PLURALITY DECISIONS, IMPLICIT CONSENSUSES, AND THE FIFTH-VOTE RULE UNDER *MARKS V. UNITED STATES*

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I. INTRODUCTION

Unlike its state supreme court counterparts,[1] United States Supreme Court decisions with no majority opinion provide precedential value. In the 1977 decision of *Marks v. United States*, the Court stated: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[2] Simply put, when there is no majority opinion, the narrowest concurring opinion provides controlling authority.[3] However, because of the difficulty identifying the narrowest grounds and the departure from the traditional rule requiring majority agreement, the *Marks* rule has drawn widespread criticism from commentators.[4] Despite pleas to return a single majority opinion in all cases, the Supreme Court has shown no signs of retreating from the *Marks* narrowest grounds rule. Perhaps this is because alternative approaches to the *Marks* rule pose as many problems as the *Marks* rule itself.[5]

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1. 5 AM. JUR. 2D *App. Review* § 563 (2007).

2. 430 U.S. 188, 193 (1977) (internal quotation marks omitted) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

3. Panetti v. Quarterman, 551 U.S. 930, 949 (2007) (citing *Marks*, 430 U.S. at 193).

4. *See* James A. Bloom, Note, *Plurality and Precedence: Judicial Reasoning, Lower Courts, and the Meaning of* United States v. Winstar Corp., 85 WASH. U. L. REV. 1373, 1412–16 (2008) (arguing for a "Simple Reconciliation Method" and "Policy Space Method"); Ken Kimura, Note, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 CORNELL L. REV. 1593, 1595 (1992) (noting "conceptual gap[s] between the legal rule and the outcome" in splintered opinions); Tristin C. Pelham-Webb, *Powelling for Precedent: "Binding" Concurrences*, 64 N.Y.U. ANN. SURV. AM. L. 693, 696 (2009) (arguing for return to traditional majority decisions); Rafael A. Seminario, Comment, *The Uncertainty and Deliberation of the* Marks *Fractured Opinion Analysis—The U.S. Supreme Court Misses an Opportunity:* Grutter v. Bollinger, 2004 UTAH L. REV. 739, 759–62 (2004) (criticizing the Court's decision not to apply *Marks* in *Grutter v. Bollinger*); Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L. J. 419, 421–22 (1992) (arguing that the binding authority of decisions where no opinion garnered a majority should be limited to their results, and for recognition of those positions as persuasive authority); W. Jesse Weins, Note, *A Problematic Plurality Precedent: Why the Supreme Court Should Leave* Marks *over* Van Orden v. Perry, 85 NEB. L. REV. 830, 871–73 (2007) (arguing the Court should discard the *Marks* rule entirely).

5. *See* Linas E. Ledebur, Comment, *Plurality Rule: Concurring Opinions and a Divided Supreme Court*, 113 PENN. ST. L. REV. 899, 913–14 (2009) (criticizing the "hybrid approach" and "legitimacy model" proposed by previous commentators).

This Article addresses the application of the *Marks* rule and does not dispute that it has its shortcomings. The author fully concedes that a single majority opinion–or even a short per curium opinion offered by the concurring Justices in a plurality decision identifying the *Marks* holding–would alleviate the problems associated with the *Marks* rule. However, this Article is based on the assumption that the *Marks* doctrine is now an established rule and must be followed by lower courts. Rather than provide a critique of *Marks* itself or propose an alternative approach, this Article will argue for the best existing approach to interpreting the *Marks* rule.

One of the key problems with the *Marks* rule is that the various circuits are divided over how to apply it. Two different approaches have been adopted since the *Marks* decision. The first is called the implicit consensus approach. The implicit consensus approach only recognizes a *Marks* holding in cases if the narrowest concurring opinion is a logical subset of the broader concurring opinion.[6] In other words, a *Marks* holding exists only where there is implicit agreement between the various positions expressed by the concurring Justices in a plurality decision, even though some Justices would extend the reasoning further than the Justices who expressed a narrower position.[7] The second approach is the fifth-vote rule, which is also called the predictive approach.[8] This approach treats the position expressed by the Justice whose vote was necessary to secure a majority in a plurality decision as the controlling opinion under *Marks*.[9] Put differently, the Justice that provided the fifth vote in a decision describes the holding in the case because that Justice's position best describes how the Court would handle similar factual scenarios in subsequent cases involving the same issues raised in the plurality decision.[10] Thus, comparing these two approaches, the debate over *Marks* is whether or not there must be logical agreement between the various concurring opinions for a plurality decision to have precedential value. The implicit consensus approach requires logical agreement between the reasoning of the concurring opinions[11] while the fifth-vote rule does not.[12]

This Article's thesis is that the fifth-vote rule is the proper approach to the *Marks* rule. This approach is proper from both a legal and policy standpoint. First, from a legal standpoint, the Supreme Court has interpreted and applied the *Marks* rule to mean the fifth-vote rule, rather than the implicit consensus approach. From a policy standpoint, the fifth-vote rule allows the lower courts to reach the same result in a given case that the Supreme Court would

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6. King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc).

7. *See infra* notes 85–88 and accompanying text.

8. *See infra* Part III.B, notes 117–119 and accompanying text.

9. Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d 682, 694 n.7 (3d Cir. 1991), *aff'd in part and rev'd in part on other grounds*, 505 U.S. 833 (1992).

