2023

Setting a New Benchmark: An Exploration of Maxwell Stearns's Injection of Dimensionality into the Marks Analysis

Elisabeth Neylan

Setting a New Benchmark: An Exploration of Maxwell Stearns's Injection of Dimensionality into the *Marks* Analysis

Elisabeth Neylan*

I. INTRODUCTION

Stare decisis, Latin for "to stand by things decided" mandates courts to resolve new cases consistently with binding precedent.[1] A prior case constitutes binding precedent when it addresses the same legal question as the new case and presents similar facts.[2] Moreover, to be binding, the court that decided the prior case must have either been the same court or a "superior court within the hierarchy" of the court deciding the new case.[3] Stare decisis serves important purposes, including realizing the legitimate expectations of those who are subject to the law.[4]

There is no question that U.S. Supreme Court majority opinions bind lower federal courts.[5] Questions have arisen, however, in the context of plurality opinions.[6] The Supreme Court has instructed lower courts, in what is now known as the *Marks* rule, that the holding in such cases is the judgment-supportive opinion that resolves the case on the narrowest grounds.[7]

In *Marks v. United States*, [8] petitioners were charged with transporting obscene materials. The conduct that gave rise to the charges occurred before the Supreme Court announced new standards for "isolat[ing] 'hard core' pornography from expression protected by the First

* J.D. Candidate, 2023, Seton Hall University School of Law; B.A., Georgetown University.
[1] *See, e.g.*, Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 788 (2012).
[2] Hon. John M. Walker, Jr., *The Role of Precedent in the United States: How Do Precedents Lose Their Binding Effect?*, STAN. L. SCH. (Feb. 29, 2016), https://cgc.law.stanford.edu/commentaries/15-john-walker/.
[3] *Id.*
[4] *Id.* (quoting Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring)).
[5] *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (6th ed. 2019).
[6] *See, e.g.*, James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 GEO. L.J. 515 (2011) (explaining that plurality opinions result where a majority of Justices agree on the judgment in a particular case but "no single rationale or opinion garners five votes"); James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 Geo. L.J. 515 (2011)
[7] Marks v. United States, 430 U.S. 188, 191 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (Stewart, J., concurring) (plurality opinion)).
[8] *Marks*, 430 U.S. at 189.

Amendment" in *Miller v. California*.[9] Petitioners were convicted based on the *Miller* standard and appealed, arguing that the fragmented decision in *Memoirs v. Massachusetts*[10] set the governing obscenity standard at the time of their conduct.[11]

In *Memoirs*, the Court reviewed the Massachusetts courts' finding that a book, *John Cleland's Memoirs of a Woman of Pleasure*, was obscene and thus not entitled to First Amendment protection.[12] Although the *Memoirs* Court held that the Massachusetts courts erred in finding the book obscene, it did not produce a majority opinion.[13] Thus, the Justices who concurred in the judgment did so for different reasons, with each opinion expressing a different standard for obscenity.[14]

Even though the *Memoirs* Court fractured, the *Marks* Court agreed that it set the governing obscenity standard at the time of the *Marks* defendants' conduct.[15] Justice Powell, writing for the majority, "clarified the rule for identifying the Court's holding in fractured panel cases and the extent to which litigants can rely upon such cases as a matter of due process."[16] He stated the *Marks* rule as the following: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . .'"[17]

---

[9] *Id.* at 190 (quoting Miller v. United States, 413 U.S. 15, 29 (1973)).
[10] A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen. of Mass., 383 U.S. 413 (1966).
[11] *Marks*, 430 U.S. at 191.
[12] *Memoirs*, 383 U.S. at 413.
[13] *Id.*
[14] *Id.* at 417.
[15] *Id.*
[16] Maxwell L. Stearns, *The Case for Including* Marks v. United States *in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321, 323 (2000).
[17] *Marks*, 430 U.S. at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (Stewart, J., concurring) (plurality opinion). Note that the Supreme Court first announced this rule in a footnote in the plurality opinion in *Gregg*, but "because *Marks* was the first majority opinion to state it, the rule is now known by that case's name." Richard M. Re, *Beyond the Marks Rule*, 132 HARV. L. REV. 1942, 1949 (2019).

Marks has proven notoriously complicated both in theory and in practice.[18] While the Supreme Court has attempted to clarify the rule, its doctrinal statements "demonstrate inconsistencies, even confusion."[19] The following question, posed by Justice Alito, highlights part of the reason why *Marks* has proven so confounding:

> Let's say that nine people are deciding which movie to go and see, and four of them want to see a romantic comedy, and two of them want to see a romantic comedy in French, and four of them want to see a mystery. . . . [A]re the two who want to see the romantic comedy in French . . . a logical subset of those who want to see a romantic comedy?[20]

Professor Maxwell Stearns, in his attempt to simplify the inquiry, has devised a solution to the *Marks* rule by introducing what he views as a necessary component of the analysis, known as "dimensionality."[21]

This Comment analyzes Professor Stearns's solution in greater depth and notes where dimensionality may prove helpful and where it may not. Specifically, this Comment argues that the starting point should be to determine whether the reasoning of the judgment-supportive opinions in the precedential case would yield the same result in the new case. If so, then the lower court should resolve the new case consistently with that result.[22] If, on the other hand, this analysis does not produce a clear answer, then the lower court should engage in the dimensionality analysis. If that fails, lower courts should feel free to use the fragmented case as persuasive authority, but

---

[18] Lower courts have devised various approaches to the *Marks* rule, including the following: least impact analysis, lowest common denominator, logical subset analysis, Matryoshka (Russian nested) dolls, median opinion approach, shared agreement approach, and all opinions approach. *See* Maxwell L. Stearns, *Modeling Narrowest Grounds*, 89 GEO. WASH. L. REV. 461, 469 (2021); *see also* Re, *supra* note 17, at 1976–93.

[19] *Modeling Narrowest Grounds*, *supra* note 18, at 463.

[20] Oral Argument at 12:48, Hughes v. United States, 584 U.S. _ (2018) (No. 17-155), https://www.oyez.org/cases/2017/17-155 (last visited Jan. 14, 2022) (The Supreme Court most recently had the opportunity to address the *Marks* rule in *Hughes v. United States*. Although the Justices did not resolve the *Marks* issue in the case, they did address *Marks* in depth during the *Hughes* oral arguments.).

