When *Marks* Misses the Mark: A Proposed Filler for the "Logical Subset" Vacuum

*By Damien M. Schiff**

The discernment of the holding, or *ratio decidendi*, of a case can be exceedingly difficult to master.[1] The task is hard enough when the relevant holding is to be found in a single judicial opinion. Thus, if lawyers find it challenging consistently and accurately to infer the legal rule from one opinion, it stands to reason that, *a fortiori,* they will be helpless to distill one rule of decision from multiple opinions. Yet that daunting task is precisely what lawyers must attempt frequently with the so-called "split decisions" of appellate courts, *i.e.*, decisions in which a majority of the court's voting members agree on a particular disposition, but cannot agree on a single rationale supporting that disposition. In the U.S. Supreme Court, the rule for several decades has been that

> [w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[2]

This is known as the *Marks* rule, from the eponymous case.

The *Marks* rule is useful when a decision's "narrowest grounds" can be identified. When a decision produces many opinions of judges concurring in the judgment, under *Marks* the controlling opinion is that which (1) supports the result in the actual case, but (2) would reach that same result, in factually similar cases, in *fewer* instances than any other concurring opinion. Point (1) derives from *Marks*'s "concurring in the judgment" requirement, whereas point (2) comes from the rule's "narrowest grounds" condition.

Courts have interpreted the "narrowest grounds" requirement as mandating a "logical subset" analysis,[3] meaning that a given rule and rationale is a decision's narrowest grounds if the rule and rationale would produce the same results (or "outcome set")—*e.g.*, "constitutional" or "unconstitutional," "jurisdictional" or "not jurisdictional"—as the rule and rationale in another opinion concurring in the judgment, *but in a smaller set of cases*.[4] An instructive example of the logical subset theory can be found within the context of constitutional scrutiny analysis. Assume that the Court upholds the constitutionality of a statute on competing grounds: one group of justices on rational basis, another on strict scrutiny. Because the "constitutional" outcome set of a strict scrutiny rule is wholly contained with the same outcome set of a rational basis rule (because every statute that passes strict scrutiny passes rational basis, but the converse is not true), strict scrutiny would comprise the *Marks* narrowest grounds for a decision upholding a statute's constitutionality on competing strict scrutiny/rational basis reasons.

But what happens when *none* of the outcome sets of competing rationales is a logical subset of any other—if the competing outcome sets only *partially overlap*, such that one cannot say that a finding of constitutionality under Opinion X will necessarily lead to a finding of constitutionality under Opinion Y, or the converse?

The courts have developed several *Marks* supplements. One approach, which I term the "shifting majority" rule, looks to the opinions of *all* the judges on the court, including those in dissent, and affords binding authority to any proposition enjoying a majority of the judges' votes, regardless of their position in the majority-dissent breakdown.[5] Another approach, which I term the "fact-bound" rule, limits the holding of the decision to the precise facts (or nearly so) of the decision.[6] Both of these supplements are unsatisfactory, and this article will demonstrate why those algorithms should be rejected, proposing in their stead a better *Marks* supplement, which I term the "majority of the majority" rule:

When the Supreme Court issues a decision and judgment in which no opinion garners a majority of the Justices' votes, and in which no opinion authored by a Justice concurring in the judgment is a logical subset of any other opinion authored by a Justice concurring in the judgment, then the controlling opinion in such a case is that opinion concurring in the Court's judgment joined by the greatest number of Justices.

This rule would offer clarity and ease of application, as well as consistency with the constitutional limits of the federal judiciary.

Most legal scholarship on split opinions takes one of two approaches. Addressing the issue descriptively, many writers identify reasons for *why* courts produce split opinions, and consider the value of split decisions, and their demerits.[7] Others, addressing the issue prescriptively, offer *Marks* substitutes.[8] This article proceeds along a different path. The point here is not to provide a *substitute* for the *Marks* analysis, but rather a *supplement* for when the *Marks* analysis is inapt. The Supreme Court has never addressed the issue, and there is no consistent answer supplied by the inferior federal courts.

Part I below provides a brief discussion of *Marks* and explains its application in the paradigmatic case of the logical subset opinion, while explaining that *Marks*, by its own terms, cannot be universal. Part II continues the argument by describing existing *Marks* supplements and explains why those supplements should be rejected. Finally, Part III sets forth the "majority of the majority" rule and defends it as the best available *Marks* supplement.

