of the court. The United States Supreme Court has explained: 'When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of [a majority], [the narrowest grounds rule

		applies].' . . . [However,] [i]n *Y.M.*, there *was* a single rationale (the erroneous admission of hearsay) for the result (a reversal). Thus, while all members of this court may not have agreed with the discussion of the disputed issue in *Y.M.*, all members agreed with the holding (that the case should be reversed based on the evidentiary error of improperly admitting hearsay). To attempt to characterize that holding as something less than authoritative is misleading." (citations omitted) (quoting Marks v. United States, 430 U.S. 188 (1977)) (citing *Y.M.*, 890 So. 2d 103).			
	Id. at 174 (Murdock, J., concurring in the result) (for 2 justices).	"While two members of this Court concurred in the plurality opinion in *Y.M.* . . . , I and two other members of this Court chose to concur only in *the result* reached in that case. While I cannot speak for the other two members of this Court who voted only to concur in the result in *Y.M.*, I can say that I agreed with essential aspects of the analysis of the main opinion. More importantly, however, I note that *the result* reached in *Y.M.* was the reversal of the trial court's judgment and the remand of the cause for 'proceedings consistent with the principles expressed in this opinion.' . . . The 'principle[] expressed' in *Y.M.* that provided the basis for reversal was the principle that hearsay that is not otherwise admissible under our rules of evidence is not 'competent evidence' with respect to the issue whether to terminate parental rights. Therefore, I would not have concurred in the result reached in *Y.M.* without agreeing (1) that, under the facts of that case, the court reports at issue contained inadmissible hearsay evidence and, most notably for purposes of the present discussion, (2) that hearsay evidence that is otherwise inadmissible under our rules of evidence is not competent evidence with respect to the issue of whether to terminate parental rights." (third alteration in original) (citations omitted) (quoting *Y.M.*, 890 So. 2d at 114).			
	Ex parte Discount Foods, Inc., 789 So. 2d 842, 845 (Ala. 2001).	"We note again that this Court's opinion in *Discount Foods I* was a plurality opinion. The precedential value of the reasoning in a plurality opinion is questionable at best."			
	Comments:	Although a plurality of the Civil Court of Appeals in Alabama in *E.W.* discusses the narrowest grounds rule, that opinion ultimately acknowledges the Alabama Supreme Court has determined nonmajority opinions are of limited precedential value. The plurality also mentions it is unnecessary to resolve the application of the narrowest grounds			U

		rule to resolve the case. Separate concurring justices in that case seek to apply the narrowest ground rule. Although one might, based on the quoted language from the Alabama Supreme Court, classify this as N, due to the reliance among some lower court judges, we place this as a U.			
Alaska (appt.)	Alaska Dep't of Fish & Game v. Manning, 161 P.3d 1215, 1220–21 (Alaska 2007).	"In *McDowell*, [the court] held that the portion of the 1986 subsistence statute limiting subsistence fishing and hunting activities to rural residents violated the [equal protection clauses] of the Alaska Constitution. . . . But while [the court] held that an equal protection analysis was proper[,] . . . [the court] did not reach a majority consensus as to the proper level of scrutiny to apply. [The plurality determined that "demanding scrutiny" was the appropriate test. But, Justice Moore, in a concurring opinion, articulated a less demanding "close scrutiny" test.] As [the court has] previously noted, '[w]hen a fragmented court decides a case and no single rationale explaining the result enjoys the assent of [the majority], the holding of the court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.' In *McDowell*, it was Justice Moore who concurred on the narrowest grounds and his position would therefore ordinarily be considered the court's holding. However, Justice Moore's concurrence expressly refused to rule out the possibility that a more stringent test was merited and our subsequent case law has, in fact, repeatedly articulated—although never actually applied—the plurality opinion's stringent demanding scrutiny test. Ultimately then, it is not entirely clear which equal protection test carries precedential weight." (last two alterations in original) (footnotes omitted) (quoting *In re* Adoption of Erin G., 140 P.3d 886, 890 (Alaska 2006)) (citing McDowell v. State, 785 P.2d 1 (Alaska 1989)).			
	In re Adoption of Erin G., 140 P.3d 886, 890 (Alaska 2006).	An earlier case, *In re Adoption of T.N.F.*, 781 P.2d 973 (Alaska 1989) (plurality opinion), involves a custody challenge by the non-Indian biological mother of an Indian child to an adoption involving the biological father (through artificial insemination) who is Indian and not her spouse and the biological mother's sister. *See id.* at 974. The question is whether the biological mother may challenge an adoption proceeding under a federal statute, § 1914 of Indian Child Welfare Act (ICWA) of 1978, 25 U.S.C. § 1914, or whether she is foreclosed from doing so based on any of three			

		alternative theories: (1) the incorporation into ICWA of the Alaska statute of limitations absent duress or fraud, (2) a judicially crafted Indian-family exception to disallowing such challenges recognized in New Jersey, as a basis for denying standing, or (3) the concurrence's newly crafted non-Indian mother of an Indian child exception as an alternative basis for denying standing. *See id.* at 974–77. The case is complicated by three factors: (1) the plurality comprises two Justices, and the concurrence and partial dissent are each on behalf of a single Justice; (2) because the concurrence finds no standing, it does not address the statute of limitations issue; and (3) the partial dissent does not address the concurrence's novel standing analysis. All four Justices reject the New Jersey theory involving the non-Indian family exception, and logically, all Justices would agree that for the adoption challenge to succeed, all three bases for disallowing the challenge must be rejected. Any single theory is sufficient to disallow the adoption challenge. Because all reject theory two, only the statute of limitations and the non-Indian mother of an Indian child standing theory are relevant. The plurality (for two) disallows the challenge based on statute of limitations; the concurrence (for one) disallows the challenge based on the novel standing theory. The partial dissent rejects the statute of limitations theory without addressing the novel standing theory. If we assume that had the concurrence addressed it, it would reject the statute of limitations theory, and that had the dissent addressed it, it would accept the concurrence's novel standing theory, that would imply two justices out of four reject each of the two relevant theories advanced to bar the adoption challenge. The conclusion in *In re Adoption of Erin G.* that the narrowest grounds rule cannot be applied to *In re Adoption of T.N.F* is therefore valid because, based on reasonable assumptions, the case implicates more than a single dimension, meaning the *Marks* premise of a single dimension fails to hold. The opinion states: "We agree with David's conclusion that *T.N.F.* does not have stare decisis effect. . . . The United States Supreme Court has held that '[w]hen 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 judgment on the narrowest grounds.' But one federal court has noted that this principle is inapplicable if there is no obvious

		'narrower' opinion or 'common denominator of the Court's reasoning.' *T.N.F.* contains no 'narrower' reasoning agreed upon by all three affirming justices." (alteration in original) (footnotes omitted) (first quoting *Marks*, 430 U.S. at 193; and then quoting Anker Energy Corp. v. Consolidation Coal Co., 177 F.3d 161, 169–70 (3d Cir. 1999)).			
	Comments:	Alaska has embraced language that suggests considering the application of *Marks* to its state highest court decisions, but the *Manning* court circumvents applying the reasoning from the opinion it identifies as narrower through a doctrinal exception, and the *Erin G.* court correctly recognizes that the doctrine's premise does not apply in the earlier *T.N.F.* case. Although based on these cases one might categorize Alaska as Y, given these two uncertain applications, we take the more cautious approach of categorizing it as a U.			U
Ariz. (appt.)	N/A	It does not appear that the Arizona Supreme Court has considered *Marks* as applied to their own fractured opinions; the databases show twelve cites to *Marks* only to discern the narrowest holding in U.S. Supreme Court cases. *See, e.g.*, State v. Bush, 423 P.3d 370, 387 (Ariz. 2018); State v. Medina, 306 P.3d 48, 63 (Ariz. 2013).			
	Comments:	Arizona has not addressed or resolved this issue.			U
Ark. (elect.)	Byrd v. State, 879 S.W.2d 435, 438 (Ark. 1994).	In *Byrd v. State*, involving a criminal conviction for a misdemeanor by a six-person jury, Justice Brown discusses the Minnesota Supreme Court case, *State v. Hamm*, 423 N.W.2d 379 (Minn. 1988). Justice Brown explains that the Minnesota Constitution is similar to that of Arkansas in that both constitutions "provide[] that the right to a jury trial [is] 'inviolate' but d[o] not state the number of jurors." *Byrd*, 879 S.W.2d at 438. After explaining Justice Yetka's opinion, the *Byrd* majority describes Justice Kelley's concurring opinion as being "on narrower grounds." *Id.* Whereas the Minnesota plurality treats the twelve-person jury as inviolate, Justice Kelley considers the permissibility of modifying it, albeit only by state constitutional amendment. *See Hamm*, 423 N.W.2d at 387. Further, the *Byrd* majority appears to accept Justice Kelley's opinion, stating "We agree and are reluctant to erode the fundamental right of trial by jury under our system of state government without a vote of the people, particularly in light of Amendment 16 which			

		installed nine-juror verdicts in civil cases and was a clear recognition by the people of this State that twelve-member juries was the standard."			
	Comments:	*Byrd* may shed light on how lower courts should interpret plurality decisions by the Arkansas Supreme Court. The databases, however, do not show Arkansas cases expressly adopting the *Marks* rule for Arkansas plurality decisions, as opposed to using the doctrine to construe a nonmajority decision by the Minnesota Supreme Court; the case does not express a firm commitment to applying the rule to its own state highest court decisions.			U
Cal. (appt.)	People v. Villalpando, No. G045028, 2013 WL 2366207, at *21–22 (Cal. Ct. App. May 30, 2013).	Applying *Marks* to *People v. Rodriguez*, 290 P.3d 1143 (Cal. 2012), and concluding that Justice Baxter's "concurring opinion represents the *Rodriguez* holding" because "Justice Baxter concurred in the *Rodriguez* judgment on the narrowest grounds"			
	People v. Rodriguez, No. G049977, 2015 WL 5231992, at *12 n.7 (Cal. Ct. App. Sept. 8, 2015).	"Because Justice Baxter concurred in the *Rodriguez* judgment on the narrowest grounds, his concurring opinion represents the *Rodriguez* holding. When a fragmented court decides a case and no single rationale explaining the result enjoys a majority assent, the court's holding may be viewed as the position concurring in the judgments on the narrowest grounds."			
	Comments:	California appears to apply the *Marks* rule to its own nonmajority opinions.	Y		
Colo. (appt.)	Town of Breckenridge v. Egencia, LLC, 2018 COA 8, ¶ 38.	"Breckenridge's reliance on Justice Coat's plurality decision in *Expedia II* is misplaced. 'When a fragmented [c]ourt decides a case and no single rationale explaining the result enjoys the assent' of a majority of justices, 'the holding of the [c]ourt may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.' Accordingly, Justice Hood's concurrence [on the narrowest grounds] in *Expedia II* is instructive." (first and second alterations in original) (citations omitted) (quoting Marks, 430 U.S. at 193) (citing City & Cnty. of Denver v. Expedia, Inc. (*Expedia II*), 2017 CO 32).			
	Comments:	Colorado appears to apply the *Marks* rule to its own nonmajority opinions.	Y		
Conn. (appt.)	Conn. Coal. for Just. in Educ. Funding, Inc. v. Rell, 176 A.3d 28, 36 (Conn. 2018).	"[B]ecause Justice Palmer's concurring opinion provided the narrowest grounds of agreement, it was controlling." (referring to the split opinion in *Conn. Coal. for Jus. in Educ. Funding, Inc. v. Rell*,			