10. Thurmon, *supra* note 4, at 436.

11. *King,* 950 F. 2d at 781.

12. *Casey*, 947 F.2d at 694 n.7.

have reached had the Court decided the case the lower court is deciding. Part II of this Article provides background into the *Marks* rule, specifically the components of precedent and the historic background into the development of the *Marks* rule.[13] Part III provides an overview of the two approaches to the *Marks* rule: the implicit consensus approach and the fifth-vote approach.[14] Part IV demonstrates, by both the Court's statements about *Marks* and its application of *Marks*, that the Supreme Court has embraced the fifth-vote rule as its interpretation of the *Marks* rule.[15] Part V presents policy justifications that validate using the fifth-vote rule over the implicit consensus approach.[16] Part VI suggests application principles that lower courts may apply to limit the shortcomings of the fifth-vote rule.[17]

II. BACKGROUND: THE ROLE OF PRECEDENT AND THE DEVELOPMENT OF THE *MARKS* RULE.

The *Marks* rule breaks with conventional understanding of precedent. To place this rule in perspective, this section provides the necessary background for the discussion of the *Marks* rule. First, this section will provide an overview of precedent, namely the role of reasoning in reaching the result of a case. Second, this section provides the historical background in the development of majority opinions and plurality decisions.

A. The Role of Precedent in the American Legal System

The Supreme Court serves two important roles in the American legal system: the first is to resolve the controversies before it and the second is to guide the lower courts on how to resolve subsequent cases involving facts similar to the one the Court decided.[18] This second goal arises from the first goal; that is, that lower courts are bound by the precedent created by prior Supreme Court decisions under the principal of stare decisis.[19] Stare decisis requires that both the reasoning and the result of a higher court decision

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13. *See infra* pp. 393–98.
14. *See infra* pp. 398–413.
15. *See infra* pp. 413–428.
16. *See infra* pp. 428–437.
17. *See infra* pp. 437–441.
18. Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 757 (1980).
19. Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d 682, 691–92 (3d Cir. 1991) *aff'd in part and rev'd in part on other grounds*, 505 U.S. 833 (1992); *see also* 21 C.J.S. *Courts* § 193 (2006) (stating that stare decisis means that like facts should receive the same treatment from subsequent courts and courts should apply the reasoning adopted from the prior decision). Stare decisis comes from Latin meaning "to stand by things decided." BLACK'S LAW DICTIONARY 1537 (9th ed. 2009). Stare decisis is "[t]he doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation." *Id.* Precedent is "[a] decided case that furnishes a basis for determining later cases involving similar facts or issues." *Id.* at 1295.

should determine how lower courts resolve future cases.[20] Put differently, stare decisis means that a decision reached by the Supreme Court must be followed by lower courts in subsequent cases involving issues similar to the original Supreme Court case.[21] Thus, the principle of law drawn from a Supreme Court case will govern later cases with similar facts.[22] In other words, precedent requires that subsequent cases involving similar facts should be decided the same way as the previous case was decided.[23]

However, not all the reasoning of a higher court is binding. Stare decisis limits the precedential force of a higher court to the ratio decidendi of the opinion; that is the reasoning necessary to achieve the result of the decision.[24] Any portions of the opinion that are not ratio decidendi are dictum and not binding on lower courts.[25] Therefore, stare decisis is comprised of two essential components: the ratio decidendi—i.e., rule stare decisis—and the result reached by the court—i.e., result stare decisis.[26] Taken together, these two components of stare decisis are the ingredients of legal rules.[27] Typically, a single majority opinion produces the reasoning explaining the result of the case.[28] However, a problem arises when there is no majority opinion that explains the result. Each concurring opinion provides different reasoning to explain the result. In these situations, the challenge becomes which opinion, if any, should provide the reasoning that should become stare decisis. The Court would take nearly two centuries after its foundation to answer this question in the *Marks v. United States* decision.[29]

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20. *Casey*, 947 F.2d at 692; *see also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI . L. REV. 1175, 1177 (1989) (stating that "when the Supreme Court . . . decides a case, not merely the *outcome* of that decision, but the *mode of analysis* that it applies will thereafter be followed by the lower courts . . . .").

21. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 7 (Amy Guttman, ed. 1997) (defining stare decisis as "the principle that a decision made in one case will be followed in the next").

22. 20 AM. JUR. 2D *Courts* § 129 (2005).

23. *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 572–73, 597 (1987).

24. Novak, *supra* note 18, at 758; *see also* Thurmon, *supra* note 4, at 423.

25. Thurmon, *supra* note 4, at 423; *Ratio decidendi* is Latin for "the reason for deciding." BLACK'S LAW DICTIONARY 1376 (9th ed. 2009). The *ratio decidendi* in this article is treated as "[t]he principle or rule of law on which a court's decision is founded." *Id.* The term "dictum" used in this paper is technically *obiter dictum*, which is Latin for "something said in passing." *Id.* at 1177. Dictum is "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision of the case and therefore not precedential." *Id.*

26. Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d 682, 691–92 (3d Cir. 1991), *aff'd in part and rev'd in part on other grounds*, 505 U.S. 833 (1992); Novak, *supra* note 18, at 757 n.7.