I. The *Marks* Rule and its Limits

As the Supreme Court stated in *Marks*, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[9] The Court's opinion in *Marks* drew from language in *Gregg v. Georgia*, where the Court examined *Furman v. Georgia*, a case presenting a constitutional challenge to a Georgia death penalty statute.[10]

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A. An Explication of the Marks Rule

In *Furman*, five justices joined in the judgment of the Court and concluded that the death penalty as administered in Georgia was unconstitutional. The Court, however, split on the legal rule to support its conclusion. The two concurring justices contended that capital punishment is unconstitutional in all cases, whereas the remaining justices in the majority concluded only that the particular death penalty law at issue was unconstitutional—leaving open the possibility that other death penalty laws may pass constitutional muster. In *Gregg*, the Court anticipated the *Marks* rule through its reading of *Furman*:

> Since five Justices wrote separately in support of the judgments in *Furman*, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds....[11]

In *Marks* itself, the Court was presented with the question of whether certain materials determined to be obscene by the lower courts enjoyed First Amendment protection. The Court concluded that the pertinent legal rule was to be found in its split decision in *Memoirs v. Attorney General of the Commonwealth of Massachusetts*, in which six justices reversed a lower court's judgment that a novel deemed obscene was not protected under the First Amendment.[12] Three justices in the *Memoirs* majority agreed with the lower court that obscene materials are not constitutionally protected; yet the same justices rejected as too lax the lower court's standard for constitutionally unprotected obscenity.[13] Two other justices in the *Memoirs* majority joined in the judgment on the grounds that, because the First Amendment protects obscenity however defined, the novel in question was constitutionally protected.[14] A sixth justice concurred on the grounds that all forms of obscenity, save hardcore pornography, are protected under the First Amendment.[15] The *Marks* Court concluded that the *Memoirs* three-justice rule—which imposes a heightened standard for regulation of obscenity—was the decision's narrowest grounds and therefore the controlling rule of law.

B. The Limits of the Marks Rule and Marks Substitute/Supplements

The *Marks* rule works only where at least one opinion concurring in the judgment functions as a subset of the relevant outcomes of all other opinions concurring in the judgment.[16] As the D.C. Circuit in *King v. Palmer* explained,

> *Marks* is workable—one opinion can be meaningfully regarded as "narrower" than anotherConly when one opinion is a logical subset of other, broader opinions. In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment.
>
> ...When, however, one opinion supporting the judgment does not fit entirely within a broader circle drawn by the others, *Marks* is problematic. If applied in situations where the various opinions supporting the judgment are mutually exclusive, *Marks* will turn a single opinion that lacks majority support into national law. When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be.[17]

King therefore recognized two related shortcomings with the *Marks* rule when applied in circumstances lacking a logical subset. First, the rule demands that one presume the other majority justices to agree, *pro tanto*, with the "narrowest grounds" opinion—which is unlikely if that narrower opinion would produce a result in a different case with which the remaining members of the majority would disagree. Second, and related, the rule would seem to produce anti-majoritarian results, where the views of one justice in the majority prevail in a subsequent case, even where the remainder of the Court in the original case would disagree with that justice's rationale. *King* resolved the issue by disregarding *Marks* and limiting the relevant split decision analysis to the result reached.[18]

1. From the Cases

Other courts, however, have found that the "fact-bound" rule, discussed in greater detail below, is unsatisfying. Those courts have adopted the aforementioned "shifting majority" rule, whereby the holding of a split decision is any proposition expressly or impliedly supported by a majority of the justices participating in the split decision. A recent decision to adopt that approach is *United States v. Johnson*, in which the First Circuit interpreted the Supreme Court's split decision in *Rapanos v. United States*. In *Johnson*, the court was asked to decide which test for Clean Water Act jurisdiction under *Rapanos* is controlling: the test contained within the plurality opinion authored by Justice Scalia, or the test contained within the concurring opinion of Justice Kennedy? The *Johnson* court concluded that *Rapanos* is not susceptible to a *Marks* "logical subset" analysis, principally because Justice Kennedy's jurisdictional test does not, purportedly, operate as a subset of the plurality's test.[19] The *Johnson* court went on to analyze the three principal *Rapanos* opinions—the plurality, concurrence, and dissent—concluding that, because the dissent would support Clean Water Act jurisdiction in every instance in which either the plurality or Justice Kennedy would find jurisdiction, a majority of Justices (although shifting) would support either test. Thus, *Johnson* held that both *Rapanos* majority tests are valid.[20]

