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## The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective

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# The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective

Adam S. Hochschild\*

## INTRODUCTION

On the evening of December 12, 2000 America watched as TV legal scholars scrambled to decipher the United States Supreme Court's split decision in *Bush v. Gore*.<sup>1</sup> Despite the six different opinions, that case turned out to be easy enough to understand. A clear majority of five Justices ruled the same way. Real problems arise when there is less than a clear majority speaking for the Court—when the leading opinion of the Court is a plurality opinion.

A Supreme Court plurality decision holds ambiguous precedential value. At the very least, plurality decisions bind the parties in the particular case.<sup>2</sup> Our jurisprudential tradition further assumes that all cases elaborate a general rule of decision, or *ratio decidendi*, that applies to future cases involving similar issues.<sup>3</sup> The discernment of a *ratio decidendi* from a majority opinion is generally uncontroversial because a majority opinion represents the rationale of a majority of Justices.<sup>4</sup> But, the discernment of a *ratio decidendi* from a plurality

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1. 148 L. Ed. 2d 388 (2000).

2. It appears that the majority requirement for Supreme Court judgments, as opposed to the precedential value of Court opinions, is purely a product of tradition and has been largely ignored by commentators. *But see* Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 30 (1993) (suggesting that “it is firmly settled” that Justices would be “untroubled and unanimous” in recognizing the validity of a judgment supported by a mere majority). This Note focuses on the confusion surrounding the precedential value of Supreme Court plurality decisions and will deal only tangentially with the issue of the majority requirement for Court judgments.

3. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES \*69-71; Nicholas St. John Green, *Stare Decisis*, 14 AM. L. REV. 609, 609-51 (1880); EUGENE WAMBAUGH, THE STUDY OF CASES § 7 (1894) (“[A]lthough the court can pass upon no case except the one before it, the decision is a precedent for all cases in which the circumstances do not differ materially from the circumstances upon which the decision is made.”).

4. *See, e.g.*, WAMBAUGH, *supra* note 3, at § 47.

opinion, which represents the rationale of less than half of the Justices, is more problematic. A majority opinion may command more authority than a plurality decision,<sup>5</sup> but precisely what authority does a plurality decision command? In other words, how should courts apply a plurality decision to subsequent controversies involving similar issues?

This Note posits that the growing confusion surrounding plurality opinions is a foreseeable consequence of the formative years of the Supreme Court. The hubris of wielding federal judicial power, that has driven Justices since the Court's inception, is the cause of the plurality opinion chaos. An examination of the history of the Supreme Court's power and its methods of decision making suggests that the problem is deeply rooted in American law. Accordingly, an earnest solution involves a shift in our fundamental understanding of the Supreme Court's role. We must begin, at least, by recognizing the esteemed and modest beginnings of the Supreme Court.

Part I discusses the role of the early Court in terms of both its decision making procedures and its role as an institution within a federal system. Part IA is concerned with the Supreme Court under the first Chief Justice, John Jay. Under Chief Justice Jay, the Supreme Court exercised modest authority and employed a decision making process that generally is considered now to be outmoded and unhelpful. Part IB focuses on the legacy of Chief Justice John Marshall, who became Chief Justice seven years after Chief Justice Jay resigned. Often considered the father of the modern Court, Chief Justice Marshall strengthened the authority of the Court in the public eye and provided the framework for the Court's new decision making system.

Part II explains plurality decisions and discusses the confusion surrounding such opinions in the federal courts. Part III closely examines three exceptionally awkward Supreme Court plurality decisions that typify this confusion. Part IV considers some modern attempts, including the Court's own, to solve the problem of plurality decision interpretation. Finally, Part V proposes a shift towards a modest, pre-Marshall, Jay-era vision of the role of the Supreme

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5. *But see infra* notes 155-58 and accompanying text.

Court, aimed at avoiding the plurality interpretation problem.

## I. THE EARLY COURT

The early years of the Supreme Court laid the groundwork for the modern problem of plurality decision interpretation. The mechanics of decision making changed significantly within the Court's first fifteen years, helping to precipitate the current confusion.

Originally, Supreme Court Justices each delivered individual opinions separately, or *seriatim*.<sup>6</sup> The Supreme Court most likely derived the *seriatim* practice from English common law courts.<sup>7</sup> The U.S. Constitution offers no guidance on the voting procedures of the Supreme Court. The drafters included one passing reference to the "Chief Justice,"<sup>8</sup> but otherwise said nothing about the number of Justices on the Court, how the Court should decide cases, or in what sense lower courts are bound by Supreme Court decisions.

### *A. Seriatim from the Beginning: The Court Under Chief Justice Jay*

Many twentieth-century Supreme Court historians argue that through the Court's first eleven years, from 1789 to 1800, it was an ineffective and clumsy institution.<sup>9</sup> These historians posit that the Court first became institutionally viable when John Marshall became

6. See generally *SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL* (Scott Douglas Gerber ed., 1998) [hereinafter *SERIATIM*].

7. Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 *CORNELL L.Q.* 186, 190 (1959).

8. "The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside. . . ." U.S. CONST. art. I, § 3, cl. 6.

9. See, e.g., WESTEL W. WILLOUGHBY, *THE SUPREME COURT OF THE UNITED STATES: ITS HISTORY AND INFLUENCE IN OUR CONSTITUTIONAL SYSTEM* 84-85 (1890) ("The history of the first ten years of the Supreme Court, from 1789 to 1800, is not the most important period of its existence."). Two other Chief Justices served on the Court between Chief Justices Jay and Marshall: John Rutledge (1795) and Oliver Ellsworth (1796-1799). John Jay actually was nominated by President John Adams and confirmed by the Senate for a second term to begin in 1800, but Jay refused to serve. BERNARD SCHWARTZ, *A BASIC HISTORY OF THE SUPREME COURT* 12 (1968) ("The elegance of the justices' attire [at the first public session of the Court] could, however, scarcely serve to conceal the relative ineffectiveness of the first Supreme Court, at least by comparison of what that tribunal was later to become."). *But see generally* *SERIATIM*, *supra* note 6 (containing eleven essays arguing that the pre-Marshall Court deserves more respect).

Chief Justice in 1801.<sup>10</sup> According to these Marshall-centrist historians, Chief Justice Jay was altogether ineffective as the Court's first Chief Justice.<sup>11</sup>

Controversy surrounded Chief Justice Jay's service on the Court. Chief Justice Jay was politically active outside the Court, simultaneously pursuing multiple governmental roles.<sup>12</sup> During his tenure as Chief Justice from 1789 to 1794, he also served as secretary of state and the overseas diplomat to Great Britain, and successfully ran for governor of New York.<sup>13</sup> While these activities raised concerns about constitutional separation of powers,<sup>14</sup> Chief Justice Jay remained enthusiastic about his career choices,<sup>15</sup> which were supported by the likes of President George Washington.<sup>16</sup> Until the end of his tenure he was confident in his abilities as an ubiquitous public figure active beyond the bounds of the Supreme Court.<sup>17</sup>

10. See *supra* note 9. See also Samuel L. Olken, *Chief Justice John Marshall in Historical Perspective*, 31 J. MARSHALL L. REV. 137, 137-38 ("Uncertain and often fragmented in its initial decade, the Court under Marshall's energetic and charismatic leadership, emerged as the principal guardian of the Constitution, a bulwark for individual rights and the ultimate arbiter of conflicts within the federal system.") (footnotes omitted). When Jay refused to serve, Adams nominated and the Senate confirmed John Marshall, who began his Chief Justiceship in 1801. See HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* 71-72 (1992).

11. See *supra* note 47 and accompanying text.

12. See, e.g., Sandra VanBurkleo, "Honor, Justice, and Interest:" *John Jay's Republican Politics and Statesmanship on the Federal Bench*, in *SERIATIM*, *supra* note 6, at 32-52.

13. *Id.*

14. See JULIUS GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES ANTECEDENTS AND BEGINNINGS TO 1801*, at 747 (1971) ("The Jay appointment [to the ambassadorship to Great Britain] was roundly denounced as a violation of the principle of separation of powers" (citing *BACHE'S GENERAL ADVERTISER*, April 19, 28, 29, 1794, and *May 2, 1794*; *DUNLAP'S AMERICAN DAILY ADVERTISER*, May 12, 1794)).