27. *See* SCALIA, *supra* note 21, at 7 (stating, in the context of stare decisis, that "future courts [must] adhere to the principle underlying a judicial decision which causes that decision to be a legal rule").

28. *Casey*, 947 F.2d at 691–93.

29. *See* Ledebur, *supra* note 5, at 901–10 (explaining the history of Supreme Court decision-making leading up to *Marks*).

B. Establishment of the Marks Rule

For much of the Court's history, there was no need for a rule on how to interpret plurality decisions. This section will examine the evolution of the Court's practices leading to *Marks*. Originally, each Justice presented his opinion separately in each decision. This practice changed under Chief Justice John Marshall when, in an effort to strengthen the institution, the Court began to speak through a single "opinion of the Court."[30] After the opinion of the Court practice was implemented, the Court would rarely hand down any plurality decisions.[31] In the 1950s, the number of plurality decisions increased, culminating in the considerable confusion state legislatures faced in drafting legislation relating to the death penalty to satisfy the standards in *Furman v. Georgia*.[32] The Court would finally determine the precedential value of plurality decisions in the 1977 decision of *Marks v. United States*.[33]

John Marshall joined the Supreme Court as Chief Justice in 1801, at a time when the Court was viewed as a "junior partner" in government to the President and Congress, rather than a co-equal branch.[34] The Court did little business and its own members thought little of it. During its first decade, the Court only decided an average of six cases per year.[35] The first Chief Justice, John Jay, resigned to serve as Governor of New York—a position he considered more important than Chief Justice.[36] Alexander Hamilton, Patrick Henry, and William Cushing all declined President George Washington's offers to succeed Jay as Chief Justice.[37] When the position of Chief Justice reopened six years after Jay's resignation, Jay was again offered the post.[38] He declined the position, claiming the Supreme Court lacked the "public confidence and respect . . . it should possess."[39] Jay was not alone in his sentiments about the Court. Five of the first twelve members of the Court resigned during the Court's first decade, including Justice John Rutledge, who resigned to serve on the South Carolina Supreme Court.[40] Incredibly, when the seat of government moved to Washington, D.C., no provision was made for giving the Supreme Court a place to operate, so it was given a basement room in the Capitol.[41]

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30. *See infra* notes 34–50 and accompanying text.
31. *See infra* notes 51–52 and accompanying text.
32. *See infra* notes 53–61 and accompanying text.
33. *See infra* notes 62–74 and accompanying text.
34. William H. Rehnquist, *John Marshall: Remarks of October 6, 2000*, 43 WM. & MARY L. REV. 1549, 1549 (2002).
35. *Id.* at 1550.
36. *Id.*; *see also* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 283 (1996).
37. SMITH, *supra* note 36, at 283.
38. *Id.*
39. *Id.* (internal quotation marks omitted).
40. Terrence J. Lau, *Judicial Independence: A Call for Reform,* 9 NEV. L. J. 79, 89 (2008).
41. Rehnquist, *supra* note 34, at 1551.

Despite its relative insignificance, the Court John Marshall joined was a lightning rod of political controversy.[42] Congress would eventually impeach, but fail to remove, Justice Samuel Chase as part of a Republican assault on the Federalist Judiciary.[43] The new Chief Justice was concerned about the institutional strength of the Court.[44] Marshall recognized one way to strengthen the Court was to speak in one unified voice.[45] Prior to John Marshall's appointment, the Court did not speak though one single majority opinion, but rather each Justice wrote his own separate opinion to explain his view of the case.[46] The Chief Justice persuaded his colleagues that the Court should speak through one single opinion called the "Opinion of the Court."[47] By speaking with one unified voice, the Court's decisions would carry more legitimacy than the disjointed, inconsistent explanations the Justices offered through multiple opinions.[48] Marshall was immensely successful at establishing this practice, as every opinion the Court handed down for the next four years would be unanimous.[49] Thus, the "Opinion of the Court" practice was borne as a practical way to strengthen the Court as an institution, rather than a means to develop precedent.[50]

From the beginning of John Marshall's tenure as Chief Justice until the beginning of Earl Warren's term, plurality decisions were rare: from 1801 until

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42. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA 21–22 (1990) (discussing the controversy between the Federalists and the Republicans at the beginning of the Marshall Court).

43. *Id.* at 22.

44. SMITH, *supra* note 36, at 293 (noting that Marshall was hoping the "Opinion of the Court" would help identify the Supreme Court as the highest court and enhance the Court's prestige); Adam S. Hochschild, *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective*, 4 WASH. U. J.L. & POL'Y 261, 267 (2000) (Marshall was "[c]oncerned about the ambiguous precedential value of seriatim decisions . . . .").

45. SMITH, *supra* note 36, at 293.

46. *See* Hochschild, *supra* note 44, at 263–67 (discussing the weakness of the Court as an institution prior to John Marshall's appointment as Chief Justice).

47. SMITH, *supra* note 36, at 293.

48. *See* Justin F. Marceau, *Lifting the Haze of* Baze*: Lethal Injection, the Eighth Amendment, and Plurality Opinions*, 41 ARIZ. ST. L.J. 159, 171 (2009).

