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Legitimacy Model for the Interpretation of Plurality Decisions

Ken Kimura

A LEGITIMACY MODEL FOR THE INTERPRETATION OF PLURALITY DECISIONS

> A dissent in the court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed. Nor is the appeal always in vain. In a number of cases dissenting opinions have in time become the law.
>
> Chief Justice Charles Evan Hughes.[1]

The important role that plurality decisions play in developing the law dictates the need for an inquiry into their proper precedential value.[2] In the last two decades, the dramatic increase in the use of plurality decisions highlights a growing concern over the difficulty in their interpretation.[3] Part I of this Note introduces the tension between plurality decisions and traditional principles of interpretation. Part II discusses current approaches to interpreting plurality decisions and posits an alternative tripartite test. Part III

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1 CHARLES EVAN HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1937 ed.), *noted in* Karl M. Zo Bell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 211 (1959). An opinion "concurring in judgment" is similar to an opinion "dissenting in judgment" insofar as both "illuminate issues which might otherwise be relegated to the obscurity of a footnote." John F. Davis & William L. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 75 n.82 (1974). *See generally infra* note 13 (discussing the structure of plurality decisions).

2 Plurality decisions deal with some of the most controversial issues of our day. *See, e.g.*, U.S. v. Kokinda, — U.S. —, 110 S. Ct. 3115 (1990) (applying First Amendment public forum analysis to postal sidewalk); *see generally* Part III.B.3 (discussing the "complex plurality decision"). *See also* Walton v. Arizona, — U.S. —, 110 S. Ct. 3047 (1990) (applying Eighth Amendment capital punishment standards to Arizona statute); County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573 (1989) (applying First Amendment Establishment Clause analysis to religious symbols within county courthouse); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (applying Fourteenth Amendment Equal Protection Clause to city plan favoring minority business enterprises); Webster v. Reproductive Health Serv., 492 U.S. 490 (1989) (applying constitutional review of state statutory restrictions on abortions). *But see* Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127, 1139 (1981) (suggesting that most plurality decisions in nonconstitutional issue areas create little controversy).

3 Between 1801 and 1955, the Court averaged 0.29 plurality decisions per term. *See* Comment, *Supreme Court No-Clear-Majority Decisions: A Study in Stare Decisis*, 24 U. CHI. L. REV. 99, 99 n.4 (1956) (discussing 45 plurality decisions). Between 1956 and 1969, the Court averaged 3.00 plurality decisions per term. *See* Davis & Reynolds, *supra* note 1, at 60 (discussing general trends in plurality decisions). Between 1970 and 1980, the Court averaged 8.8 plurality decisions per term. *See* Note, *supra* note 2, at 1127 n.1, 1147 (listing 88 plurality decisions). Between 1981 and 1991, the Court averaged 10.3 plurality decisions per term. *See* Appendix (listing 103 plurality decisions).

evaluates this alternative approach and suggests precedential consequences that should attach to different types of plurality decisions.

I
INTRODUCTION

The doctrine of stare decisis assumes the articulation of a majority Supreme Court decision.[4] As originally conceived, the doctrine required lower court deference to both the "outcome" of a Supreme Court decision and the "legal rule" supporting that outcome.[5] The outcome of a decision is defined as the disposition of the litigation with respect to the particular parties and facts before the Court.[6] The legal rule, on the other hand, is the reasoning that a Justice adopts in reaching a particular outcome.[7] The historical evolution of the splintered decision, however, has surpassed the original assumptions upon which the doctine of stare decisis was based.

A. The Nature of Plurality Decisions

A plurality decision, by its very nature, represents the most unstable form of case law. It is the resolution of a "hard" case by a nonunanimous Court.[8] At least three opinions, resting upon diverse legal theories, are present in a plurality decision. The

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4 HENRY C. BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS 10 (1912) (suggesting that the doctrine of stare decisis assumes a simple majority decision); EUGENE WAMBAUGH, THE STUDY OF CASES 98 (2d. ed. 1894) (same). For an in-depth discussion of the doctrine of stare decisis in the context of plurality decisions, see Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COL. L. REV. 756, 757-58 (1980) (discussing Black and Wambaugh).

5 James Hardisty, *Reflections on Stare Decisis*, 55 IND. L.J. 41, 52-57 (1979) (distinguishing the legal rule and the particular outcome). *See generally* Novak, *supra* note 4, at 756 nn. 8, 10 (discussing Hardisty in-depth). In the context of litigation over the Equal Protection Clause, for example, one of three alternative legal rules is generally applicable: strict scrutiny review, intermediate scrutiny review, and rational basis review. *See generally* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (plurality decision). *See* discussion *infra* part III.A (discussing the "incoherent plurality decision"). The possible outcomes of a Supreme Court decision are limited to a finite set of alteruatives. *But see* Comment, *supra* note 3, at 150-53 (arguing for the recognition of a third, "second-choice minority" outcome).

6 *See supra* note 5 and accompanying text (describing alternative outcomes).

7 *See supra* note 5 and accompanying text (describing alternative legal rules).

8 Professor Dworkin suggests that hard cases arise "when no settled rule dictates a decision either way . . ." Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1060 (1975). In a plurality decision, a substantial disagreement among the Justices exists as to which legal rule should decide the case. *See infra* note 13 and accompanying text (discussing the structure of plurality decisions). Thus, plurality decisions constitute "hard" cases. Ronald Dworkin, *Judicial Discretion*, 60 J. PHIL. 624, 627 (1963) (when "two textbook rules by their terms apply" or when "no textbook rule applies", then a decision is a "hard" case). *See generally* Note, *Dworkin's "Rights Thesis"*, 74 MICH. L. REV. 1167, 1171 (1976).

Supreme Court's failure to articulate a single rule of law creates confusion in the lower courts as how to interpret and weigh that decision.[9]

Plurality decisions are unique because of a conceptual gap between the legal rule and the outcome. In "simple majority" decisions, a numerical majority of Justices agree on both a single legal rule and a single outcome.[10] On the other hand, in plurality decisions, no single legal rule carries the support of all of the concurring Justices.[11] Instead, at least two coalitions of concurring Justices articulate different legal rules in an attempt to justify the same outcome.

The method by which plurality decisions are announced highlights their distinctive nature. A minimum of three opinions, none with the support of more than four Justices, combine to form a plurality decision.[12] The lead opinion ("L") announces the outcome that a numerical majority of Justices supported, and articulates one of several competing legal rules. Concurring opinions ("C") articulate alternative legal rnles that independently justify the outcome announced by the lead opinion. Often, a dissenting opinion ("D") exists, which rejects the outcome that both the lead and concurring opinions adopted, and articulates yet another alternative legal rule.[13]

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9 *See generally* Davis & Reynolds, *supra* note 1, at 71 (suggesting that plurality decisions create "confusion in the lower courts"); Douglas J. Whaley, *A Suggestion for the Prevention of No-Clear-Majority Judicial Decisions*, 46 TEX. L. REV. 370, 371 (1968) (arguing that plurality decisions represent a "breakdown in the judicial system"); Note, *supra* note 2, at 1128 (suggesting that plurality decisions constitute a "failure to fulfill the Court's obligations").

10 For this Note, a "numerical" majority comprises a coalition of at least five of nine Justices with respect to one component (*i.e.*, the legal rule or the outcome) of a decision. This is to be distinguished from a "simple majority decision," in which the *same* numerical majority that agrees on a particular outcome also agrees that a single legal rule serves to justify that outcome. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954) (unanimous decision). *See infra* note 22 and accompanying text (discussing *Brown*).

A simple majority decision is announced as "*the* opinion of the Court." *See, e.g.*, *Brown*, 347 U.S. at 486 (Warren, C.J., lead opinion) (emphasis added). A plurality decision, on the other hand, is announced as "*an* opinion [of the Court]." *See, e.g.*, U.S. v. Kokinda, — U.S. —, 110 S. Ct. 3115, 3117 (1990) (O'Connor, J., lead opinion) (emphasis added). *See* discussion *infra* part III.B.3 (discussing the "complex plurality decision").

11 *See supra* note 10 and accompanying text (discussing the distinction between a numerical majority and a simple majority decision).

12 When the full Court is sitting, any opinion garnering the support of more than four Justices would trigger a "simple majority" decision. When only eight Justices are sitting, then a coalition of four Justices might create an "affirmance by an equally divided Court." When only seven Justices are sitting, a coalition of four Justices would trigger a simple majority decision. *See* Recent Cases, 86 HARV. L. REV. 1307 (1973); Note, *Lower Court Disavowal of Supreme Court Precedent*, 60 VA. L. REV. 494 (1974).

13 Many decisions are plurality decisions with respect to only one aspect of the case. In these "partial" plurality decisions, the concurring Justices will introduce their opin-

B. Principles of Precedential Legitimacy

The absence of a simple majority creates precedential uncertainty in plurality decisions. This precedential uncertainty may be seen as a function of three factors: (1) the difficulty in identifying a particular legal rule that a numerical majority of Justices support, (2) the difficulty in identifying a particular outcome that is justified in light of a single legal rule, and (3) the difficulty in explaining an adequate connection between the identified legal rule and the identified outcome. The critical inquiry is the identification of a legal rule that should have binding precedential impact.

1. *The Principle of Majoritarianism*

One component of the Supreme Court decision is the "legal rule."[14] The principle of majoritarianism requires the identification of a "majority rule" a rule that a numerical majority of Justices explicitly adopt as the law of the land.[15] Absent this majority agreement, a rule should have no binding precedential effect. Any legal rule articulated in a plurality decision that is not a majority rule has

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ion, "Justice X, joined by Justice Y, concurring in part and concurring in the judgment." *See, e.g.*, Asarco Inc. v. Kadish, 490 U.S. 605 (1989) (Brennan, J., concurring in judgment).

The lead opinion is placed at the head of the decision and is announced, "Justice X, joined by Justice Y, announced *the* judgment and *an* opinion of the Court." *See, e.g.*, *Kokinda*, 110 S. Ct. at 3117 (1990) (O'Connor, J., lead opinion) (emphasis added). When appropriate, the lead opinion may also be referred to as a concurring opinion.

A concurring opinion is announced, "Justice X, *concurring in the judgment*." *See, e.g.*, *Kokinda*, 110 S. Ct. at 3125 (Kennedy, J., concurring in judgment) (emphasis added). A "concurring opinion", as the term is used here, should be distinguished from a "simple concurrence" ("SC"), which is a coalition of Justices who explicitly agree with both the legal rule and the outcome announced by the lead opinion and simply expand upon that analysis in a separate opinion. A decision with only a simple concurrence should not be considered a plurality decision. *See* discussion *infra* part II.C.3 (discussing the "false plurality decision"). A simple concurrence is announced, "Justice X, joined by Justice Y, concurs." *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 230 (1978) (Marshall, J., simple concurrence). The lead opinion will generally indicate that the Justices involved in a simple concurrence are joining in the lead opinion. *But see Plyler*, at 203 (Brennan, J., lead opinion) (failing to affirmatively indicate that the Justices joining in the simple concurrence are also joining in the lead opinion).