[21] *See Modeling Narrowest Grounds*, *supra* note 18, at 463.

[22] This approach draws from the "shared agreement" approach. *See* Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795. The approach endorsed in this Comment differs slightly from that approach, as explained *infra* Part IV.

ultimately should resolve the case on the merits according to their reading of the law governing the case.[23]

This Comment will proceed as follows. Part II will discuss Professor Stearns's dimensionality approach in detail. Part III will introduce *United States v. Alvarez*, a fractured Supreme Court opinion dealing with the First Amendment.[24] *Alvarez* will serve as a lens through which to examine dimensionality for the remainder of the Comment, and this Part will summarize the various opinions therein. Part IV will apply the dimensionality analysis to *Alvarez*, concluding that *Alvarez* likely has only one dimension. Part V will demonstrate the approach endorsed in this Comment, a modified shared agreement approach coupled with the dimensionality analysis, by applying *Alvarez* to lower court decisions dealing with "Ag-gag" legislation.[25] Part VI will briefly conclude.

II. DISCUSSION OF MAXWELL STEARNS AND DIMENSIONALITY

As noted above, lower courts have struggled to derive precedential value from plurality opinions despite the *Marks* rule's command because it is not always clear which judgment-supportive opinion constitutes the "narrowest grounds."[26] As a result, different federal circuits employ various approaches when interpreting a fractured Supreme Court decision, and some circuits do not even consider fractured Supreme Court opinions to be binding on them at all.[27] Professor Stearns seeks to make it easier for lower federal courts to discern the binding precedent

[23] *See generally* Re, *supra* note 17, at 1942 (arguing that "Court precedent should form only when a single rule of decision has the express support of at least five Justices").
[24] United States v. Alvarez, 567 U.S. 709 (2012).
[25] "Ag-gag" laws are laws aimed at preventing investigative journalists from exposing negative treatment of animals on farms. *See* Jacquelyn M. Lyons, *The Future Implications for Ag-Gag Laws*, 47 SETON HALL L. REV. 915, 915 (2017).
[26] *See Modeling Narrowest Grounds*, *supra* note 18, at 469; see also Re, *supra* note 17, at 1976–93.
[27] *See id.*

from fragmented Supreme Court decisions by introducing what he believes is a necessary ingredient in the analysis.[28]

Professor Stearns argues that the *Marks* rule should apply in cases that implicate *only* a single relevant dimension.[29] He defines dimensions as "scales or measures along which virtually anything can meaningfully be expressed and compared."[30] To illustrate dimensionality, he provides the following example:

> 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.[31]

Professor Stearns argues that when a case implicates only one dimension, there is necessarily a narrowest grounds opinion, and "with equal certainty, in cases implicating more than one dimension, there is not."[32] The next section will explore one case that Professor Stearns posits includes only one dimension, and the following section will look at a case that, according to Professor Stearns, has two.

A. *Professor Stearns's Application of Dimensionality to* Marks: *One Relevant Dimension*

Prior to *Marks*, the Supreme Court issued three pertinent decisions defining proscribable obscenity.[33] First, in *Roth v. United States*,[34] the Supreme Court held that speech is unprotected

[28] *Modeling Narrowest Grounds*, *supra* note 18, at 468–69.
[29] *Id.*
[30] *Id.*
[31] *Id.* at 469.
[32] *Id.* at 470.
[33] *See The Case for Including* Marks v. United States *in the Canon of Constitutional Law*, *supra* note 16, at 323.
[34] Roth v. United States, 354 U.S. 476 (1957).

obscenity if "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[35]

Then, in *Memoirs v. United States*,[36] the Supreme Court issued a fractured opinion: (1) Justice Brennan, writing for a three-Justice plurality, stated that "a book cannot be proscribed unless it is *utterly* without redeeming social value";[37] (2) Justices Black and Douglas concurred, expressing the view that the First Amendment forbids proscribing any materials as obscene;[38] (3) Justice Stewart also concurred, pursuant to his view that the First Amendment permits only hard-core pornography to be proscribed as obscene;[39] and (4) Justices Clark, Harlan, and White separately dissented; they would have continued to follow *Roth* or a more relaxed rational basis standard.[40]

Finally, in *Miller v. California*,[41] the Court introduced a new test, which asks whether the work "lacks serious literary, artistic, political, or scientific value."[42] This test, in expanding criminal liability, "marked a significant departure from *Memoirs.*"[43]

Since petitioners' conduct in *Marks* occurred before *Miller* was decided, they lacked "fair warning" that they might be subjected to the more stringent standards.[44] The Court thus held that the Due Process Clause precluded applying the *Miller* standard to petitioners.[45] Justice Powell then concluded that *Memoirs* was the law governing petitioners' conduct.[46] Since *Memoirs* was a

---

[35] *Marks*, 430 U.S. at 193 (quoting *Roth*, 354 U.S. at 489).
[36] *Memoirs*, 383 U.S. at 413.
[37] *Marks*, 430 U.S. at 194 (quoting *Memoirs*, 383 U.S. at 418 (Brennan, J., concurring) (plurality opinion)).
[38] *See Memoirs*, 383 U.S. at 424.
[39] *Marks*, 430 U.S. at 194.
[40] *The Case for Including* Marks v. United States *in the Canon of Constitutional Law*, *supra* note 16, at 325; *Memoirs*, 383 U.S. at 450 (Clark, J., dissenting).
[41] *Miller*, 413 U.S. at 15.
[42] *Marks*, 430 U.S. at 194 (quoting *Miller*, 413 U.S. at 22).
[43] *Id.*
[44] *Id.* at 196.
[45] *Id.*
[46] *Id.* at 194.

plurality opinion, Justice Powell reasoned that the *Memoirs* plurality expressed the narrowest grounds opinion and therefore was the holding of the *Memoirs* Court.[47]

Professor Stearns visually depicted Justice Powell's *Marks* analysis as follows:[48]

(A) Douglas & Black (concurring)	(B) Stewart (concurring)	(C) Brennan, Fortas, and Warren (plurality)	(D) Clark, Harlan, and White (dissenting)
No proscribable obscenity	Hard-core pornography only as proscribable obscenity	"Utterly without redeeming social value" standard for proscribable obscenity	*Roth* standard (Clark and White) or rational basis test (Harlan) for proscribable obscenity
Broad protection of obscenity		Narrow protection of obscenity	