49. SMITH, *supra* note 36, at 293.

50. The precedential value of Supreme Court opinions was still developing at this time. *See* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court,* 52 VAND. L. REV. 647, 666–82 (1999) (discussing the development of precedent and the declaratory view of the law under the Marshall Court). In Professor Lee's view, "[t]he founding-era doctrine of precedent thus was in an uneasy state of internal conflict" between a the view that prior decisions provided stability and certainty in the law and "a declaratory understanding of the common law gave rise to an exception permitting some form of reexamination of the merits of a prior decision." *Id.* at 666. This conflict continued into the Marshall Court. *See id.* at 666–76.

1955, the Court handed down only forty-five plurality decisions.[51] However, from 1955 until 1981 the number of plurality decisions jumped to 130.[52]

The problem of precedential values of plurality opinions came to the national forefront with the 1972 death penalty decision of *Furman v. Georgia*.[53] *Furman* was a 5-4 decision that declared the death penalty, as applied in the cases litigated before the Court, violated the Eighth Amendment.[54] Several Justices were tentative on their views at the conference, so they agreed to write their own separate opinions on the constitutionality of the death penalty.[55] As a result, *Furman* was a very divergent opinion with no majority agreement. Two Justices took the position that the death penalty was always unconstitutional, but three Justices found the death penalty was merely being applied by the states in an unconstitutional manner.[56] Though the Court did not outright declare the death penalty unconstitutional, at least two members of the Court privately believed the decision would end the death penalty in the United States.[57]

Despite the Justices' misgivings about the death penalty, most states were not ready to end it. The splintered *Furman* decision became a national problem: thirty-five states passed new death penalty laws attempting to satisfy the objections to the death penalty raised by the case.[58] However, *Furman* was such a divergent opinion, only the Court could explain which position produced the holding.[59] A plurality of the Court did so in the 1976 decision *Gregg v. Georgia*.[60] A three-Justice plurality of Justice Stewart, Justice Powell, and Justice Stevens explained the holding of *Furman* in a footnote: "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—Mr. Justice Stewart and Mr. Justice White."[61] Notably, this footnote certainly is not a sweeping change of doctrine on interpreting plurality decisions—it merely explains the three Justices' rationale for finding a precedential basis for their reasoning.

However, in the wake of the *Gregg* decision and with the vast increase in plurality decisions, the Court provided its instruction on how to interpret

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51. Note, *Plurality Decisions and Judicial Decision Making*, 94 HARV. L. REV. 1127, 1127 n.1 (1981) [hereinafter *Plurality Decisions*].

52. *Id.* For further recent discussion on why plurality decisions occur, see Adam H. Morse, *Rules, Standards, and Fractured Courts*, 35 OKLA. CITY U. L. REV. 559 (2010); James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 GEO. L.J. 515 (2011).

53. Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).

54. *Id.* at 239–40.

55. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 211 (1979).

56. *See infra* notes 178–202 and accompanying text.

57. WOODWARD & ARMSTRONG, *supra* note 55, at 209, 432.

58. *Id.* at 430.

59. *Id.* at 431 (discussing how the Court agreed that the nine opinions in *Furman* created confusion).

60. 428 U.S. 153 (1976).

61. *Id.* at 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

splintered opinions in the 1977 decision *Marks v. United States*.[62] In *Marks*, the Court resolved a circuit split on the standards of obscenity.[63] The specific issue the Court addressed in *Marks* was whether the 1966 obscenity plurality decision of *Memoirs v. Massachusetts*[64] was a binding precedent that superseded a 1957 majority opinion, *Roth v. United States*.[65] In *Memoirs*, six Justices issued three opinions in favor of reversing the Massachusetts Supreme Court determination that the material in the case was obscene.[66] A three-Justice plurality reasoned that obscene materials were constitutionally protected unless the materials "were 'utterly without redeeming social value.'"[67] Justices Black and Douglas reasoned that the First Amendment absolutely prohibited any governmental suppression of obscenity.[68] Finally, Justice Stewart added the final vote for reversal on grounds that only "hardcore pornography" could be suppressed.[69] The *Marks* Court determined that the plurality opinion reflected the holding of the *Memoirs* Court.[70] In reaching its determination, the Court turned its explanation of the *Furman* holding from *Gregg* into an instruction to lower courts on how to interpret its splintered opinions. The Court stated that the controlling opinion of the Court in a plurality decision "may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds."[71] Without elaboration, the Court concluded that Justice Black's and Justice Douglas's positions were broader than the plurality's position.[72] Ignoring Justice Stewart's opinion entirely, the Court simply stated that the plurality opinion provided the governing standard.[73] The plurality position in *Memoirs* was, therefore, the law and controlled over *Roth*.[74]

III. *MARKS* IN APPLICATION

Notably, neither *Gregg* nor *Marks* explained how the Court determined which opinion was the "narrowest grounds" opinion. Experience has shown that identifying the *Marks* holding is easier said than done: Even the Supreme Court itself recognizes that determining the narrowest grounds may baffle

62. 430 U.S. 188 (1977).

63. *Id.* at 189.

64. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413 (1966).

65. *Marks*, 430 U.S. at 192–93.

66. *Id.* at 193 (discussing *Memoirs*, 383 U.S. at 418).

67. *Id.* at 193–94.

68. *Id.* at 193 (citing *Memoirs*, 383 U.S. at 421, 424).

69. *Id.* at 193.

70. *Id.* at 193–94.

71. *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.) (internal quotation marks omitted)).

72. *Id.*

73. *Id.* at 194.