15. See VanBurkleo, *supra* note 12, at 32. VanBurkleo writes: "In [Jay's] own words, the problem at hand was to discover, within legal and political limits, how the new federal judiciary—and especially the Supreme Court—might provide 'due support to the national government' in pursuit of 'great and obvious principles of sound policy.'" *Id.* (citing Letter from John Jay to John Adams, Jan. 2, 1801, in *IV THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY* 285 (Henry P. Johnston ed., 1891)).

16. See VanBurkleo, *supra* note 12, at 45 ("Historians of the Jay Court often decry these bifurcated interests and credentials, but Washington found them uniquely compatible with American needs and priorities in 1789.") (citing Letter from George Washington, President of the United States, to John Jay (Oct. 5, 1789); *Instructions to Envoy Extraordinary*, May 6, 1794, in *III THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY* 378-79 (Henry P. Johnston ed., 1891)).

17. See VanBurkleo, *supra* note 12, at 46 (Jay "abruptly and freely abandoned the bench

Chief Justice Jay was also politically active on the Court. He hoped for national unity and believed that this fundamental American objective required diminished state power.<sup>18</sup> Chief Justice Jay preached his support of Federalism in the *Federalist Papers*<sup>19</sup> and was eager to use the Supreme Court to further this goal.<sup>20</sup>

In *Chisholm v. Georgia*,<sup>21</sup> the Court's first important decision,<sup>22</sup> Chief Justice Jay exhibited his nationalism seriatim.<sup>23</sup> The issue *Chisholm* posed was whether a state could be sued by citizens of another state.<sup>24</sup> The Court held by a 5-1 vote that Georgia was subject to liability.<sup>25</sup> In a well-articulated opinion,<sup>26</sup> Chief Justice Jay argued

when he perceived that national 'objects' were best pursued elsewhere." *Id.*

18. See WILLOUGHBY, *supra* note 9, at 84. John Jay writes:

What power should be granted to the government so constituted, is a question that deserves much thought. I think the more the better: the States retaining only so much as may be necessary for domestic purposes, and all their principal officers, civil and military, being commissioned and removable by the National Government.

*Id.*

19. THE FEDERALIST NOS. 2-5, 64 (John Jay). In *Federalist 2*, Jay writes:

This country and this people seem to have been made for each other, and it appears as if it was the design of Providence that an inheritance so proper and convenient for a band of brethren, united to each other by the strongest ties, should never be split into a number of unsocial, jealous, and alien sovereignties.

THE FEDERALIST NO. 2, at 36 (John Jay) (Roy P. Fairfield ed., 1966).

20. See, e.g., VanBurkleo, *supra* note 12, at 39-40; GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 159, 472-73 (1969); Martin Diamond, *What the Framers Meant by Federalism*, in *A NATION OF STATES* 31-33 (Robert Goodwin ed., 1974); Letter from John Jay to George Washington, March 16, 1786, in *III THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY* 186-87 (Henry P. Johnston ed., 1891).

21. 2 U.S. (2 Dall.) 419 (1793).

22. See SCHWARTZ, *supra* note 9, at 13; GOEBEL, *supra* note 14, at 728. Goebel notes that the seriatim opinions in *Chisholm* deserve to be considered more or less at large, for not only was this the first great case to be decided by the Court, but also the Court delivered the opinions at a moment when factional divisions over the limits of national authority lent explosive force to the issue sub judice. *Id.* See also John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1895-1941 (1983) (stating that Federalists demanded the assertion of federal jurisdiction over suits against states in order to enforce the Peace Treaty of 1783 with Great Britain).

23. *Chisholm*, 2 U.S. (2 Dall.) at 469-79 (Jay, C.J., opinion). For more on the seriatim practice of the early Court, see *supra* note 6 and accompanying text.

24. See, e.g., *Chisholm*, 2 U.S. (2 Dall.) at 469 (Jay, C.J., opinion).

25. *Id.* at 480.

26. Jay delivered "one of the most clear, profound and elegant arguments perhaps ever given in a court of judicature." GOEBEL, *supra* note 14, at 732 (quoting DUNLAP'S AMERICAN DAILY ADVERTISER, Feb. 21, 1793). Goebel himself commented that the opinion was

vehemently that citizens should be able to sue states.<sup>27</sup> The decision, however, was met with widespread hostility.<sup>28</sup> The public uproar soon inspired a national movement to amend the Constitution, and in 1798 the Eleventh Amendment was ratified, instituting state sovereignty and superceding *Chisholm*.<sup>29</sup>

The aftermath of the *Chisholm* case destroyed Chief Justice Jay's dreams of a strong, authoritative Court.<sup>30</sup> Chief Justice Jay remained proud of the *Chisholm* decision and was disappointed to see its demise.<sup>31</sup> His disillusionment with what he perceived to be the Court's futility ultimately led to his resignation in 1795, two years after *Chisholm*, and three years before ratification of the Eleventh Amendment.<sup>32</sup>

Throughout his career Chief Justice Jay remained a staunch

"considerably less than this but must be considered at large because it is the chief exhibit on Jay's judicial prowess." GOEBEL, *supra* note 14, at 732.

27. *Chisholm*, 2 U.S. (2 Dall.) at 469-79 (Jay, C.J., opinion).

28. In Georgia, the state House of Representatives proposed a resolution that declared that the state was not bound by unfavorable Supreme Court decisions and that the state would disregard them as unconstitutional. GOEBEL, *supra* note 14, at 734. The Georgia circuit court presented a grievance to the Supreme Court that read in part: "We present as a grievance the decision of the Supreme Court, in a question relative to the liability of the State of Georgia to answer an Action commenced against her by one individual of another State, exclusive of the incompatibility of Sovereignty and liability to be sued." GOEBEL, *supra* note 14, at 735 n.42. The Georgia Governor also delivered a defiant message to the Court. GOEBEL, *supra* note 14, at 735. Formal resolutions in Virginia, Massachusetts, and New York also expressed unwillingness to follow the Supreme Court. *Id.* at 735-36.

29. U.S. CONST. amend. XI. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Id.*

30. See VanBurkleo, *supra* note 12, at 49 ("The outcry after *Chisholm* and the related march toward constitutional limitation completely shattered Jay's ever-diminishing faith in the high court's political and diplomatic utility."). But see Irving Dillard, *John Jay, in 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS* 15, 16 (Leon Frieman & Fred L. Israel eds., 1969). Dillard argues, albeit weakly, that Chief Justice Jay took the public reaction to *Chisholm* in stride. *Id.* Dillard writes that despite the "setback" to Chief Justice Jay's vision for the Court, Chief Justice Jay was not devastated by Congress and the states resorting to the amending process to overturn the *Chisholm* decision. He believed the duty of the Supreme Court was to interpret and apply the Constitution, leaving it to Congress and the states to use their best judgment to seek constitutional changes. *Id.*

31. See VanBurkleo, *supra* note 12, at 49, and accompanying quote in note 30.

32. See *id.* at 50 ("Jay's resignation thus symbolized keen disappointment, and from the point of view of his colleagues marooned on a sinking federal bench, the situation could only get worse.").

advocate of nationalist principles.<sup>33</sup> His desire for a centralized federal power was antithetical to the framers' modest aspirations for the Supreme Court.<sup>34</sup> Chief Justice Jay departed the Court realizing that America, at that time, wanted nothing more than modesty in its court of last resort.<sup>35</sup>

### *B. Marshall and Consolidated Opinions*

In 1801 John Marshall became Chief Justice and helped establish the strong, authoritative Court for which Chief Justice Jay had hoped.<sup>36</sup> Chief Justice Marshall provided the framework for the modern understanding of both the Supreme Court's authority and the Court's system of decision making.<sup>37</sup> Concerned about the ambiguous precedential value of seriatim decisions, Chief Justice Marshall introduced and established the practice of the Chief Justice announcing a single opinion which represented the undivided "opinion of the Court."<sup>38</sup>

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33. See generally VanBurkleo, *supra* note 12; Dillard, *supra* note 30.

34. See THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[T]he judiciary . . . will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatsoever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

*Id.* See also MONTESQUIEU, 1 THE SPIRIT OF LAWS 178 (Thomas Nugent trans., Robert Clarke Co. 1873) ("Of the three powers above mentioned [Executive, Legislature, and Judiciary], the JUDICIARY is . . . next to nothing."). See also *infra* note 43 and accompanying text (discussing Thomas Jefferson's harsh criticisms of Chief Justice Marshall's attempts to bring more authority to the Supreme Court).