A dissenting opinion is announced, "Justice X, joined by Justice Y, dissenting." *See, e.g.*, *Plyler*, at 242 (Burger, C.J., dissenting).

14 *See supra* note 5 and accompanying text (discussing the terminology of "legal rules").

15 The principle of majoritarianism is a component of the doctrine of stare decisis. The doctrine implicitly assumes a majoritarian requirement, insofar as a simple majority decision is being evaluated. *See supra* note 4 and accompanying text (discussing the assumption of a simple majority decision based on the traditional doctrine of stare decisis). On the other hand, the principle of majoritarianism has independent doctrinal underpinnings. *See, e.g.*, United States v. Vidaver, 73 F. Supp. 382, 384 (E.D. Va. 1947) (referring to the "doctrine of the majority opinion").

been implicitly or explicitly rejected by a majority of the court.[16] A numerical test for precedential legitimacy is justified by the incoherence of any approach that does not incorporate a numerical component.

One line of reasoning, supporting the need to identify a majority rule, argues that Supreme Court decisions are generated through "bandwagoning," where individual Justices form temporary coalitions supporting or opposing a particular legal rule and outcome.[17] Pursuant to this individualized perspective, the only possible method to distinguish the victorious coalition from the defeated coalition is a numerical standard.

An alternative line of reasoning views the announcement of a Supreme Court decision as something more than the tabulation of juridical votes. Pursuant to this holistic perspective, the decision announced by a simple majority of Justices transcends the shifting preferences of individual Justices and becomes "*the* opinion of the

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16 A nonmajority rule may be explicitly rejected. Thus, in Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (plurality decision), the rule of law articulated by Justice Stevens (that review pursuant to federal statute was sufficient to resolve the case) is explicitly rejected by a majority of the Court. *Id.* at 287 (Powell, J., lead opinion) (constitutional review is necessary); *id.* at 355 (Brennan, J., dissenting) (constitutional review is necessary). Alternatively, a nonmajority rule may be implicitly rejected. In Bakke, even if Justice Powell and Justice Brennan had not explicitly rejected Justice Steven's reasoning, the simple fact that they propose alternative standards implicitly means that they reject the nonmajority rule. *See* discussion *infra* part III.A. (discussing the "incoherent plurality decision").

17 The term "bandwagoning", as used here, suggests that individual Justices form separate coalitions through joining an opinion, supporting or opposing a particular legal rule. This use of the term sbould be distinguished from its application in the study of international relations. *See* Saurin Shah, Balancing and Bandwagoning (May 1, 1988) (unpublished manuscript, on file with the Johns Hopkins University library).

The individualized perspective suggests that a coalition comprising a numerical majority is the controlling faction.

> [L]ike legislative action, decisions of the [Supreme] Court reflect a collective position derived from the interaction of the views of a number of different actors—the nine Justices on the Court. In this situation, the state court is bound only by those constraints to which a majority of the Justices subscribes.

Earl M. Maltz, *The Concept of the Doctrine of the Court in Constitutional Law*, 16 GA. L. REV. 357, 399-403 (1982). *See generally* Zo Bell, *supra* note 1 (adopting an individualized perspective of dissenting Justices). The individualized perspective is not analytically limited to the study of plurality decisions: dissenting opinions, *see, e.g.*, McGautha v. California, 402 U.S. 183, 248 (1971) (Brennan, J., dissenting), simple concurrences, *see, e.g.*, School Dist. of Abington Township v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring); and the articulation of beliefs in nonjudicial forums, *see, e.g.*, William J. Brennan, *In Defense of Dissents*, 37 HASTINGS L.J. 426 (1986), provide alternative grounds upon which to base an individualized perspective of Supreme Court decisions. *See generally* Laurence H. Tribe, *Architect of the Bill of Rights*, 77 ABA J., Feb. 1991, at 47, 48 (reviewing Justice Brennan's contribution to constitutional law).

Court."[18] When the Court does not speak as a single entity, the precedential value of the legal rule is diminished. Under both the individualized and holistic perspective, the support of a numerical majority of Justices is a necessary component of precedential legitimacy.

2. *The Need for a Reasoned Outcome*

A second component of a Supreme Court decision is the particular "outcome."[19] The outcome announced by a Supreme Court decision should be a logical consequence of the legal rules that the concurring Justices provide.[20] When two or more coalitions of concurring Justices reach the same outcome based upon mutually exclusive legal rules, then that particular outcome has not been justified: it is merely the result of a chance happenstance, the meaningless intersection of conclusions. In this situation, attributing precedential value to any one of the alternative legal rules articulated in the concurring opinions would lead to an incoherent result. A lower court would be bound to follow a legal rule, which, had it been applied in the plurality decision itself, would not necessarily

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18 *See supra* note 10 (discussing the different rhetoric surrounding plurality and simple majority decisions). Pursuant to the holistic perspective of precedent, a majority rule must be identified.

> [A]n opinion that fails to command the support of a majority of the Justices participating in a case . . . is not labelled an "opinion of the Court" and has no precedential value . . . [it] does not articulate a rule binding on the lower courts or one to which the Supreme Court must accord stare decisis effect.

Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067 (1988). This holistic perspective is most consistent with the doctrine of stare decisis. *See infra* note 23 (discussing the requirement of nexus).

19 *See supra* note 5 and accompanying text (describing alternative outcomes).

20 Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959). *See generally* Novak, *supra* note 4 (discussing Wechsler in-depth). The proposition that the outcome should be a logical consequence of the rationale is not accepted unanimously. Robert H. Bork explains that the contrary view, "arrested legal realism," stands for the proposition that the rationale is an artificial consequence of the outcome. ROBERT H. BORK, THE TEMPTING OF AMERICA 69 (1990). One articulation of legal realism is found in the writings of Justice Oliver Wendell Holmes, who argues that

> It is the merit of the common law that it decides the case first and determines the principle afterwards. Looking at the forms of logic it might be inferred that when you have [a] minor premise and a conclusion, there must be a major, which you are always prepared then and there to assert. But in fact lawyers, like other men, frequently see well enough how they ought to decide on a given state of facts without being very clear as to the [reason].

Oliver Wendell Holmes, *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1, 1 (1870), *cited in* SHELDON M. NOVICK, THE HONORABLE JUSTICE 125 (1989). The dialogue over the true process by which a Court reaches an outcome is beyond the scope of this Note. Moreover, to the extent that legal realism is an empirical observation, rather than a prescriptive one, it has little bearing on this Note's conclusion. This Note hopes only to outline how a plurality decision *should* be treated.

have resulted in the same outcome.[21] The outcome is justified only when one can identify an "internal rule" that all the concurring Justices agree is sufficient to reach the outcome.

3. *The Nexus Requirement*

The third requirement for a legitimate decision is the identification of some nexus of agreement between the majority rule (which identifies a legitimate rule) and the internal rule (which identifies a legitimate outcome). This "nexus" component requires, at the very least, that the majority rule and the internal rule be the same. In a simple majority decision, the lead opinion always articulates *both* the majority rule and the internal rule.[22] Thus, by definition, a complete, unitary nexus exists between the two rules. In a plurality decision, discerning a majority rule or an internal rule is questionable: even when they are both present, they are not necessarily the same.[23]

The doctrine of stare decisis assumes a unitary agreement between the rule and the outcome—they must be "fused into one cohesive whole" to form a simple majority decision.[24] Thus, the same coalition of Justices must support both the majority rule and the internal rule. This strict "unitary" nexus requirement cannot be fulfilled in a plurality decision. At best, the majority rule that one coalition supports will happen to be the same as the internal rule that a different coalition supports. This nonunitary nexus is the closest agreement possible in a plurality decision.[25]

Ultimately, in the plurality context, the nexus requirement is justified by the basic need for consistency. If the principle of majoritarianism points to one particular legal rule as precedentially legitimate, but a reasoned outcome is only possible pursuant to an

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21 *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1954). *See* discussion *infra*, part III.A (discussing the "incoherent plurality decision").

22 Thus, the single opinion in Brown v. Board of Educ., 347 U.S. 483 (1954), incorporated both the majority rule and the internal rule. One commentator suggests that "[i]f the Court had further split into a majority divided against itself, if the justices had spoken as nine individuals rather than as 'the Supreme Court,' the moral authority of *Brown* would perhaps have been too diluted to have led to even the gradual social changes which it in fact inspired." Davis & Reynolds, *supra* note 1, at 63.

23 *See, e.g.*, United States v. Kokinda, — U.S. —, 110 S. Ct. 3115 (1990). *See* discussion *infra* part II.B.3 (discussing the "complex plurality decision").

24 Novak, *supra* note 4, at 758. Under the traditional view of the doctrine of stare decisis, the absence of this unity would be sufficient to diminish the precedential value of a decision. This Note suggests that both the principle of majoritarianism and the need for a reasoned outcome are primary principles. They are each justified, not only as traditional components of the doctrine of stare decisis but also independently. For this reason, they may be evaluated separately for the purpose of determining precedential legitimacy.

25 *See* discussion *infra* part II.C.3 (discussing the "explanation plurality decision").

alternative legal rule, then neither rule has fulfilled both the majority rule and the internal rule requirement. It is only when the same legal rule is identified under both headings that a decision is precedentially legitimate.

II
ALTERNATIVE APPROACHES TO INTERPRETING PLURALITY DECISIONS

A myriad of approaches to the interpretation of plurality decisions has developed in the last several decades.[26] One set of approaches, the inclusive models, recognizes both a binding legal rule and a binding outcome in every case. A second set, the exclusive models, limits the precedential consequences of a plurality decision to discrete categories of cases. After considering the relative merits of each of these approaches, this Note will propose an alternative "legitimacy model" of interpretation.

A. Inclusive Models of Interpretation

Inclusive models of interpretation use various ad hoc criteria to identify a binding legal rule and outcome in every case. The focus is on factors intrinsic to a particular opinion, which identifies that opinion as meriting precedential value without referring to the other opinions articulated in the decision.[27] A total disregard for the importance of the relationship exists between the alternative legal rules and between the rule and the outcome. This misconception makes the inclusive models ultimately unsuccessful in discerning a proper rule and a proper outcome.