A similar approach was employed by the Third Circuit in *Student Public Interest Research Group of New Jersey, Inc. v. AT&T Bell Laboratories*,[21] in interpreting the Supreme Court's split decision in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*.[22] In that case, the High Court held that enhancements to the lodestar for attorneys' fees under the Clean Air Act, for assuming the risk of non-payment, were improper. A plurality of four Justices contended that such enhancements are always improper, whereas Justice O'Connor, concurring separately, argued that such enhancements are not always improper, but that they were in the case under review.[23] The Third Circuit, applying *Delaware Valley*, concluded that, because the dissent in that case would have approved of enhancements generally—and because O'Connor approved of enhancements under certain circumstances—therefore a majority of *Delaware Valley* would hold that enhancements are proper if Justice O'Connor's standards are met.[24]

The Third Circuit's approach is somewhat more controversial than *Johnson*'s, because in *Johnson* the First Circuit found the *Marks* inquiry to be unhelpful, whereas

in *Student Public Interest Research Group* the Third Circuit never discussed *Marks*, although it was arguably applicable. Under *Marks*, the "narrowest grounds" of *Delaware* would be Justice O'Connor's opinion, *but only* for the proposition that, under the circumstances present in the case, enhancements are improper. Importantly, *Marks* would not authorize a rule from the other side of the *Delaware* coin, *i.e.*, a rule that would affirmatively *approve* of enhancements where Justice O'Connor's conditions are met. That conclusion is a function of *Marks*'s mandate that the interpreting court look to the opinions of the justices concurring in the judgment. Given that the judgment in *Delaware* was a reversal of the Court of Appeals's authorization of enhancements under that case's circumstances, a rule upholding enhancements under other circumstances, not before the Court, would be *obiter dicta*. Thus, the "shifting majority" rule produces on occasion the odd result of converting dicta into holding.

As noted above, another method that the courts have employed to interpret split decisions not readily susceptible to *Marks* is the "fact-bound" rule. Under that rule, the holding of the Court is the result reached.[25] Like *Marks*, the "fact-bound" rule is more easily stated than applied. What is a case's result? What are the relevant variables to the majority's algorithm? What are the constants? A worthwhile case study of the "fact-bound" rule can be found among the appellate cases interpreting the Supreme Court's decision in *Eastern Enterprises v. Apfel*.[26] In *Eastern Enterprises*, the Court held that the retroactive application of the Coal Industry Retiree Health Benefit Act to Eastern Enterprises was unconstitutional. A plurality of justices, in an opinion authored by Justice O'Connor, held that the Act effected a taking, and reached that conclusion by applying the multi-factor regulatory takings test set forth in *Penn Central Transportation Co. v. City of New York*.[27] Justice Kennedy, concurring separately, agreed that the Act was unconstitutional as applied, but contended that the result flowed from a due process, not a takings, analysis.[28] Thus, the case presents a *Marks* supplement opportunity: *Marks* is not applicable because neither the plurality's takings test, nor Justice Kennedy's substantive due process test, is a logical subset of the other. Of the courts that have interpreted *Eastern Enterprises*, at least two have adopted a somewhat generous version of the "fact-bound" rule.[29] Others have adopted a more cramped interpretation.[30] No circuit court has adopted what one might term a "full" version of the rule, which in the context of *Eastern Enterprises* would mean that a statute is unconstitutional if it fails both the plurality's and Justice Kennedy's test.[31]

The principal shortcoming of the "fact-bound" rule is that it reduces the Supreme Court to a case-by-case adjudicator, and deprives its opinions of the sweeping character that is fitting for a court of last resort. Another demerit to the rule is that it encourages fractiousness. It is not surprising, then, that few commentators, to whose views we now turn, have found that substitute satisfying.