The table shows that "the issues in *Memoirs* can be readily cast along a single dimension, namely the breadth or narrowness[49] of the Supreme Court obscenity doctrine in its protection of sexually explicit materials."[50] As Professor Stearns explains, the underlying premise of Justice Powell's articulation of the narrowest grounds rule is that by arranging each opinion along the single dimension continuum it is possible to discern "as the Court's consensus position that opinion which although not a majority first choice candidate, would defeat all others in direct binary

[47] *Id.*
[48] *The Case for Including* Marks v. United States *in the Canon of Constitutional Law*, *supra* note 16, at 327. Note that Professor Stearns states that the dissenting opinions are "ineligible for holding status . . . on the facts of the case." *Id.*
[49] Justice Stewart's "hard-core pornography" standard offers more First Amendment protection than Justice Brennan's "utterly without redeeming social value" standard. The former protects from government infringement anything short of hard-core pornography, whereas the latter accords First Amendment protection except where the expression is "utterly without redeeming social value." Since expressions short of hard-core pornography can still be "utterly without redeeming social value," this standard offers less First Amendment protection than Justice Stewart's standard. Cites for this text?
[50] *The Case for Including* Marks v. United States *in the Canon of Constitutional Law*, *supra* note 16, at 327.

comparisons."[51] Professor Stearns points out that such an option would be the Condorcet winner[52] in the language of social choice.[53]

At the heart of cases implicating one dimension is the premise that "if forced to choose among each of the remaining opinions, those writing or joining the opinions at the outer edge would most prefer the one closest to them and least prefer the one farthest from them."[54] For simplicity, Professor Stearns labeled opinions in the table A (Douglas), B (Stewart), C (Brennan), and D (White). Professor Stearns also treats the Douglas and Stewart opinions as one opinion, A/B, and represents all of the dissents as D. He explains:

> [T]he ordinal rankings of the A/B camp are as follows: A/B,C,D. The ordinal rankings of the D camp are D,C,A/B. The ordinal rankings of the C camp are irrelevant because whether they are C,A/B,D or C,D,A/B, the result is the same. If the only options available are A/B, C, and D, then option C, the narrowest grounds decision, is the dominant second choice (or Condorcet winner) for the Court as a whole.[55]

Thus, Justices Stewart and Douglas would prefer Justice Brennan's opinion to Justice White's opinion because they favor broader protection of obscenity, and Justice Brennan's standard ("utterly without redeeming social value") confers greater protection than any of the dissenting standards (*Roth* standard or rational basis review). Likewise, Justice White would prefer Justice Brennan's opinion to Justice Stewart's or Justice Douglas's opinion, for the opposite reason: he prefers less protection for obscenity. Thus, since two of the three camps would choose Justice Brennan's opinion, Justice Brennan's opinion is the Condorcet winner and therefore the "narrowest grounds" opinion.

---

[51] *Id.*
[52] *See generally Condorcet Winner Overview*, OXFORD REFERENCE, https://www.oxfordreference.com/view/ (last visited Jan. 14 2022) (defining Condorcet winner as "the option, or candidate, in a multicandidate election, which wins a simple majority against each of the others when every pair of candidates is compared").
[53] *The Case for Including* Marks v. United States *in the Canon of Constitutional Law*, *supra* note 16, at 327.
[54] *Id.*
[55] *Id.* at 328–29.

B. *Professor Stearns's Application of Dimensionality to* McDonald v. City of Chicago*: Two Relevant Dimensions*

In a more recent article, Professor Stearns addresses dimensionality in a fragmented case implicating two relevant dimensions: *McDonald v. City of Chicago*.[56] In *McDonald*, prompted by a Chicago handgun ban, the Court addressed whether the Second Amendment protections apply to the States.[57]

Two years earlier, in *District of Columbia v. Heller*,[58] the Supreme Court held that the Second Amendment protects an individual right to keep and bear arms for self-defense.[59] It struck down a D.C. law banning handgun possession in the home.[60] Chicago enacted similar laws to those struck down *Heller*, but since D.C. is a federal territory, the Court did not address in *Heller* whether the same protections are incorporated against the States.[61]

In *McDonald*, the Court answered that question in the affirmative, but the Court fractured, and the various opinions show that the grounds for incorporating the Second Amendment against the States varied among the Justices.[62] Justice Alito, writing for a four-Justice plurality found that the Second Amendment right to bear arms is incorporated in the concept of due

[56] McDonald v. City of Chi., 561 U.S. 742 (2010).
[57] *Id.* at 748. The Bill of Rights originally only applied to the Federal Government. *See id.* at 754; *see also* Barron ex rel. Tiernan v. Mayor of Baltimore, 32 U.S. 243 (1833). After the Civil War, however, Congress adopted constitutional amendments, including the Fourteenth Amendment, that "fundamentally altered our country's federal system." *Id.* The Fourteenth Amendment states, specifically, that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1. Four years after the adoption of the Fourteenth Amendment, the Court held that the Privileges or Immunities Clause of the Fourteenth Amendment only protects rights that "owe their existence to the Federal Government." *McDonald*, 561 U.S. at 754 (quoting The Slaughter-House Cases, 83 U.S. 36, 79 (1873)). Then, in the late nineteenth century, the Court began to hold that the Due Process Clause of the Fourteenth Amendment prevents the States from abridging rights set out in the Bill of Rights. *Id.* at 743; *see also* Hurtado v. California, 110 U.S. 516 (1884).
[58] D.C. v. Heller, 554 U.S. 570 (2008).
[59] *Id.*; *see also McDonald*, 561 U.S. at 742.
[60] 554 U.S. 570.
[61] *Id.*
[62] *McDonald*, 561 U.S. at 742.

process.[63] Justice Thomas, concurring in the judgment, agreed that the Fourteenth Amendment makes the Second Amendment "fully applicable to the States" but disagreed that it is enforceable against the States through the due process clause. He posited instead that the Second Amendment right is "a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause."[64] The four dissenting Justices disagreed that the Fourteenth Amendment incorporates a private right of self-defense against the States.[65]

Relevant to the *Marks* analysis, five justices agreed that the Fourteenth Amendment incorporates the Second Amendment against the States. Justice Thomas, however, introduced a second dimension by resolving the case on alternate grounds.[66] Since Justice Thomas's vote was the decisive fifth vote in favor of the judgment, his added dimension thwarted the application of the narrowest grounds rule in that case.[67]