35. See VanBurkleo, *supra* note 12, at 49-50.

36. See *supra* Part IA.

37. Without Justice Marshall, Charles Evan Hughes, who served as Chief Justice from 1930 to 1941, likely would not have said, "The constitution is what the judges say it is." SAMUEL HENDEL, CHARLES EVAN HUGHES AND THE SUPREME COURT 11-12 (1951).

38. See HENRY J. ABRAHAM, THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE 218-19 (7th ed. 1993); 3 ALBERT BEVERIDGE, THE LIFE OF JOHN MARSHALL 16 (1919). Chief Justice Marshall began the practice of consolidating opinions in "Amelia's Case." *Talbot v. Seeman*, 5 U.S. (1 Cranch)



Chief Justice Marshall based this policy on ideology and efficiency.<sup>39</sup> He intended to instill public confidence in Supreme Court opinions so that the Supreme Court could enforce nationalist, federalist policy.<sup>40</sup> He attempted to eliminate fear amongst lawyers and lower courts that the Supreme Court would revisit closely decided cases and subsequently overrule them.<sup>41</sup> However, later in his tenure as Chief Justice, Supreme Court decisions were published regularly with multiple opinions.<sup>42</sup>

Marshall's single-opinion policy was not without its critics. During Marshall's tenure, many respected legal and political figures, including President Thomas Jefferson, condemned Chief Justice Marshall's authoritarian consolidation of opinions as fascistic.<sup>43</sup>

1 (1801). Chief Justice Marshall's new procedure seemed to have begun triumphantly; *Amelia's Case* established "an important rule of international law and is of permanent value." BEVERIDGE, *supra* at 16. Scott Gerber, *Introduction: The Supreme Court before John Marshall in SERIATIM*, *supra* note 6, at 20.

39. See R. Dean Moorhead, *The 1952 Ross Prize Essay: Concurring and Dissenting Opinions*, 38 A.B.A. J. 821, 821 (1952) (explaining that Marshall believed a unified voice would strengthen the "power and dignity of the Court" (quoting 14 ENCYCLOPEDIA BRITANNICA 969 (1951)); Igor Kirman, Note, *Standing Apart to be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083, 2086-87 (1995); BEVERIDGE, *supra* note 38, at 16 ("Marshall took the first step in impressing the country with the unity of the highest court of the Nation."). Justice Frankfurter claimed that the Court abandoned seriatim opinions for efficiency's sake. The Court's increase in the number of cases it heard required the consolidation of opinions. *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 487 (1939) (Frankfurter, J., concurring).

40. See, e.g., 1 LOUIS B. BOUDIN, *GOVERNMENT BY JUDICIARY* 267-316 (1932) (discussing Marshall and his nationalistic judicial activism); ALFRED H. KELLY & WINFREDA HARBISON, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 257-83 (5th ed. 1976) (discussing the same). See also Herbert Alan Johnson, *John Marshall, in THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS*, *supra* note 30, at 290-91 ("Primarily, [Marshall] was a man who strongly supported the concept of federal supremacy over the states. This dominant theme is the focal point of *McCulloch v. Maryland* [17 U.S. (4 Wheat.) 316 (1819)], yet it is the leitmotif of nearly every Marshall opinion in the Constitutional field.").

41. See ZoBell, *supra* note 7, at 193 (noting that Marshall's opinions were the opinions of the Supreme Court as a whole); G.P.J. McGinley, *The Search for Unity: The Impact of Consensus Seeking Procedures in Appellate Courts*, 11 ADEL. L. REV. 203, 210-12 (1987) (observing that lower courts tend to view majority decisions as more authoritative than a series of *seriatim* opinions and consensus lends authority to an opinion).

42. The first recorded concurrence during Marshall's tenure as Justice was *Huidekoper's Lessee v. Douglass*, 7 U.S. (3 Cranch) 1, 72 (1805) (Johnson, J., concurring in judgment). See ZoBell, *supra* note 7, at 195.

43. Jefferson considered Marshall's policy a "dangerous engine of consolidation." Moorhead, *supra* note 39, at 821. Jefferson also was convinced that the new policy would make

Others suggest that Chief Justice Marshall was so concerned with controlling and maintaining authoritative decisions that he claimed a majority supported the “opinion of the Court” when actually less than a majority agreed with it.<sup>44</sup>

Moreover, the abolition of seriatim decisions arguably led to an emphasis on mustering a majority vote rather than publishing a well-reasoned, principled opinion.<sup>45</sup> Some Justices, including Chief Justices Salmon P. Chase and William Howard Taft and Justice Oliver Wendell Holmes, often joined majority opinions in order to preserve their political capital amongst their brethren.<sup>46</sup> An alternative explanation, perhaps, is that the early American republic needed a formidable and unified voice.<sup>47</sup> The modern model of a

Justices “lazy” and “incompetent” because “nobody knows what opinion any individual member gave in any case, nor even that he who delivers the opinion concurred in it himself.” David O. Stewart, *A Chorus of Voices*, 77 A.B.A. J. 50, 50 (1991).

44. ZoBell, *supra* note 7, at 193 n.41.

45. ALEXANDER BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS*, 18-19 (1957). Bickel noted that Justice Brandeis joined the majority in *Atherton Mills v. Johnson* (Child Labor Case), 259 U.S. 20 (1922), for tactical reasons. *Id.* Bickel quoted Justice Brandeis as remarking, “‘Can’t always dissent,’ and also referring to Holmes’ reluctance to dissent again after he had once had his say on a subject.” *Id.* at 18. Bickel believed that it “might have seemed to Brandeis churlish, and a disservice in the long run to his effectiveness . . . and to his future relations with the new Chief Justice, Taft, to turn around at this juncture and register a dissent.” *Id.* *But see* Clyde Spillenger, *Reading the Judicial Canon: Alexander Bickel and the Book of Brandeis*, 1 J. AM. HIST. 125, 133-51 (June 1992) (casting doubt on Bickel’s thesis). *See also* RONALD D. ROTUNDA, *MODERN CONSTITUTIONAL LAW: CASES AND NOTES* 176 (1997) (noting Bickel’s and Spillenger’s arguments in the light of voting distributions on the Supreme Court in New Deal Commerce Clause cases).

46. Chase served as Chief Justice from 1864-1873. Taft served as Chief Justice from 1921-1930. Holmes served as Associate Justice from 1902-1931. BICKEL, *supra* note 45, at 18. *See also* SALMON P. CHASE, *THE SALMON P. CHASE PAPERS* vol. 1, 517 (John Niven ed., 1993). Chase explained that he rarely filed dissents because he thought “that except in very important causes [filing a] dissent [was] inexpedient.” *Id.* *See also* David M. O’Brien, *Institutional Norms and Supreme Court Opinions: On Reconsidering the Rise of Individual Opinions*, in *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* 91-93 (Cornell W. Clayton & Howard Gillman eds., 1999) (discussing incidents of dissent suppression on the Supreme Court). The authors quote Taft:

I don’t approve of dissentings generally, for I think in many cases where I differ from the majority, it is more important to stand by the Court and give its judgment weight than merely to record my individual dissent where it is better to have the law certain than to have it settled either way.

*Id.* at 93 (citing ALPHEUS T. MASON & WILLIAM M. BEANEY, *THE SUPREME COURT IN A FREE SOCIETY* 66, 223 (1956)).