		990 A.2d 206 (Conn. 2010)).				
	Little v. Comm'r of Corr., 172 A.3d 325, 339 (Conn. App. Ct. 2017).	Applying *Marks* to *Luurtsema v. Comm'r of Corr.* ("*Luurstema II*"), 12 A.3d 817 (Conn. 2011), and concluding "that the only parts of the plurality opinion in *Luurtsema II* that have any precedential value are the court's affirmative answers to the reserved questions of whether *Salamon* applies retroactively in habeas corpus proceedings and to Luurtsema's case in particular. Those answers are the narrowest grounds on which a majority of the panel clearly agreed." (citations omitted) (citing State v. Salamon, 949 A.2d 1092 (Conn. 2008)).				
	Comments:	Connecticut applies *Marks* to its state court opinions.	Y			
Del. (appt.)	N/A	The Delaware Supreme Court has five members and generally hears cases in panels of three. *See* DEL. SUP. CT. R. 2(a). The Delaware Supreme Court hears cases en banc if the panel is unable to reach a unanimous decision. *See* DEL. SUP. CT. R. 4. Accordingly, plurality decisions are rare, and it does not appear that the Delaware courts have addressed how to determine the holding of such fragmented decisions. The Rules of the Supreme Court of Delaware also do not address this question. *See* DEL. SUP. CT. R. 2; DEL. SUP. CT. R. 4; *The Supreme Court of Delaware: Oral Arguments*, DEL. CTS., https://courts.delaware.gov/help/proceedings/supreme.aspx [https://perma.cc/BF49-CRV6]. Most notable is Rule 4(d), *Panel assignments and the Court en Banc: Rehearing by Court*.				
	Comments:	Delaware has not addressed or resolved this issue.				U
Fla. (appt.)	Cannon v. State, 206 So. 3d 831, 834 n.3 (Fla. Dist. Ct. App. 2016).	"With a fragmented decision like [the Florida Supreme Court's fractured *Steinhorst v. State*, 636 So. 2d 498 (Fla. 1994) opinion], we are bound by the narrowest grounds on which a majority of the justices agreed."				
	Comments:	Florida appears to apply the *Marks* rule to its own nonmajority opinions.	Y			
Ga. (elect.)	Nuci Phillips Mem'l Found., Inc. v. Athens-Clarke Cnty. Bd. of Tax Assessors, 703 S.E.2d 648, 653–61 (Ga. 2010) (Nahmias, J., concurring specially).	Under the section titled "The Implication of This Case," Justice Nahmias, writing a special concurrence, observes that the plurality opinion is narrower than his separate opinion and that the plurality opinion will be precedent in future cases. Justice Nahmias does not cite to *Marks*.				
	Comments:	This could be categorized as Y or U. Although this only appears in a special concurrence, it is against the interest of Justice Nahmias, who asserts that the plurality opinion, not				U

		his own, controls as precedent. Even so, we regard this an insufficient datum to conclude definitively that Georgia is applying the narrowest grounds rule to its own fractured state highest court opinions.			
Haw. (appt.)	State v. Kikuta, 253 P.3d 639, 658 n.14 (Haw. 2011).	The Kikuta court declined to apply the narrowest grounds doctrine to *State v. Stenger*, 226 P.3d 441 (Haw. 2010), stating: "[U]nder the doctrine set forth in *Marks v. United States*, also known as the 'narrowest grounds' doctrine, . . . the holding of a plurality opinion 'may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.' However, that doctrine has been discredited. More importantly, the doctrine has been applied very rarely and inconsistently by the Supreme Court." (citations omitted) (quoting *Marks*, 430 U.S. at 193). The Court relied upon Justice Alito's opinion in *Nichols v. United States*, 511 U.S. 738, 745–46 (1994), criticizing *Marks* as more easily stated than applied.			
	Comments:	The Hawaii Supreme Court declined to apply the *Marks* rule to its own opinions regarding the doctrine as "discredited."		N	
Idaho (elect.)	N/A	It does not appear that Idaho courts have considered *Marks* as applied to their own highest court plurality opinions. The research databases reveal five cites to *Marks* by Idaho courts to either discern the narrowest holding for U.S. Supreme Court plurality opinions or on the separate issue of retroactive application of laws. *See, e.g.*, State v. Wass, 396 P.3d 1243, 1248–49 (Idaho 2017); State v. Stanfield, 347 P.3d 175, 184–85 (Idaho 2015); State v. Shackelford, 247 P.3d 582, 601 n.8 (Idaho 2010). The databases show no Idaho cases using the narrowest grounds or similar language on their own nonmajority opinions.			
	Comments:	Idaho has not addressed or resolved this issue.			U
Ill. (elect.)	People v. Gutman, 2011 IL 110338, ¶ 25.	Declining to apply *Marks* to a U.S. Supreme Court opinion, by adopting Justice Alito's dissenting opinion in *United States v. Santos*, 553 U.S. 507 (2008), instead of Justice Stevens's narrowest grounds concurrence, stating "[u]nlike the federal courts, we are not required to discern the meaning of Justice Stevens's concurrence and attempt to apply it."			
	Comments:	This case is notable for two reasons. First, it addresses a U.S. Supreme Court decision and appears to			U

		mistakenly claim that the narrowest grounds rule binds only lower federal courts with respect to such nonmajority cases, rather than all lower courts. Second, although it does not definitively resolve the matter, by rejecting the application of *Marks* in a context in which it should be applied, the Illinois Supreme Court strongly implies that it would decline to extend the doctrine to its own case law. Although this could be classified as N or U, because it does not specifically address the application to state highest court decisions, we classify this as U.			
Ind. (appt.)	Harvey v. State, 719 N.E.2d 406, 410 n.4 (Ind. Ct. App. 1999).	"This court is obliged to follow precedents established by the Indiana Supreme Court. However, no precedent for us to follow can be drawn from *Emery* as it was affirmed by an equally divided court in two separate opinions. Ordinarily, following the procedure used to extract a rule of law from a fragmented United States Supreme Court, we would look for the 'least common denominator' among the justices and find 'the position taken by the [j]ustices who based their acquiescence in the decision on the narrowest grounds.'" (alteration in original) (citations omitted) (quoting Frame v. State, 587 N.E.2d 173, 175 (Ind. Ct. App. 1992)) (citing Emery v. State, 717 N.E.2d 111 (Ind. 1999))			
	Comments:	By "following the [same] procedure used to extract a rule of law from a fragmented United States Supreme Court," *id.*, Indiana appears to apply the *Marks* rule to its own nonmajority opinions.	Y		
Iowa (appt.)	N/A	It does not appear that Iowa courts have considered *Marks* as applied to their own highest court plurality opinions. The research databases show four cites to *Marks* by Iowa courts to discern the narrowest holding for U.S. Supreme Court plurality opinions. *See, e.g.*, Book v. Voma Tire Corp., 860 N.W.2d 576, 592 (Iowa 2015). The databases show no Iowa cases using the narrowest grounds or similar language on their own nonmajority opinions.			
	Comments:	Iowa has not addressed or resolved this issue.			U
Kan. (appt.)	State v. Hoffman, 196 P.3d 939, 940–41 (Kan. Ct. App. 2008).	"The Kansas Supreme Court considered a case that is factually similar to [the appellee's] in *State v. Fisher*. A three-member plurality was joined by another justice in concluding that the district court properly suppressed evidence collected in a trash pull from a rural residence. The plurality opinion			

		applied a two-part test. First, the court must determine whether the trash was located within the curtilage of the residence. . . . Second, if the trash is located within the curtilage, the court must determine '"whether the person manifested a subjective expectation of privacy in the trash container and whether that expectation of privacy in the garbage is objectively reasonable."' . . . While the view we've noted from *Fisher* was adopted by only a plurality of three justices, it is consistent with the United States Supreme Court's opinion in [*California v. Greenwood*, 486 U.S. 35 (1988)]. Thus, the *Fisher* plurality's conclusion seems to us equally applicable to [the appellee's] case." (citations omitted) (quoting State v. Fisher, 154 P.3d 455 (Kan. 2007)). This case is of limited value because the quoted language can be read either to imply general reliance on the plurality in a nonmajority case or specific reliance on the plurality because it accords with a U.S. Supreme Court case's reasoning.			
	Comments:	There is insufficient data from which to determine whether Kansas courts rely on the plurality opinion in a nonmajority case or have failed to consider the application of the narrowest grounds rule.			U
Ky. (elect.)	Bailey v. Bertram, No. 2009–SC–000210–MR, 2010 WL 1641115, at *4 (Ky. Apr. 22, 2010).	In *Bailey*, appellee, the marital father of a child in a custody dispute, relied on the Kentucky Supreme Court's decision in *J.N.R. v. O'Reilly*, 264 S.W.3d 587 (Ky. 2008), to obtain a writ of prohibition that disallowed mandated paternity testing, claiming state statutes denied subject matter jurisdiction to any court to determine paternity of a child where there was no evidence or allegation that the marital relationship ceased ten months prior to the child's birth. *Bailey*, 2010 WL 164115, at *2. The *Bailey* court noted that in *J.N.R.*, two justices joined the main opinion, two justices separately concurred in the result, and three justices dissented. *See id.* at *4. The Court explained that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of [four] 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 . . . ." *Id.* (second and third alterations in original) (quoting *Marks*, 430 U.S. at 193). The *Bailey* court further determined that under the relevant caselaw, a nonmajority decision may not overturn a past state highest court decision. *Id.* In this instance, the relevant proposition on which appellee relied was not expressed in the			

		concurrence of four justices, comprising a majority. The court ultimately determined this did not end the matter, and it decided to allow required paternity, rejecting a claim of equitable estoppel. *Id.*			
	Comments:	The Kentucky Supreme Court states that the narrowest grounds rule controls its fractured decisions, although as applied to the specific case under review, this is dictum because the application would require a majority decision overturning a prior state highest court ruling. Even so, there is no contrary evidence suggesting that in a proper case the narrowest grounds rule would fail to apply. Therefore, although one might justifiably classify as a U, given the absence of contrary evidence, we are comfortable classifying as a Y.	Y		
La. (elect.)	State v. Thompson, 2015-0886 (La. 9/18/17); 233 So. 3d 529, 568 n.1 (Crichton, J., concurring in part and dissenting in part).	"A plurality opinion (consisting of less than four votes at the Louisiana Supreme Court) 'lack[s] precedential authority.'" (alteration in original) (quoting Warren v. La. Med. Mut. Ins. Co., 2007-0492 (La. 12/2/08); 21 So. 3d 186, 210 (Knoll, J., concurring in the result)).			
	State v. Karey, 2016-0377 (La. 6/29/17); 232 So. 3d 1186, 1205 n.1 (Crichton, J., dissenting).	"In finding this to be an enforceable agreement, the plurality opinion, in my view, ignores what could be a chilling effect on pre-trial discussions between district attorneys and defense attorneys, which would be to the detriment of all parties in the criminal justice system. Fortunately, as a plurality decision, its holding is on the more narrow grounds of the concurring justice." (citing *Marks*, 430 U.S. at 193).			
	Warren v. La. Med. Mut. Ins. Co., 2007-0492 (La. 12/2/08); 21 So. 3d 186, 210 (Knoll, J., concurring in the result).	"[W]hile I concur in the result reached by the majority dismissing plaintiffs' [medical malpractice] suit, I disagree with the majority's reliance upon the plurality opinion in *Borel v. Young*, on rehearing, which has no precedential authority to support the holding that the three-year provision in [the Louisiana statute] is prescriptive, and its reaffirmation of *Hebert v. Doctors Memorial Hospital*. . . . I find plaintiffs' action is perempted [sic] by the clear language of the [Louisiana statute], and write separately to reiterate my position on the issue of the peremptive [sic] nature of [the statute's] three-year provision, which issue remained unresolved in our jurisprudence in light of the lack of precedential authority of the plurality opinion on rehearing in *Borel*." (citations omitted) (first citing			