1. *The Plurality Opinion Model*

One inclusive method refers to the concurring opinion that the largest coalition of Justices supports ("the plurality opinion") for affirmative precedential gnidance.[28] Pursuant to this method, a lower court would simply count the number of Justices supporting

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26 The Supreme Court has failed to articulate a comprehensive approach to plurality interpretation. *See supra* note 9 (discussing lower court confusion). The only discrete method of analysis that has been explicitly recognized by the Supreme Court is the narrowest grounds model. *See* discussion *infra* part II.B.1 (discussing the narrowest grounds model).

27 These models are "inclusive" in that all plurality decisions, no matter how incoherent, merit precedential value. For this reason, the test for identifying the authoritative rule of law in a plurality decision is based upon nonlegitimacy factors of interpretation. "Exclusive" models, on the other hand, distingnish between those plurality decisions that merit precedential value and those that do not.

28 *See generally* Whaley, *supra* note 9 (advocating the plurality opinion test); Novak, *supra* note 4, at 774 n.87 (same).

each concurring opinion, and the opinion with the most votes would control. This approach is justified because the plurality opinion represents the "majority of the majority": it is the opinion that the largest coalition of Justices supports.

The plurality opinion model fails to identify either a legitimate rule or outcome. The legal rule that the plurality opinion articulates, Rule X, is not necessarily a majority rule. Indeed, in some cases, the alternative legal rule, Rule Y, may be the majority rule.[29] In this situation, although a numerical majority of Justices adopt Rule Y as the proper legal rule, the plurality opinion model would identify Rule X as precedentially binding.

Similarly, the particular outcome that the concurring Justices adopts may not be coherently justified by Rule X. If Rule X and Rule Y are mutually exclusive or functionally unrelated, then no "common line of reasoning" exists that justifies the outcome. Indeed, in those cases where Rule Y articulates the common thesis among the concurring Justices, the adoption of the plurality opinion, Rule X, would be completely incoherent.[30]

The plurality opinion model seems to articulate a coherent standard. However, the focus on numbers in the plurality opinion model is misleading. The "majority of the majority" analysis underlying the plurality opinion model completely disregards the role of the dissenting opinion. A nine Justice Court does not become a five Justice Court just because four Justices dissent.[31] When evaluated against the traditional principles of interpretation, this model fails to survive scrutiny.

2. *The Persuasive Opinion Model*

A second inclusive method refers to the most "persuasive" opinion for precedential guidance. Adopting this method, a lower court might decide that a particular opinion is the most persuasive for any number of reasons: the reasoning is "enlightened," the opinion is written by the most prestigious Justice, the opinion is the lead opinion, or the opinion is consistent with prior precedent.[32] These alternative criteria share the common characteristic that lower courts are granted discretion in determining the state of the law. A great deal may be said for this method of interpretation: the

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29 *See, e.g.*, Boos v. Barry, 485 U.S. 312 (1988). *See generally* discussion *supra* part III.C (discussing the "legitimate plurality decision").

30 *See, e.g.*, *Boos*, 485 U.S. at 312. *See generally* discussion *supra* III.C (discussing the "legitimate plurality decision").

31 *See* A.M. Honore, *Ratio Decidendi: Judge and Court*, 71 L.Q. REV. 196, 198 (1955).

32 *See generally* Novak, *supra* note 4; Comment, *supra* note 3.

absence of certainty for future litigation may well be counterbalanced by infusing a greater level of dialogue in lower courts.

The benefits that flow from this persuasiveness test do not pierce the issue of precedential value. It is not the attribution of stare decisis value, but rather the recognition that the precedential inquiry is not possible in the plurality context that creates the incidental benefit of lower court fermentation. This inclusive method, in short, is an abdication of the precedential inquiry. Moreover, when compared to the plurality opinion test, this persuasiveness test pales. To the extent that a lower court might designate the nonplurality opinion as the most persuasive opinion, any kind of attempt at numerical legitimacy is abandoned.

The inclusive method of attributing precedential value to a particular opinion, by disregarding the alternative opinions, is unjustified. The persuasiveness test fails to provide an objective criterion by which to discern precedential value. The plurality opinion test, while providing an objective criterion, fails to justify the use of the test. Any inclusive method, operating upon the false assumption that a legal rule is discernible in every plurality decision, is forced to adopt blanket methods that fail to survive analytical scrutiny.

B. Exclusive Models of Interpretation

An exclusive model of interpretation recognizes a binding legal rule in only limited circumstances. Plurality decisions that merit precedential value are distingnished from those that do not. The critical inquiry is whether the standard is consistent with traditional principles of interpretation.[33] Two exclusive models will be evaluated: the dual-majority model and the narrowest grounds model. Each of these methods have individual relative strengths that will be relied upon in forming the legitimacy model.

1. *The Dual-Majority Model*

The dual-majority model recognizes a binding legal rule when a numerical majority of Justices supports it.[34] Thus, it is only when the dissenting opinion and one of the concurring opinions advocate the same legal rule that precedential value is attributed to a plurality decision. This model relies exclusively on the principle of majoritarianism in order to identify a legal rule.

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33 *See supra* note 27 (distinguishing inclusive and exclusive models).

34 *See generally* Davis & Reynolds, *supra* note 1; Note, *supra* note 2; Novak, *supra* note 4.

The dual-majority model, however, fails to identify a legal rule that coherently justifies the particular outcome of the case.[35] The focus of the dual-majority decision is on the legal rule that the dissenting opinion articulates: the concurring opinion, which articulates the same legal rule as the dissenting opinion, is the precedentially mandatory opinion. This reliance upon the dissenting opinion to determine the proper rule means that the outcome is not justified: the dissent is not part of the outcome and does not serve to rationalize the decision in the case itself.

2. *The Narrowest Grounds Model*

The narrowest grounds model recognizes a binding legal rule only when one of the concurring opinions is "narrower" than the other.[36] Although this is the only model of interpretation that the Supreme Court has recognized to date, the Court has never fully explained what it entails.[37] The academic literature and the text of the Supreme Court decisions support several alteruative readings.[38] The only interpretation consistent with the principles of interpretation is that the narrower rule is the one that articulates a common legal theory which the concurring Justices share. The identification of a shared theory of law permeating the analysis of the concurring Justices legitimates the particular outcome of a decision.

The narrowest grounds model succeeds in coherently justifying the particular outcome of the case. The outcome of a plurality decision is a logical consequence of the legal rules that the concurring Justices provide. The Justices supporting the broader legal rule must necessarily recognize the validity of the narrower legal rule. That is, if a statute is found to be constitutionally permissible pursuant to a strict scrutiny standard of review, then it is necessarily permissible pursuant to a rational basis standard of review.[39] From the text of the alternative concurring opinions, it is possible to deter-

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35 *See, e.g.*, United States v. Kokinda, 110 S. Ct. 3115 (1990). *See generally* discussion *infra* part III.B.3 (discussing the "complex plurality decision").

36 *See generally* Davis & Reynolds, *supra* note 1; Note, *supra* note 2; Novak, *supra* note 4.

37 City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) (discussing Saia v. People of State of New York, 334 U.S. 558 (1948); Marks v. United States, 430 U.S. 188 (1977) (discussing A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of the Commonwealth of Mass., 383 U.S. 413 (1966) (plurality decision); Gregg v. Georgia, 428 U.S. 153 (discussing Furman v. Georgia, 408 U.S. 238 (1972) (per curiam decision).

38 *See generally* Novak, *supra* note 4 (discussing Supreme Court precedent of "narrowest grounds").

39 *See, e.g.*, Board of Educ. v. Mergens, 496 U.S. 226 (1990) (plurality decision). *See generally* discussion *supra* part III.B.2 (discussing the "narrowest grounds" plurality decision).

mine that if all of the Justices apply the narrower rule, the outcome would have been the same.

The narrowest grounds model is inconsistent with the principle of majoritarianism. The driving force behind majoritarianism is the requirement that a numerical majority agree upon a single legal rule. The legal rule that the narrowest concurring opinion articulates does not necessarily fulfill this condition. Although the narrower legal rule may share certain aspects of the broader legal rule, it does not necessarily follow that the Justices supporting the broader rule accept the validity of the narrower rule. Indeed, the fact that the decision creates a split concurrence suggests that some Justices do not accept the validity of the narrower rule.

To construe the narrower legal rule as the majority rule is misguided. It is true that the coalition of Justices supporting the broader rule would necessarily reach the same outcome under the narrower rule. This seems to suggest that this coalition implicitly accepts the narrower rule. However, in future decisions, the coalition supporting the broader rule will "implicitly" agree with the narrower rule only on those occasions when the same particular outcome is achieved. When the alternative outcome results, no basis exists for believing that the Justices supporting the broader rule will still accept the principles underlying the narrower rule. This one-way flow of legitimacy disallows imputing a majority agreement on the narrower rule.

C. An Alternative Approach to Interpreting Plurality Decisions

This Note advocates the recognition of five categories of plurality decisions, each with different precedential implications.[40] Plurality decisions should be differentiated by three factors: the presence or absence of a majority rule, the presence or absence of an internal rule, and the presence or absence of an agreement between the majority rule and the internal rule. The critical task, then, is to identify methods of discerning the majority rule and the internal rule. The two exclusive models discussed above succeed in properly identifying these two rules.

1. *Testing for Precedential Legitimacy*

The dual-majority model successfully identifies the majority rule. For a dual-majority to exist, there must be agreement between at least one coalition of concurring Justices and one coalition of dissenting Justices. It is only those plurality decisions in which a dual-

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40 A sixth category is the "false plurality decision," which will not be discussed in depth. *See* discussion *supra* part II.C.3 (discussing the "false plurality decisions").

majority exists that a numerical majority of Justices explicitly advocates a single rule of law.

The narrowest grounds model successfully identifies the internal rule. In a plurality decision, the lead opinion might be interpreted to hold that "Rule X justifies Outcome Z." Similarly, the concurring opinion might be interpreted to hold that "Rule Y justifies Outcome Z." The critical issue is the nature of the relationship between Rule X and Rule Y. When Rule X and Rule Y are in a narrower-broader relationship (*e.g.*, Rule X is narrower than Rule Y given Outcome Z), then an internal rule may be discerned.[41] On the other hand, when Rule X and Rule Y are not in a narrower-broader relationship, either because the rules are mutually exclusive or because the rules are simply unrelated, then an internal rule may not be discerued.[42]

Recognizing the presence or absence of an agreement between the majority rule and the internal rule is a relatively simple matter. A lower court should compare the concurring opinion that articulates the majority rule with the concurring opinion that articulates the internal rule. If it is the same opinion, then there is agreement. If it is not the same opinion, then no agreement exists.