74. *Id.*

lower courts in some cases.[75] Since *Marks*, the various circuits have adopted two approaches to the application of the *Marks* rule. The first is called the "implicit consensus approach" or "common denominator approach."[76] This approach requires an agreement between the reasoning and the result of the concurring opinions in any splintered decision.[77] Specifically, this approach requires that the narrower concurring opinion must be a logical subset of the broader concurring opinion for there to be a *Marks* holding.[78]

The second approach, known as the "predictive approach," or what I refer to as the fifth-vote rule, treats the *Marks* holding as the position that articulates the narrowest grounds necessary to secure a majority.[79] That is, the Justice who provides the fifth concurring vote provides the controlling position under *Marks*.[80] This approach merely requires majority agreement on a standard that could produce results in subsequent cases on which a majority of the Court would agree, even if a majority of the Justices would reach the result relying on different reasoning.[81]

This section will first examine the implicit consensus approach including the origins, applications, and drawbacks of the approach.[82] Second, this section will describe the fifth-vote rule along with the origins, applications, and drawbacks of the approach.[83] Finally, this section will compare the two approaches and show that where an implicit consensus controlling opinion exists, the same opinion will control under the fifth-vote rule.[84]

A. Implicit Consensus

The first approach to the narrowest grounds doctrine is the implicit consensus approach, which requires agreement between both the result and the reasoning of the concurring Justices.[85] Specifically, a *Marks* holding can only be found when "[the] narrower opinion fit[s] entirely within a broader circle drawn by the other[] [broader opinions]."[86] Put another way, this approach requires the various Justices' positions to fit within each other like

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75. Nichols v. United States, 511 U.S. 738, 745 (1994).

76. *See* Melissa M. Berry et al., *Much Ado about Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-Percolation after* Rapanos, 15 VA. J. SOC. POL'Y & L. 299, 327 (2008) (stating this approach "ascribes agreement to the Justices on the reasoning for the result.").

77. *Id.*

78. King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc).

79. Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d 682, 694 n.7 (3d Cir. 1991), *aff'd in part and rev'd in part on other grounds*, 505 U.S. 833 (1992).

80. *Id.*

81. *Id.* at 694.

82. *See infra* notes 85-116 and accompanying text.

83. *See infra* notes 117-58 and accompanying text.

84. *See infra* notes 159-64 and accompanying text.

85. Berry et al., *supra* note 76, at 327 (stating this approach "ascribes agreement to the Justices on the reasoning for the result").

86. United States v. Robison, 521 F.3d 1319, 1323 (11th Cir. 2008) (Wilson, C.J., dissenting from the denial of rehearing en banc) (internal quotations omitted).

"Russian dolls."[87] The narrowest approach must be a "logical subset" of the broadest opinion, representing a "common denominator" that a majority of the Justices would accept.[88] Thus, under this approach, a majority of the Court will agree on a rationale producing the result, even if some Justices would take the rationale producing the result further than the narrower concurring Justices would accept.

1. King v. Palmer—The Approach is Defined

The implicit consensus approach was initially defined by the D.C. Circuit in the 1989 en banc decision of *King v. Palmer*.[89] In *King*, the court declined to recognize a *Marks* holding in the statutory attorneys' fees damages case, *Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air (Delaware Valley II)*, because the reasoning in the opinions between the concurring Justices were not subsets of each other.[90] Specifically, Justice O'Connor, the fifth concurring vote, agreed with the four dissenting Justices in part and the four-Justice plurality in part in reaching her conclusion that the attorney in that case was not entitled to an enhanced contingency fee under the statute at issue.[91] In reaching its conclusion, the court explained "*Marks* is workable—one opinion can be meaningfully regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions."[92] The narrowest opinion, thus, represents "a common denominator" in the concurring Justice's reasoning.[93] In short, the *Marks* holding is found in the position that is "implicitly" approved by a majority of the concurring Justices.[94] Looking to *Delaware Valley II*, the Court concluded that there was no implicit consensus arising from the case because the plurality, Justice O'Connor, and the dissenters each offered three separate approaches to contingency fees, rather than one approach upon which a majority implicitly agreed.[95]

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87. Marceau, *supra* note 48, at 171.

88. King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc); *see also* United States v. Alcan Aluminum Corp., 315 F.3d 179, 189 (2d Cir. 2003); A.T. Massey Coal Co., v. Massanari, 305 F.3d 226, 236 (4th Cir. 2002). *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the definitive case for the fifth-vote rule, also speaks of *Marks* as searching for a common denominator. 947 F.2d 682, 694 (3d Cir. 1991), *aff'd in part and rev'd in part on other grounds*, 505 U.S. 833 (1992). However, *Casey* treats the common denominator as a "*result[ ]* with which the majority of the Justices from the controlling case would agree." *Id.* (emphasis added). Whereas *King*, treats the common denominator as *reasoning* a majority of the Justices would agree with. 950 F.2d at 781.

89. Marceau, *supra* note 48, at 171.

90. *King*, 950 F.2d at 782.

91. *Id.* at 776–77.

92. *Id.* at 781.

93. *Id.*

94. *Id.*

95. *Id.* at 782.