According to Professor Stearns, "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." [68] Since it is likewise not possible to capture the *McDonald* opinions from broad to narrow, *Marks* cannot be applied.[69]

Professor Stearns explains that figuring out "whether a case implicates two dimensions requires identifying the premise on which all Justices must logically agree."[70] The premise he identified in *McDonald* follows: "Striking the Chicago handgun ban requires incorporating the

---

[63] *Id.* at 769.
[64] *McDonald*, 561 U.S. at 805–06 (Thomas, J., concurring).
[65] *Id.* at 858 (Stevens, J., dissenting).
[66] *See Modeling Narrowest Grounds*, *supra* note 18, at 473.
[67] *Id.* Had Justice Thomas provided the sixth vote in favor of the judgment, his added dimension would not have mattered. *See id.*; (discussing Ramos v. Louisiana, 590 U.S _ (2020). I'm assuming this is a place holder be sure to fill in the details)
[68] *Id.*
[69] *Id.*
[70] *Id.* at 523–24.

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."[71] The two controlling issues, therefore, become: "(1) Is the Heller right incorporated via the Due Process Clause?; and (2) is the Heller right incorporated via the Privileges or Immunities Clause?"[72] Visually, Professor Stearns depicted *McDonald* as follows:[73]

	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)

In sum, a Supreme Court opinion has two dimensions if: (1) separate opinions support the Court's judgment despite reaching opposite resolutions of controlling issues, and (2) 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."[74] Otherwise, the case only has one dimension.

III. INTRODUCTION TO THE DIFFERENT OPINIONS IN *UNITED STATES V. ALVAREZ*

In *United States v. Alvarez*,[75] the Court considered whether the Stolen Valor Act of 2005[76] violated the First Amendment's Free Speech Clause.[77] The underlying controversy began at a public board meeting, where board member Xavier Alvarez ("Alvarez") said "I'm a retired marine of twenty-five years. I retired in 2001. Back in 1987, I was awarded the Congressional Medal of

[71] *Modeling Narrowest Grounds*, *supra* note 18, at 524.
[72] *Id.*
[73] *Id.* at 523.
[74] *Id.*
[75] *Alvarez*, 567 U.S. at 709.
[76] 18 U.S.C.§ 704(b).
[77] *Alvarez*, 567 U.S. at 713.

Honor."[78] All of this was untrue, as Alvarez had never served in the U.S. Armed Forces much less received a military decoration.[79]

The U.S. Government obtained an indictment charging Alvarez with violating the Stolen Valor Act, which made it a crime to falsely claim receipt of military decorations or medals.[80] Alvarez challenged the constitutionality of the Act, claiming that it violated the First Amendment.[81] The Government argued that the criminal ban on falsely claiming such honor furthers its purpose in creating and bestowing the medal: that the Nation can "hold in its highest respect and esteem those who, in the course of carrying out the 'supreme and noble duty of contributing to the defense of the rights and honor of the nation,' have acted with extraordinary honor."[82] The Ninth Circuit found that the Solen Valor Act violated the First Amendment and the Supreme Court affirmed in a fragmented decision.

A. *The Plurality*

The plurality—Justices Kennedy, Roberts, Ginsburg, and Sotomayor—found that the content-based restriction on speech warranted strict scrutiny.[83] It began by noting that "the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[84] Accordingly, content-based restrictions on speech are presumed invalid and the Government bears the burden of proving their constitutionality.[85]

[78] *Id.* at 715.
[79] *Id.*
[80] *Id.* at 714.
[81] *Id.*
[82] *Alvarez*, 567 U.S. at 715 (quoting Selective Draft Law Cases, 245 U.S. 366, 390 (1918)).
[83] *Id.* (noting that content-based regulations of speech require "exacting scrutiny").
[84] *Id.* at 716 (quoting Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 573 (2002)).
[85] *Id.*

The plurality pointed out that, since content-based restrictions pose a substantial threat to free expression, the Court has rejected as "startling and dangerous" a "free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing of relative social costs and benefits."[86]

Content-based restrictions on speech have been permitted, as a general matter, only when confined to the few "historic and traditional categories [of expression] long familiar to the bar.'"[87] The plurality went on to list some of the relevant exceptions, including obscenity,[88] defamation,[89] speech integral to criminal conduct,[90] and fraud.[91]

Rejecting the argument that false statements of fact receive no First Amendment protection, the plurality noted that the cases that have upheld restrictions on speech all involve some "legally cognizable harm" such as invasion of privacy or costs of "vexation litigation."[92] The Stolen Valor Act, on the other hand, "targets falsity and nothing more."

The plurality also noted the breadth of the statute, which applies to a false statement "made at any time, in any place, to any person . . . [regardless of whether the false speech] was used to gain a material advantage."[93] The plurality did acknowledge that the government could restrict false claims "made to effect a fraud or secure moneys or other valuable considerations, say, offers of employment," but the Stolen Valor Act was not so limited in their view.[94]

---

[86] *Id.* at 717 (quoting United States v. Stevens, 559 U.S. 460, 470 (2010)).
[87] *Id.*
[88] *Alvarez*, 567 U.S. at 717 (citing *Miller*, 413 U.S. at 15).
[89] *Id.* (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964)).
[90] *Id.* (citing Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949)).
[91] *Id.* (citing Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)).
[92] *Alvarez*, 567 U.S. at 719.
[93] *Id.* at 723
[94] *Id.*

Since the Stolen Valor Act targeted false statements regardless of their ability to cause harm, and the government did not show that the restriction was "actually necessary" to achieve its goals, the plurality held that the Act could not stand.[95]

B. *The Concurrence*

The concurrence, written by Justice Breyer and joined by Justice Kagan,[96] agreed that the Stolen Valor Act violated the First Amendment, but rejected the plurality's strict categorical analysis in favor of a balancing approach. Specifically, the concurrence applied intermediate scrutiny, reasoning that the statute "works First Amendment harm, while the government can achieve its objectives in less restrictive ways."[97] It also noted that the Stolen Valor Act lacked the limiting features of other prohibitions on false statements, which are limited "sometimes by requiring proof of specific harm to identifiable victims; sometimes by specifying that the lies be made in contexts in which a tangible harm to others is especially likely to occur; and sometimes by limiting the prohibited lies to those that are particularly likely to produce harm."[98]