2. *The Categorization of Plurality Decisions*

The tripartite test yields five different categories of plurality decisions. In the "incoherent plurality decision," neither the majority rule nor the internal rule are discernible.[43] In the "dual-majority

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41 The concurring opinion may be imputed with the holding that "Rule Y (and necessarily Rule X) justify Outcome Z." The internal rule, Rule X, is a common grounds of agreement among all of the concurring Justices: if the plurality decision at hand had been evaluated exclusively pursuant to Rule X, both the lead opinion and the concurring opinion would still have achieved Outcome Z.

42 First, if Rule X and Rule Y are mutually exclusive rules, then the lead opinion may be imputed with the holding that "Rule X (and not Rule Y) justifies Outcome Z." Similarly, the concurring opinion may be imputed with the holding that "Rule Y (and not Rule X) justifies Outcome Z." In this situation, no internal rule exists: if the plurality decision had been evaluated exclusively pursuant to Rule X, the concurring opinion would not have reached the same outcome; if the plurality decision had been evaluated exclusively pursuant to Rule Y, the lead opinion would not have reached the same outcome. The outcome is simply not justified by a coherent set of concurring opinions.

Second, if Rule X and Rule Y are simply unrelated rules, there is no internal rule. The lead opinion is holding that "Rule X (not a subset of Rule Y) justifies Outcome Z." The concurring opinion is holding that "Rule Y (not a subset of Rule X) justifies Outcome Z." Even though the lead opinion does not explicitly reject Rule Y, it is simply unknown what outcome the lead opinion would have chosen. Similarly, even though the concurring opinion does not explicitly reject Rule X, it is simply unknown what outcome the concurring opinion would have chosen.

43 *See* discussion *infra* part III.A (discussing the "incoherent plurality decision").

plurality decision" only the majority rule is discernible.[44] In the "narrowest grounds plurality decision," only the internal rule is discernible.[45] In the "complex plurality decision," no agreement exists between the majority rule and the internal rule.[46] In the "legitimate plurality decision," a majority rule is discernible, an internal rule is discernible, and an agreement exists between the majority rule and the internal rule.[47] Each type of plurality decision yields different precedential consequences.

In an attempt to clarify the relationship between the majority rule, the internal rule, and the requirement of an agreement as between the majority rule and the interual rule, this Note will utilize a box matrix schematic:[48]

TABLE ONE

	Rule #1 >	Rule #2 >	Rule #3
Outcome #1	L(2) SC(1)	C(2)	
Outcome #2			D(4)

The Legitimacy Model

Scanning the matrix, one can conclude that no majority rule exists[49] and that the two Justice concurrent ("C(2)") announced the internal rule,[50] Rule #2. Thus, this is a "narrowest grounds plurality deci-

44 *See* discussion *infra* part III.B.I (discussing the "dual-majority plurality decision").

45 *See* discussion *infra* part III.B.2 (discussing the "narrowest grounds plurality decision").

46 *See* discussion *infra* part III.B.3 (discussing the "complex plurality decision").

47 *See* discussion *infra* part III.C (discussing the "legitimate plurality decision").

48 The vertical axis represents alternative outcomes. *See generally supra* note 5 (discussing "outcomes"). The horizontal axis represents alternative legal rules. *See generally supra* note 5 (discussing "legal rules"). The greater than (">") symbol is used to indicate that, with respect to Outcome #I, Rule #3 is narrower than Rule #2, which in turn is narrower than Rule #1. In this hypothetical, three Justices, in the lead opinion and the simple concurrence, held that Rule #I was the proper legal rule and that Outcome #1 was the proper outcome. Two Justices, in the concurring opinion, held that Outcome # 1 was proper, but did so on the basis of Rule #2. Finally, four Justices, in the dissenting opinion, argued that Outcome #2 was proper on the basis of Rule #3.

49 The failure to locate five Justices in any one column (Rule #1, Rule #2, or Rule #3) indicates the absence of a majority rule. *See* discussion *supra*, part I.B.1 (discussing "majority rule").

50 One coalition of concurring Justices advocates Rule #1. A second coalition of concurring Justices advocates Rule #2. As indicated by the greater than (">") symbol, Rule #2 is the narrower rule. Thus, the concurring opinion articulates Rule #2 as the internal rule.

sion." This matrix will be applied throughout Part III in evaluating plurality decisions. The general nature of this matrix will be introduced in the next section on "false" plurality decisions.

3. *False Plurality Decisions*

There exists a category of plurality decisions, the "false plurality," that legitimacy analysis does not sufficiently evaluate. Those decisions in which no ultimate disagreement exists between the lead and concurring opinions, as to the proper rule of law, fall within this category.[51] These are "easy" cases because that the concurring Justices agree on the ultimate rationale supports the plurality outcome.[52] Lower courts face no pragmatic difficulty in applying the decision as precedent in future cases. The only reason the decision is considered a plurality decision is because of the terminology that the Justices use.[53]

In the "explanation" plurality, the lead and concurring opinions agree on one applicable rule, but provide different explanations for applying that standard. In these cases, a majority coalition exists with respect to both the proper outcome and the proper rule needed to justify that outcome.[54]

TABLE TWO

	Rule #1	Rule #2
Outcome #1		L(3) C(2)
Outcome #2	D(4)	

The Explanation Plurality

The relationship between the alternative rules and the alternative outcomes is unimportant in these cases because a numerical major-

51 These decisions are "false plurality decisions" in the sense that they do not create the interpretive tension that is the characteristic of true plurality decisions. To a large extent, their presence in Supreme Court literature might be diminished through the use of simple concurrence opinions.

52 *Cf. supra* note 8 and accompanying text (discussing plurality decisions in the context of Dworkin's "hard case" thesis).

53 The mere existence of an alternative opinion that is labelled a "concurrence in judgment" and carries the weight of a necessary coalition of Justices is sufficient to create the false plurality decision. *See generally supra* note 13 (discussing the structure of plurality decisions).

54 They are similar to "simple" majority decisions because a unity exists between the primary plurality that advocates the plurality outcome and the secondary plurality that advocates the legitimate rationale.

ity agrees on both.[55] For the same reason, the positioning of the dissenting opinion, with respect to the lead and concurring opinion, is unimportant.[56]

This type of plurality decision does not raise precedential tensions: both a numerically legitimate standard and an analytically legitimate outcome exist. The absence of a numerically justified explanation fails to discredit the applicability of the standard to the law. A lower court, when faced with such a decision, should have no difficulty in discerning both the rationale and the outcome: there is no inherent ambiguity with respect to the standard of law enunciated in the decision.

The "mislabelled plurality" describes those decisions in which the "concurrence in judgment" is in substance a simple concurrence.[57] In these cases, an agreement between the lead and concurring opinion also exists as to both the proper standard and the proper outcome in a case.

TABLE THREE

	Rule #1	Rule #2	Rule #3
Outcome #1			D(3)
Outcome #2	L(2) C(4)		

The Mislabelled Plurality Decision

Again, the positioning of the dissent is unimportant to the stare decisis consequences of the opinion. To the extent that a numerical majority exists in both the standard and the outcome, there is a legitimate standard.

The legitimacy consequences of a mislabelled simple concurrence plurality compel the same line of analysis as the explanation plurality. A legitimate rationale exists because a numerical majority agrees that Rule #1 is the proper standard under which to review

55 In the explanation plurality, the relation between the standards is unimportant because only one standard has to be reviewed with respect to precedential value. Any alternative standard that a dissenting opinion might advocate is not only inferentially rejected by the primary plurality, but is also affirmatively rejected by the primary plurality in its explicit adoption of the alternative standard.

56 For examples of explanation pluralities, see Burnham v. Superior Court of Cal., 495 U.S. 604 (1990); Pennsylvania v. Muniz, 496 U.S. 582 (1990); Local #391 v. Terry, 494 U.S. 558 (1990).

57 It is a "mislabelled" plurality decision because the proper label would be to call it a simple concurrence. That is, the coalition of Justices who "concur in judgment" are really "concurring."

the case. A legitimate outcome is evident because, as tested under Rule #1, a numerical majority agrees that Outcome #2 is proper. Unlike the explanation plurality, no disagreement exists as to why the rule of law is applicable. Therefore, the rationale and the outcome are legitimate.

In addition to these two false plurality decisions, lower courts should consider the implications of two further categories of plurality decisions that are "false" for different reasons. In this second false plurality subcategory, the presence of structural tension is insufficient to create precedential tension. Here, the terminology fails to indicate a plurality decision, but the substantive analysis underlying the alternative rules does lend itself to legitimacy analysis.

The "mislabelled plurality concurrence" is the opposite of the "mislabelled simple concurrence" plurality.[58] In a mislabelled plurality concurrence, an opinion labelled a simple concurrence is, in substance, a plurality concurrence. From a structural perspective, this creates an interpretive tension characteristic of true plurality decisions.

TABLE FOUR

	Rule #1	Rule #2	Rule #3
Outcome #1			D(4)
Outcome #2	SC(1)	L(4)	

The Mislabelled Plurality Concurrence

Again, positioning of different opinions in outcomes and standards is not important. The defining characteristic of the "mislabelled plurality concurrence" is that the opinion designated as a simple concurrence (*i.e.*, Justice X concurs) actually advocates an alternative standard to the one articulated in the lead opinion.

Viewed from a legitimacy perspective, this decision should be characterized as a true plurality decision. No numerical majority exists regarding the proper standard applicable in such a case. Because that the concurring Justices label their opinion as a simple concurrence and not as a concurrence in judgment, they are joining in the lead opinion by definition. Thus, although the substance of their simple concurrence is different from the lead opinion, they are,

58 *See, e.g.*, Plyler v. Doe, 457 U.S. 203 (1982) (mislabelled plurality concurrence).

in actuality deemed joining the lead opinion. This decision is a simple majority opinion.

Finally, in the "splintered" decision, three or more coalitions of Justices advocate alternative legal rules, but the lead opinion independently succeeds in garnering the support of a simple majority of Justices.[59] As in the mislabelled plurality concurrence decision, the substantive analysis of the decision seems to indicate that plurality analysis is applicable. However, unlike the mislabelled simple concurrence, the concurring opinion fails to upset the numerical majority garnered by the lead opinion. Like the mislabelled plurality concurrence decision, the structural format can take a variety of forms.

TABLE FIVE

	Rule #1	Rule #2
Outcome #1	C(1)	M(5)
Outcome #2	D(3)	

The Non-Numerical Plurality

The analysis, which concurring and dissenting Justices articulate, is irrelevant for precedential purposes because of the existence of a majority opinion.

The precedential value of the splintered decision is not in question. A simple majority of Justices has agreed that Rule #2 is the proper standard and that, by reason of this standard, Outcome #1 is justified. This type of decision merits attention in a discussion of plurality decisions because the difference in substantive analysis that the three coalitions of Justices articulate is similar to true plurality decisions.