47. *See, e.g.*, JEAN EDWARD SMITH, *JOHN MARSHALL: DEFINER OF A NATION* 1-2 (1996)

strong Supreme Court with consolidated, albeit sometimes fragmented, opinions was perhaps the necessary means by which to advance republican values in the young nation.<sup>48</sup>

Consolidated opinions of the Court would not exist without Chief Justice Marshall's innovations.<sup>49</sup> By eliminating the seriatim practice,<sup>50</sup> Chief Justice Marshall laid the groundwork for the hermeneutically confusing mixtures of joint opinions, concurrences, and dissents.<sup>51</sup> Few people today question the "Marshall law" of consolidated opinions.<sup>52</sup> Ironically, despite Chief Justice Marshall's insistence on abolishing fractured, seriatim decisions and maintaining straightforward precedents, divided decisions now are more common

(arguing, as the title of the book suggests, that Marshall "define[d] the nation" by strengthening the Court's role in the interests of nationalist, Federalist policy); Olken, *supra* note 10, at 138 (reviewing Smith's book and affirming his thesis). Other biographies of Marshall include: LEONARD BAKER, *JOHN MARSHALL: A LIFE IN LAW* (1974); BEVERIDGE, *supra* note 38; CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* (1996); FRANCIS N. STITES, *JOHN MARSHALL: DEFENDER OF THE CONSTITUTION* (1981); JAMES B. THAYER, *JOHN MARSHALL* (1901); G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 7-34* (Oxford Paper ed. 1978) (discussing Marshall); Joseph Story, *A Discourse upon the Life, Character, and Services of the Honorable John Marshall*, in 3 *JOHN MARSHALL: LIFE, CHARACTER, AND JUDICIAL SERVICES* 327 (John F. Dillon ed., 1903). Marshall also wrote an autobiography, *JOHN MARSHALL, AN AUTOBIOGRAPHICAL SKETCH* (J.S. Adams ed., 1937).

48. See, e.g., SMITH, *supra* note 47, at 1-2; Olken, *supra* note 10, at 137-38. In his panegyric to the Marshall court, Olken writes:

[O]ver the course of three and a half decades, the Marshall Court delineated the limits of government in a democratic republic and, in so doing, bolstered the prestige of the federal judiciary while preserving the delicate balance between state and federal authority. Constitutional supremacy, judicial independence and dedication to the rule of law characterized the philosophy of the Court during this era.

*Id.* at 138.

49. See *supra* notes 38-42 and accompanying text.

50. See *supra* note 38 and accompanying text.

51. See *supra* notes 38-42 and accompanying text.

52. Recent scholarship assumes the validity of joint opinions, focusing on the interpretation of concurring and plurality opinions rather than on whether split decisions are valid at all. See, e.g., Kirman, *supra* note 39; Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 *CORNELL L. REV.* 1593 (1992); Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 *DUKE L. J.* 419 (1992). Two articles, written in 1952, address the question of the validity of split decisions: Moorhead, *supra* note 39 and Richard B. Stephens, *The Function of Concurring and Dissenting Opinions in Courts of Last Resort*, 5 *U. FLA. L. REV.* 394 (1952). Both articles defend the practice of separate opinion writing, though neither advocates the Court's original seriatim practice.

and more confusing.<sup>53</sup>

## II. A MODERN PROBLEM: PLURALITY DECISIONS

Against the backdrop of the Jay and Marshall eras, this Note addresses plurality opinions, a particularly problematic outgrowth of the early Court.

### *A. Establishing a Plurality Decision*

Plurality decisions result from several different scenarios. In all Court decisions, a majority of the Justices must support “judgment *X*.” Within that judgment-majority, the Justices agreeing on judgment *X* may have different rationales for reaching that conclusion. If five or more Justices out of the nine on the Court support judgment *X* and a particular given rationale, *A*, the Court has established a majority decision. If less than five agree on the rationale (yielding rationales *A* and *B*, and conceivably as many as nine), then the Court has established a plurality decision. The plurality opinion, therefore, represents the majority rationale for the majority judgment.

For example, five Justices could support judgment *X*, and within that judgment-majority, three Justices support rationale *A* and two Justices support rationale *B*. Further, assume four dissenting Justices support judgment *Y* and agree on their dissenting rationale. The three Justices supporting judgment *X* and rationale *A* will write the plurality decision. Although a plurality of Justices, four, agrees on the dissenting rationale, a majority disagrees with the dissent’s judgment. Accordingly, the group of three, supporting judgment *X* and rationale *A*, writes the plurality decision for the Court.

A Justice may opt not to join an opinion, thereby preventing the establishment of a majority decision and instead establishing a plurality decision. In general, there are three reasons a Justice might do this: to limit the plurality rationale, to expand the plurality rationale, or to provide an entirely different rationale for the majority judgment.<sup>54</sup>

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53. See, e.g., *supra* note 6 and accompanying text.

54. One scholar attempted to discern four categories of concurrences: the limiting

Recently, some commentators have insisted that a “false plurality,” or true majority, exists when a fifth Justice writes independently of a four-Justice plurality, but concurs in both judgment and rationale.<sup>55</sup> This theory seems to echo Chief Justice Marshall’s bias that seriatim opinion writing must bow to the need for a consolidated, authoritative voice.<sup>56</sup>

### *B. The Increasing Prevalence of Plurality Decisions*

Fractured opinions have increased dramatically since Chief Justice Marshall’s tenure.<sup>57</sup> Despite his enduring influence, a number of factors account for the proliferation of plurality opinions. Today Supreme Court decisions are generally longer, more detailed, and divided into parts,<sup>58</sup> providing increased opportunities for

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concurrence, the expansive concurrence, the doctrinal concurrence, and the emphatic concurrence. Laura Krugman Ray, *The Justices Write Separately: Uses of the Concurrence by the Rehnquist Court*, 23 U.C. DAVIS L. REV. 777 (1990). The limiting concurrence agrees only to a certain extent with the plurality rationale. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring). The expansive concurrence agrees with the plurality rationale entirely, but would expand it even further. *See, e.g., id.* at 584 (Thomas, J., concurring). The doctrinal concurrence provides an entirely different theory of support of the majority judgment. The emphatic concurrence agrees with the plurality rationale in its entirety but emphasizes a certain aspect or aspects. *See supra* Ray, at 789-809. It seems, however, that the emphatic concurrence is a species of expansive concurrence. In terms of a concurring opinion’s relationship to the plurality opinion, such concurrences can be divided into two general categories—those that join the plurality opinion and those that do not. *See* Kirman, *supra* note 39, at 2088. The author argues that these polar classifications are more helpful than Ray’s four categories: “The evolution of the Court’s opinion writing process—from the issuance of multiple separate opinions to announcing judgment in an opinion by a majority of the Court that is often accompanied by separate opinions—suggests an alternative, and simpler, classification.” *Id.* These classifications, however, fail to account for the difficulty in interpreting limiting and expansive concurrences in relation to the plurality opinion. That is to say, it is not always clear whether limiting and expansive occurrences ultimately approve of the plurality rationale. *See infra* Parts IV and V.

55. *See* Thurmon, *supra* note 52, at 1 n.1; Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127, 1130-32 (1981); Comment, *Supreme Court No-Clear Majority Decisions: A Study in Stare Decisis*, 24 U. CHI. L. REV. 99 (1956).

56. *See generally supra* Part I.

57. *See* SCHWARTZ, *supra* note 9, at 357; Kimura, *supra* note 52, at 1593 n.3; Kirman, *supra* note 39, at 2083.

58. *See, e.g.*, Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 807-14 (1982) (arguing that the prevalence of longer, more detailed opinions is appropriate in the interests of “full exposition”).

disagreement.<sup>59</sup> In addition, the alleged decline of leadership on the Court may contribute to fractured decisions.<sup>60</sup> Even Chief Justice Marshall's strongest critics would concede that he was an incomparably strong leader of the Court.<sup>61</sup> The growing prominence and power of the Supreme Court over the past 200 years also may have led Justices to attach their names to the opinions of others more judiciously.<sup>62</sup>

As discussed in Part I, each generation of the Court adopted Chief Justice Marshall's belief that a unified voice was necessary and practicable for the survival and growth of the republic.

### III. EXCEPTIONALLY CONFUSING PLURALITY OPINIONS

Three Supreme Court cases present archetypal instances of the confusion caused by plurality decisions. In *National Mutual Insurance Co. v. Tidewater Transfer Co.*,<sup>63</sup> the Court addressed the validity of a federal statute that purportedly gave district courts jurisdiction over civil actions between citizens of states and citizens of the District of Columbia.<sup>64</sup> Justice Jackson, writing for a plurality of three Justices,<sup>65</sup> found proper jurisdiction.<sup>66</sup> Justice Jackson adhered to the holding of *Hepburn and Dundas v. Ellzey*,<sup>67</sup> in which Chief Justice Marshall ruled that a citizen of the District of Columbia was not a citizen of a state for diversity purposes.<sup>68</sup> However, Justice

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59. Archibald Cox, *The Supreme Court, 1979 Term—Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 72 (1980) (arguing that Justices should seek a consensus more often in order to prevent fractured decisions).