While the court did not find an implicit consensus in *Delaware Valley II*, the *King* court offered insight into the implicit consensus approach by explaining the *Marks* decision in light of the implicit consensus approach.[96] In explaining *Marks*, the *King* court concluded that the plurality opinion controlled the *Memoirs* decision, because Justice Black and Justice Douglas, by the logic of their position that the government could not suppress obscene material, accepted the plurality position that anything with socially redeeming value is not obscene.[97] Thus, a majority of the *Memoirs* Court implicitly approved the plurality's standard.[98]

2. Implicit Consensus Approach in Application

For an implicit consensus to exist, the ratio decidendi of the narrowest opinion must fit within the ratio decidendi of a broader opinion.[99] Several points necessarily follow from this requirement. First, under the implicit consensus approach, a narrowest grounds holding may be found only if, by a logical consequence of their position, the broader concurring Justices agree with the standard adopted by the narrower concurring Justices.[100] When this consensus does not exist, then there is no *Marks* holding.[101] This framework means that lower courts are bound by the common thread of reasoning accepted by a majority of the Justices, but are not bound by reasoning embraced by a minority of the Court,[102] so the portion of the broader concurring Justices' reasoning not accepted by the narrower positions has no precedential value. Second, where an implicit consensus exists, the Justices from the broader opinion must "always agree with the result reached" when the test created by the narrower Justice's position is satisfied.[103]

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96. *King*, 950 F.2d at 781.

97. *Id.*

98. *Id.*

99. *Id.* (discussing that the various opinions must be a logical subset of broader opinions and the narrower position is a common denominator on which all of the Justices agree); Berry et al., *supra* note 76, at 327 (stating this approach "ascribes agreement to the Justices on the reasoning for the result.").

100. *King,* 950 F.2d at 781. In explaining the narrowest ground approach in the context of *Marks* itself, the court stated, "Because Justices Black and Douglas had to agree, as a logical consequence of their own position, with the plurality's view that anything with redeeming social value is not obscene, the plurality of three in effect spoke for five Justices: *Marks*' 'narrowest grounds' approach yielded a logical result." *Id.* The Court applied similar analysis to *Gregg v. Georgia*; however, this Article will later dispute the implicit consensus finding in *Gregg*. *See infra* Section IV.B.I.

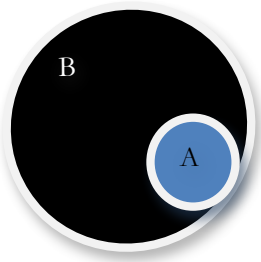
101. *King*, 950 F.2d at 784 (stating that where there is no agreement on "all the analytically necessary portions" of the opinion, then "*Marks* will not yield a majority holding").

102. Marceau, *supra* note 48, at 172.

103. United States v. Robison, 521 F.3d 1319, 1323 (11th Cir. 2008) (Wilson, C.J., dissenting from the denial of rehearing en banc).

Implicit consensus approach illustrated

An implicit consensus approach exists where the reasoning of the narrower Justice's positions is a logical subset of broader opinions. An implicit consensus exists in a plurality opinion if the narrower Justices' reasoning (shown here in circle *A*) fits within the reasoning of the broader Justices' reasoning (circle *B*). *A* represents a common denominator with which a majority of the Justices agree.



3. Critiques on the Implicit Consensus Approach

The implicit consensus approach has the notable advantage of attempting to preserve the tradition of majority agreement on both the reasoning and the result of a decision.[104] The approach works best in situations where one set of Justices reaches a result based on rationale A, while another set of Justices reaches the result based on rationale A and B; in these cases there is agreement on rationale A, so rationale A controls.[105] However, when this sort of scenario does not arise, the approach can be practically unworkable. In reality, courts must often stretch the meaning of the implicit consensus approach to find a *Marks* holding.

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104. Marceau, *supra* note 48, at 172 (noting the common denominator approach preserves the "sine qua non of the American system of precedent, that only a majority of the Court can define precedent").

105. *See* Novak, *supra* note 18, at 763. In previous literature, this situation has been called a "false plurality" decision. Hochschild, *supra* note 44, at 272; *Plurality Decisions*, *supra* note 51, at 1130.

The first problem with the implicit consensus approach is that it attempts to reduce lengthy and complicated Supreme Court opinions into geometric figures. In reality, it is difficult to find many cases where implicit agreement truly exists. The approach is questionable because if there were truly an agreement between the Justices, one must wonder why the Justices did not join a single majority opinion (perhaps with some Justices expressing their preferences for broader or narrower reasoning in a separate concurrence). Courts applying this approach often end up finding a "constructive consensus" rather than an "implicit consensus."[106] That is, the Justices each write separately and present a different reason for the outcome. Because the Justices write separately, there must be some points of disagreement between them. However, the *King* court specifically stated that there can be no *Marks* holding where there are distinct approaches to an issue.[107] In actuality, each separate opinion presents a distinct position, so it is difficult to find any implicit consensuses. For instance, in *Marks*, one commentator disputes the existence of an implicit consensus because Justice Black and Justice Douglas implicitly *rejected* the plurality approach by applying an absolute prohibition on government regulation of obscenity. Thus, the two Justices would never accept the plurality standard under any circumstances.[108] In reality, the courts applying the implicit consensus approach may not end up finding agreement between the reasoning, but rather look to determine if the various opinions produce results with which a majority of the Justices would agree.[109]