2. From the Commentaries

A number of commentators have offered *Marks* substitutes. Prominent among them is the "legitimacy model" offered by Ken Kimura.[32] Kimura's model operates on the convergence of two distinct characteristics to every split decision: the internal rule and the "majority" rule.[33] The internal rule is essentially *Marks*'s narrowest grounds rule,[34] but where identification of a decision's narrowest grounds would end the analysis under *Marks*, Kimura would also require that the narrowest grounds (or internal rule) rule, before deemed a holding, must coincide with the "majority" rule, which Kimura defines as that rule which enjoys the assent of a majority of the Justices.[35]

Kimura uses *Boos v. Barry* to illustrate his model.[36] In *Boos* the plaintiff challenged a District of Columbia ordinance that restricted the right to protest within 500 feet of a foreign embassy.[37] The Court held that the ordinance violated the First Amendment as an impermissible content-based speech restriction, with the plurality contending that the exception for secondary-effects speech restrictions articulated in *Renton v. Playtime Theatres, Inc.*,[38] did not apply,[39] and the concurrence contending that the *Renton* exception is never available for political speech restrictions.[40] The dissent contended that the ordinance passed strict scrutiny, but did not discuss the *Renton* exception.[41]

Kimura argues that the legitimate holding of the case is that the *Renton* exception does not apply to political speech. That rule is consistent with the result reached in *Boos* (because if the exception were applicable to political speech then arguably the result would have been different, which in fact qualifies the rule as an "internal rule") and enjoys the assent of a majority of justices in the *Boos* decision, the concurrence as well as the dissent.[42] And, as implied from the foregoing, Kimura rejects the majority of the majority principle, in part because it requires that dissenting opinions be ignored.[43]

Mark Thurmon advocates what he terms "The Hybrid Approach," a method which in fact is quite similar to Kimura's.[44] Thurmon differentiates between "persuasive" and "imperative" authority—(the latter is any point necessary to the result reached in a particular case that was assented to by a majority of the voting justices).[45] He makes clear that the votes of dissenting justices can count.[46] Persuasive authority is any other point, not supported by a majority of Justices; the persuasiveness of that authority is a function of the number of justices supporting the point, and whether they agreed with the judgment reached.[47] The significance of persuasive authority for Thurmon is that, in the absence of contrary imperative authority, a point supported by persuasive authority becomes binding, even though (by definition) it is not a point supported by a majority of the Court.[48]

Linda Novak, in her analysis of the split decision problem, highlights the difficulties in ascertaining a decision's logical subset, but nevertheless adheres generally to the *Marks* framework.[49] Novak identifies the same disjunction as Kimura between a decision's internal and majority rules,[50] and finds the majority of the majority rule unconvincing because it converts the views of a "minority" of the Court into a holding.[51] She does, however, acknowledge the "results" rule, whereby subsequent parties in substantially the same relation as parties to a split decision are bound by the result of that earlier decision.[52]

At least one commentator has argued for a return to the practice of *seriatim* decisions,[53] commonly issued in the years prior to Chief Justice Marshall's ascendency,[54] whereas another has advocated for an emphasis on "process values" to reduce the

likelihood of split decisions.[55] Still other commentators argue simply to make the best of a bad situation, and extract from the current *Marks* disarray various benefits, such as the virtue of "percolation" of Supreme Court plurality opinions in the lower courts.[56] Justice Stevens's answer, most recently expressed in *Rapanos*, has found support in the academic literature, too[57]: that any proposition garnering a majority of the votes of *all* participating justices (be they in the majority or the dissent), is binding on the lower courts.[58]

But as far as I have been able to determine, only one commentator has advocated what I consider to be the only satisfying test, at least as a supplement to *Marks*: the "majority of the majority" rule.[59]

II. A *Marks* Supplement: The Majority of the Majority

One shortcoming of the *Marks* alternatives discussed above is just that: that they are offered as replacements to *Marks*'s logical subset rule, rather than as supplements for the courts to apply when a logical subset opinion (or point) cannot be identified. Thus, the modesty of a majority of the majority rule is a significant plus. Another clear advantage of the rule is its consistency with the constitutional requirements of Article III, a benefit which many of the competing *Marks* tests, including Kimura's and Thurmon's, lack.

Before we address the constitutional implications of interpretive theories that rely upon the views of dissenting justices, however, it bears mention that, in order for any rule to operate as a valid supplement, it ought to be consistent with *Marks* itself, as well as Article III. Where this point arises is in the fact that *Marks* requires the split decision analysis to turn upon the views of the justices concurring in the judgment; obviously, the views of dissenting justices would not so qualify.[60] Thus, the fact that the majority of the majority rule, by definition, looks only to the views of justices concurring in the judgment means that it can operate as an authentic *Marks* supplement, and not a substitute.