60. See Cox, *supra* note 58, at 72-73; Henry M. Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959). Before he became Chief Justice, Justice Rehnquist attempted to rebut the argument that the Court has witnessed declining leadership. William H. Rehnquist, "All Discord, Harmony Not Understood": *The Performance of the Supreme Court of the United States*, 22 ARIZ. L. REV. 973 (1980).

61. See generally SERIATIM, *supra* note 6 (compiling essays attacking, at least tangentially, the legend of John Marshall).

62. But see *supra* note 46 and accompanying text for evidence that in certain situations some Justices have suppressed their own dissents to join majority decisions.

63. 337 U.S. 582 (1949).

64. *Id.* at 583.

65. Justice Jackson wrote for Justices Black, Jackson, and Burton. *Id.*

66. *Id.* at 604.

67. 6 U.S. (2 Cranch) 445 (1805).

68. *Tidewater Transfer*, 337 U.S. at 587 (citing *Hepburn and Dundas*, 6 U.S. (2 Cranch)

Jackson upheld the statute on the grounds that Congress has the power to grant non-Article III jurisdiction<sup>69</sup> to Article III courts.<sup>70</sup> Justices Murphy and Rutledge concurred in judgment but disagreed entirely with Justice Jackson's reasoning.<sup>71</sup> Justices Murphy and Rutledge believed that the *Hepburn* case should be overruled<sup>72</sup> and that Congress does not have authority to grant such jurisdiction.<sup>73</sup> The third group of Justices, consisting of Chief Justice Vinson and Justices Reed, Frankfurter, and Douglas, dissented in the judgment.<sup>74</sup> The dissenting Justices agreed that the *Hepburn* case should be upheld,<sup>75</sup> but argued along with Justices Murphy and Rutledge that Congress may not grant non-Article III jurisdiction to Article III courts.<sup>76</sup>

Despite the apparent paradox,<sup>77</sup> the Court upheld the statute in a

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at 453).

69. Article III, Section 2 of the Constitution provides, in part:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2, cl. 1. Note that the language itself does not suggest whether this list is exclusive or inclusive for the purpose of determining federal jurisdiction.

70. 337 U.S. at 600.

71. *Id.* at 604 (Rutledge, J., concurring) (“I join in the Court’s judgment. But I strongly dissent from the reasons assigned to support it in the opinion of Mr. Justice Jackson.”).

72. *Id.* at 617-25 (Rutledge, J., concurring).

73. *Id.* at 606-17.

74. *Id.* at 626-46 (Vinson, C.J., dissenting); *Id.* at 646-55 (Frankfurter, J., dissenting).

75. *Id.* at 645 (Vinson, C.J., dissenting); *Id.* at 651-52 (Frankfurter, J., dissenting).

76. 337 U.S. at 626-46 (Vinson, C.J., dissenting); *Id.* at 646-55 (Frankfurter, J., dissenting).

77. See 337 U.S. at 655 (Frankfurter, J., dissenting). Justice Frankfurter wrote:

A substantial majority of the Court agrees that each of the two grounds urged in support of the attempt by Congress to extend diversity jurisdiction to cases involving citizens of the District of Columbia must be rejected—but not the same majority. And so, conflicting minorities in combination bring to pass a result—paradoxical as it may appear—which differing majorities of the Court find insupportable.

*Id.*

decision<sup>78</sup> in which seven Justices rejected one ground<sup>79</sup> for upholding the statute, and six Justices rejected the second ground.<sup>80</sup> Nevertheless, Justice Jackson wrote the plurality because his group represented the majority rationale for the majority judgment.

Similarly, in *Apodaca v. Oregon*<sup>81</sup> the Supreme Court considered whether a state court criminal conviction constitutionally requires a unanimous jury.<sup>82</sup> Justice White, writing for a plurality that included Chief Justice Burger and Justices Blackmun and Rehnquist, concluded that a criminal defendant is not entitled to a unanimous verdict in state court.<sup>83</sup> The plurality held that although the applicable federal rule is relevant to state law per incorporation of the Fourteenth Amendment,<sup>84</sup> the applicable, incorporated federal rule does not include a defendant's right to a unanimous verdict.<sup>85</sup>

Justice Powell agreed with the judgment.<sup>86</sup> However, he disagreed

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78. See 337 U.S. at 582.

79. See *supra* notes 67, 75 and accompanying text. Namely, the Justices rejected overruling the *Hepburn* case.

80. See *supra* notes 73, 76 and accompanying text. Namely, the Justices found no Congressional authority.

81. 406 U.S. 404 (1972).

82. *Id.* at 406. In an interesting note, compare majority judgment requirements of Supreme Court decisions with the unanimity requirements of criminal verdicts. 406 U.S. at 407 n.2. The origin of the requirement of unanimous decisions in criminal verdicts is "shrouded in obscurity." *Id.* The Court in *Apodaca* cited the following four possible theories for the unanimity requirement: (1) Unanimity developed to compensate for the lack of other procedures that would help guarantee a fair trial, *id.* (citing LESTER ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 347-351 (1947) and William Haralson, *Unanimous Jury Verdicts in Criminal Cases*, 21 *MISS. L.J.* 185, 191 (1950)); (2) Unanimity arose out of the Middle Ages' practice of trial by corroborative testimony of innocence, or compurgation, requiring 12 compurgators for acquittal, *id.* (citing PATRICK DEVLIN, *TRIAL BY JURY* 48-49 (1956); John V. Ryan, *Less than Unanimous Jury Verdicts in Criminal Trials*, 58 *J. CRIM. L. CRIMINOLOGY. & POL. SCI.* 211, 213 (1967)); (3) Medievalists insisted upon one true understanding of the facts. To avoid perjury, juries tended to reach the same verdict. *id.* (citing THEODORE PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 131 (5th ed. 1956) and THAYER, *supra* note 47, at 297); (4) The medieval concept of consent, or consensus, demanded unanimity, *id.* Parliamentary majoritarianism, for example, is only as old as the fifteenth century. *Id.* (citing M. CLARKE, *MEDIAEVAL REPRESENTATION AND CONSENT* 251 (1964); THEODORE PLUCKNETT, *THE LANCASTRIAN CONSTITUTION*, IN *TUDOR STUDIES* 161, 169-170 (R. Seton-Watson ed. 1924) and 1 KENNETH PICKTHORN, *EARLY TUDOR GOVERNMENT: HENRY VII* 93 (1967)).

83. 406 U.S. at 413-14.

84. *Id.* at 411-12.

85. *Id.*

86. *Johnson v. Louisiana*, 406 U.S. 356, 366-68 (1972) (Powell, J., concurring).



with the plurality's rationale,<sup>87</sup> just as Justices Murphy and Rutledge concurred in judgment and disagreed with the plurality's rationale in *Tidewater Transfer*.<sup>88</sup> Justice Powell argued uniquely that while federal jury trials require unanimity (the minority opinion),<sup>89</sup> incorporation was inapplicable (the plurality opinion).<sup>90</sup> Accordingly, Justice Powell concluded that the Constitution does not require unanimous convictions.<sup>91</sup>

Justices Douglas, Brennan, Stewart, and Marshall dissented.<sup>92</sup> The four Justices agreed with the plurality that incorporation is applicable<sup>93</sup> but disagreed with the plurality are found that federal convictions must be unanimous.<sup>94</sup> Like the dissenters in *Tidewater Transfer*,<sup>95</sup> the dissenters in *Apodaca* lost 5-4 on the judgment,<sup>96</sup> even though they commanded a majority of support for each of the relevant underlying issues: incorporation (8-1) and federal unanimity requirements (5-4).<sup>97</sup>

Finally, in *Pennsylvania v. Union Gas Company*,<sup>98</sup> the Court held by a vote of 5-4 that a federal statute permitted suits against the state of Pennsylvania.<sup>99</sup> The four Justices constituting the plurality<sup>100</sup> held

87. *Id.* at 366-80 (Powell, J., concurring).

88. *See supra* notes 71-73 and accompanying text.

89. 406 U.S. at 369-77 (Powell, J., concurring).

90. *Id.* at 378-80 (Powell, J., concurring).

91. *Id.* at 380 (Powell, J., concurring).