Further, an inherent problem exists with finding subsets between opinions because Justices take various approaches to issues in them. Practically speaking, it is difficult to try to fit opinions within each other when one set of Justices approaches an issue from one angle while another set of Justices takes a different angle. For instance, the *King* court had little trouble justifying that Justice Stewart and Justice White's opinions were logical subsets of Justice Douglas's opinion on the constitutionality of the death penalty in *Furman*.[110] The *King* court indicated that Justice Stewart's and Justice White's position was that the death penalty was unconstitutional because it was arbitrarily and capriciously administered.[111] It concluded that this position was a narrower subset of Justice Douglas's position which held that judges and juries could not have any discretion in administering the death penalty.[112] As such, Justice Douglas would have to agree that the death penalty could not be arbitrarily and capriciously administered.[113] This reading is a stretch of the *Furman*

106. Thurmon, *supra* note 4, at 429–30.

107. King v. Palmer, 950 F.2d 771, 782 (D.C. Cir. 1991) (en banc).

108. Thurmon, *supra* note 4, at 432 (noting Justice Black and Justice Douglas would never accept the plurality standard from *Memoirs*).

109. *See, e.g.*, United States v. Williams, 435 F.3d 1148, 1157–1160 (9th Cir. 2006) (claiming to be applying *King's* common denominator in reasoning test, but in actuality creating a hybrid test, satisfying requirements a majority of the Court would accept).

110. *King*, 950 F.2d at 781.

111. *Id.*

112. *Id.*

113. *Id.*

opinion. Justice Stewart and Justice White approached the death penalty out of concern for the infrequency with which the death penalty was being administered,[114] while Justice Douglas approached the question out of concern for discrimination against the poor and minorities.[115] As Section V of this Article will show, the differences in approaches in *Furman* means there is no implicit consensus. These are distinct approaches that do not overlap in reasoning at all. For example, one issue a comparison of the three Justices' opinions reveals is that there is no agreement on whether a mandatory death sentence can be unconstitutionally infrequently administered because that issue was not addressed by Justice Douglas.[116] While claiming to find a logical agreement, the only way to find an implicit consensus in many cases is to disregard a portion of the ratio decidendi from each opinion to reach a *Marks* holding.

B. The Fifth-Vote Rule

The second approach to *Marks* is the fifth-vote rule, also known as the predictive approach.[117] This rule simply requires that the fifth concurring vote in a plurality decision provide the *Marks* holding,[118] regardless of whether there is agreement in the rationale between the concurring opinions. In other words, a *Marks* holding is found in the narrowest grounds needed to secure a majority in a case.[119]

The reason for identifying the position stated by the Justice providing the fifth vote in a plurality decision as controlling precedent is because this approach seeks to find a position that best articulates an outcome that five Justices would support, even if all five Justices do not agree on the rationale. This approach looks to the fifth Justice's position, because this approach seeks to find a single legal standard that accurately predicts how the Court would resolve subsequent cases involving factual scenarios similar to the one the Court addressed in the plurality decision.[120] That is, the fifth Justice provides the controlling position because his or her position, if satisfied, would produce results that would draw the support of the four broader concurring Justices in most cases. However, if the fifth Justice's position is not satisfied in a

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114. Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring); *Id.* at 313 (White, J., concurring).

115. *Id.* at 245–49 (Douglas, J., concurring).

116. *Id.* at 257.

117. I draw the name "fifth-vote rule" from the fifth-vote concurrence rule discussed by Tristin C. Pelham-Webb relating to separate concurrences offered by a Justice who joined a five vote majority opinion which narrows the holding. Pelham-Webb, *supra* note 4, at 698–99, 713. Pelham-Webb concludes that this rule is the same as the narrowest grounds rule. *Id.* at 696.

118. Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d, 682, 694 n.7 (3d Cir. 1991), *aff'd in part and rev'd in part on other grounds*, 505 U.S. 833 (1992).

119. *Id.*

120. Thurmon, *supra* note 4, at 436.

subsequent case, the outcome from the plurality opinion would no longer command majority support. This approach therefore asks if there is a single test articulated in the decision, which, if satisfied, would produce results that a majority of the Court would accept.[121]

Put another way, this approach recognizes that, while each concurring Justice articulates a different position to reach the result in a case, by logical consequence of their positions, the four broader concurring Justices will generally reach the same result that the fifth concurring Justice's position would produce in subsequent cases, if the fifth Justice's standard is satisfied.[122] Therefore, it provides majority support for the outcome in the subsequent case. Thus, this approach does not require agreement between the ratio decidendi of the various opinions; it merely looks at potential results in subsequent cases.[123]

Practically speaking, instead of finding agreement on the ratio decidendi between the concurring opinions, the lower court reviewing the decision should identify the fifth concurring vote and rely on that position as the controlling position. The fifth Justice's position best describes how the Court would address the case the lower court is addressing, and therefore should govern the outcome of the case the lower court is deciding. In sum, at least to the extent the fifth Justice's position provides a result a majority of the Court would accept, the position articulated by the fifth concurring Justice provides controlling law.[124]

Applying this approach to the *Marks* decision, the plurality opinion from *Memoirs* is controlling, because five Justices would all agree material is not obscene if it has socially redeeming value. That is, a three-Justice plurality would find material that has socially redeeming value as constitutionally protected.[125] Justice Black and Justice Douglas, despite refusing to accept the plurality's socially redeeming standard, would always find material that has socially redeeming value constitutionally protected, because they felt the state could never regulate obscenity.[126] The three-Justice plurality therefore expresses a test covering a range of potential outcomes (that is, cases involving obscene materials without redeeming social value) that a majority of the Court would accept, because Justice Black and Justice Douglas would reach the same result in subsequent cases when the plurality standard is satisfied because

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121. *See Casey*, 947 F.2d at 693.