		Borel v. Young, 2007-0419 (La. 11/27/07); 989 So. 2d 42; and then citing Hebert v. Drs. Mem'l Hosp., 486 So. 2d 717 (La. 1986)). In a footnote, Justice Knoll added: "Prior to the majority's reliance on *Borel* as authority, this reaffirmation [of *Hebert*] had no precedential value as *Borel* on rehearing was a plurality opinion." *See id.* at 210 n.1.			
	Comments:	Although the *Karey* dissent appears to support applying *Marks* to a Louisiana Supreme Court nonmajority opinion, the separate *Thompson* and *Warren* opinions suggest that such nonmajority opinions lack precedential value. Given the limited and seemingly inconsistent authorities, Louisiana is categorized as a U.			U
Me. (appt.)	Eaton v. Paradis, 2014 ME 61, ¶ 19, 91 A.3d 590, 593–94 (plurality opinion).	"[W]e had not precisely articulated the standard by which petitions for de facto parental rights must be evaluated until our recent opinion in *Pitts v. Moore*. The plurality opinion in *Pitts* stated [that what] '[a]n individual seeking parental rights as a de facto parent must . . . show [according to a two-part test].' . . . Because we clarified the concepts necessary for a determination of de facto parenthood after the court denied [appellant's] petition for de facto parental rights, we remand the case . . . in light of our opinion in *Pitts*." (fourth alteration in original) (citation omitted) (quoting Pitts v. Moore, 2014 ME 59, ¶ 27, 90 A.3d 1169, 1179 (plurality opinion)) (citing *Pitts*, 2014 ME 59, 90 A.3d 1169). The *Pitts* plurality is also the narrowest grounds opinion. The plurality announced a two-part test for determining de facto parenthood: (1) that the person has undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life, and (2) that there are exceptional circumstances, which occur only when the nonparent can show that harm to the child will occur if he or she is not acknowledged as a de facto parent. *See Pitts*, 2014 ME 59, ¶ 27, 90 A.3d 1169. The concurrence determined that the state has a compelling interest to intervene when a person has shown the first factor above and that a showing of harm to the child is not required. *See id.* ¶¶ 49–53 (Jabar, J., concurring). Finally, the dissent agreed with the two-part test (caretaking parental role and harm) but believed that the plurality reformulated or added to these standards, thus lowering the bar. *See id.* ¶¶ 66–72 (Levy, J., dissenting). The dissent is therefore more demanding. Although this is			

		narrowest, the *Eaton* court does not indicate that as the basis for relying on the plurality decision.
	Wood v. Wood, 407 A.2d 282, 284 n.2 (Me. 1979).	"In the *Pendexter* case, what appeared to be the opinion of the [Supreme Judicial Court of Maine] was signed by only one Justice. The opinion denominated a concurring opinion was joined in by three Justices. Thus, the principles enunciated in this latter opinion are controlling because only four Justices participated in the decision." (citations omitted) (citing Pendexter v. Pendexter, 363 A.2d 743, 745, 747–50 (Me. 1976))
	Comments:	Although the *Eaton* case relies on a narrowest plurality opinion, it does not state it is doing so on the basis of a *Marks* analysis; the substantially earlier *Wood* case is likewise unhelpful in resolving the question. U
Md. (appt.)	State v. Falcon, 152 A.3d 687, 701, 707–08 (Md. 2017).	Applying *Marks* to *Schisler v. State*, 907 A.2d 175 (Md. 2006), and concluding that "careful examination of the opinion reveals that, in *Schisler*, all seven of the judges of this Court agreed that the General Assembly can end early the terms of incumbent members of a commission, regardless of who they are appointed by." "As to plurality opinions, this Court has applied the [*Marks*] test for determining the precedential value of a case that lacks a majority opinion by the Supreme Court . . . . This approach is known as the '*Marks* approach,' after *Marks v. United States* . . . ." (citation omitted).
	In re Nick H., 123 A.3d 229, 238–39 (Md. Ct. Spec. App. 2015).	"Because *Doe I* is a plurality decision, we employ the *Marks* Rule to determine the Court's holding . . . . Thus the *Marks* Rule requires us to determine the common thread running through the plurality and concurring opinions of *Doe I*." (citing Doe v. Dep't of Pub. Safety & Corr. Servs. (*Doe I*), 62 A.3d 123 (Md. 2013)). "Because the *Marks* Rule directs us to the narrowest ground common to the plurality and the concurrence, Judge McDonald's interpretations of Article 17 [of the Maryland Declaration of Rights] . . . represents the 'position taken by those Members who concurred in the judgment on the narrowest grounds.'" (quoting Wilkerson v. State, 24 A.3d 703, 715 (Md. 2011)) (citing MARYLAND DECLARATION OF RIGHTS, art. XVII).
	Quispe del Pino v. Md. Dep't of Pub. Safety & Corr. Servs., 112 A.3d 522, 530 (Md. Ct. Spec. App. 2015).	"[B]ecause the 'disadvantage' standard used by the plurality in applying Article 17 [of the Maryland Declaration of Rights] 'did not command not command a majority of the Court, the holding of *Doe* [*I*] must be viewed as the narrower position taken by Judges McDonald and Adkins.'" (third

		alteration in original) (citing MARYLAND DECLARATION OF RIGHTS, art. XVII).			
	Guardado v. State, 98 A.3d 415, 421 (Md. Ct. Spec. App. 2014).	Applying *Marks* to *Miller v. State*, 77 A.3d 1030 (Md. 2013), which had no majority opinion, and concluding the Judge Battaglia's plurality opinion in that case represented the narrowest holding.			
	Cure v. State, 26 A.3d 899, 910–11 (Md. 2011).	Analyzing what the Maryland Courts termed a "fractured" opinion and adopting the reasoning of Judge Wilner's dissent in *Brown v. State*, 817 A.2d 241, 255 (Md. 2003) (Wilner, J., dissenting), which constituted the narrowest grounds, and held that "[f]or purposes of stare decisis, we note this is a proposition that garnered the support of the four Judges in *Brown*."			
	State v. Giddens, 642 A.2d 870, 874 n.6 (Md. 1994).	Applying a *Marks*-like rule to *Prout v. State*, 535 A.2d 445, 450–51 (Md. 1998), in which "the three judge plurality believed that the issue of whether a particular crime bears on credibility should be viewed as a matter of trial court discretion. But the two concurring judges and two dissenting judges [i.e., four judges] each thought that the question was a matter of law." (The *Giddens* court cited *Prout* as precedent for holding that this issue was a matter of law but did not cite to *Marks*.)			
	Comments:	Maryland applies *Marks* to discern the narrowest holding in its state court opinion. The chart does not include several additional unpublished opinions expressing this point. *See, e.g.*, Feaster v. State, No. 1967, 2015 WL 9590659, at *5 n.3 (Md. Ct. Spec. App. Dec. 30, 2015).	Y		
Mass. (appt.)	Cote-Whitacre v. Dep't of Pub. Health, No. 04–2656, 2006 WL 3208758, at *2–3 (Mass. Sup. Ct. Sept. 29, 2006).	"The *Cote-Whitacre* decision consists of five different opinions . . . . The court thus [did] not present a majority opinion as to the rule of law to be applied in determining whether same-sex marriage is prohibited in another state [within the meaning of MASS. GEN. LAWS ch. 207, §§ 11, 12 (repealed 2008)]. In *Marks v. United States*, the U.S. Supreme Court ruled that when a divided Court provides no majority rationale for its decision, '"the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .' On the issue of statutory construction, Chief Justice Marshall's concurring opinion in *Cote-Whitacre* articulates the narrowest grounds for the judgment of the court. . . . Chief Justice Marshall's statutory construction, as the position of the court concurring in the judgment on the narrowest grounds, thus represents the holding of the court on that issue." (fourth alteration in original) (citations omitted) (quoting *Marks*, 430 U.S. at 193) (citing Cote-			

		Whitacre v. Dep't of Pub. Health, 844 N.E.2d 623 (Mass. 2006)).			
	Medina v. Hochberg, 987 N.E.2d 1206, 1211 n.11 (Mass. 2013).	Applying *Marks* to *Coombes v. Florio*, 877 N.E.2d 567 (Mass. 2007), and concluding that the holding "represents the narrowest position of the court, where Justice Ireland (joined by Justices Spina and Cowin) issued a concurring opinion, and Justice Greaney issued an opinion concurring in part and dissenting in part."			
	Comments:	Massachusetts applies *Marks* to discern the narrowest holding in its state court opinions.	Y		
Mich. (elect.)	Liquia v. Antler Bar Amusements, LLC, No. 348087, 2020 WL 4381870, at *4 (Mich. Ct. App. July 30, 2020).	In a personal injury action arising from hitting an obstruction arising from the ground at night, defendant argued that the open and obvious doctrine absolved it of any duty to the plaintiff. *See Liquia*, 2020 WL 4381870, at *2. In support of this argument, the defendant relied on a plurality opinion from the Michigan Supreme Court, *Singerman v. Municipal Service Bureau*, 565 N.W.2d 383 (Mich. 1997). *Id.* at *5. However, the Michigan Court of Appeals noted that it is not bound by plurality decisions of the Michigan Supreme Court. *Id.*			
	Auto Club Grp. Ins. Co. v. Booth, 797 N.W.2d 695 (Mich. Ct. App. 2010).	*Auto Club* involved an action for a declaratory judgment by an insurance company arguing that the defendant's homeowner's policy did not cover the defendant's actions in an accidental shooting at his home. *See Auto Club*, 797 N.W.2d at 696–976. Defendant relied on *Allstate Insurance Co. v. McCarn*, 645 N.W.2d 20 (Mich. 2002), in arguing that he was entitled to coverage based on a two-prong test devised by the Michigan Supreme Court. *Auto Club*, 797 N.W.2d at 976. But in *Auto Club*, the Michigan Court of Appeals noted that there was no majority in *McCarn* and that plurality opinions in which no majority of the participating justices agree with respect to the reasoning are not considered authoritative interpretations binding under the doctrine of stare decisis. *Id.* at 699.			
	Negri v. Slotkin, 244 N.W.2d 98, 99–100 (Mich. 1976).	"[The Court of Appeals's] reliance [on *People v. Jackson*, 212 N.W.2d 918 (Mich. 1973)] was misplaced. In *Jackson* we considered the impact on this Court of a case in which a majority of the justices sitting failed to concur in the reasoning for the decisions. . . . Plurality decisions in which no majority of the justices participating agree as to the reasoning are not an authoritative interpretation binding on this Court under the doctrine of *stare decisis*." (footnote omitted).			
	People v. Jackson, 212 N.W.2d 918, 921	"Since neither [the plurality or dissenting] opinion [in *People v. Thomas*, 197 N.W.2d 51 (Mich. 1972)]			