92. Justice Stewart wrote one dissenting opinion, which Justices Brennan and Marshall joined, *id.* at 414 (Stewart, J. dissenting), Justice Brennan wrote another dissenting opinion, which Justice Marshall joined, *id.* at 395 (Brennan, J., dissenting), and Justice Douglas wrote a third dissenting opinion, which Justices Brennan and Marshall joined. *Id.* at 380 (Douglas, J., dissenting).

93. 406 U.S. at 414-15 (Stewart, J., dissenting); 406 U.S. at 395-96 (Brennan, J., dissenting); 406 U.S. at 380-88 (Douglas, J., dissenting).

94. 406 U.S. at 414-15 (Stewart, J., dissenting); 406 U.S. at 395-96 (Brennan, J., dissenting); 406 U.S. at 394 (Douglas, J., dissenting).

95. *See supra* notes 74-77 and accompanying text.

96. The votes lined up as follows: Chief Justice Burger, Justices White, Blackmun, Powell, and Rehnquist (five) versus Justices Douglas, Brennan, Stewart, and Marshall (four).

97. *See supra* notes 83-94 and accompanying text.

98. 491 U.S. 1 (1989), *overruled by* *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). Despite the fact that *Union Gas* has been overruled, it remains relevant to a discussion of Court pluralities. Indeed, the Court apparently overruled *Union Gas* in part because it was a plurality opinion that led to "confusion" amongst the lower courts. *Seminole Tribe*, 517 U.S. at 66. *See also supra* notes 114-16 and accompanying text.

99. 491 U.S. at 23.

100. *Id.* at 5, 23. The plurality consisted of Justices Brennan, Marshall, Blackmun, and

that Congress has the power to abrogate Eleventh Amendment immunity in a Commerce Clause case<sup>101</sup> and that the statute in question effected such an abrogation.<sup>102</sup> The three dissenting Justices<sup>103</sup> argued in favor of state immunity. They claimed that Congress does not have the power to abrogate immunity under the Commerce Clause<sup>104</sup> and thus this statute could not possibly effect such an abrogation.<sup>105</sup>

Justice White concurred with the plurality in judgment, but took a distinct route to his conclusion. He contended that the statute does not abrogate Eleventh Amendment immunity.<sup>106</sup> He observed, however, that a majority of the Court disagreed with him on this issue of statutory interpretation.<sup>107</sup> Deferring to this majority,<sup>108</sup> Justice White decided that Congress has the authority to abrogate Eleventh Amendment immunity.<sup>109</sup>

Justice Scalia dissented in judgment and argued in juxtaposition to Justice White. Concurring with the plurality, Justice Scalia found that the statute abrogated immunity.<sup>110</sup> However, dissenting from the plurality, Justice Scalia concluded that Congress lacks the authority to abrogate this immunity.<sup>111</sup>

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Stevens.

101. *Id.* at 14-23.

102. *Id.* at 7-13.

103. *Id.* at 45. The Justices dissenting on the issue of immunity were Chief Justice Rehnquist and Justices O'Connor and Kennedy.

104. 491 U.S. at 30-45 (Scalia, J., concurring in part and dissenting in part). Justice Scalia authored this opinion and Chief Justice Rehnquist and Justices O'Connor and Kennedy joined only as to Parts II, III, and IV, at 30-45. For an interesting discussion of the prevalence of writing opinions in "Parts," see Lewis A. Kornhauser and Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 20 (1993) ("[I]n recent years Justices commonly have separated their opinions into numbered parts by issue, inviting the other Justices to shop among the parts, creating an environment of issue-by-issue deliberation.").

105. *Union Gas*, 491 U.S. at 30-45 (Scalia, J., concurring in part and dissenting in part).

106. *Id.* at 45-57 (White, J., concurring in the judgment in part and dissenting in part).

107. *Id.* at 56-57 ("My view on the statutory issue has not prevailed, however; a majority of the Court has ruled that the statute, as amended, plainly intended to abrogate the immunity of the States from suit in the federal courts.").

108. *Id.* at 57 ("I accept that judgment.").

109. *Id.* ("In that respect, I agree with the conclusion reached by Justice Brennan . . . that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States, although I do not agree with much of his reasoning.").

110. 491 U.S. at 29-45 (Scalia, J., concurring in part and dissenting in part).

111. 491 U.S. at 30-45 (Scalia, J., concurring in part and dissenting in part).

Justice White, unlike Justice Scalia, adjusted his decision midstream.<sup>112</sup> If Justice White individually had pursued a consistent line of reasoning and disregarded his colleagues' reasoning, he likely would have voted differently on the judgment. In other words, because he interpreted the statute to not effect an abrogation of immunity, he surely would have recognized Pennsylvania's immunity under the statute. Furthermore, because Justice White elected to defer to the majority of the Court on the issue of statutory interpretation, he provided the necessary fifth vote to permit suit against Pennsylvania. If Justice White had followed his own reasoning, his vote would have forced the opposite result and shifted the judgment from 5-4 in favor of allowing suit versus Pennsylvania to 5-4 against allowing the suit.<sup>113</sup>

The Court subsequently overruled *Union Gas* in 1996.<sup>114</sup> The Court reasoned that *Union Gas* was merely a plurality decision, that Justice White represented the fifth vote necessary for a majority judgment, that Justice White substantially disagreed with the plurality's reasoning,<sup>115</sup> and that the decision departed from established law.<sup>116</sup>

#### IV. MODERN ATTEMPTS TO SOLVE THE PROBLEM OF PLURALITY INTERPRETATION

At common law and throughout the nineteenth century, fragmented or seriatim decisions were authoritative only as to the judgment, not as to the rationale.<sup>117</sup> That is, courts did not look to plurality decisions for ratios decidendis; these cases yielded precedential weight only in subsequent cases that presented substantially similar facts.<sup>118</sup> Authoritative rationales, applicable to subsequent cases, required majority support.

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112. See *supra* notes 107-09 and accompanying text.

113. See *supra* notes 105-11 and accompanying text.

114. *Seminole Tribe*, 517 U.S. at 72.

115. *Id.* at 59-60.

116. *Id.* at 66.

117. See, e.g., HENRY C. BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS, OR THE SCIENCE OF CASE LAW 135-36 (1912); RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW 84-93 (1991); WAMBAUGH, *supra* note 3, § 48; Thurmon, *supra* note 52, at 420.

118. See *supra* note 117.

Chief Justice Marshall's legacy of consolidation and fragmentation muddles the traditional understanding of the authority of fragmented, plurality opinions. It remains unclear whether a majority is necessary to establish mandatory authority, whether a plurality opinion is just as authoritative as a majority opinion, or whether plurality opinions should be read in conjunction with concurring opinions in order to cobble together a controlling, majority rationale.

But, by 1977 it seemed that the Supreme Court had established guidelines for interpreting the precedential value of plurality opinions. In *Marks v. United States* the Court stated 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 judgments on the *narrowest grounds*.'"<sup>119</sup> The *Marks* test represented a conscious attempt to end the confusion surrounding plurality decisions' precedential value.<sup>120</sup>

Lower courts incorporated the *Marks* test with varying degrees of success.<sup>121</sup> In applying the *Marks* test, some courts focused on the implicit consensus amongst the plurality opinion and the concurring opinion or opinions (the "implicit consensus" model).<sup>122</sup> Other courts focused on *Marks*' implied license to predict how the Supreme Court

119. 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, J.) and interpreting the plurality decision of *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, 383 U.S. 413 (1966)). In *Marks*, Justices Brennan, Stewart and Marshall who concurred in part and dissented in part, agreed with the majority with respect to the "narrowest grounds" test. *Id.* at 197-98. Justice Stevens, concurring in part and dissenting in part, also agreed with the narrowest grounds test and, in fact, agreed "with everything said in the Court's opinion" short of its judgment remanding the case. *Id.* at 198.

120. *Id.* at 193.

121. See Thurmon, *supra* note 52, at 428-442, for discussion of the interpretive models cited here: the "implicit consensus" model and the "predictive" model.

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

*Marks* is workable—one opinion can be meaningfully regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions. In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment.

*Id.*

would rule on a similar issue (the “predictive” model).<sup>123</sup> Both applications were similar insofar as they looked for majority agreements in the decision.