As for the constitutional limitation, the views of dissenting Justices can play no legitimate interpretive role in split decision analysis. The reason for this prohibition derives from Article III's case or controversy requirement: federal courts are authorized to "speak the law" (jus dicere) only to the extent that the opinions they issue are tied to a judgment that resolves an actual "Case or Controversy."[61] Given that dissenting justices can have no influence on the Court's disposition of an actual case or controversy, it follows that their opinions as to the controlling rule of law are without binding power.[62]

I concede that this view is not unanimously held, certainly not among the commentators, and not (apparently) among Supreme Court justices.[63] But that latter criticism, if it be such, is really adventitious; what governs ultimately is the Constitution itself, not the occasional aberrant practices of some justices.

Constitutional legitimacy and *Marks* consistency are not the only virtues of the rule. The majority of the majority rule also has the happy result of incentivizing judicial clarity without sacrificing judicial creativity.

> The key to any solution [to the split decision problem] therefore is to motivate judges to compromise by joining in a majority statement of the law, while stating their private feelings in separate opinions. Courts can achieve this result by adopting the rule that whenever a court is unable to write an opinion that a majority will support, the plurality opinion—the opinion that the most nondissenting judges vote for—shall become the official opinion of the court and shall be binding precedent for all lower courts until the ruling court declares otherwise.[64]

The complaint so frequently heard—that the justice "concurring in the judgment" is able to make his opinion the law of the land, even though he is the only one on the Court to espouse that opinion—would effectively be answered.[65] For, under the majority of the majority rule a potential "concurring in the judgment" justice would have little or no reason to write separately, if his views were to have no binding (or even persuasive) effect on the law. At most, such a justice would have no more reason for writing separately than would one dissenting.[66]

CONCLUSION

Some decades ago, Judge Walter Gewin of the Fifth Circuit offered a tongue-in-cheek typology of concurring opinions which categorized them as "(a) excusable, (b) justifiable, or (c) reprehensible."[67] I have argued that, for constitutional, precedential, and instrumental reasons, the majority of the majority rule should be adopted as the go-to split decision hermeneutic when the *Marks* rule cannot be applied. Although "excusable" and "justifiable" concurrences will likely be with us until the end of the Republic, a *Marks* rule fortified by a majority of the majority supplement will likely rid us at least of Judge Gewin's (c).

Endnotes

1 *See, e.g.*, Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 Stan. L. Rev. 953, 956, 958 (2005) (obseving "the absence of a shared conceptual foundation for analyzing even modestly complex cases" and "the absence of any single governing source or universal agreement on how to define dicta"). For traditional explanations of how to divine a case's holding, *see* Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 Yale L.J. 161 (1930); Henry Campbell Black, Handbook on the Law of Judicial Precedents 37-53 (1912); Eugene Wambaugh, The Study of Cases 3-30 (1894).

2 Marks v. United States, 430 U.S. 188, 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

3 *See* United States v. Johnson, 467 F.3d 56, 63-64 (1st Cir. 2006) (pending on remand) (citing King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc)).

4 *Cf.* Ken Kimura (Note), *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 Cornell L. Rev. 1593, 1603-04 (1992).

5 *See, e.g.*, *Johnson*, 467 F.3d at 65-66; United States v. Cundiff, 480 F. Supp. 2d 940, 944 (W.D. Ky. 2007). Interestingly, *Johnson* did not consider the distinct possibility that the plurality's outcome set may be a subset of Justice Kennedy's outcome set. *Cf. Johnson*, 467 F.3d at 63-64.

6 *See, e.g.*, Unity Real Estate Co. v. Hudson, 178 F.3d 649, 659 (3d Cir. 1999) (citing Ass'n of Bituminous Contractors, Inc. v. Apfel, 156 F.3d 1246, 1254-55 (D.C. Cir. 1998)).

7 *See* Berkolow, *Much Ado About Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-Percolation after* Rapanos (manuscript), *available at* http://ssrn.com/abstract=1017992 (forthcoming in Va. J. Soc. Pol=y & L.); John F. Davis & William L. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 Duke L.J. 59; G.P.J. McGinley, *The Search for Unity: The Impact of Consensus Seeking Procedures in Appellate*

Courts, 11 Adel. L. Rev. 203 (1987); Laura Krugman Ray, *The Justices Write Separately: Uses of the Concurrence by the Rehnquist Court*, 23 U.C. Davis L. Rev. 777 (1990).