III
A LEGITIMACY MODEL FOR INTERPRETING PLURALITY DECISIONS

Supreme Court jurisprudence revolving around the balancing of constitutionally protected interests provides an interesting set of plurality decisions needed to evaluate the legitimacy model.[60] The

59 *See, e.g.*, Department of Human Resources v. Smith, 494 U.S. 872 (1990) (splintered decision).

60 Constitutional balancing cases can be analyzed under the legitimacy model because they often involve shifting coalitions of Justices supporting different (but related)

five types of plurality decisions resulting from tripartite legitimacy analysis will be evaluated in the context of these constitutional balancing test cases.[61] This Note suggests that each category of plurality decisions triggers different questions of precedential legitimacy and, ultimately, diverse precedential consequences.

A. The Incoherent Plurality Decision

The "incoherent plurality decision" merits no binding precedential value. The controlling characteristic of the incoherent plurality decision is the presence of at least three coalitions of Justices who cannot agree whether a particular rule or unrelated alternative rules are valid. In this situation, neither the rule nor the outcome should have mandatory precedential effect.[62]

A classic example of the incoherent plurality decision is *Regents of the University of California v. Bakke*.[63] At issue[64] was the Medical School's affirmative admissions program.[65] The lead opinion, recognizing that the admissions program utilized a "classification based on race and ethnic background," applied traditional strict scrutiny review and ruled that the program was unconstitutional.[66] The concurring opinion, arguing that the applicability of Title VI of the Civil Rights Act[67] prevented the Court from reaching the constitutional issue, concluded that the Davis admissions program was illegal pur-

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rules and different outcomes. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (plurality decision). *See* discussion *infra* part III.A (discussing the "incoherent plurality decision").

61 The five categories are the "incoherent plurality decision," the "dual-majority plurality decision," the "narrowest grounds plurality decision," the "complex plurality decision," and the "legitimate plurality decision." *See* discussion *supra* part II.C.2 (discussing the categorization of plurality decisions).

62 *See, e.g.*, American Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167 (1990) (plurality decision); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (plurality decision).

63 438 U.S. at 265.

64 A second issue, whether race may ever be considered as a factor in medical admissions programs, will not be discussed here. *Id.* at 281 (Powell, J., lead opinion).

65 The admissions program set aside sixteen of one hundred available seats for certain minority groups. *Id.* at 275 (Powell, J., lead opinion). Respondent was a white male who was denied admission to Davis Medical School in two separate years. *Id.* at 277. In both years, the school admitted minority students with grade point averages, Medical College Admissions Test scores, and benchmark scores (developed by the admissions committee) that were "significantly lower" than the respondent's scores. *Id.* at 277.

66 *Id.* at 289 (Powell, J., lead opinion). Justice Powell argned that "to justify the use of suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplisbment' of its purpose or the safeguarding of its interest." *Id.* at 305 (quoting In re *Griffiths*, 413 U.S. 717, 721-22 (1973)). Justice Powell distinguished the standard of review that the dissent advocated. *Id.* at 301.

67 Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000(d) (1988).

suant to statutory review.[68] In holding that the admissions program survived both statutory and constitutional scrutiny, the dissenting opinion applied intermediate level scrutiny pursuant to the Equal Protection Clause.[69]

TABLE SIX

	Strict Scrutiny	>	Intermediate Scrutiny	Statutory Scrutiny
Program Invalid	L(1)			C(3)
Program Valid			D(4)	

In *Bakke*,[70] neither a majority rule nor an internal rule can be identified.[71] The absence of a majority rule means that none of the legal rules articulated in the decision merit binding precedential value.[72] It is wrong to attribute precedential value to a rule that a numerical majority of the Court implicitly rejected.[73] Further, an internal rule cannot be identified: the alternative rules articulated in

68 438 U.S. at 411 (Stevens, J., concurring). Justice Stevens, joined by Chief Justice Burger, Justice Stewart, and Justice Rehnquist, "concurred in the judgment in part and dissented in part". *Id.* at 408 (Stevens, J., concurring). Justice Stevens suggests that "our settled practice . . . is to avoid the decision of a constitutional issue if a case can be fairly decided on a statutory ground." *Id.* at 411 (Stevens, J., concurring).

69 Justice Brennan, joined by Justice White, Justice Marshall, and Justice Blackmun, "concurred in the judgment in part and dissented in part". *Id.* at 359 (Brennan, J., dissenting). Justice Brennan concluded that "racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives.' " *Id.* at 359 (Brennan, J., concurring in part and dissentingin part) (*quoted in* Califano v. Webster, 430 U.S. 313, 317 (1977) (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)). Justices White, Marshall, and Blackmun wrote separate opinions. *Id.* at 379, 387, 402.

70 *Id.* at 265 (Powell, J., lead opinion).

71 A pitfall of the legitimacy model is the malleability of the categorical pre-definitions. Thus, one could label the rule articulated in the lead opinion and the dissenting opinion as "constitutional scrutiny" and create a majority rule. This difficulty is not fatal if one interprets a plurality decision with a particular issue in mind. Thus, if the issue is whether a lower court should apply a constitutional or statutory standard in resolving a similar case, then a majority rule can be identified. If, on the other hand, the issue is whether the Court articulated a discrete rnle applicable to all future cases, then a majority rule cannot be identified.

72 The principle of majoritariansim makes the presence of a majority rnle a requirement of precedential legitimacy. *See* discussion *supra* part I.B.1 (discussing the principle of majoritarianism). Here, no single rule garners the support of a numerical majority of Justices. *See* discussion *supra* part II.C.1 (discussing the test for majority rule).

73 Each alternative rnle is implicitly rejected by a majority of Justices (i.e., both the concurring opinion and the dissenting opinion reject the lead opinion's strict scrutiny rule).

the concurring opinions are functionally unrelated.[74] Neither strict scrutiny constitutional review nor statutory review succeeds in invalidating the Davis Medical School admissions program. For example, if all of the Justices had reviewed the admissions program pursuant to a strict scrutiny standard, it is unclear whether the program would have been declared unconstitutional.[75] Alternatively, if all of the Justices had reviewed the admissions program pursuant to the Title VI standard alone, it is also unclear whether the program would have been declared illegal.[76] It is incomprehensible to suggest that a rule, which had it been applied in the case itself might have led to a different outcome, should control in future cases.[77]

The incoherent plurality decision fails to generate mandatory precedential conclusions. Faced with an incoherent decision, a lower court should recognize the incoherence and formulate a legal rnle based upon either original analysis[78] or "persuasive" analysis.[79] In its search, a lower court should not be restricted, either in its

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74 The strict scrutiny review advanced by the lead opinion is premised on the applicability of the Equal Protection Clause of the Fourteenth Amendment. 438 U.S. at 289 (Powell, J., lead opinion). The statutory review that the concurring opinion advocates is premised on the inapplicability of the Equal Protection Clause. *Id.* at 408 (Stevens, J., concurring in part and dissenting in part). The stated legal rules are mutually exclusive to the extent that they disagree on whether the Equal Protection Clause applies.

75 Only the lead opinion applies the strict scrutiny standard. 438 U.S. at 268 (Powell, J., lead opinion). The concurring opinion explicitly fails to reach the constitutional issue and explicitly declines to opine as to the result of such review. *Id.* at 420 (Stevens, J., concurring in part and dissenting in part). Similarly, the dissenting opinion's holding that the program survives scrutiny pursuant to a substantial state interest does not necessarily require that the Justices joining that opinion reach a different outcome were strict scrutiny review applied. *Id.* at 268 (Powell, J., lead opinion).

76 The concurring opinion would have declared the program illegal. *Id.* at 420 (Stevens, J., concurring in part and dissenting in part). Both the lead and dissenting opinion equate the prohibitions of Title VI with the prohibitions of the Equal Protection Clause. *Id.* at 287 (Powell, J., lead opinion); *id.* at 355 (Brennan, J., dissenting). The dissenting opinion clearly indicates that the program would have survived statutory review. *Id.* at 350 (Brennan, J., dissenting) ("Prior decisions of this Court also strongly suggest that Title VI does not prohibit the remedial use of race where such action is constitutionally permissible."). The lead opinion, on the other hand, yields uncertain results. If Justice Powell had reviewed the program pursuant only to Title VI (without the aid of constitutional interpretation), then we know only that he would have allowed race to be taken into account. *Id.* at 286 (Powell, J., lead opinion). Justice Powell, however, never reaches a conclusion about the statutory test alone. *Id.* at 287 (Powell, J., lead opinion).

77 *See* discussion *supra* part I.B.2 (discussing the need for a coherent outcome).

78 The better alternative is to allow the lower court faced with an incoherent decision to develop an original rule. *See* Novak, *supra* note 4, at 781 (suggesting that lower court experimentation would be useful).

79 The persuasive analysis may include factors identified with the inclusive models: the lead opinion, the plurality opinion, and the persuasive opinion. *See* discussion *supra* part II.A (discussing inclusive models of interpretation). An additional alternative might be to rely upon the state of case law prior to the plurality decision. *See, e.g.*, Johnston v. IVAC Corp., 885 F.2d 1574, 1579 (1989) (relying upon prior case law). *See generally supra* notes 37-41 (distinguishing mandatory and persuasive precedential effect).

choice of rule or outcome.[80] This conclusion differs sharply from the approach generally taken by both the courts and commentators.[81]

B. The Partially Legitimate Plurality Decision

Three of the five categories of plurality decisions are "partially" legitimate.[82] They partially fulfill some of the prerequisites to precedential legitimacy.[83] In this situation, no mandatory precedential consequence results.[84] Nonetheless, the fulfillment of one or more of the prerequisites limits lower courts' future treatment of similar cases. Because these limits differ, depending upon which factors are fulfilled, each category will be reviewed separately.

1. *The Dual-Majority Plurality Decision*

A dual-majority plurality decision should only be given persuasive precedential value. The defining characteristic of this type of decision is the presence of a majority rule tempered by the absence of an internal rule. The absence of an internal rule frustrates efforts to attribute binding precedential effect. The presence, however, of a majority rule places persuasive limits on the lower courts' use of alternative rules. The critical inquiry is whether the identification of a majority rule is sufficient to create precedential consequences.