	(Mich. 1973).	obtained four signatures, neither is binding under the doctrine of stare decisis."			
	People v. Anderson, 205 N.W.2d 461, 467 (Mich. 1973).	"The clear rule in Michigan is that a majority of the Court must agree on a ground for decision in order to make that binding precedent for future cases. If there is merely a majority for a particular result, then the parties to the case are bound by the judgment but the case is not authority beyond the immediate parties."			
	Comments:	It does not appear that Michigan applies *Marks* to its state court opinions. Also, lower courts are not bound by plurality decisions more generally.		N	
Minn. (elect.)	State v. Andersen, 784 N.W.2d 320, 329–30 (Minn. 2010).	"Recently, in *State v. Stein*, we addressed the standard of review in circumstantial evidence cases. In a three-justice plurality opinion, we said that when reviewing the sufficiency of circumstantial evidence, 'our first task is to identify the circumstances proved.' . . . Our second step is to 'examine independently the reasonableness of all inferences that might be drawn from the circumstances proved.' . . . We conclude that [the plurality] is the proper approach . . . ." (citation omitted) (first quoting State v. Stein, 776 N.W.2d 709, 718 (Minn. 2010) (plurality opinion); and then quoting *id.* at 716) (citing *Stein*, 776 N.W.2d at 714). Although the court applies the plurality, this appears to be based on persuasiveness, not based on a rejection of the narrowest grounds rule, which isn't discussed.			
	Comments:	It does not appear that Minnesota courts have considered *Marks* as applied to nonmajority opinions by the Minnesota Supreme Court. Rather, the courts seem to simply rely on the plurality's opinion without expressly rejecting the application of the narrowest grounds rule in this context. Given the limited information, we classify Minnesota with a U.			U
Miss. (elect.)	Puckett v. State, 2000-DR-01077-SCT (¶ 9) (Miss. 2002).	Rejecting reliance on the plurality opinion in *Booker v. State*, 699 So. 2d 132 (Miss. 1997) (plurality opinion), as it "is not binding authority and has no precedential value as a plurality opinion."			
	Buffington v. State, 2001-KA-00325-SCT (¶ 15) (Miss. 2002).	Rejecting reliance on *Wolfe v. State*, 98-KA-00047-SCT (Miss. 1999), because "a majority of all sitting judges is required to create precedent, and therefore, it follows that a plurality vote [in *Wolfe*] does 'not create a binding result.'" (quoting			

		Churchill, 619 So. 2d 900, 904 (Miss. 1993) (en banc)).			
	Churchill v. Pearl River Basin Dev. Dist., 619 So. 2d 900, 904 (Miss. 1993) (en banc).	"[I]t is a logical conclusion for this Court to recognize that a plurality vote does not create a binding result. The narrowest holding in *Presley*, in which a majority of the sitting justices concurred, was that Miss. Code Ann. § 11-46-6 is unconstitutional. As there is no majority vote for Part II, we can only note that it has no precedential value." (first citing Presley v. Miss. State Highway Comm'n, 608 So. 2d 1288 (Miss. 1992) (en banc); and then citing MISS. CODE. ANN. § 11-46-6 (1992) (repealed 1992)). Part of the substantive ruling in *Churchill*, holding that a sovereign defendant is estopped from asserting sovereign immunity if it purchases public liability insurance, has been superseded by MISS. CODE ANN. § 11-46-17(4) (2021). *See* L.W. v. McComb Separate Mun. Sch. Dist., 97-CA-01465-SCT (¶¶ 32–34) (Miss. 1999). This did not change the court's conclusion that a plurality opinion does not create binding precedent.			
	Morgan v. City of Ruleville, 627 So. 2d 275, 278 (Miss. 1993).	"In *Presley*, this Court held Section 11-46-6 unconstitutional. However, there is a question as to whether this decision should be applied retroactively or prospectively. . . . [In] Part II of the decision in *Presley*, four justices agreed to apply it prospectively, three justices wanted to apply it retroactively, and two justices dissented altogether. . . . [A]ssuming that Part II of *Presley* received a plurality vote, it still cannot be used as authority to apply Part I of *Presley* in the instant case. . . . '[W]hen no single rationale commands a majority, "the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds."[']. . . The narrowest holding in *Presley* is simply that Miss.[ ]Code Ann. § 11-46-6 is unconstitutional. This holding is the only point of *Presley* which has precedential value." (citation omitted) (quoting *Churchill*, 619 So. 2d at 903) (first citing *Presley*, 608 So. 2d 1288; and then citing MISS. CODE. ANN. § 11-46-6).			
	Comments:	The *Morgan* case, in 1993, relied on the narrowest grounds rule, but the more recent *Puckett* and *Buffington* cases make plain that nonmajority decisions do not hold precedential status. Professors Richard Re and Saul Levmore have, in separate works, treated this state as applying the narrowest grounds rule based upon their analyses of the 1993		N	

		Morgan case. *See* Re, *supra* note 11, at 1961 n.116; Saul Levmore, *Ruling Majorities and Reasoning Pluralities*, 3 THEORETICAL INQUIRIES LAW 87, 96 n.18 (2002). Based on the more recent Mississippi cases presented in the chart, we treat this state as rejecting that rule, and thus categorize as N.			
Mo. (appt.)	May v. Greater Kan. City Dental Soc'y, 863 S.W.2d 941, 948–49 (Mo. Ct. App. 1993).	"This point [that a nonviable fetus is not a person for purposes of a wrongful death action] is controlled by *Rambo v. Lawson*, in which the court held that the plaintiff could not state a claim for the wrongful death of an unborn child. . . . 'In *Rambo*, a plurality of this Court ruled that the term person does not include a nonviable fetus, and therefore, a civil cause of action for the wrongful death of a nonviable fetus will not lie.' The *Rambo* decision controls and decides this point against [the] plaintiff . . . ." (citations omitted) (quoting State v. Knapp, 843 S.W.2d 345, 349 (Mo. 1992) (en banc)) (citing Rambo v. Lawson, 799 S.W.2d 62, 64 (Mo. 1990) (en banc) (plurality opinion)). The substantive ruling in *Rambo* is superseded by statute such that a wrongful death action now includes the death of a nonviable fetus. *See* MO. REV. STAT. § 1.205 (2020); Connor v. Monkem Co., 898 S.W.2d 89, 92–93 (Mo. 1995) (en banc). This did not affect reliance upon the plurality opinion in construing a nonmajority case.			
	Comments:	It does not appear that Missouri courts have considered *Marks* as applied to plurality opinions by the Supreme Court of Missouri. Rather, in this relatively early case from 1993, the Missouri Court of Appeals seemed simply to rely on the plurality's opinion in a nonmajority ruling but without directly addressing the applicability of the narrowest grounds rule.			U
Mont. (elect.)	N/A	It does not appear that Montana courts have considered *Marks* as applied to their own highest court plurality opinions. The research databases only reveal two cites to *Marks* in cases involving the separate issue of retroactive application of laws. *See* State v. Goebel, 2001 MT 155, ¶¶ 18–23, 306 Mont. 83, 31 P.3d 340; State v. Coleman, 605 P.2d 1000, 1012 (Mont. 1979). The databases show no Montana cases using the narrowest grounds or similar language.			
	Comments:	Montana has not addressed or resolved this issue.			U

Neb. (appt.)	N/A	Nebraska courts appear not to have considered *Marks* as applied to their own highest court plurality opinions. The research databases reveals only one cite to *Marks*, which declines to apply *Marks* to a federal case. *See* State v. Dubray, 854 N.W.2d 584, 611 & n.80 (Neb. 2014) (citing *Marks*, 430 U.S. at 193) (declining to apply *Marks* to Montana v. Egelhoff, 518 U.S. 37 (1996), to adopt the reasoning of Justice Ginsburg's concurring opinion and claiming that resolving *Marks* as applied to the immediate case "is unnecessary to deciding this appeal").			
	Comments:	Nebraska has not addressed or resolved this issue.			U
Nev. (elect.)	N/A	It does not appear that Nevada courts have considered *Marks* as applied to their own state highest court plurality opinions. The research databases reveal only three cites to *Marks*, construing the narrowest holding in federal cases or determining the unrelated question of retroactive application of laws. *See*, *e.g.*, Stevens v. Warden, Nev. State Prison, 969 P.2d 945, 948 (Nev. 1998); Marlow v. Baca, No. CR13-0660, 2017 Nev. Dist. LEXIS 1921, at *11 (Nev. Dist. Ct. Dec. 26, 2017).			
	Comments:	Nevada has not addressed or resolved this issue.			U
N.H. (appt.)	N/A	It does not appear that New Hampshire courts have considered *Marks* as applied to their own highest court plurality opinions. The research databases reveal only one cite to *Marks* dealing with the retroactive application of laws. *See* State v. Hayes, 389 A.2d 1379, 1382 (N.H. 1978).			
	Comments:	New Hampshire has not addressed or resolved this issue.			U
N.J. (appt.)	Tretina Printing, Inc. v. Fitzpatrick & Assocs., Inc., 640 A.2d 788, 796 (N.J. 1994) (Clifford, J., concurring).	This complex case involves the Supreme Court of New Jersey addressing its earlier ruling, *Perini Corp. v Great Bay Hotel & Casino, Inc.*, 610 A.2d 364 (N.J. 1992) (plurality opinion), governing the terms under which an arbitration award may be revisited on judicial review. *Id.* at 366. Relying on a New Jersey statute, a *Perini* plurality found a basis in law for the award of damages resulting from a delay in contract performance, notwithstanding substantial performance. *See id.* at 383. The dissent, applying the same standard, did not find such a basis in law, and would, instead, have sustained the lower court decision modifying the arbitration award. *Id.* at 403 (Stein, J., concurring in part and dissenting in part). The Chief Justice's concurrence determined that only in the event of egregious error is an arbitration award subject to judicial modification. *Id.* at 399 (Wilentz, C.J., concurring). The Supreme			