The Supreme Court’s first application of *Marks*’ narrowest grounds test was fairly straightforward. In *City of Lakewood v. Plain Dealer Publishing Company*<sup>124</sup> the Court seamlessly discerned the narrowest grounds of the plurality opinion at issue.<sup>125</sup> The Court held that a 1949 plurality decision, *Kovacs v. Cooper*,<sup>126</sup> manifested majority assent to a critical distinction between *Kovacs* and a 1948 case, *Saia v. New York*.<sup>127</sup> Both the implicit consensus model and the predictive model would have reached the same results in *City of Lakewood* because, as the Court stated, the narrowest grounds were easily discernible.<sup>128</sup>

The Court subsequently applied the test two additional times without problem. In the 1994 case *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>129</sup> the Court employed the *Marks* test, citing its application in the 1992 version of *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>130</sup>

However, the Court later conceded the *Marks* test’s limited applicability to plurality decisions. In *Nichols v. United States*,<sup>131</sup> the Court revisited *Baldasar v. Illinois*,<sup>132</sup> a splintered decision that dealt with the constitutionality of certain sentencing considerations.<sup>133</sup>

The *Nichols* Court abandoned the narrowest grounds test.<sup>134</sup> The

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

124. 486 U.S. 750 (1988).

125. *Id.* at 764-65 & n.9.

126. 336 U.S. 77 (1949).

127. 334 U.S. 558 (1948); *City of Lakewood*, 486 U.S. at 764.

128. 486 U.S. at 764-65 & n.9.

129. 510 U.S. 1309 (1994).

130. 505 U.S. 833 (1992) (citing *Planned Parenthood*, 510 U.S. at 1310 n.2.).

131. 511 U.S. 738 (1994).

132. 446 U.S. 222 (1980).

133. Specifically, as construed by the *Baldasar* plurality, the defendant in *Nichols* argued that a sentencing court’s consideration of his prior convictions during a proceeding in which the defendant was not represented by counsel violated the Sixth Amendment of the Constitution. *Nichols*, 511 U.S. at 741.

134. A majority of five Justices spoke as the Court, per Chief Justice Rehnquist. Justice Souter concurred in the judgment but disagreed with the precedential value that the majority accorded to *Baldasar*. *Nichols*, 511 U.S. at 749-54 (Souter, J., concurring). Justices Blackmun,

Court noted that the circuits were split regarding the proper application of the test<sup>135</sup> and some circuits found the test inapplicable because they could not discern the narrowest grounds.<sup>136</sup> According to the *Nichols* Court, the narrowest grounds test proved easier to state than to apply.<sup>137</sup> The Court found that it would not be “useful” to apply the narrowest grounds test to its “utmost logical possibility,” given the confusion amongst the lower courts attempting to interpret *Baldasar*.<sup>138</sup> The Court accordingly held that it was free to overrule *Baldasar*, which it then did.<sup>139</sup>

*Nichols* suggests that the Court abandoned the narrowest grounds test, but the Court subsequently returned to *Marks* for guidance. In a puzzling follow-up to *Nichols*, the Supreme Court applied the narrowest grounds test in 1997 without comment in *O’Dell v. Netherland*.<sup>140</sup>

However, *Nichols* and *O’Dell* are potentially reconcilable. The “logically possible” narrowest grounds in *Nichols* baffled both the lower courts and the Supreme Court itself.<sup>141</sup> In *O’Dell*, on the other hand, the narrowest grounds were clear to both the lower courts and

Stevens, and Ginsburg dissented, arguing that the Court can and should apply a narrowest grounds test to *Baldasar*, thereby yielding a different judgment. *Nichols*, 511 U.S. at 754-57 (Blackmun, Stevens, Ginsburg, J., dissenting).

135. *Nichols*, 511 U.S. at 745 (citing *Santillanes v. U.S. Parole Comm’n*, 754 F.2d 887, 889 (10th Cir. 1985) (holding that Justice Blackmun’s concurrence represented the controlling precedent of *Baldasar*) and *United States v. Williams*, 891 F.2d 212, 214 (9th Cir. 1989) (holding that Justice Marshall’s concurrence represented the controlling precedent of *Baldasar*)). “State courts have similarly divided.” *Nichols*, 511 U.S. at 745 (referring to 742 n.7, the disparate opinions: *Lovell v. State*, 678 S.W.2d 318, 320 (Ark. 1984); *Hlad v. State*, 565 So. 2d 762 (Fla. App. 1990), *aff’d*, 585 So. 2d 928, 930 (Fla. 1991); *State v. Vares*, 801 P.2d 555, 557 (Haw. 1990); *Sheffield v. Pass Christian*, 556 So. 2d 1052, 1053 (Miss. 1990); *State v. Laurick*, 575 A.2d 1340 (N.J. 1990), *cert. denied*, 498 U.S. 967 (1990).

136. *Nichols*, 511 U.S. at 745 (citing *United States v. Castro-Vega*, 945 F.2d 496, 499-500 (2d Cir. 1991); *United States v. Eckford*, 910 F.2d 216, 219 n.8 (5th Cir. 1990); and *Schindler v. Clerk of Circuit Court*, 715 F.2d 341, 345 (7th Cir. 1983)).

137. *Nichols*, 511 U.S. at 745 (stating that the narrowest grounds test “is more easily stated than applied to the various opinions supporting the result in *Baldasar*.”).

138. *Id.* at 745-56. The Court stated: “We think it not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it. The degree of confusion following a splintered decision such as *Baldasar* is itself a reason for reexamining that decision.” *Id.*

139. *Id.* at 748-49.

140. 521 U.S. 151 (1997).

141. See *supra* note 137 and accompanying text.

to the Supreme Court.<sup>142</sup> Perhaps the Court thereby implicitly approved “selective application” of the narrowest grounds test, depending on whether the lower court finds the rule helpful or not. As such, the lower courts may have to determine on a case-by-case basis when the application of the narrowest grounds test is an illogical “logical possibility”<sup>143</sup> and therefore inappropriate.

Such a standard, while somewhat salvaging the narrowest grounds test, still would allow different courts to find different narrowest grounds in the same Supreme Court case. This was the situation when the lower courts tried to interpret *Baldasar* before the Court decided *Nichols*.<sup>144</sup>

Moreover, it is important to note that the Court has not applied the *Marks* rule in all appropriate circumstances.<sup>145</sup> For example, in *Texas v. Brown*<sup>146</sup> the Court examined a plurality decision in a precedential case, *Coolidge v. New Hampshire*.<sup>147</sup> In *Coolidge* a plurality of four Justices<sup>148</sup> held that officers could seize evidence pursuant to the “plain view” exception to the Fourth Amendment’s warrant requirement<sup>149</sup> only when they discovered the evidence “inadvertently.”<sup>150</sup> Four other Justices, each writing separately and concurring in part and dissenting in part, argued that inadvertence was not necessary for a constitutional seizure of evidence in plain view.<sup>151</sup> Justice Harlan, providing the fifth and deciding vote,

142. See *supra* note 138 and accompanying text.

143. See *id.* Indeed, it seems that when the “logical possibility” of a rule is unacceptable, the rule is necessarily illogical.

144. See *supra* notes 137-38 and accompanying text.

145. See *infra* note 155.

146. 460 U.S. 730 (1983).

147. 403 U.S. 443 (1971).

148. The plurality in *Coolidge* consisted of Justices Marshall, Stewart, Douglas and Brennan. *Id.*

149. The Fourth Amendment of the Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST., amend. IV.

150. *Coolidge*, 403 U.S. at 469.

151. *Id.* at 492 (Burger, C.J., concurring in part and dissenting in part); *Id.* at 506 (Black, J., concurring in part and dissenting in part); *Id.* at 510 (Blackmun, J., concurring in part and dissenting in part); *Id.* at 516 (White, J., concurring in part and dissenting in part).

concurring in the judgment but offered no rationale for his position.<sup>152</sup> The *Brown* Court revisited the inadvertence issue but ignored the *Marks* test altogether.<sup>153</sup> The Court held that the inadvertence requirement was “not a binding precedent,” although it was “the considered opinion of four Members of the Court” and should be “the point of reference for further discussion of the issue.”<sup>154</sup>

On numerous occasions, in fact, the Supreme Court and lower courts failed to follow majority-decision Supreme Court precedent.<sup>155</sup> For instance, the Supreme Court perpetually revisits and overrules or modifies its Commerce Clause jurisprudence.<sup>156</sup> While adherence to majority decision precedent remains the norm,<sup>157</sup> majoritarianism clearly is not talismanic.<sup>158</sup> That is, the question of how many Justices joined a particular opinion is not dispositive of its precedential value. American jurisprudence needs a different approach to the plurality problem.