The Supreme Court's analysis of the due process protections accorded to putative natural fathers provides one example of the dual-majority plurality decision. In *Michael H. v. Gerald D.*,[85] the Court reviewed the validity of a California statute creating a "conclusive" presumption that a child born to a married woman living with her husband was a child of the marriage.[86] The putative natural father challenged this presumption with a due process claim grounded in the Fourteenth Amendment. The critical issue was

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80 At least one court has entirely "disavowed" the mandatory precedential value of a plurality decision. *See, e.g.*, Baker v. State, 289 A.2d 348, 354 (1972) (disavowing outcome of U.S. v. Jorn, 400 U.S. 470 (1971) (plurality decision)) *noted in* Novak, *supra* note 4, at 773-74. *See generally* Hardisty, *supra* note 5 (discussing outcome stare decisis).

81 The precedential value of a plurality decision is generally accepted without critical analysis. *See generally supra* note 5 (discussing outcome stare decisis).

82 The dual-majority plurality decision, the narrowest grounds plurality decision, and the complex plurality decision are "partially" legitimate. *See* discussion *supra* part II.C.2 (discussing different categories of plurality decisions).

83 The tripartite legitimacy test requires the presence of a dual-majority, a narrowest grounds, and agreement between the majority rule and the internal rule. *See* discussion *supra* part II.C.1 (discussing tripartite test).

84 *See generally supra* notes 37-41 and accompanying text (discussing the difference between mandatory and persuasive authority).

85 Michael H. v. Gerald D., 491 U.S. 110 (1989) *reh'g denied*, 111 S. Ct. 1645 (1991) (plurality decision).

86 CAL. EVID. CODE § 621 (West 1992).

whether the claim triggered procedural due process protections. Five Justices agreed that the claim was properly evaluated as a procedural issue.[87] Four Justices disagreed and opined that the claim should be evaluated exclusively as a substantive due process issue.[88]

TABLE SEVEN

	Procedural Due Process	Substantive Due Process
Statute Valid	C(1)	L(2) SC(2)
Statute Invalid	D(4)	

Michael M. v. Gerald D.

The five opinions of the Justices disagreed as to both the proper rule and the proper outcome in this case. In the lead opinion, four Justices explicitly rejected the applicability of procedural due process analysis. Instead, they called for an evaluation pursuant to substantive due process.[89] According to this analysis, the Justices held that the statute was valid. In the concurrence, Justice Stevens recognized that the claim should be evaluated procedurally and concluded that the statute was valid.[90] The four dissenting Justices held that under a procedural due process analysis the statute was invalid.[91]

The dual-majority plurality decision fails to articulate an internal rule. Procedural due process analysis and substantive due process analysis do not follow the same reasoning. Thus, the reader is uncertain of the result had the majority rule applied a procedural due process analysis in this particular case. The four Justices in the lead and simple concurrence opinions do not indicate the standard they would have chosen pursuant to that test.

The dual-majority plurality decision should have limited precedential value. The *identified rule* should be given precedential value because the presence of a numerical majority of Justices who concur

87 491 U.S. at 132 (Stevens, J., concurring in judgment); *Id.* at 157 (Brennan, J., dissenting, joined by Marshall, J., and Blackmun, J.); *Id.* at 159 (White, J., dissenting, joined by Brennan, J.).

88 *Id.* (Scalia, J., lead opinion, joined by Scalia, J., and Rehnquist, C.J.); *Id.* (O'Connor, J., simple concurrence, joined by Kennedy, J.).

89 *Id.* (Scalia, J., lead opinion, joined by Scalia, J., and Rehnquist, C.J.); *Id.* (O'Connor, J., simple concurrence, joined by Kennedy, J.).

90 *Id.* (Stevens, J., concurring in judgment).

91 *Id.* at 157 (Brennan, J., dissenting, joined by Marshall, J., and Blackmun, J.); *id.* at 159 (White, J., dissenting, joined by Brennan, J.).

justifies that rule (or no other rule is proper). The identified outcome should not be given precedential value because the absence of an internal rule means that the outcome is not the result of a true majority decision.

2. *The Narrowest Grounds Plurality Decision*

The "narrowest grounds" plurality decision merits persuasive precedential value. As a derivation of the narrowest grounds model, it is the only interpretive rule that the United States Supreme Court has explicitly recognized.[92] In this decision, one particular legal rule coherently justifies the outcome. However, this internal rule fails to carry the explicit support of a majority of Justices.

One example of the narrowest grounds plurality decision is *Board of Education of Westside Community Schools v. Mergens*.[93] Students at Westside High School sought to form a Christian club on high school premises based on the Equal Access Act.[94] The School Board argued that applying the Equal Access Act would violate the Establishment Clause of the First Amendment.[95] The dissenting opinion declined to reach the constitutional issue and held that the Equal Access Act did not support the students' claim that they should be able to form a Christian club school premises.[96]

A majority of the Justices, however, did reach the First Amendment issue. The lead opinion held that the Equal Access Act properly allowed the formation of a religious club because the school, in allowing meetings on school premises, was not "actually endorsing" a particular religion.[97] The first concurring opinion ("C1") agreed with the outcome, but argned that "endorsement" was an improper test for evaluating Establishment Clause claims and advocated the adoption of a "coercion" standard.[98] Thus, if the Equal Access Act allowed schools to "directly coerce" religious beliefs, then it would be invalid pursuant to the Establishment Clause. The second concurring opinion ("C2") agreed that the Equal Access Act, as applied, was not invalid, but argned that the proper standard was

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92 *See* discussion *supra* part II.B.2 (discussing the narrowest grounds model).

93 Board of Educ. v. Mergens, 496 U.S. 226 (1990) (plurality decision).

94 21 U.S.C. §§ 4071 (1988).

95 Student religious groups brought an action against the school district, under the Equal Access Act, to allow the formation of a Christian club at the high school. The school board argued that the Equal Access Act, as applied, violated the Establishment Clause of the First Amendment. *Mergens*, 496 U.S. at 226 (plurality decision).

96 *Id.* at 270 (Stevens, J., dissenting).

97 *Id.* at 231 (O'Connor, lead opinion, joined by Rehnquist, C.J., White, J., Blackmun, J.).

98 *Id.* at 258 (Kennedy, J., concurring in judgment, joined by Scalia, J.).

whether a school policy "appeared to endorse" a particular religion.[99]

TABLE EIGHT

	Appearance Endorsement	>	Actual Endorsement	>	Direct Coercion
Statute Valid	C2(2)		L(4)		C1(2)
Statute Invalid					

Board of Education of Westside Community Schools v. Mergens

The narrowest grounds plurality decision succeeds in coherently justifying the outcome, but fails to identify a majority rule.[100] All eight concurring Justices would agree with the reasoning of the first concurrence ("C1"): that if a statute allows the "direct coercion" of a religious belief, it is invalid. Six of the eight concurring Justices would agree with the reasoning of the lead opinion that any statute "actually endorses" a religious belief is invalid pursuant to the Establishment Clause. Only two Justices, however, argue that any statute which "appears to endorse" a religion is constitutionally invalid. Thus either the "direct coercion" or the "actual endorsement" test is proper.[101]

The absence of a majority rule discredits this decision. Although the "actual endorsement" test coherently justifies the conclusion that the Equal Access Act, as applied, does not violate the Establishment Clause, a majority of Justices have implicitly rejected this standard. Both the coalition of Justices that argues for the "appearance of endorsement" test and the coalition that argues for the "coercion" test implicitly agree that the "actual endorsement" test should *not* control.

The narrowest grounds decision merits only persuasive precedential value. The need for a majority rule makes mandatory precedential value improper. However, the narrower grounds (in this case either the "direct coercion" or the "actual endorsement" test)

99 *Id.* at 262 (Marshall, J., concurring in judgment, joined by Brennan, J.).

100 None of the three Establishment Clause standards was supported by a numerical majority of Justices.

101 The three alternative rules are functionally related. The concurring opinion's "appearance of endorsement" test is the broadest of the three rules. The two Justices joining in that opinion necessarily believe that the Equal Access Act does not "actually endorse" or "directly coerce" religious beliefs. *Mergens*, 496 U.S. 262 (Marshall, J., concurring in judgment, joined by Brennan, J.).

justifies the outcome. When no alternative rule exists that also justifies the outcome, lower courts should attribute persuasive authority to precedent on the narrowest grounds.

3. *The Complex Plurality Decision*

The third partially legitimate decision, the "complex" plurality, is analytically incoherent and should be completely disavowed. The presence of both a majority rule and an internal rule lends support to the proposition that lower courts should attribute precedential value to these decisions. However, in this type of decision, the majority rule analysis and the internal rule analysis lead to conflicting conclusions. The absence of agreement makes this the most difficult category of plurality decision to evaluate.

One recent example of the complex plurality decision is found in *United States v. Kokinda*. In this First Amendment case, the Supreme Court examined the applicability of the public forum analysis to post office sidewalks.[102] At issue was the validity of a United States Postal Service regulation that prohibits individuals from soliciting contributions on postal premises.[103] The lead opinion, holding the regulation valid, reasons that post office sidewalks were not traditional public fora and the regulation is therefore entitled to rational basis review.[104] The dissenting opinion, finding the regulation invalid, determines that post office sidewalks were traditional public fora and the regulation should therefore be reviewed pursuant to a strict scrutiny standard.[105] The concurring opinion agrees with the lead opinion as to the validity of the regulation, but bases its decision on a strict scrutiny test that the dissent advocated.[106]

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102 U.S. v. Kokinda, — U.S. —, 110 S. Ct. 3115 (1990). Public forum analysis is a "tripartite framework for determining how First Amendment interets are to be analyzed with respect to Goverument property, Regulation of speech activity on governmental property that has been traditionally open to the public for expressive activity, such as public streets and parks, is examined under strict scrutiny . . . Regulation of speech on property that the Government has expressly dedictated to speech activity is also examined under strict scrutiny . . . But regulation of speech activity where the Government has not dedicated its property to First Amendment activity is examined only for reasonableness."

Id., 110 S. Ct. at 3119-20 (O'Connor, J., lead opinion, joined by Rehnquist, C.J., White, J., and Scalia, J.) (citations omitted).

103 39 CFRT § 232.1(h)(1) (1991).

104 110 S. Ct. at 3121 (O'Connor, J., lead opinion, joined by Rehnquist, C.J., White, J., Scalia, J.).

105 *Id.* at 3133 (Brennan, J., dissenting, joined by Marshall, J., Stevens, J., Blackmun, J.).

106 *Id.* at 3126 (Kennedy, J., concurring in judgment).

TABLE NINE

	Strict Scrutiny	Rational Basis
Regulation Constitutional	C(1)	L(4)
Regulation Unconstitutional	D(4)	

United States v. Kokinda

In *Kokinda*, the majority rule and the internal rule diverge. The concurring opinion articulates the majority rule: Five Justices agreed that the Court should apply a higher standard of review.[107] The lead opinion states the internal rule: The regulation is valid through application of the rational basis test. Justice Kennedy, in the concurring opinion, believes that the regulation is valid pursuant to a rational basis test because he finds it valid under the higher scrutiny of the time, place, and manner restriction.[108] The majority rule and the internal rule thus conflict.