Even though the concurrence conceded that the statute had substantial justification, the Government could substantially achieve its objectives in less restrictive ways. Thus, in working disproportionate constitutional harm, that statute failed intermediate scrutiny and violated the First Amendment.[99]

C. *The Dissent*

The dissent, authored by Justice Alito and joined by Justices Scalia and Thomas, [100] reasoned that Congress enacted the Stolen Valor Act of 2005 to address "an epidemic of false

[95] *Id.* at 715.
[96] *Id.* at 730.
[97] *Id.*
[98] *Alvarez*, 567 U.S. at 734.
[99] *Id.* at 739.
[100] *Id.*

claims about military decorations … [that] undermin[ed] the country's system of military honors and inflict[ed] real harm on actual medal recipients and their families." [101] In their view, the statute was narrowly drafted to reach only "knowingly false statements about hard facts directly within a speaker's personal knowledge." [102] The dissenting Justices pointed out that a long line of cases have recognized that "the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest." Therefore, the dissent posited that the Act was constitutional and did not threaten freedom of speech. In their view, "the lies covered by the Stolen Valor Act have no intrinsic value and thus merit no First Amendment protection unless their prohibition would chill other expression that falls within the Amendment's scope."[103] In this case, there was no such risk.

Each camp of Justices in *United States v. Alvarez* therefore adopted a different approach. It is necessary to understand the reasoning driving each approach to evaluate this Comment's proposal for how lower courts should approach plurality opinions, illustrated through *Alvarez*, and then to compare that proposal to the current practice of some lower courts.

IV. MODIFIED DIMENSIONALITY APPROACH AS APPLIED TO *ALVAREZ*

This Comment proposes a modified dimensionality approach, which entails two steps: (1) a modified shared agreement approach; and (2) a dimensionality analysis. The modified shared agreement approach requires figuring out if the reasoning of the judgment-supportive opinions in the precedential case would lead to the same result in the new case. If so, the lower court should resolve the new case accordingly. If, on the other hand, the reasoning of the judgment-supportive

[101] *Id.*
[102] *Id.*
[103] *Alvarez*, 567 U.S. at 751 (Alito, J., dissenting).

opinions in the precedential case would not lead to the same result in the new case, the court should then engage in a dimensionality analysis.

A. *Step One: Modified Shared Agreement Approach*

This Comment argues that lower courts should begin the inquiry not by trying to determine the relevant dimensions, but by first figuring out if the reasoning in the opinions that support the judgment in the precedential case leads to the same resolution of the new case. If so, the lower court should resolve the new case consistently with that resolution.[104] Some scholars have proposed a similar "shared agreement" approach whereby lower courts are bound by the reasoning in the judgment-supportive opinions in the precedent case if those opinions would compel the same result in the new case.[105]

While generally approving of this approach, this Comment disagrees with the proposition that "the shared agreement approach is consistent with the language and holding of *Marks*," because, identifying the points on which a majority of the judgment-supportive justices agree does not yield any "grounds" that were expressed in the precedent case, let alone the "narrowest grounds."[106] For example, if a plurality of the Court stated that the tallest person should win a hypothetical contest and concurring Justices posited that the heaviest person should win, then in a new case where one person is both the tallest and the heaviest it seems intuitively correct that that person should win the contest. That position, though, is not accurately described as the narrowest grounds opinion because no Justice in the precedential case expressed the grounds that the tallest and heaviest individual should win. Lower courts intuitively already engage in this type of

[104] *See, e.g.*, *Questioning Marks: Plurality Decisions and Precedential Constraint*, *supra* note 22, at 803.
[105] *Id.*
[106] *Id.* at 839.

analysis, and an example of lower court deriving precedential status from *Alvarez* in this way is provided below.[107]

Thus, even though this formulation cannot be expressed as the "narrowest grounds" rule, it is a simple way to derive precedential status from a fragmented case consistent with the views of a majority of Justices who concurred in the judgment. It makes sense to begin this way to avoid the complex task of deciphering the relevant dimensions where it is not necessary to do so.

On the other hand, if it is not readily apparent that the reasoning of the judgment-supportive opinions of the precedential case produces the same result in the new case, it is helpful to proceed to the dimensionality analysis.

B. *Step Two: Dimensionality*

According to Professor Stearns, "lower courts should presume that the opinions can be expressed along a single dimension . . . and apply that opinion representing the deciding Court's median position. This will generally coincide with the position closest to dissent for each separate judgment."[108] As noted above, Professor Stearns draws from social choice theory, and explains that if a fragmented case implicates one relevant dimension, "the opinion consistent with the outcome that resolves the case on narrowest grounds is a median, dominant second choice, or Condorcet winner. If either of the extremes prefers an opposite extreme to the median position, the opinions do not align on a single dimension."[109]

Applying this reasoning to *Alvarez*, it seems plausible that the plurality, applying strict scrutiny to the content-based restriction on speech in question, would prefer the concurrence's intermediate scrutiny to the dissent's least protective approach. Likewise, the dissent would prefer

[107] *See infra* Part V.A. (discussing Animal Legal Def. Fund v. Kelly, 9 F.4th 1219 (10th Cir. Aug. 19, 2021)).
[108] *Modeling Narrowest Grounds*, *supra* note 18, at 529.
[109] *Id.* at 533–34.

the concurring Justices' approach to the plurality's. Thus, assume the plurality is "A," the concurrence is "B," and the dissent is "C." The ordinal rankings of the A camp are: A,B,C; the ordinal rankings of the C camp are C,B,A, so the ordinal rankings of the B camp, whether B,A,C or B,C,A, do not matter since either way B wins.

In other words, since each extreme would prefer the concurring opinion to the other extreme, that opinion is the "Condorcet winner" and therefore expresses the narrowest grounds opinion. It is easy to see in a table why the median position is the concurrence:

Plurality (A)	Concurrence (B)	Dissent (C)
Strike Down: Strict Scrutiny & Categorical Analysis	Strike Down: Intermediate Scrutiny & Balancing	Uphold: No 1A protection for false factual statements where no threat of chilling speech.
Most Protection Given to False Factual Statements →		Least Protection

On the other hand, while it is easy to see how level of scrutiny can be arranged along a single dimension from least exacting to most exacting, it is not entirely clear how the different analytical frameworks employed by the plurality and the concurrence fit in. Although the analytical approach is potentially less relevant to the above analysis,[110] it is conceivable that a lower court could initially intuit that, much like Justice Thomas resolved *McDonald* on alternate grounds, the concurring justices in *Alvarez*, in employing a balancing approach, introduced a second dimension.