		Court of New Jersey in *Tretina v. Fitzpatrick & Assocs.*, once more, fractured but a majority coalesced on the Chief Justice's view set out in *Perini*. *Trentina Printing*, 640 A.2d at 792–93 (plurality opinion). The *Tretina* plurality opinion did not cite to *Marks*, whereas Justice Clifford, who changed his views to that of the *Perini* Chief Justice, did. *Id.* at 797 (Clifford, J., concurring). In doing so, Justice Clifford identified the Chief Justice's *Perini* concurrence as controlling, but read that opinion narrowly, as restricting judicial review of arbitration awards without necessarily setting out a clear standard. *Id.*			
	Comments:	Because this case involved a state highest court revisiting its own earlier decision, rather than a lower court construing a fractured state highest court decision, whether *Marks* applies to the state highest court decisions remains formally unresolved. Despite this, it appears that a majority of the New Jersey Supreme Court justices embrace the logic of *Marks* as applied to that court's decisions. This is marked with a U, but is leaning toward a Y.			U
N.M. (appt.)	N/A	It does not appear that New Mexico courts have considered *Marks* as applied to their own highest court plurality opinions. The research databases show only two cites to *Marks* in cases applying *Marks* to a federal case or the retroactive application of laws. *See, e.g.*, State v. Norush, 642 P.2d 1119, 1121 (N.M. 1982); State v. Bullcoming, 226 P.3d 1, 8 (N.M. 2010).			
	Comments:	New Mexico has not addressed or resolved this issue.			U
N.Y. (appt.)	People v. Brown, 7 N.Y.S.3d 19, 21–22 (N.Y. App. Div. 2015).	"Following analogous precedent pertaining to plurality opinions by the United States Supreme Court, we apply the narrower approach of Judge Graffeo [in *People v. Sibblies*, 8 N.E.3d 852, 855 (N.Y. 2014)], which leaves intact the well-settled law that a post-certificate assertion that the People are not ready does not, by itself, vitiate the previously filed certificate of readiness" (citing *Marks*, 430 U.S. at 193).			
	People v. Joseph, 999 N.Y.S.2d 320, 323 (N.Y. Crim. Ct. 2014).	"Judge Statsinger [in *People v. McLeod*, 988 N.Y.S.2d 436 (N.Y. Crim. Ct. 2014)] reasoned that in cases where a plurality opinion from an appellate court results in no clear ruling, the trial court must follow the more narrow reasoning: 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" (quoting *McLeod*, 988			

		N.Y.S.2d at 439).			
	People v. McLeod, 988 N.Y.S.2d 436, 439 (N.Y. Crim. Ct. 2014).	"While the Court of Appeals has not adopted a similar rule [as in *Marks*], it has expressly recognized that this is indeed the appropriate means of construing a fragmented decision of the United States Supreme Court. It seems more than reasonable, then, to assume that the Court of Appeals would apply the same rule of construction to its own decisions in the rare case where there is no single rationale adopted by at least four judges." (citation omitted).			
	Comments:	New York applies the *Marks* rule to its state court opinions.	Y		
N.C. (elect.)	Grantham v. Crawford, 693 S.E.2d 245, 250 n.1 (N.C. Ct. App. 2010).	"According to Justice Newby in his dissent [in *Crocker v. Roethling*, 675 S.E.2d 625 (N.C. 2009)], 'Justice Martin's opinion, having the narrower directive, is the controlling opinion . . . and requires the trial court to conduct a voir dire examination of the proffered expert witness.'" (quoting *Crocker*, 675 S.E.2d at 635 n.1 (Newby, J., dissenting)).			
	Crocker v. Roethling, 675 S.E.2d 625, 635 n.1 (N.C. 2009) (Newby, J., dissenting).	"The separate opinions of Justice Martin and Justice Hudson, when taken together, constitute a majority of the Court in favor of reversing and remanding. Justice Martin's opinion, having the narrower directive, is the controlling opinion, and requires the trial court to conduct a voir dire examination of the proffered expert witness. References in this dissenting opinion to 'the majority' denote matters as to which the opinions of Justices Martin and Hudson seem to agree. When responding to one of those opinions separately, this dissenting opinion will refer to the authoring Justice by name." (citation omitted) (citing *Marks*, 430 U.S. at 193).			
	Comments:	North Carolina applies the *Marks* rule to its state court opinions. Notably, this is first demonstrated in a dissenting opinion, but it then forms the basis for a subsequent ruling in the North Carolina Court of Appeals construing the relevant North Carolina Supreme Court opinion in which that dissent appears.	Y		
N.D. (elect.)	N/A	It does not appear that North Dakota courts have considered *Marks* as applied to their own highest court plurality opinions. The research databases show one cite to *Marks* in a case applying *Marks* to a federal case. *See* State v. Orr, 375 N.W.2d 171, 175 (N.D. 1985).			
	Comments:	North Dakota has not addressed or resolved this issue.			U
Ohio	N/A	It does not appear that Ohio courts have considered			

(elect.)		*Marks* as applied to their own highest court plurality opinions. The research databases reveal twenty-seven cites to *Marks* in cases applying the narrowest grounds rule to federal cases or related to the retroactive application of laws. *See, e.g.*, State v. Adams, 144 Ohio St. 3d 429, 2015-Ohio-3954, 45 N.E.3d 127, 169, at ¶¶ 252–56.			
	Comments:	Ohio has not addressed or resolved this issue.			U
Okla. (appt.)	N/A	It does not appear that Oklahoma courts have considered *Marks* as applied to their own highest court plurality opinions. The research databases reveal seven cites to *Marks* in cases applying the narrowest grounds rule to federal cases or related to the retroactive application of laws. *See, e.g.*, *In re* Initiative Petition No. 349, State Question No. 642, 838 P.2d 1, 5 n.8 (Okla. 1992).			
	Comments:	Oklahoma has not addressed or resolved this issue.			U
Or. (elect.)	N/A	It does not appear that Oregon courts have considered *Marks* as applied to their own highest court plurality opinions. The research databases reveal six cites to *Marks* in cases applying the narrowest grounds rule to federal cases. *See, e.g.*, *In re* Validation Proc. to Determine the Regularity & Legality of Multnomah Cnty. Home Rule Charter Section 11.60 & Implementing Ordinance No. 1243 Regulating Campaign Fin. & Disclosure, 462 P.3d 706, 724 (Or. 2020) (en banc).			
	Comments:	Oregon has not addressed or resolved this issue.			U
Pa. (elect.)	Commonwealth v. McClelland, 233 A.3d 717, 731–32 (Pa. 2020).	Applying *Marks* to *Commonwealth ex rel. Buchanan v. Verbonitz*, 581 A.2d 172 (Pa. 1990), and concluding, "We have little difficulty in stating with certainty that five Justices in *Verbonitz* agreed a *prima facie* case cannot be established by hearsay evidence alone, and the common rationale among those Justices involved due process considerations."			
	Commonwealth v. Alexander, 243 A.3d 177, 197 (Pa. 2020).	"We begin our analysis by observing again that *Gary* was not a majority decision but rather an opinion announcing the judgment of the court. *See* 210 Pa. Code § 63.4(B)(3) ('An opinion shall be designated as the "Opinion Announcing the Judgment of the Court" when it reflects only the mandate, and not the rationale, of a majority of Justices.'). . . . We apply the *Marks* Rule." (citing Commonwealth v. Gary, 91 A.3d 102 (Pa. 2014)).			
	McNeil v. Jordan, 894 A.2d 1260, 1279 (Pa. 2006).	"Pursuant to the narrowest reasoning uniting a majority of the justices participating in this case, and the opinion of Mr. Justice Saylor, given the facts of this case the trial court is directed to assess whether Henry Jr. can establish probable cause that his			

		requested discovery will permit the filing of a complaint capable of surviving a demurrer in the instant litigation and to rule accordingly." (footnotes omitted) (citations omitted).			
	Hardy v. Southland Corp., 645 A.2d 839, 842 (Pa. Super. Ct. 1994).	"Applying this [*Marks*] analysis to the present case, it would seem that we would be obligated to apply the modified assumption of the risk doctrine as set forth in the lead *Howell* opinion." (citing Howell v. Clyde, 620 A.2d 1107 (Pa. 1993)).			
	Comments:	Pennsylvania applies *Marks* to construe the narrowest holding in their state court nonmajority opinions.	Y		
R.I. (appt.)	N/A	It does not appear that Rhode Island courts have considered *Marks* as applied to their own highest court plurality opinions. The databases reveal two cases applying the narrowest grounds doctrine to federal cases. *See* State v. Nordstrom, 529 A.2d 107, 111 n.1 (R.I. 1987); State v. Pine, 524 A.2d 1104, 1108 (R.I. 1987).			
	Comments:	Rhode Island has not addressed or resolved this issue.			U
S.C. (appt.)	N/A	It does not appear that South Carolina courts have considered *Marks* as applied to their own highest court plurality opinions. The research databases reveal two cites to *Marks* by South Carolina courts applying the narrowest grounds rule to federal cases. *See* State v. Harrison, 741 S.E.2d 727, 732 (S.C. 2013); State v. Key, 848 S.E.2d 315, 319–20, 319 n.2 (S.C. 2020).			
	Comments:	South Carolina has not addressed or resolved this issue.			U
S.D. (appt.)	State v. Guthrie, 2001 SD 61, ¶ 96, 627 N.W.2d 401, 434 (Gilbertson, J., concurring in part and concurring in result in part).	"As there is no majority opinion regarding the rationale for adjudication of this issue, resolution of the conflicting theories set forth in the various writings of this case await a future decision of this Court." As indicated by Justice Gilberston's concurring opinion, South Dakota has not yet resolved how to construe its nonmajority opinions. Other than *Guthrie*, the databases reveal only one additional case citing *Marks* and applying the narrowest grounds rule to a federal case. *See* State v. Plastow, 2015 SD 100, ¶ 22 n.9, 873 N.W.2d 222, 230 n.9.			
	Comments:	South Dakota has not addressed or resolved this issue.			U
Tenn. (appt.)	N/A	It does not appear that Tennessee courts have considered *Marks* as applied to their own highest court plurality opinions. The research databases reveal sixteen cites to *Marks* by Tennessee courts applying the narrowest grounds rule to federal cases and to assess the retroactive application of laws. *See,*			

		e.g., State v. Feaster, 466 S.W.3d 80, 85 (Tenn. 2015).
	Comments:	Tennessee has not addressed or resolved this issue. U
Tex. (elect.)	Unkart v. State, 400 S.W.3d 94, 100–01 (Tex. Crim. App. 2013).	"But a fractured decision may constitute binding authority if, and to the extent that, a majority holding can be ascertained from the various opinions in the case. Even if the rationales seem disparate, if a majority of the judges agree on a particular narrow ground for or rule of decision, then that ground or rule may be viewed as the holding of the court. With respect to *Blue*, it is not possible to ascertain a majority holding or the narrowest ground or rule that commands a majority of the court." (footnote omitted) (citing Blue v. State, 41 S.W.3d 129 (Tex. Crim. App. 2000) (en banc)). In *Blue v. State*, the Court of Criminal Appeals of Texas reversed and remanded a conviction following a trial judge's informing the jury of a possible prior plea deal, which the defendant rejected, and implying that trying a criminal defendant suggests guilt. *See Blue*, 41 S.W.3d at 130–32 (plurality opinion). The *Blue* court fractured with four separate opinions, three of which are relevant to the narrowest grounds analysis. The opinion issuing the judgment comprised of four votes, and the dissent comprised of three votes. *See id.* at 129. Two judges concurred in the judgment, and one member joining the opinion issuing the judgment separately concurred, seeking to narrow the reach of the plurality ruling. *See id.* at 133 (Meyers, J., concurring in the judgment); *id.* (Mansfield, J., concurring); *id.* at 135 (Keasler, J., concurring in the judgment). (This implicated issues related to *Washington v. Glucksburg* and *Shlup v. Delo*.) This case, which is two dimensional, can be simplified as turning on two controlling issues: (1) Is the Texas court able to reverse and remand, despite the defendant's failure to object to the trial judge's comments, based on fundamental error without evaluating the case under Texas evidentiary rules?; (2) Applying the Texas evidentiary rules, does the defendant's failure to object preclude review on appeal only if the claimed basis for error involves an evidentiary ruling? *See id.* at 130–31 (plurality opinion). The plurality rested on a combination of federal and state cases finding foundational error without applying the Texas evidentiary rules. *See id.* at 132–33. The concurrence in the judgment determined that it must apply the state evidentiary rules but reasoned that those rules—intended to capture, not change, prior state law—permitted a