Because the majority rule and the internal rule disagree, all of the precedential difficulties articulated in the analysis of the dual-majority and the narrowest grounds decision are triggered. The higher review advocated by the concurrence fails to coherently justify the validation of the postal regulation and consequently cannot be the binding rule.[109] If the Court had applied the higher standard of review in *Kokinda*, then their conclusion that the postal regulation is valid would not necessarily have resulted.[110] Indeed, four of the five Justices who reviewed the case pursuant to a higher standard of

107 Five of nine Justices agree that postal sidewalks may be traditional public fora and that a higher standard of review is triggered. This coalition of the concurring opinion (Kennedy, J.) and the dissenting opinion (Brennan, J., Marshall, J., Stevens, J., Blackmun, J.) constitute a majority of the sitting Justices.

108 The two rules that the concurring opinion and the lead opinion articulate are functionally related. The rational basis review standard is the narrowest grounds upon which the validity of the regulation may be justified. The concurring opinion, which holds that the postal regulation was valid even under a higher standard of scrutiny used from time, place, and manner restrictions, must believe that if the rational basis test were in fact applicable, the same outcome would be achieved. The rational basis test is the only line of reasoning acceptable to all the five Justices in the lead and concurring opinions that would hold the postal regulation valid.

109 *See* discussion *supra* part II.B.1 (discussing the dual-majority plurality decision).

110 The lead opinion, in arguing that the postal regulation survived rational basis review, does not give any indication as to what result they would have reached pursuant to a strict scrutiny standard of review. *Kokinda*, 110 S. Ct. at 3121 (O'Connor, J., lead opinion, joined by Rehnquist, C.J., White, J., and Scalia, J.).

scrutiny decided that the statute was invalid under that standard.[111] A lower court should not be required to apply the higher standard in future cases because if the Supreme Court had applied the higher standard in *Kokinda* itself, the postal regulation might have been held invalid.

In addition, rational basis review cannot be the proper standard. Only four of nine Justices accept this rule of law.[112] The other Justices reject the rational basis standard holding that a higher level of review should be the test. In this circumstance, a lower court should not be required to apply the rational basis test when a majority of the Court has explicitly rejected the standard.

The principles of interpretation underlying the legitimacy model do not yield any definite conclusions as to how the courts should treat "complex" plurality decisions. One alternative would be to establish the priority of either the majority rule or the internal rule. For example, a lower court that felt the requirement of a coherently justified outcome was more important than the principle of majoritarianism might adopt the internal rule.[113] The difficulty with this alternative is that there is no neutral basis upon which to evaluate the relative merit of the two principles: both are primary principles and seek to legitimize different components of the decision, *i.e.*, the rule and the outcome.[114]

A better alternative accepts the incoherence of both the majority rule and the internal rule. As in the case of an incoherent plurality decision, a lower court should experiment with its own criteria, unrestricted by any opinion articulated in the plurality decision.[115] Since neither a legitimate rule nor a coherently reasoned outcome is discernible from the Supreme Court, a lower court should articulate both a rule and an outcome which they independently recoguize as proper.

C. The Legitimate Plurality Decision

Lower courts should give the "legitimate plurality decision" binding precedential value. A decision is legitimate only when it fulfills all three components of precedential legitimacy: A majority

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111 *Id.*, at 3126-27 (Brennan, J., dissenting, joined by Marshall, J., Stevens, J., Blackmun, J.); *Id.*, at 3125-26 (Kennedy, J., concurring in judgment).

112 *Id.* at 3121 (O'Connor, J., lead opinion, joined by Rehnquist, C.J., White, J., Scalia, J.).

113 The internal rule would probably be considered more authoritative because it is based upon Supreme Court precedent. *See generally* discussion *supra* part II.B.2 (discussing the "narrowest grounds" model).

114 *See* discussion *supra* parts I.B.1 (discussing the principle of majoritarianism), I.B.2 (discussing the need for a reasoned outcome).

115 *See* discussion *supra* part III.A (discussing the incoherent plurality decision).

rule is identified, an internal rule is identified, and an agreement exists between the two rules.[116] In the legitimate plurality decision, it is possible to identify one particular concurring opinion that incorporates both the majority rule and the internal rule. The narrower concurring opinion articulates a legal rule that the dissenting opinion supports. This legal rule should have mandatory precedential value.

A plurality decision rarely fits into the legitimate plurality category. A hypothetical example from the constitutional balancing context explains this tendency.[117] The Court finds that a state statute does not violates the Equal Protection Clause. To reason this conclusion two different concurring coalitions apply the strict scrutiny and rational basis standards. For this decision to fall within the legitimate plurality category, the dissenting opinion would have to declare the statute unconstitutional, applying the rational basis test.[118]

TABLE TEN

	Strict Scrutiny	Rational Basis
Statute Constitutional	L(3)	C(2)
Statute Unconstitutional		D(4)

Hypothetical

This configuration is highly unlikely: a dissenting coalition, arguing that a statute should be declared unconstitutional, would rarely adopt the lower level of constitutional scrutiny. For the dissent to adopt the rational basis test, they must disagree with the lead opinion not only as to the choice of legal rules (rational basis or strict scrutiny) but also as to the scope of the alternative legal rules themselves. The hierarchy of constitutional review itself becomes suspect when a statute fails to survive rational basis review (according to the dissenting opinion) but succeeds in surviving strict scrutiny

116 *See* discussion *supra* part II.C.2 (discussing the categorization of plurality decisions).

117 The hypothetical is drawn from cases in the "complex plurality decision" category. *E.g.*, United States v. Kokinda, — U.S. —, 110 S. Ct. 3115 (1990) ("complex plurality decision").

118 The rational basis test is a narrower grounds than the strict scrutiny test for upholding the statute. The concurring Justices supporting the heightened standard must believe that the statute survives rational basis scrutiny. Thus, a legitimate plurality decision will occur only when the dissenting opinion adopts the rational basis test.

review (according to the local opinion). For this reason, the majority rule and the internal rule will rarely agree.

One example of the "legitimate plurality decision" is *Boos v. Barry*.[119] In this case, the plaintiff challenged, on First Amendment grounds, a District of Columbia provision restricting the ability to march within 500 feet of a foreign government's embassy.[120] The principal issue was whether the provision was "content-based" or not.[121] The lead opinion suggests the proper rule is to evaluate the provision according to both the general case law on content-based regnlations and the "secondary effects" exception articulated in *Renton v. Playtime Theatres, Inc.*[122] In the lead opinion, Justice O'Connor concludes that the provision failed to survive scrutiny under the case law and did not fall within the *Renton* exception.[123] The concurring opinion agrees but argues that the *Renton* exception is always inapplicable to political speech.[124] The dissenting opinion concludes that the display provision survived scrutiny, but fails to articulate clearly the legal rule it relied upon.[125] The dissenting opinion based its decision on the lower court's ruling, which did not specifically reach the *Renton* issue.[126] Thus, there is reason to believe that the dissenting Justices did not accept the *Renton* standard.

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119 Boos v. Barry, 485 U.S. 312 (1988) (plurality decision).

120 D.C. CODE ANN. § 22-1115 (1981), S.J. Res. 191, ch.29, § 1, 52 Stat. 30 (1938) *repealed by* D.C. Law 7-105 § 2, 35 D.C. Reg. 728, 3659 (1988), prohibited, *inter alia*, the display of signs that bring foreign governments into disrepute within 500 feet of that country's embassy.

121 *Boos*, 485 U.S. at 319-21 (O'Connor, J., head opinion, joined by Stevens, J., Scalia, J.). A second issue concerning the validity of the congregation clause of the D.C. provision will not be dealt with here.

122 Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (content neutral speech restrictions are justified without reference to the content of the regulated speech); *Boos*, 485 U.S. at 319-21 (O'Connor, J., lead opinion, joined by Stevens, J., Scalia, J.). Although Justice O'Connor ultimately concluded that the provision failed to survive scrutiny, she nonetheless implied that the *Renton* analysis was applicable.

123 *Boos*, 485 U.S. at 319-21 (O'Connor, J., lead opinion, joined by Stevens, J., Scalia, J.).

124 *Id.* at 337-38 (Brennan, J., concurring in judgment, joined by Marshall, J.).

125 *Id.* at 338-39 (Rehnquist, C.J., dissenting, joined by White, J., Blackmun, J.). *Boos* is difficult to evaluate because of the relicense of the dissenting Justices. *Id.*

126 The lower court did, however, imply that the *Renton* exception was applicable to this situation. *See, e.g.*, Finzer v. Barry, 798 F.2d 1450, 1469 n.15 (D.C. Cir. 1986). For this reason, the argument that the dissent did not accept the *Renton* standard is somewhat strained. For purposes of evaluating the category on principled grounds, this Note will assume that the dissenting Justices adopted the "no exception" rule advocated by the concurring opinion. This is a legitimate assumption because ultimately the lower court did not evaluate the case pursuant to the *Renton* exception. *Id.*

TABLE ELEVEN

	No-Exception Rule	<	Yes-Exception Rule
Provision Valid	D(3)		
Provision Invalid	C(2)		L(3)

Boos v. Barry

In *Boos*, the conclusion of the dissent and concurence, holding that the *Renton* exception should not apply to political speech,[127] should carry binding precedential value. First, to the extent that the dissenting opinion holds that the *Renton* exception is inapplicable, a majority rule has been 11 articulated.[128] Second, the "no exception" holding is an internal rule that coherently justifies the case: the lead opinion must recognize the reasoning of the concurring opinion as to the "no exception" rule.[129] Third, the majority rule and the internal rule agree. The lower courts should give the "no exception" rule, which Justice Brennan articulates in the concurring opinion, binding precedential value.

The absence of a true simple majority[130] should not remove precedential value from plurality decisions. The doctrine of stare decisis traditionally requires that the same majority of Justices agree as to both the legal rule and the particular outcome.[131] This perspective would, by definition, strip all plurality decisions of precedential value.[132] The justification for attributing precedential value to the "legitimate plurality" decision does not, however, rest solely

127 485 U.S at 335-38 (Brennan, J., concurring in judgment, joined by Marshall, J.).

128 Five of eight Justices declined to evaluate the provision under the *Renton* exception. This coalition of the concurring opinion (Brennan, J., joined by Marshall, J.) and the dissenting opinion (Rehnquist, C.J., joined by White, J., Blackmun, J.) constitutes a majority of sitting Justices. Justice Kennedy took no part in the case. *See supra* note 15 and accompanying text (discussing decisions by eight Justice courts).