The thought process would proceed as follows. The *Alvarez* plurality and concurrence implicate two relevant dimensions: level of protection (strict scrutiny vs. intermediate scrutiny) and analytical framework (categorical analysis vs. balancing).

[110] *Modeling Narrowest Grounds*, *supra* note 18, at 496–97 (noting that "[n]ot all dimensions are necessarily relevant in applying the narrowest grounds rule").

In Professor Stearns's terms, "the underlying premise on which all justices must logically agree" could be framed as the following: Striking down the Stolen Valor Act of 2005 requires finding, through a categorical analysis or balancing approach, that the government failed to satisfy the warranted level of scrutiny. One way to express the controlling issues therefore could be: (1) Is a categorical analysis the appropriate analytical framework?; and (2) Does the Act satisfy the level of protection accorded the targeted speech?

It is impossible, however, to reconcile the above analysis with Professor Stearns's statement that in two-dimensional cases: "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."[111]

Here, the plurality and concurrence express opposite resolutions of controlling issues yet still yield the Court's judgment, but the dissenting opinion, does not "express a favorable resolution of a single controlling issue from the perspective of *each* of those opinions;" it only arguably expresses a favorable resolution of the analytical framework from the perspective of the plurality, if you agree that the dissent employs a categorical analysis.

Thus, *Alvarez* likely has one relevant dimension, but the process arriving at that result is complex. Therefore, the more appropriate starting point is to decide whether the plurality and concurrence in the precedent case would resolve the new case the same way. This same modified shared agreement approach is also helpful when there is more than one dimension, in which case Professor Stearns's approach is not applicable.[112]

---

[111] *Id.* at 523.

[112] *See, e.g.*, *Questioning Marks: Plurality Decisions and Precedential Constraint*, *supra* note 22, at 795.

Even though critics will argue that applying the reasoning of the plurality and the concurrence to the facts of the new case will not necessarily prove easy, or produce uniformity among the lower federal courts, this is precisely the kind of analysis that courts employ when they apply the reasoning of a precedential case with a majority opinion to a new case. The approach is also analogous to a lower federal court applying two of its own prior precedents that conflict in some way to a new case. If both precedents lead to the same result in the new case, there is no need to resolve the conflict.

If, on the other hand, the analysis does not produce a clear answer, then lower courts should have discretion to use the fragmented opinion as persuasive authority. In these cases, lower courts should ultimately be free to decide the case on its merits by analyzing for themselves the best reading of the law governing the case.

That said, the dimensionality analysis still has value insofar as it makes readily apparent the precedential value of a case provided that the case lends itself to determining the relevant dimensions and only implicates one.

V. DISCUSSION OF *ALVAREZ* AS APPLIED TO "AG-GAG" LAWS

In 1990, states began passing "ag-gag" or "farm security" laws aimed at preventing investigative journalists from infiltrating agricultural production facilities in order to expose the treatment of animals therein.[113] Such laws criminalize, among other things, taking "photography or recordings on agricultural operations without the consent of the owner."[114] Many of the statutes have been challenged as violating the First Amendment, and lower courts are split as to how to

[113] *See* Kevin C. Adam, *Shooting the Messenger: A Common-Sense Analysis of State "Ag-Gag" Legislation Under the First Amendment*, 45 SUFFOLK U. L. REV. 1129 (2012); *see also* Matthew Shea, *Punishing Animal Rights Activists for Animal Abuse: Rapid Reporting and The New Wave of Ag-Gag Laws*, 48 COLUM. J.L. & SOC. PROBS. 337 (2015).
[114] Elizabeth Rumley, *"Ag-gag" Laws: An Update of Recent Legal Developments*, THE NAT'L AG. LAW CTR. (Aug. 26, 2021), https://nationalaglawcenter.org/ag-gag-laws-an-update-of-recent-legal-developments/.

apply *Alvarez* to them.[115] This Comment will therefore examine the *Marks* approach endorsed above in the context of applying *Alvarez* to "Ag-gag" laws. Since this Comment is focused on the *Marks* issue rather than the underlying substantive issues in these cases, the merits of the "Ag-gag" legislation are outside the scope of this Comment.

A. *Step One: Modified Shared Agreement Approach Applied*

In *Animal Legal Def. Fund. v. Kelly*,[116] the Tenth Circuit considered Animal Legal Defense Fund's ("ADLF's") challenge to Kansas's "Ag-gag" law.[117] The three relevant subsections of the "Ag-gag" law prohibit the following without effective consent of the owner and with intent to damage the enterprise: (b) acquiring "control" over an animal facility; (c) recording on an animal facility's property; and (d) trespassing on an animal facility's property.[118] The district court held that all three provisions were unconstitutional, and the Tenth Circuit affirmed.[119]

Relevant to this Comment's *Marks* proposal, the *Kelly* court cited *Alvarez* as controlling but said: "We need not engage in a *Marks* analysis here, however, because the plurality and concurring opinions in *Alvarez* are in accord on the points relevant to Kansas's argument."[120]

Specifically, according to the Tenth Circuit majority, the *Alvarez* plurality and concurrence agree that false factual statements can be "subject to First Amendment scrutiny requiring the government to provide a justification."[121] The two *Alvarez* judgment-supportive opinions further agree that restrictions on statements that cause "legally cognizable harm tend not to offend the

---

[115] *Id.*
[116] *Kelly*, 9 F.4th at 1224.
[117] Kan. Farm Animal and Field Crop and Research Facilities Protection Act, Kan. Stat. Ann. § 47-1827 (1990).
[118] *Id.*
[119] *Kelly*, 9 F.4th at 1224.
[120] *Id.* at 1232.
[121] *Id.* (quoting *Alvarez*, 567 U.S. at 729 (Kennedy, J., concurring) (plurality opinion) and *Alvarez*, 567 U.S. at 732–34, 737 (Breyer, J., concurring)).