8 *See* Adam S. Hochschild (Note), *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective*, 4 Wash. U.J.L. & Pol'y 261 (2000); Kimura, *supra* note 4; Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 Duke L.J. 419 (1992); Linda Novak (Note), *The Preceential Value of Supreme Court Plurality Decisions*, 80 Colum. L. Rev. 756 (1980); Douglas J. Whaley, *A Suggestion for the Prevention of No-Clear-Majority Judicial Decisions*, 46 Tex. L. Rev. 370 (1967).

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

10 408 U.S. 238 (1972).

11 *Gregg*, 428 U.S. at 169 n.15.

12 383 U.S. 413 (1966).

13 *See id*. at 418-19 (opinion of Brennan, J., joined by Warren, C.J., and Fortas, J.).

14 *See Memoirs*, 383 U.S. at 421 (Black, J., concurring on grounds stated in Ginzburg v. United States, 383 U.S. 463, 476 (1966) (Black, J., dissenting) (First Amendment forbids any regulation of obscenity), and Mishkin v. New York, 383 U.S. 502, 515-16 (1966) (Black, J., dissenting) (same)); *id*. at 433 (Douglas, J., concurring).

15 *See Memoirs*, 383 U.S. at 421 (Stewart, J., concurring on grounds stated in Ginzburg v. United States, 383 U.S. 463, 499 (1966) (Stewart, J., dissenting) ("hardcore pornography" beyond First Amendment), and Mishkin v. New York, 383 U.S. 502, 518 (1966) (Stewart, J., dissenting) (same)).

16 *See supra* Introduction. Professor Stearns contends that the *Marks* test is applicable to the vast majority of plurality decisions. *See* Maxwell L. Stearns, Constitutional Process: A Social Choice Analysis of Supreme Court Decision Making 105 (2000), *cited in* Joseph M. Cacace (Note), *Plurality Decisions in the Supreme Court of the United States: A Reexamination of the* Marks *doctrine after* Rapanos v. United States, 41 Suffolk U.L. Rev. 97, 113-14 n.137 (2007).

17 950 F.2d 771, 781-82 (D.C. Cir. 1991) (en banc). *See Johnson*, 467 F.3d at 64.

18 *King*, 950 F.2d at 784-85.

19 *See Johnson*, 467 F.3d at 64. The court also noted that a strict adherence to the significant nexus test would produce "bizarre outcome[s]." *Id*.

20 *Id*. at 66. *See Cundiff*, 480 F. Supp. 2d at 944 (adopting *Johnson*'s interpretation of *Rapanos*) (appeal pending).

21 842 F.2d 1436 (3d Cir. 1988).

22 483 U.S. 711 (1987).

23 *Compare id*. at 729-30 (plurality opinion) *with id*. at 731 (O'Connor, J., concurring in part and concurring in the judgment).

24 *See Student Public Interest Research Group*, 842 F.3d at 1451 ("Because the four dissenters would allow contingency multipliers in all cases in which Justice O'Connor would allow them, her position commands a majority of the court.").

25 *See King*, 950 F.2d at 784 (citing Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 655 (1949) (Frankfurter, J., dissenting), [another famous split decision upholding the constitutionality of the Court of Claims] for the proposition that "a result is binding even when the Court fails to agree on reasoning.").

26 524 U.S. 498 (1998).

27 438 U.S. 104 (1978). *See E. Enterps.*, 524 U.S. at 529 (plurality opinion).

28 *E. Enterps.*, 524 U.S. at 539 (Kennedy, J., concurring in the judgment and dissenting in part).

29 Unity Real Estate Co. v. Hudson, 178 F.3d 649, 659 (3d Cir. 1999) ("*Eastern*, therefore, mandates judgment for the plaintiffs only if they stand in a substantially identical position to Eastern Enterprises with respect to both the plurality and Justice Kennedy's concurrence.") (citing Ass'n of Bituminous Contractors, Inc. v. Apfel, 156 F.3d 1246, 1254-55 (D.C. Cir. 1998)); Mary Helen Coal Corp. v. Hudson, 164 F.3d 624 (4th Cir. 1998) (table) (granting appellant summary reversal because the case was "materially indistinguishable from *Eastern*").