		reversal even when the identified error is not evidentiary. *See id.* at 136–137 (Keasler, J., concurring in the judgment). The dissent rejected the first theory, claiming that the reversal may not rest on general state or federal precedents but must be assessed based upon state evidentiary rules. Also, the dissent rejected the concurrence in the judgment, claiming that raising the challenge was procedurally foreclosed by state evidentiary rules. *See id.* at 142–43 (Keller, J., dissenting). All judges agreed that to reverse and remand, the court must either apply a general fundamental error analysis or determine that the state evidentiary rules do not procedurally foreclose the appeal. *See id.* at 131 (plurality opinion); *id.* at 134 (Mansfield, J., concurring); *id.* at 136–37 (Keasler, J., concurring in the judgment); *id.* at 142–44 (Keller, J., dissenting). If those joining the opinion issuing the judgment would agree that when applying those rules the claim is procedurally foreclosed, and if those concurring in the judgment would agree that there is no independent basis beyond state evidentiary rules for the appeal, then separate majorities would reject each claimed basis for relief, supporting the inference that the case is two dimensional and thus, the premise of *Marks* fails to apply.			
	Ervin v. State, 331 S.W.3d 49, 53 (Tex. App. 2010).	"When an appellate court decides a case without issuing a majority opinion providing a single rationale explaining the result, the majority holding is the position taken by those members who concurred in the judgment on the narrowest grounds."			
	Haynes v. State, 273 S.W.3d 183, 187 (Tex. Crim. App. 2008) (plurality opinion).	"[W]e do not agree with the State that *Collier* contains no majority holding. Judge Keasler's concurring opinion in *Collier* sets out a majority holding, because this opinion does contain the narrowest ground upon which five of the judges concurring in the judgment in *Collier* agreed." (citing Collier v. State, 999 S.W.2d 779 (Tex. Crim. App. 1999)).			
	Comments:	Texas applies *Marks* to their state court opinions to discern the narrowest holding for precedential value.	Y		
Utah (appt.)	N/A	It does not appear that Utah courts have considered *Marks* as applied to their own highest court plurality opinions. The research databases reveal two cites to *Marks* by Utah courts applying the narrowest grounds rule to federal cases. *See, e.g.*, Midvale City Corp. v. Haltom, 2003 UT 26, 73 P.3d 334; State v. Anderson, 2020 UT App 135, 475 P.3d 967 (Utah Ct. App. 2020).			

	Comments:	Utah has not addressed or resolved this issue.			U
Vt. (appt.)	N/A	It does not appear that Vermont courts have considered *Marks* as applied to their own highest court plurality opinions. The research databases reveal three cites to *Marks* by Vermont courts applying the narrowest grounds rule to federal cases or related to the separate issue of the retroactive application of laws. *See, e.g.*, State v. Fleurie, 2008 VT 118, 185 Vt. 29, 968 A.2d 326; State v. Porter, 671 A.2d 1280 (Vt. 1996); State v. Lafountain, 628 A.2d 1243 (Vt. 1993).			
	Comments:	Vermont has not addressed or resolved this issue.			U
Va. (appt.)	N/A	It does not appear that Virginia courts have considered *Marks* as applied to their own highest court plurality opinions. The research databases reveal eleven cites to *Marks* by Virginia courts applying the narrowest grounds rule to federal cases or related to the separate issue of the retroactive application of laws. *See, e.g.*, Secret v. Commonwealth, 819 S.E.2d 234 (Va. 2018).			
	Comments:	Virginia has not addressed or resolved this issue.			U
Wash. (elect.)	State v. Ruem, 313 P.3d 1156, 1170 & n.7 (Wash. 2013) (en banc) (Johnson, J., concurring in part and dissenting in part).	"In Washington, '[w]hen there is no majority opinion, the holding is the narrowest ground upon which a majority agreed.' Therefore, when the rationale for a dissent more closely aligns with the lead opinion on a certain issue, that rationale forms the court's holding as to that issue." (alteration in original) (citation omitted) (quoting *In re* Francis, 242 P.3d 866 (Wash. 2010)). In a footnote, Justice Johnson adds: "I see no reason for this court to follow th[e] [*Marks*] rule because of the significant differences between this court and our federal counterpart. We are elected directly by the people rather than appointed. . . . Just because my conscience will not allow me to sign an opinion that reverses Ruem's conviction does not invalidate my opinion that Justice Stephens' Ferrier holding correctly states the law in Washington."			
	In re Francis, 242 P.3d 866, 873 n.7 (Wash. 2010) (en banc).	"The State's reliance on *Shale* is also misguided because there was no majority opinion in *Shale*; the portion of the lead opinion upon which the State relies has no precedential value. The four-justice lead opinion and four-justice concurrence agreed only in the result . . . . When there is no majority opinion, the holding is the narrowest ground upon which a majority agreed." (citing *In re* Shale, 158 P.3d 588 (Wash. 2007) (en banc)).			
	Davidson v. Henson,	"When there is no majority agreement as to the			

	954 P.2d 1327, 1335 (Wash. 1998) (en banc).	rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds." (citing State v. Zakel, 812 P.2d 512 (Wash. Ct. App. 1991)).			
	Comments:	Washington courts appear to follow the *Marks* rule although there is a recent separate opinion by Justice Johnson, writing separately and calling into question whether state courts should follow their "federal counterpart." This appears to be a minority position and contrary to practice in the state. The overall weight of authority appears to support a Y.	Y		
W. Va. (elect.)	Constellium Rolled Prods. Ravenswood, LLC v. Griffith, 775 S.E.2d 90, 104 n.1 (W. Va. 2015) (Loughry, J., concurring, in part and dissenting, in part).	"Inasmuch as I concur in the result only as it pertains to punitive damages and do not concur in the rationale advanced by the author, the analysis as to punitive damages does not 'enjoy[ ] the assent' of three Justices and is therefore, as to that aspect, a plurality opinion." (alteration in original) (quoting *Marks*, 430 U.S. at 193).			
	Comments:	Other than Justice Loughry's opinion, which refers to *Marks* in explaining that he concurs only in the result, not the rationale, it does not appear that West Virginia courts have considered *Marks* as applied to their nonmajority opinions.			U
Wis. (elect.)	State v. Weber, 2016 WI 961, ¶ 83 n.1, 372 Wis. 2d 202, 887 N.W.2d 554 (Bradley, J., dissenting).	"I use the term 'lead' opinion for two reasons. First, I am concerned that without this cue, the reader may mistakenly believe that the lead opinion has any precedential value. Although four justices join in the mandate of the opinion to reverse the court of appeals (Zeigler, J., joined by Roggensack, C.J., Gableman, J.[,] and Kelly, J.), it represents the reasoning of only three justices . . . . Second, I use the term 'lead' opinion because although it is undefined in our Internal Operating Procedures, its use here is consistent with past description. We have said 'that a lead opinion is one that states (and agrees with) the mandate of a majority of justices, but represents the reasoning of less than a majority of the participating justices.'" (quoting State v. Lynch, 2016 WI 66, ¶ 143, 371 Wis. 2d 1, 885 N.W.2d 89 (Abrahamson & Bradley, JJ., concurring in part, dissenting in part)).			
	State v. Lynch, 2016 WI 66, ¶ 7 n.9, 371 Wis. 2d 1, 885 N.W.2d 89.	Declining to discern a narrowest holding from *State v. Shiffra*, 499 N.W.2d 719 (Wis. Ct. App. 1993), as modified by *State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298, concluding, "[W]hile five Justices would reverse the decision of the court of			

		appeals—in whole or in part—no more than three Justices can agree on the same rationale or result. As a result, the law remains as the court of appeals has articulated it."			
	State v. Deadwiller, 2013 WI 75, ¶ 55, 834 N.W.2d 362 (Abrahamson, C.J., concurring).	"This court has followed *Marks* in applying plurality opinions of the United States Supreme Court and in applying plurality decisions of this court."			
	DeBruin v. St. Patrick Congregation, 2012 WI 94, ¶ 98, 816 N.W.2d 878 (Bradley, J., dissenting).	"There is no majority opinion of this court. . . . Accordingly, because no opinion has garnered the vote of four justices, nothing set forth in any of the opinions has precedential value."			
	Town of Madison v. Cnty. of Dane, 2008 WI 83, ¶ 48 n.5, 752 N.W.2d 260 (Roggensack, J., dissenting).	"The lead opinion, coupled with the concurrence's vote to reverse the court of appeals, decides the outcome in this dispute between the Town of Madison and Dane County. The lead opinion has no precedential value because the concurrence does not join the lead opinion's statutory interpretation."			
	Comments:	Wisconsin employs "lead opinions" when there is no majority; opinions bearing that designation do not necessarily express the holding on the narrowest grounds. Two Justices on the Wisconsin Supreme Court define lead opinion as "one that states (and agrees with) the mandate of a majority of justices, but represents the reasoning of less than a majority of the participating justices." *Lynch*, 2016 WI 66, ¶ 143 (Abrahamson & Bradley, JJ., concurring in part, dissenting in part). Among practitioners, there has been a recognized push for Wisconsin courts to resolve how to construe nonmajority opinions. *See, e.g.*, Alan Ball, *A Spike in Fractured Decisions*, SCOWstats (May 30, 2017), http://www.scowstats.com/2017/05/30/a-spike-in-fractured-decisions/ [https://perma.cc/V8BD-HA72] (providing a statistical overview of fractured opinions in Wisconsin and arguing for a need for clarity respecting how to construe such opinions); Philip C. Babler, *The Need for a Marks Rule in Wisconsin*, Foley & Lardner LLP: Wis. App. L. (Nov. 14, 2018),			U

		https://www.foley.com/en/insights/publications/2018/11/need-for-marks-rule-in-wisconsin [https://perma.cc/TL7A-LFL7] (blog post from a senior attorney at the law firm of Foley & Lardner LLP, showing how practitioners in Wisconsin appear to construe state plurality opinions). However, Wisconsin has not yet resolved whether to apply the narrowest grounds rule to its state highest court opinions.			
Wyo. (appt.)	N/A	It does not appear that Wyoming courts have considered *Marks* as applied to their own highest court plurality opinions. The research databases reveal two cites to *Marks* by Wyoming courts, applying the narrowest grounds rule to federal cases or related to the separate question involving the retroactive application of laws. *See*, *e.g.*, Anderson v. State, 2014 WY 13, 317 P.3d 1108 (Wyo. 2014); Sodergren v. State, 715 P.2d 170 (Wyo. 1986).			
	Comments:	Wyoming has not addressed or resolved this issue.			U
Summary:		**Prelim tally:**	13	3	34
		Judicial Selection Breakdown	**Y**	**N**	**U**
		Elected—partisan, nonpartisan, legislative	5	2	14
		Appointed—gubernatorial, assisted	8	1	20

Method: This Table is based on searches of Westlaw and Lexis. Case citing references to *Marks v. United States* were filtered by state. Filtered cases were reviewed to determine if the state court cited *Marks* for narrowest grounds purposes, if the state court was using *Marks* to decipher a U.S. Supreme Court decision, and if the court was applying *Marks* to state cases. Additionally, if a case cited to a second case not on the filtered list and the second case appeared to also discuss Marks or narrowest grounds, that second case was also reviewed. State cases were also searched using Westlaw and Lexis. State cases were narrowed by date range (1977–Present) and terms, such as: "narrow," "narrowest," "plurality," "narrowest grounds," "fractured," "nonmajority," and "split opinion." Secondary sources were also examined for references to *Marks* and the narrowest grounds rule as applied to state cases. Searches for secondary sources were conducted on Westlaw, Lexis, HeinOnline, and Google Scholar.