129 The rules articulated by the concurring opinion and the lead opinion are functionally related. With respect to the outcome that the provision is invalid, the "no exception" rule is the narrowest grounds upon which to justify the outcome. The lead opinion, which held that the District of Columbia provision was invalid even if it was evaluated under the *Renton* exception, must necessarily believe that if the *Renton* exception were in fact inapplicable, the same outcome would have been achieved. In comparing the nature of the alternative rules articulated by the lead opinion and the concurring opinion, the concurring opinion furnishes the only coherent reasoning acceptable to all the concurring Justices for the particular outcome.

130 *See supra* note 8 and accompanying text (defining "simple majority").

131 *See supra* note 19 and accompanying text (discussing the doctrine of stare decisis).

132 *Id.*

upon an affirmative parallel to simple majority decisions; rather, it rests upon the incoherence of attributing such authority to any alternative rule.[133]

The legitimacy model recognizes two basic components to precedential legitimacy. First, the majority rule is constructed to identify a legitimate rationale. Second, the internal rule is constructed to justify the particular outcome. When a legitimate legal rnle (that a majority of Justices support) serves to justify coherently the particular outcome of the plurality decision (by providing the narrowest grounds of agreement among the concurring Justices), then both the legal rule and the outcome should be given binding precedential value.

CONCLUSION

The precedential consequences of a plurality decision are a function of the nature of alternative articulated legal rules and the alignment of Justices with respect to those rules.[134] Courts should attribute persuasive authority to a legal rule that a numerical majority of Justices support.[135] Courts should also attribute persuasive authority to a legal rule that the concurring Justices agree justifies the particular outcome.[136] Mandatory precedential value, however, is proper only when one particular opinion incorporates both the majority rule and the internal rule.[137]

Plurality decisions should not confuse lower courts. The legitimacy model of interpretation significantly limits the use of plurality

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133 The tripartite legitimacy test is based upon components of the doctrine of stare decisis. This doctrine assumes the existence of at least a simple majority decision. For this reason, much of the preliminary analysis seeks to identify, in plurality decisions, a majority rule that looks like the rule found in a unanimous decision. Similarly, the identification of an internal rnle is evaluated in comparison to a unanimous decision. However, both the majority rule and the internal rule have independent doctrinal underpinnings. *See* discussion *supra* parts I.B.I (discussing the principle of majoritarianism), I.B.2 (discussing the need for reasoned outcomes). Moreover, the incoherence of attributing precedential value to any alternative rule is not premised upon stare decisis doctrine. *See* discussion *supra* parts III.B.1 (discussing the "dual-majority plurality decision"), III.B.2 (discussing the "narrowest grounds plurality decision").

134 *See* discussion *supra* part II.C.2 (discussing the categorization of plurality decisions).

135 *See* discussion *supra* part III.B.1 (discussing the "dual-majority plurality decision"). *See generally* discussion *supra* parts I.B.1 (discussing the principle of majoritarianism), II.B.1 (discussing the dual-majority model of interpretation).

136 *See* discussion *supra* part III.B.2 (discussing the "narrowest grounds plurality decision"). *See generally* discussion *supra* parts I.B.2 (discussing the need for a coherent outcome), II.B.2 (discussing the narrowest grounds model of interpretation).

137 *See* discussion *supra* part III.C (discussing the "legitimate plurality decision"); discussion *supra* parts III.A (discussing the "incoherent plurality decision"), III.B.3 (discussing the "complex plurality decision"). *See also supra* note 7 and accompanying text. *See generally* discussion *supra* part I.B.3 (discussing the nexus requirement).

decisions as authoritative precedent.[138] When controlling law is not discernible, lower courts should feel free to experiment with alternative rules and outcomes based on their own criteria.[139] The Supreme Court, in announcing a plurality decision, should recognize that it has abdicated its precedent-setting role and has articulated instead an "appeal to the brooding spirit of the law [and] to the intelligence of a future day."[140]

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138 The inclusive methods of interpretation attribute precedential value to every plurality decision. *See* discussion *supra* part II.A (discussing inclusive models). Under the exclusive models of interpretation, a binding legal rule is identified when *either* a majority rule or an internal rule is identified. *See* discussion *supra* part II.B (discussing exclusive models). In contrast, the legitimacy model attributes precedential value to a plurality decision only when *both* a majority rule and an internal rule are discernible, and, even then, only if the two identified rules are the same. *See* discussion *supra* part III.C (discussing the "legitimate plurality decision").

139 *See supra* note 9 and accompanying text 78 (discussing the merits of lower court experimentation).

140 HUGHES, *supra* note 1, at 68.

APPENDIX

1981 Term: Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981); Michael M. v. Superior Court, 450 U.S. 464 (1981); Kassel v. Consol. Freightways Corp., 450 U.S. 662 (1981); Rosales-Lopez v. United States, 451 U.S. 182 (1981); Rhodes v. Chapman, 452 U.S. 337 (1981); California Medical Ass'n v. Fed. Election Comm'n, 453 U.S. 182 (1981); Robbins v. California, 453 U.S. 420 (1981); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981). *1982 Term*: Rose v. Lundy, 455 U.S. 509 (1982); Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853 (1982); Clements v. Fasing 457 U.S. 957 (1982); Northern Pipelines Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982). *1983 Term*: Connecticut v. Johnson, 460 U.S. 73 (1983); Florida v. Royer, 460 U.S. 491 (1983); Texas v. Brown, 460 U.S. 730 (1983); Planned Parenthood Ass'n of Kansas City, Mo. Inc. v. Ashcroft, 462 U.S. 476 (1983); Oregon v. Bradshaw, 462 U.S. 1039 (1983); Guardians Ass'n v. Civil Service Comm'n of City of New York, 463 U.S. 582 (1983), *cert. denied*, 463 U.S. 1228 (1983); Barclay v. Florida, 463 U.S. 939 (1983); Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983). *1984 Term*: Michigan v. Clifford, 464 U.S. 287 (1984); South Carolina v. Regan, 465 U.S. 367 (1984); Justices of Boston Court v. Lydon, 466 U.S. 294 (1984); Spaziano v. Florida, 468 U.S. 447 (2984); Wasman v. United States, 468 U.S. 559 (1984); United States v. Karo, 468 U.S. 705 (1984). *1985 Term*: New Jersey v. T.L.O., 469 U.S. 325 (1985); Oneida County v. Oneida Indian Nation, 470 U.S. 226 (1985); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985); United States v. Bagley, 473 U.S. 667 (1985). *1986 Term*: Pacific Gas & Elec. Co. v. Public Utilities Comm'n, 475 U.S. 1 (1986); Pembaur v. City of Cincinnati, 475 U.S. 469 (1986); Turner v. Murray, 476 U.S. 28 (1986); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); International Longshoremen's Ass'n, AFL-CIO v. D., 476 U.S. 380 (1986); Bowen v. American Hosp. Ass'n, 476 U.S. 610 (1986); Bowen v. Roy, 476 U.S. 693 (1986); Attorney General v. Soto-Lopez, 476 U.S. 898 (1986); Ford v. Wainwright, 477 U.S. 399 (1986); City of Riverside v. Rivera, 477 U.S. 561 (1986); Thornburg v. Gingles, 478 U.S. 30 (1986); Davis v. Bandemer, 478 U.S. 109 (1986); Papasan v. Allain, 478 U.S. 265 (1986); Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986); Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986). *1987 Term*: California Fed. Sav. and Loan Ass'n v. Guerra, 479 U.S. 272 (1987); Pennsylvania v. Ritchie, 480 U.S. 39 (1987); Asahi Metal Indus. Co., v. Superior Court, 480 U.S. 102 (1987); United States v. Paradise, 480 U.S. 149 (1987); Town of

Newton v. Rumery, 480 U.S. 386 (1987); O'Connor v. Ortega, 480 U.S. 709 (1987); Lukhard v. Reed, 481 U.S. 368 (1987); Gray v. Mississippi, 481 U.S. 648 (1987); Young v. United States, 481 U.S. 787 (1987); City of Houston v. Hill, 482 U.S. 451 (1987); Goodman v. Lukens Steel Co., 482 U.S. 656 (1987); Welch v. Texas Dep't of Highways, 483 U.S. 468 (1987); Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711 (1987). *1988 Term*: City of St. Louis v. Praprotnik, 485 U.S. 112 (1988); Boos v. Barry, 485 U.S. 312 (1988); Kungys v. United States, 485 U.S. 759 (1988); Bankers Life and Cas. Co. v. Crenshaw, 486 U.S. 71 (1988); EEOC v. Commercial Office Products Co., 486 U.S. 107 (1988); Sun Oil Co. v. Wortman, 486 U.S. 717 (1988); Franklin v. Lynaugh, 487 U.S. 164 (1988); Pierce v. Underwood, 487 U.S. 552 (1988); Thompson v. Oklahoma, 487 U.S. 815 (1988); Watson v. Fort Worth Bank and Trust, 487 U.S. 977 (1988). *1989 Term*: Sheet Metal Workers' Int'l Ass'n v. Lynn, 488 U.S. 347 (1989); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989); Teague v. Lane, 489 U.S. 288 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228 (I989); ASARCO, Inc. v. Kadish, 490 U.S. 605 (1989); Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989); Michael H. v. Gerald D., 491 U.S. 110 (1989); Massachusetts v. Oakes, 491 U.S. 576 (1989); Jett v. Dallas Indep. School Dist., 491 U.S. 701 (1989); Murray v. Giarratano, 492 U.S. 1 (1989), *cert. denied*, 111 S. Ct. 83 (1990); Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96 (I989); Stanford v. Kentucky, 492 U.S. 361 (1989); Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408 (1989); Webster v. Reproductive Health Serv., 492 U.S. 490 (1989); County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989). *1990 Term*: Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558 (1990); Burnham v. Superior Court of Cal., 495 U.S. 604 (1990); Peel v. Attorney Registration and Disciplinary Comm'n of Ill., 496 U.S. 91 (1990); American Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167 (1990); Board of Educ. v. Mergens, 496 U.S. 226 (1990); Pennsylvania v. Muniz, 110 S. Ct. 2638 (1990); Hodgson v. Minnesota, 110 S. Ct. 2926 (1990); Walton v. Arizona, 110 S. Ct. 3047 (1990); United States v. Kokinda, 110 S. Ct. 3115 (1990). *1991 Term*: Arizona v. Fulminante, 111 S. Ct. 1246 (1991); Hernandez v. New York, 111 S. Ct. 1859 (1991); Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950 (1991) Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773 (1991); James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991); Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991); Schad v. Arizona, 111 S. Ct. 2491 (1991); Harmelin v. Michigan, 111 S. Ct. 2680 (1991).