30 *See* United States v. Dico, Inc., 266 F.3d 864, 879 (8th Cir. 2001); Franklin County Convention Facilities Auth. v. American Premier Underwriters, Inc., 240 F.3d 534, 552 (6th Cir. 2001). Some of the cases have applied the "shifting majority" rule to *Eastern Enterprises*. *See* Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1339 & n.10 (Fed. Cir. 2001) (citing various authorities for proposition that "regulatory actions requiring the payment of money are not takings").

31 *Cf*. PLF Amicus Brief, Nos. 06-853, 06-1014, 2007 WL 868963, at 4 (Mar. 21, 2007).

32 Kimura, *supra* note 4.

33 *See id*. at 1599-1600.

34 *See id*. at 1606.

35 *Id*. at 1624.

36 485 U.S. 312 (1988).

37 *See id*. at 315.

38 475 U.S. 41 (1986).

39 *Boos*, 485 U.S. at 320-21 (plurality opinion).

40 *See id*. at 334-335 (Brennan, J., concurring in part and concurring in the judgment).

41 *See id*. at 338-39 (Rehnquist, C.J., concurring in part and dissenting in part).

42 Kimura, *supra* note 4, at 1623.

43 *Id*. at 1601-02.

44 Thurmon, *supra* note 8.

45 *Id*. at 452.

46 *Id*. at 454.

47 *See id*. at 455-56.

48 *See id*. at 451.

49 Novak, *supra* note 8, at 762-64.

50 *Id*. at 764-65.

51 *Id*. at 768.

52 *See id*. at 779.

53 *See* Hochschild, *supra* note 8, at 283-86. Interestingly, one rather hoary commentary contends that the interpretation of seriatim decisions is really no different from the interpretation of majority decisions. *See* Goodhart, *supra* note 1, at 179.

54 Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 Cornell L. Rev. 186, 192-94 (1959). Thomas Jefferson famously criticized Marshall for changing the Court's practice. *See* Thomas Jefferson, Writings 1446 (The Library of America 1984) (Letter from Jefferson to Thomas Ritchie, dated Dec. 25, 1820).

55 Note, *Plurality Decisions and Judicial Decisionmaking*, 94 Harv. L. Rev. 1127, 1145 (1981).

56 *See* Berkolow, *supra* note 7, at 48-49.

57 Cacace, *supra* note 16, at 130-31.

58 *See Rapanos*, 126 S. Ct. at 2265 & n.14 (Stevens, J., dissenting).

59 Whaley, *supra* note 8, at 376.

60 *See King*, 950 F.2d at 793.

61 *See generally* Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992) (Federal courts have no authority "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot

affect the matter in issue in the case before it.") (citation omitted).

62 *Cf.* United States v. Robison, 505 F.3d 1208, 1221 (11th Cir. 2007) ("We are controlled by the decisions of the Supreme Court. Dissenters, by definition, have not joined the Court's decision."). In *Robison*, the Eleventh Circuit adopted Justice Kennedy's significant nexus test as controlling under *Marks*. *See Robison*, 505 F.3d at 1222.

63 *See Johnson*, 467 F.3d at 65-66 (citing Waters v. Churchill, 511 U.S. 661, 685 (1994) (Souter, J., concurring); League of United Latin Am. Citizens v. Perry, 126 S.Ct. 2594, 2607 (2006) (Kennedy, J.); and Alexander v. Sandoval, 532 U.S. 275, 281-82 (2001) (Scalia, J.), as examples where a Justice has derived a case's "holding" from the views expressed in dissents). *See also Rapanos*, 126 S. Ct. at 2265 & n.14 (Stevens, J., dissenting).

64 Whaley, *supra* note 8, at 376.

65 For the influence of the middle-of-the-road Justice, see generally Andrew D. Martin *et al.*, *The Median Justice on the United States Supreme Court*, 83 N.C.L. Rev. 1275 (2005).

66 For the value of dissenting opinions generally, see William J. Brennan, *In Defense of Dissents*, 50 Hastings L.J. 671 (1999).

67 Walter P. Gewin, *Opinions-Dissents, Special Concurrences, Policy, Techniques*, 63 F.R.D. 594, 595 (1972).