APPENDIX B: LOWER COURT AND SCHOLARLY TREATMENT OF *FULLILOVE V. KLUTZNICK* FROM 1980–1990

Supreme Court Cases (reverse chronological order)	**Quote(s)**	**Notes**
Metro Broad., Inc. v. FCC, 497 U.S. 547, 564 (1990).	"A majority of the Court in *Fullilove* did not apply strict scrutiny to the race-based classification at issue. Three Members inquired 'whether the *objectives* of th[e] legislation are within the power of Congress' and 'whether the limited use of racial and ethnic criteria . . . is a constitutionally permissible *means* for achieving the congressional objectives.' Three other Members would have upheld benign racial classifications that 'serve important governmental objectives and are substantially related to achievement of those objectives.' We apply that standard today." (alterations in original) (internal citations omitted) (first quoting Fullilove v. Klutznick, 448 U.S. 472, 473 (1979) (plurality opinion); and then quoting *id.* at 519 (Marshall, J., concurring in the judgment)).	This Supreme Court majority, which opted for the Marshall test, implicitly rejected treating Powell as controlling.
Id. at 608 (O'Connor, J., dissenting).	"Although the Court correctly observes that a majority did not apply strict scrutiny, six Members of the Court rejected intermediate scrutiny in favor of some more stringent form of review. Three Members of the Court applied strict scrutiny. Chief Justice Burger's opinion, joined by Justice White and Justice Powell, declined to adopt a particular standard of review but indicated that the Court must conduct 'a most searching examination.'" (internal citations omitted) (quoting *Fullilove*, 448 U.S. at 491 (plurality opinion)).	Justice O'Connor concedes Powell doesn't control but notes that Marshall also did not control. She suggested Burger was controlling.
City of Richmond v. J.A. Croson Co., 488 U.S. 469, 487 (1989).	"The principal opinion in *Fullilove*, written by Chief Justice Burger, did not employ 'strict scrutiny' or any other traditional standard of equal protection review."	It is notable that the Supreme Court itself deemed the Burger opinion, capturing the median as controlling.

Supreme Court Cases (reverse chronological order)	**Quote(s)**	**Notes**
Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 302 (1986) (Marshall, J., dissenting).	"Despite the Court's inability to agree on a route, we have reached a common destination in sustaining affirmative action against constitutional attack. . . . [I]n *Fullilove*, the Court upheld a congressional preference for minority contractors because the measure was legitimately designed to ameliorate the present effects of past discrimination."	Although Justice Marshall's dissent regards the Burger opinion as controlling, this allowed him to support a closer doctrinal position to his own than that of Justice Powell.

Lower Court Cases (reverse chronological order)	**Quote(s)**	**Notes**
Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo, 981 F.2d 50, 56–57 (2d Cir. 1992).	"*Fullilove* had upheld the federal minority enterprises program . . . . In a splintering of opinions reasoning that 'Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities,' . . . a majority of the Supreme Court upheld the constitutionality of the federal set-aside program." (internal citations omitted) (quoting *Fullilove*, 448 U.S. at 477 (plurality opinion)).	The Second Circuit gravitated toward Burger.
Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo, 743 F. Supp. 977, 990 n.14 (N.D.N.Y. 1990).	"No judicial opinion obtained a majority in *Fullilove*. The plurality decision of Chief Justice Burger and the concurrence of Justice Powell, however, followed a middle path between the divergent opinions of a fragmented Court. Therefore, pursuant to *Marks v. United States*, this court is bound to follow the opinions of Justices Burger and Powell."	The District Court claimed to apply both Powell and Burger

Lower Court Cases (reverse chronological order)	**Quote(s)**	**Notes**
Tenn. Asphalt Co. v. Farris, 942 F.2d 969, 973 (6th Cir. 1991).	"Chief Justice Burger, in an opinion for himself, Justice White and Justice Powell, emphasized [in *Fullilove*] the broad authority of Congress under the Spending Power provisions and the Commerce Clause of the Constitution to provide a safeguard against federal funds being used to perpetuate the effects of prior discrimination that had largely excluded minority businesses from public contracts."	The Sixth Circuit gravitated toward Burger.
Shurberg Broad. of Hartford, Inc. v. FCC, 876 F.2d 902, 911 (D.C. Cir. 1989).	"In his plurality opinion [in *Fullilove*], Chief Justice Burger stressed Congress' special constitutional authority under the Fourteenth Amendment to enact measures to remedy past discrimination. Justice Powell's concurrence also stressed that Congress had made the finding of past discrimination and that Congress had selected the particular remedy." (internal citations omitted).	The D.C. Circuit seeks to reconcile Burger and Powell.
Id. at 939 n.12 (Wald, J. dissenting).	"The application of *Fullilove* to this case is complicated by the fact that in *Fullilove*—as in *Bakke* and *Wygant*—no opinion commanded a majority of the Court. I rely principally on Chief Justice Burger's opinion, joined by Justices Powell and White."	The dissent relied solely on Burger.
Winter Park Commc'ns, Inc. v. FCC, 873 F.2d 347, 365–66 (D.C. Cir. 1989) (Williams, J., concurring).	Concurrence in part: "Both Chief Justice Burger's plurality opinion and Justice Powell's concurrence [in *Fullilove*] stressed Congress's unique role in ensuring equal protection under the Fourteenth Amendment. Both opinions, however, left obscure the extent to which Congress's special role left it free to mandate racial preferences solely on the basis of general societal discrimination." (internal citations omitted)	The D.C. Circuit seeks to reconcile Burger and Powell.

Lower Court Cases (reverse chronological order)	**Quote(s)**	**Notes**
Associated Gen. Contractors of Cal., Inc. v. City & Cnty. of San Francisco, 813 F.2d 922, 928 (9th Cir. 1987).	"[A]ppellants overlook that the *Fullilove* plurality relied on section 5 as authority only for the federal government's imposition of affirmative action on state and local governments."	The Ninth Circuit relied upon Burger.
Associated Gen. Contractors of Cal., Inc. v. City & Cnty. of San Francisco, 619 F. Supp. 334, 339 (N.D. Cal. 1985).	"Although no one approach commanded a majority of the *Fullilove* Court, lower courts, drawing from the above analysis, and other opinions rendered in the case, have distilled a three-part test to measure the constitutionality of affirmative action legislation."	The District Court devised a three-part test, which it claimed reconciled the major concerns expressed in all three opinions, and states this is closest to Burger.
Hammon v. Barry, 813 F.2d 412, 423–24 (D.C. Cir. 1987).	"Likewise, the various opinions in *Fullilove* emphasized that the 10 percent government contract set-aside program at issue there was remedial in nature, specifically designed to reduce past racial and ethnic discrimination. In his plurality opinion, Chief Justice Burger dwelt on the fact that Congress created the set-aside program only in the wake of long experience with government contracts and after determining that a variety of impediments to equal opportunity existed in that arena."	The D.C. Circuit relied upon Burger.
S.J. Groves & Sons Co. v. Fulton Cnty., 696 F. Supp. 1480, 1490 (N.D. Ga. 1987).	"Three of the six majority justices in *Fullilove* repeatedly emphasized that their decision to uphold the PWEA was based in large part on two considerations: first, 'the legislative authority of Congress' specifically delegated by the Constitution, particularly section five of the fourteenth amendment; and second, the electoral accountability of Congress as a 'politically responsive branch[ ] of Government.'" (alteration in original) (quoting *Fullilove*, 448 U.S. at 480, 490 (plurality opinion)).	The District Court's articulated test appears to reconcile the three opinions rather than to select one as controlling.

Lower Court Cases (reverse chronological order)	**Quote(s)**	**Notes**
Britton v. S. Bend Cmty. Sch. Corp., 775 F.2d 794, 809, 811 (7th Cir. 1985).	"In neither case [*Bakke* nor *Fullilove*] did any opinion command the assent of a majority of the Court. Thus the Court's opinions do not provide the kind of guidance in the constitutional area that its decision in *Weber* does in analyzing Title VII challenges." "In the period since the Supreme Court's decisions in *Bakke* and *Fullilove* a number of circuits have developed principles, based on the underlying concerns of the various Justices' opinions, for determining whether the challenged voluntary affirmative action plan is sufficiently related to the governmental objective of remedying past discrimination."	The Seventh Circuit cites most heavily to Burger but generally seeks to reconcile and synthesize the opinions.
Paradise v. Prescott, 767 F.2d 1514, 1531 (11th Cir. 1985).	"We recognized the absence of a definitive Supreme Court standard for judging the constitutionality of affirmative action. After examining the various opinions found in *Bakke* and *Fullilove*, we concluded that the appropriate standard of review should account for the concerns common to the various views expressed in those two fragmented decisions. Using this approach, we concluded that legislation employing benign racial classifications generally will be upheld if: (1) the governmental authority has authority to pass such legislation; (2) adequate findings have been made to ensure that the legislation is remedying the present effects of past discrimination; and (3) the use of the classifications extends no further than the demonstrated need of remedying the present effects of the past discrimination." (citations omitted)	The Eleventh Circuit distilled and attempted to reconcile the various opinions in *Fullilove* and *Bakke*.

Lower Court Cases (reverse chronological order)	**Quote(s)**	**Notes**
Dotson v. City of Indianola, 739 F.2d 1022, 1027 (5th Cir. 1984) (Wisdom, J., concurring in the result).	"In *Fullilove* Justices Powell and Stewart indicate that the interests of 'innocent' whites may be taken into account in fashioning a remedial plan, but Chief Justice Burger's plurality opinion, citing *UJO*, states, 'When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, . . . 'a sharing of the burden' by innocent parties is not impermissible.'" (citation omitted) (quoting *Fullilove*, 448 U.S. at 480, 484 (plurality opinion))	Although the majority opinion cites to all *Fullilove* opinions, it does not provide analysis as to which is controlling. Judge Wisdom, concurring, seeks to synthesize and reconcile the Burger and Powell opinions.
Kromnick v. Sch. Dist. of Phila., 739 F.2d 894, 901 (3d Cir. 1984).	"The absence of an Opinion of the Court in either *Bakke* or *Fullilove* and the concomitant failure of the Court to articulate an analytic framework supporting the judgments makes the position of the lower federal courts considering the constitutionality of affirmative action programs somewhat vulnerable."	The Third Circuit implies that the choice is speculative.