## V. AN OLD APPROACH TO A MODERN PROBLEM

Chief Justice Marshall brought force and authority to the Supreme Court.<sup>159</sup> His abandonment of the seriatim practice and his insistence on consolidated opinions brought a unified voice to a Court that previously spoke only in individual voices.<sup>160</sup> A unified voice brought

152. *Id.* at 490 (Harlan, J., concurring in judgment).

153. *Id.* at 737.

154. *Id.* The Court ultimately and entirely rejected the inadvertence requirement in *Horton v. California*, 496 U.S. 128 (1990).

155. *See, e.g.*, *Int'l Union, United Auto. Workers v. Johnson Controls*, 499 U.S. 187 (1991) (disregarding majority decision precedent of *Dothard v. Rawlinson*, 433 U.S. 321 (1977), in a Title VII decision and appearing to adopt *Dothard's* dissent instead); *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942) (disregarding Supreme Court precedent in the Second Amendment case of *United States v. Miller*, 307 U.S. 174 (1939)).

156. *See, e.g.*, *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895); *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.* 301 U.S. 1 (1937) (implicitly overruling *E.C. Knight Co.*); *United States v. Darby*, 312 U.S. 100 (1941) (overruling *Hammer*); *Wickard v. Filburn*, 317 U.S. 111 (1942) (ignoring *E.C. Knight Co.*); *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (overruling *Usery*); *United States v. Lopez*, 514 U.S. 549 (1995) (overruling *Wickard*).

157. *See, e.g.*, *Seminole Tribe*, 517 U.S. at 66.

158. *See id.* at 59-66.

159. *See supra* Part I.

160. *See supra* note 38 and accompanying text.



authority to the Court and enabled the institution to act as a leading judicial and political force. Although strongly opposed at the time by citizens who insisted upon a more modest role for the Supreme Court,<sup>161</sup> Chief Justice Marshall's innovations became Supreme Court traditions.<sup>162</sup> Few people today question the propriety of the changes he instituted.

Chief Justice Marshall fulfilled Chief Justice Jay's quest to establish the Court as an instrument of national unity. The Court's role under Chief Justice Jay, the role that he hoped to transcend, was characterized by the passivity underlying the popular understanding of the Court in the early republic. As demonstrated in the aftermath of *Chisholm*, the public largely wanted the Court to assume a more modest role.<sup>163</sup> The push to ratify the Eleventh Amendment left Chief Justice Jay distraught, but simultaneously salvaged America in the minds of many.

Chief Justice Marshall abandoned the seriatim practice of the Jay Court.<sup>164</sup> In doing so, he helped realize the common vision of the Court advanced by both men. While Chief Justice Marshall's decision forged a strong identity for the Court, it also created a problem that did not exist in the Jay Court. Because the introduction of consolidated opinions coincided with the growing strength of the Court, the legal community came to demand majority opinions. Often, the result was plurality.

A plurality decision may raise more questions than it answers.<sup>165</sup> *Tidewater Transfer*, *Apodaca*, and *Union Gas* demonstrate the particular difficulties of plurality decisions.<sup>166</sup> In *Tidewater Transfer*, conflicting minorities consolidated to establish a plurality decision with which differing majorities disagreed.<sup>167</sup> Similarly, in *Apodaca* the dissenters lost 5-4 on the judgment even though they commanded a majority of support for each relevant underlying issue.<sup>168</sup> In *Union*

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161. See *supra* note 43 and accompanying text.

162. See *supra* note 52 and accompanying text.

163. See *supra* notes 28-29 and accompanying text.

164. See *supra* Part I.

165. See *supra* Parts II and III.

166. See *supra* Part III.

167. See *supra* notes 77-80 and accompanying text.

168. See *supra* notes 96-97 and accompanying text.

*Gas* one Justice forced an opposite judgment by changing his argument midstream to accommodate the majority of Justices who disagreed with him on an underlying issue.<sup>169</sup> To further confuse the issue of plurality decision interpretation, *Union Gas* subsequently was overruled in 1996, in part because it was a plurality decision.<sup>170</sup>

The Supreme's Court's new "narrowest grounds" test, first articulated in *Marks*,<sup>171</sup> is an inadequate solution. First, the test is inapplicable if the plurality and the concurrences cannot discern the "narrowest grounds" and agree to them. Second, the Supreme Court inconsistently follows the test, as demonstrated in the series of cases including *Nichols*, *O'Dell*, and *Brown*.<sup>172</sup> Finally, the Court itself admitted in *Nichols* that the *Marks* test is not the final word on plurality-decision interpretation.<sup>173</sup>

Further, the demand for a majority rationale is curious because the Supreme Court and lower federal courts do not always follow a clear-majority Supreme Court opinion. While majority Supreme Court decisions generally stand as precedent, this is not an absolute principle. In fact, in some areas of the law majority decisions of the Court regularly are disregarded or overruled.<sup>174</sup> Thus, majoritarianism is clearly non-dispositive. Even if lower courts should selectively apply the narrowest grounds test to cases of apparent majority agreement, the true extent of its applicability remains unclear.

Accordingly, the development of sound jurisprudence to interpret plurality decisions requires a fresh look at the early Court. During the Jay era, the American legal community viewed a powerful Supreme Court with skepticism. Public sentiment also was overwhelmingly critical of a strong Court.<sup>175</sup> The reaction to *Chisholm*, culminating in the ratification of the Eleventh Amendment, suggested that Americans generally believed that the Supreme Court had overstepped its authority.<sup>176</sup>

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169. See *supra* notes 106-09 and accompanying text.

170. See *supra* note 114-16 and accompanying text.

171. See *supra* note 119 and accompanying text.

172. See *supra* notes 132-54 and accompanying text.

173. See *supra* notes 134-37 and accompanying text.

174. See *supra* note 155-56.

175. See *supra* notes 28-29, 43 and accompanying text.

176. See *id.*

However, Chief Justice Marshall's radical innovations created their own fallout, exemplified by the confusion surrounding plurality decisions. The Supreme Court, as well as lower courts, struggles to extract ratios decidendis from fractured opinions. They struggle because Chief Justice Marshall's era vested tremendous authority in the words of the Court. According to the Supreme Court, lawyers and judges usually<sup>177</sup> must find the authoritative narrowest grounds from the Court's plurality opinions,<sup>178</sup> and as this Note demonstrates, this is no easy task.

Thomas Jefferson foresaw the inherent dangers of promoting the interests of national power and unity through opinion consolidation.<sup>179</sup> While perhaps he did not foresee the specific problem of plurality opinion interpretation, Jefferson has been vindicated. Our modern legal community must seriously reconsider the pre-Marshall skepticism of a powerful Supreme Court.

#### CONCLUSION

The Court's modern role stems from the innovations of Chief Justice Marshall.<sup>180</sup> The problem of plurality decision interpretation is a consequence of this modern role, by which the Court prescribes its own overweening power. No "test"—recommended by the Supreme Court or otherwise—can dispel the confusion surrounding these plurality decisions.

If the legal community is willing to reexamine the skeptical attitudes toward the Court popular during Chief Justice Jay's tenure, then the problem of plurality decisions necessarily will wane. If the Jeffersonian and other popular understandings of government in the early republic are worthy of our attention, the Supreme Court need not exercise all the power it does now. The American legal system should demand modesty from its Supreme Court in its decisions. Only then will lawyers and judges no longer be forced to accept the

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177. See *supra* notes 141-43. The adverb "usually" is actually appropriate only if *Nichols* and *O'Dell* are reconcilable. *Id.* If they are irreconcilable, then even more confusion would surround the interpretation of plurality decisions.

178. See *supra* note 119 and accompanying text.

179. See *supra* note 43 and accompanying text.

180. See *supra* Part I.

inherently muddled and fragmented decisions the Court hands down to them. But, if we ignore the founding principles of our government and blindly follow the popular principles of the modern legal age, then plurality confusion will remain with us indefinitely.