Constitution."[122] The *Kelly* court then stated: "Those two propositions are the only ones from *Alvarez* necessary for our analysis."[123]

Thus, the *Kelly* court applied these points of agreement among the *Alvarez* plurality and concurrence to the Kansas statute, concluding that subsections (b), (c), and (d) are unconstitutional.[124] The court first found that the provisions in question involve speech because they regulate "what may be permissibly said to gain access to or control over an animal facility."[125] Since all three subsections forbid speech made with "the intent 'to damage the enterprise conducted at the animal facility,'" the court further found that they are viewpoint discriminatory.[126]

Moreover, the Tenth Circuit posited that the intent to damage the enterprise element "does not necessarily constitute the sort of harm required for false speech to be unprotected under *Alvarez*."[127] Thus, "the viewpoint discrimination on this basis subjects the relevant subsections of the Act to strict scrutiny," which Kansas had not attempted to meet.[128] The Tenth Circuit therefore affirmed the lower court ruling that these provisions of the Kansas statute violated the First Amendment.[129]

In a footnote, the Tenth Circuit clarified its holding in light of an Eighth Circuit case, *ALDF v. Reynolds*,[130] considered in greater detail below, which was decided while *Kelly* was pending. The statute at issue in *Reynolds* contains an "Access Provision," which forbids obtaining access to an agricultural production facility by false pretenses.[131] The Eighth Circuit upheld the Access

[122] *Id*.
[123] *Id*. at 1232.
[124] *Id*. at 1232.
[125] *Kelly*, 9 F.4th at 1232.
[126] *Id*.
[127] *Id*.
[128] *Id*.
[129] *Id*.
[130] Animal Legal Def. Fund v. Reynolds, 8 F.4th 781 (8th Cir. Aug. 10).
[131] *Id*.

Provision as constitutional, reasoning that trespass is a legally cognizable harm.[132] Even so, the Tenth Circuit viewed its *Kelly* decision as consistent with *Reynolds* and distinguished the two cases on the grounds that the latter statute was not viewpoint discriminatory.[133] The court explained that "even assuming trespass alone provides legally cognizable harm, as held by the Eighth Circuit, the viewpoint discriminatory nature of the statute here renders it subject to strict scrutiny—a standard Kansas did not attempt to meet."[134]

Judge Hartz, dissenting in *Kelly*, agreed that the *Alvarez* plurality and concurrence established that prohibitions of "false factual statements that cause legally cognizable harm tend not to offend the Constitution."[135] Unlike the panel majority, however, the dissent vehemently disagreed with the majority's conclusion that obtaining a property owner's consent to enter the property by deception effects no legally cognizable harm.[136] Judge Hartz stated that a property owner's power to decide who can be on the property is a "fundamental and ancient right."[137]

The dissent went further to state that "the clear import of *Alvarez* is that a fraudulently obtained consent to enter another's property, particularly the type of entry desired by Plaintiffs, is not protected by the First Amendment."[138] The dissent points out that the *Alvarez* plurality and concurrence explicitly stated that "an invasion of privacy" qualifies as a legally cognizable

---

[132] *Id.* at 781.
[133] *Kelly*, 9 F.4th at n.17.
[134] *Id.*
[135] *Kelly*, 9 F.4th at 1246 (Hartz, J., dissenting (quoting maj. op. at 21)).
[136] *Id.*
[137] *Id.* at 1247 (citing Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."); Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979) (the "right to exclude" is "universally held to be a fundamental element of the property right" (internal quotation marks omitted)); Rakas v. Illinois, 439 U.S. 128, 143 (1978) ("One of the main rights attaching to property is the right to exclude others.") (citing 2 William Blackstone, Commentaries, ch. 1); 2 William Blackstone, Commentaries, *2 (property is "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe")).
[138] *Kelly*, 9 F.4th at 1248–49.

harm.[139] It follows that entry on another's property to investigate ("snooping around") is a "quintessential invasion of privacy," so these provisions should be upheld.[140]

Thus, *Kelly* is a helpful illustration of the appropriate starting place in *Marks* analyses regardless of whether the *Kelly* majority or dissent was correct on the merits. The disagreement did not have to do with *Marks,* but rather with underlying legal theories that the court would have disagreed on had it been applying a majority opinion. Importantly for the purposes of this Comment, all the judges deciding *Kelly* reached the result that they thought was consistent with the reasoning of the *Alvarez* plurality and concurrence. Thus, it was not necessary to proceed further with the *Marks* analysis, including determining the dimensions at play in *Alvarez.*

B. *Step Two: Dimensionality Applied*

Animal Legal Def. Fund v. Reynolds[141] concerned an Iowa statute like the one at issue in *Kelly*. The Iowa statute prohibited "agricultural production facility fraud" and defined it as doing either of the following: (a) "obtain[ing] access to an agricultural production facility by false pretenses;" or (b) knowingly making a false statement on an agricultural production facility's employment application with the intent to commit an unauthorized act therein. [142]

The court referred to the first section as the "Access Provision" and to the second as the "Employment Provision."[143] At the summary judgment stage, the district court concluded that both provisions violated the First Amendment.[144]

[139] *Kelly*, 9 F.4th at 1249 (quoting *Alvarez* 567 U.S. at 719; see also *id.* at 734 (Breyer, J., concurring) (distinguishing false statements that are not protected by the First Amendment because they "cause harm to a specific victim of an emotional-, dignitary-, or privacy-related kind").
[140] *Id.*
[141] *Reynolds*, 8 F.4th at 781.
[142] Iowa Code § 717A.3A(1)(a)–(b) (2012).
[143] *Reynolds*, 8 F.4th at 784.
[144] *Id.*

The Eighth Circuit began by considering the precedential value of *Alvarez* but concluded that since the concurring opinion was not a logical subset of the plurality or vice versa, it was not possible to discern a holding in the case. It highlighted that the *Alvarez* concurrence is "arguably narrower" than the plurality since it applied intermediate scrutiny and not strict scrutiny, but "the concurrence suggested more broadly that all false factual statements receive some protection under the First Amendment, while the plurality indicated that certain false speech is outside the First Amendment."[145] It therefore read the only binding aspect of *Alvarez* as its specific result but bore in mind "the various opinions" in seeking to resolve the new argument about restrictions on false statements.[146]

The Eighth Circuit's grappling with the relative narrowness of the various *Alvarez* opinions could signal that applying dimensionality will pose some of the same difficulties as the current *Marks* approaches. As discussed above, the dimensionality analysis hinges on the ability to force one opinion to take itself out of the equation and choose among the remaining opinions. This inquiry produces a Condorcet winner.