Lower Court Cases (reverse chronological order)	**Quote(s)**	**Notes**
S. Fla. Chapter of Associated Gen. Contractors of Am., Inc. v. Metro. Dade Cnty., Fla., 723 F.2d 846, 850 & n.7 (11th Cir. 1984).	"As in *Bakke*, the Court in *Fullilove* did not produce a majority opinion, with three different views emerging from those Justices voting to uphold the statute." "The district court referred to the Chief Justice's opinion as the 'plurality opinion' in *Fullilove*. Two justices also concurred in Justice Marshall's opinion, however, meaning that neither the Chief Justice nor Justice Marshall's opinion garnered the support of a plurality. Thus, to the extent that the term 'plurality opinion' connotes that an opinion commands more support than other opinions in the case, neither Chief Justice Burger nor Justice Marshall's opinion qualifies." (internal citation omitted).	The Eleventh Circuit notes that the District Court had observed neither Marshall nor Burger, at three Justices each, can claim special status as plurality.
S. Fla. Chapter of Associated Gen. Contractors of Am., Inc. v. Metro. Dade Cnty., Fla., 552 F. Supp. 909, 931 (S.D. Fla. 1982).	"While the plurality opinion did not explicitly state what standard of review should be applied to benign racial or ethnic classifications, Justice Powell wrote a concurring opinion in which he repeated his belief, first expressed in *Bakke*, that the strict scrutiny standard should be applied." (footnote omitted)	The District Court appears to rely upon Powell's *Fullilove* analysis, combined with his *Bakke* analysis, to discern the evolving standard.
Uzzell v. Friday, 592 F. Supp. 1502, 1517 n.29 (M.D.N.C. 1984).	"Chief Justice Burger wrote an opinion announcing the judgment of the Court [in *Fullilove*] in which Justices White and Powell joined. Justice Powell also filed a concurring opinion applying the test set forth in his opinion in *Bakke*."	The District Court appears to rely upon Powell's *Fullilove* analysis, combined with his *Bakke* analysis, to discern the evolving standard.

Lower Court Cases (reverse chronological order)	**Quote(s)**	**Notes**
Williams v. City of New Orleans, 729 F.2d 1554, 1568 (5th Cir. 1984) (Higginbotham, J., specially concurring).	"Chief Justice Burger's plurality opinion in *Fullilove*, joined by Justices Powell and White, notes that '[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees.' Justice Powell wrote a concurring opinion adhering to his endorsement in *Bakke* of a strict scrutiny standard of review for all racially-based plans." (internal citations omitted) (alteration in original) (quoting *Fullilove*, 448 U.S. at 491 (plurality opinion)).	The Fifth Circuit appears to synthesize the Burger and Powell positions, along with *Weber* and other Fifth Circuit cases.
Williams v. City of New Orleans, 543 F. Supp. 662, 679 (E.D. La. 1982)	"The case [*Fullilove*] produced no majority opinion, and a wide range of possible approaches."	The District Court offers no guidance.
Bratton v. City of Detroit, 704 F.2d 878, 885 (6th Cir. 1983).	"*Fullilove* is a plurality decision with little precedential value."	The Sixth Circuit implies Burger controls but questions the precedential value.
Ohio Contractors Ass'n v. Keip, 713 F.2d 167, 170 (6th Cir. 1983).	"Neither *Fullilove* nor *Bakke* produced a majority opinion from the Supreme Court and we depend on the several plurality opinions for guidance."	The Sixth Circuit seeks to reconcile all the opinions.
Mich. Rd. Builders Ass'n, Inc. v. Milliken, 571 F. Supp. 173, 175 (E.D. Mich. 1983).	"Interestingly, each party relies upon *Fullilove v. Klutznick* in support of their respective positions. . . . In a plurality decision, the Court determined that the MBE was constitutional notwithstanding its mandate that 'at least 10% of [any grant for local public works projects] shall be expended for minority businesses.' In its ruling, it is clear that the *Fullilove* Court adhered to its earlier stance that 'racial classifications are not *per se* invalid under [the Equal Protection Clause of] the Fourteenth Amendment.'" (internal citation omitted) (alteration in original) (first quoting *Fullilove*, 448 U.S. at 454 (plurality opinion); and then quoting *id.* at 517 (Marshall, J., concurring in the judgment)).	The District Court seems to rest on the Burger opinion.

Lower Court Cases (reverse chronological order)	**Quote(s)**	**Notes**
Sw. Wash. Chapter, Nat'l Elec. Contractors Ass'n v. Pierce Cnty., 667 P.2d 1092, 1097 (Wash. 1983) (en banc).	"The concurring opinion of Justice Powell provides some guidance in interpreting Chief Justice Burger's opinion, since Justice Powell did sign it, but is not controlling because Justice Powell was not a necessary member of the majority."	The Washington Supreme Court most clearly articulates that the controlling opinion is Burger, not Powell, because Powell was not necessary to the majority, or median.
M.C. West, Inc. v. Lewis, 522 F. Supp. 338, 342 (M.D. Tenn. 1981).	"Again, no one opinion [in *Fullilove*] spoke for a majority of the Court. A clear plurality of the Court, however, would require precise findings of discrimination before allowing an affirmative action program to stand."	The District Court implies reliance on Burger.

Article (alpha by author)	**Quote(s)**	**Notes**
Jesse H. Choper, *The Constitutionality of Affirmative Action: Views from the Supreme Court*, 70 KY. L.J. 1, 5–6 (1981–1982).	"As has become increasingly true, especially when the issue is controversial, there was no opinion for the Court. Rather, there were two principal opinions[, Marshall and Burger,] in *Fullilove*, written on behalf of a majority of the Court with three Justices subscribing to each." "Of great significance were the votes of Chief Justice Burger and Justice Powell to uphold the MBE provision since their positions in *Fullilove* raise to six the number of Justices committed to the view that the Constitution does not prohibit *all* race-conscious affirmative action."	Author suggests Burger and Powell were essential to raising supporting votes to six.
Paul N. Cox, *The Question of "Voluntary" Racial Employment Quotas and Some Thoughts on Judicial Role*, 23 ARIZ. L. REV. 87, 167 (1981).	"The point of the Burger and Powell opinions [in *Fullilove*] is that there will be judicial deference to congressional policy making, and that policy making authority seems clearly to include the right to define the evil sought to be remedied so long as the purpose is proper."	Author seeks to reconcile Burger and Powell.

Article (alpha by author)	Quote(s)	Notes
Drew S. Days, III, Fullilove, 96 YALE L.J. 453, 466, 467, 474 (1987).	"Justice Powell, who joined in the Burger opinion, wrote separately to restate his view on the proper standard of review."	Purely descriptive.
Author argued for the U.S. Government in *Fullilove*.	"The efforts to delineate the appropriate test for evaluating the constitutionality of racial classifications ran from Justice Powell's 'strict scrutiny' to Chief Justice Burger's 'most searching examination' to Justice Marshall's 'substantially related to an important governmental objective.' The truth is, however, that all the members of the majority applied a standard that fell below any of the ones upon which they claimed to rely." "[T]he fact was not lost upon states and localities that only Chief Justice Burger, and perhaps Justice White, thought it dispositive that the set-aside emanated from Congress."	This quote and the next seem to center on the Burger analysis.
Deborah L. Jacobs, *Justice Out of Balance: Voluntary Race-Conscious Affirmative Action in State and Local Government*, 17 URB. LAW. 1, 5 (1985).	"In an opinion by Justice Burger which relied heavily on the plenary powers of Congress under section 5 of the fourteenth amendment to redress past societal discrimination, the Court in *Fullilove* upheld against a constitutional and statutory challenge a 'minority business enterprise' provision of the Public Works Employment Act of 1977." (footnote omitted) (quoting 42 U.S.C. § 6705(f)(2) (1982))	This centers on Burger.
Peter G. Kilgore, *Racial Preferences in the Federal Grant Programs: Is there a Basis for Challenge after* Fullilove v. Klutznick, LAB. L.J., May 1981, at 306, 308, 313. Author was co-counsel for petitioners in *Fullilove*.	"*Fullilove*, consisting of five separate opinions, none of which attracted more than three votes, resulted in the remaining four Justices [in *Bakke*] expressing their view and one possibly making a change." "The uncertainty left by these opinions [of Burger and Powell] has been reflected in lower court decisions."	This mentions lower court uncertainty without deciding.

Article (alpha by author)	Quote(s)	Notes
Larry M. Lavinsky, *The Affirmative Action Trilogy and Benign Racial Classifications—Evolving Law in Need of Standards*, 27 WAYNE L. REV. 1, 16 (1980).	"All of the Justices comprising the majority concluded that the set- aside provision was enacted to remedy the effects of past racial discrimination. Unable to agree on a single legal approach, they wrote three separate opinions." (footnote omitted).	This does not choose.
Michael J. Phillips, *Neutrality and Purposiveness in the Application of Strict Scrutiny to Racial Classifications*, 55 TEMP. L.Q. 317, 333–34 (1982).	"While upholding [the MBE provision] by a 6-3 vote, the Court, in its various opinions, managed to enunciate at least four distinct positions on the constitutional treatment of congressionally-mandated reverse racial preferences. . . . The first position, marking a considerable departure from the framework of analysis previously used in equal protection cases involving race, was contained in Chief Justice Burger's opinion announcing the judgment of the Court." (footnotes omitted)	Seems to rely upon Burger.
John E. Richards, *Equal Protection and Racial Quotas: Where Does Fullilove v. Klutznick Leave Us?*, 33 BAYLOR L. REV. 601, 604, 606 (1981).	"Chief Justice Burger, joined by Justices White and Powell, wrote the lead opinion." "Although Justice Powell joined the Chief Justice's opinion, he wrote separately to apply his *Baake* [sic] analysis to *Fullilove*."	Merely describes the relationship between Burger and Powell.
Mark B. Robinette, Comment, Fullilove v. Klutznick*: An Initial Victory for Congressional Affirmative Action*, 8 OHIO N.U. L. REV. 377, 379, 387 (1981).	"The Supreme Court, speaking through Chief Justice Burger, focused its analysis on whether the MBE objectives were within the power of Congress and, if so, whether the means used for achieving the objectives were permissible." "The decision also leaves undecided the appropriate level of equal protection scrutiny that should be applied to congressional affirmative action, inasmuch as the Burger opinion refused to define the level of scrutiny that it applied."	This quote notes that Burger declined to join the Powell articulation of the governing standard.

Method: These data are derived from searches of Westlaw, for cases, and HeinOnline, for law review and journal articles. Case citing references to *Fullilove v. Klutznick*, 448 U.S. 448 (1980), were filtered by date range (1980–1990), depth of treatment (highest and second highest level), and searches within cases for "Burger," "Powell," "Marks," and "narrowest grounds." Additionally, if a case cited to a second case not on the filtered list, that second case was also examined. A similar search was completed using LexisNexis to check for database variations. For law reviews and journals search terms included: "Fullilove v. Klutznick"; "Fullilove"; "Klutznick"; "narrowest grounds"; "Burger"; "Powell"; and "Marks." Articles were filtered by date range (1980–1990). Additionally, if an article cited to another article not on the filtered lists that was of note, the article was also reviewed. A similar search was completed using Google Scholar. Although no lower court treats the Powell *Fullilove* opinion as controlling on narrowest grounds, as Appendix A shows, two federal district court judges do rely upon the Powell opinion in *Fullilove*, combined with the controlling Powell opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 269 (1978), to derive an emerging Supreme Court consensus position respecting benign race-based accommodations more generally.

		Supreme Court	Lower Courts	Law Review/ Journal
Summary:	**Burger:**	3	9	3
	Powell:	0	2	0
	Seeks to Reconcile Burger and Powell:	0	5	2
	Seeks to Reconcile Burger, Powell, and Marshall:	0	5	0
	Not Applicable	0	3	4