The Eighth Circuit's uncertainty as to the relative narrowness of the judgment-supportive opinions in *Alvarez* signals that it may also be unsure which opinion would be preferable to the opinion forced to choose. If that is the case, it could reach the opposite conclusion than the one reached above, that *Alvarez* has in fact two dimensions, which underscores that the dimensionality analysis may be equally difficult in practice as the current *Marks* approaches and may similarly fail to produce uniformity among the lower courts.

[145] *Id.* at 785.
[146] *Id*.

The Eighth Circuit then upheld the Access Provision as constitutional because trespass is an ancient cause of action the provision targets "intentionally false speech undertaken to accomplish a legally cognizable harm."[147]

The Employment Provision, on the other hand, was held not constitutional.[148] Even though "a narrowly tailored statute aimed at preventing false claims" to secure employment would not run afoul of the First Amendment, the court found this statute overly broad because it did not require that the false statements be material to the employment.[149] The absence of a materiality requirement was therefore fatal to the Employment Provision under either strict scrutiny or intermediate scrutiny.[150]

Judge Grasz joined the court's opinion in full because he believed "it is consistent with current law, as best we can determine it from limited and sometimes hazy precedent," further supporting the idea that lower courts need a workable approach to plurality decisions.[151]

Judge Gruender, dissenting, agreed that neither the *Alvarez* plurality nor concurrence is a logical subset of the other. The Judge would not have held that it is therefore impossible to discern a holding from *Alvarez*, though it may be more difficult.[152] Judge Gruender began by looking to the various ways the Eighth Circuit and other circuits have read fragmented precedents in the past where neither opinion is a logical subset of the other.[153] Most relevant to the present discussion is the "fallback approach" of resolving the new case in a way that would have commanded the votes of any five justices on the *Alvarez* Court, including dissenters.[154] Although this Comment does

[147] *Id.* at 786.
[148] *Id.* at 787.
[149] *Reynolds*, 8 F.4th at 787.
[150] *Id.*
[151] *Id.* at 788.
[152] *Id.* at 789.
[153] *Id.*
[154] *Reynolds*, 8 F.4th at 791 (Gruender, J., dissenting); *see also* Nina Varsava, *The Role of Dissents in the Formation of Precedent*, 14 DUKE J. CONST. LAW & PUB. POL'Y 285 (2019).

not find support for this approach in the language of *Marks*, Judge Gruender's analysis illustrates that the reasoning of the *Alvarez* plurality and concurrence would not lead to the same result in *Reynolds*. The modified shared agreement approach, discussed above, would therefore likely not work here.

Judge Gruender first reasoned that the *Alvarez* plurality would have upheld the Access Provision since trespass is a legally cognizable harm.[155] He posited that the *Alvarez* plurality would have also upheld the Employment provision because "[w]here false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment."[156] Judge Gruender read the preceding quote to mean that a lie for the purpose of gaining employment is not protected by the First Amendment regardless of materiality.[157] The reasoning of the *Alvarez* concurrence, on the other hand, suggests that it would subject such lies told for the "purpose of material gain" to at least intermediate scrutiny, so it was not clear to Judge Gruender that the concurrence would uphold the Employment Provision.[158]

Judge Gruender reasoned that the *Alvarez* dissent, on the other hand, would support upholding both provisions because they criminalize "only knowingly false statements about hard facts directly within [the] speaker's personal knowledge" and do not threaten freedom of speech.[159]

---

[155] *Reynolds*, 8 F.4th at 787.
[156] *Id.* at 794 (quoting *Alvarez*, 567 U.S. at 723).
[157] *Id.*
[158] *Id.* at 790 (citing *Alvarez*, 567 U.S. at 730–31, 734–36 (Breyer, J., concurring) ("highlighting the 'limiting features' of regulations of fraud, perjury, false claims, impersonation, and trademark infringement that enable them to hold up better under intermediate scrutiny than the Stolen Valor Act").
[159] *Reynolds*, 8 F.4th at 791 (quoting *Alvarez*, 567 U.S. at 739 (Alito, J., dissenting)).

Since the *Alvarez* plurality and the *Alvarez* dissenters[160] would presumably uphold both the Access Provision and the Employment Provision, Judge Gruender posited that they should be upheld as commanding the support of a majority of the *Alvarez* Court.[161]

Assuming *arguendo* that Judge Gruender is correct to the extent that the reasoning of the *Alvarez* plurality and concurrence would not yield the same resolution of *Reynolds*, the next step should be to look at dimensionality in *Alvarez* and apply the "narrowest grounds" opinion: the concurrence. This would entail applying intermediate scrutiny and a balancing approach to the provisions of the Iowa statute.

Scholars may criticize this approach as being inconsistent with the Court's custom of applying strict scrutiny to cases implicating the First Amendment, or elevating outlier views to precedential status,[162] but until the Supreme Court clarifies or overrules *Marks*, it is the state of the law.

The two cases discussed above, *Kelly* and *Reynolds*, demonstrate when Professor Stearns's dimensionality approach is helpful and when it is not. As in *Kelly*, where the lower court judges agree that the reasoning of the judgment-supportive opinions in the precedential case would support the same result in the instant case, they should resolve the case accordingly. Where, as in *Reynolds*, the lower court judges conclude that the reasoning of the judgment-supportive opinions in the precedential case does not compel the same result in the new case, the judges should engage in a dimensionality analysis.

---

[160] This Comment rejects counting the views of dissenters since *Marks* requires looking to opinions that support the judgment, thereby precluding reliance on dissenting opinions.
[161] *Id.*
[162] *See, e.g.*, Re, *supra* note 17, at 1942.

VI. CONCLUSION

Ultimately, Professor Stearns's approach to the *Marks* rule will be a helpful addition to the toolbox of lower courts, but it will likely not be the only tool necessary. Thus, lower courts should begin by determining whether the plurality and concurrence in the precedent case would agree on the resolution of the outcome of the new case. If not, they should engage in a dimensionality analysis. If the dimensionality analysis fails, they should resolve the case on the merits as they see fit.