122. *See* Triplett Grill, Inc., v. Akron, 40 F.3d 129, 133–34 (6th Cir. 1994) (citing *Casey*, 947 F.2d at 693) (stating that the standard articulated under a *Marks* holding should produce results a majority of the Court would accept); *see also* Otto v. Pa. State Educ. Ass'n-NEA, 330 F.3d 125, 138 (3d Cir. 2003).

123. *See* Thurmon, *supra* note 4, at 435–36 (explaining that the precedent preserved is the result, rather than the reasoning).

124. *See Casey*, 947 F.2d at 693. *Casey* does not resolve the question on how lower courts should address decisions where the fifth Justice articulates possible results a majority of the Court would not support. *Id.* This Article proposes solutions to resolving problems where there is no majority agreement for the outcome. *See infra* Part IV.

125. *See* discussion *supra* notes 63–73 and accompanying text.

126. *See* discussion *supra* notes 63–73 and accompanying text.

Justice Black and Justice Douglas each believed the state could never prohibit obscenity.[127] That is, Justice Black and Justice Douglas agree with the results the socially redeeming value test would produce when satisfied.[128] In sum, the plurality decision produces a *Marks* holding because a majority of the Court would agree with the results that the "no socially redeeming value" standard would produce when satisfied, even if a majority did not agree on a single rationale.

Illustration of Range of Factual Outcomes

The fifth-vote rule seeks to duplicate the result of the plurality decision based on potential results a majority of the Court would accept in subsequent cases. Assume six Justices concur in a case: a four-Justice plurality on the broadest grounds, a fifth Justice on narrower grounds than the plurality, and a sixth Justice on narrower grounds than either the plurality or the fifth Justice. The below graph demonstrates the range of possible results that would be satisfied by the reasoning offered in each opinion.

Sixth Justice: A_____B

Fifth Justice: C_____D

Four Justice Plurality: E_____F

← Range of outcomes/results →

Range A to B reflects a range of outcomes which all six Justices would reach by logic of their opinions. Range C to D reflects a range of outcomes five Justices would reach by logic of their opinions. Range E to F reflects a range of outcomes four Justices would reach by logic of their opinions. Under the fifth-vote rule, the fifth Justice's position controls because that Justice articulates a standard that would produce results—range C to D—on which a majority of the Court would agree. If the fifth Justice's standard is not satisfied (i.e., falls outside of range C to D), the outcome no longer draws majority support, and the outcome no longer commands majority support.

Thus, the plurality decision controls under *Memoirs* because the range of outcomes the plurality described covered all cases where potentially obscene material has socially redeeming value. Justice Black and Justice Douglas produced opinions that would cover all potential obscenity cases, so their position would overlap with the socially redeeming value range the plurality supported. Because five Justices would agree that the Constitution protects

127. *See* discussion *supra* notes 63–73 and accompanying text.
128. *See* discussion *supra* notes 63–73 and accompanying text.

material that has socially redeeming value, the plurality position controls under *Marks*. Justice Stewart provided a sixth, unnecessary vote, so his position is unnecessary for a *Marks* holding.

***Memoirs* Plotted:**

Justice Stewart (sixth Justice-obscenity = hard core pornography)

A_____B

Three Justice plurality (obscenity=no socially redeeming value)

C_____D

Justice Black and Justice Douglas (obscenity is protected by the First Amendment)

F_____E

Range of Results/Outcomes

Here, the results produced by the socially redeeming value test (when satisfied) fall fully within the results Justice Black and Douglas would reach when their test is satisfied, so this position produces majority support.

4. Planned Parenthood v. Casey—The Approach is Defined

The fifth-vote rule was first explained in full by the Third Circuit in *Planned Parenthood v. Casey*.[129] In *Casey*, the Third Circuit considered whether various Supreme Court abortion plurality decisions following *Roe v. Wade* had controlling authority over *Roe*.[130] In determining that the splintered decisions controlled instead of *Roe*, the *Casey* court determined that *Marks* stood for the "very important proposition" that a legal standard ceases to be the law when a majority of the Court declines to apply the rule, even if there is no agreement as to the proper legal standard.[131] *Marks* itself recognized that the splintered opinion of *Memoirs v. Massachusetts* superseded prior majority decisions of the Court.[132] The reason behind recognizing the narrowest grounds concurring opinion as controlling authority was that the *Marks* Court sought to "promote predictability in the law by ensuring lower court adherence to Supreme Court precedent."[133] Thus, *Marks* sought to find a single legal standard that would

129. Marceau, *supra* note 48, at 173.

130. Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d 682, 687–91 (3d Cir. 1991), *aff'd in part and rev'd in part on other grounds*, 505 U.S. 833 (1992).

131. *Casey*, 947 F.2d at 693.

132. *Id.*

133. *Id.*

produce results upon "which a majority of the Justices in the case articulating the standard would [accept.]"[134] Therefore, if one of the Justices states a standard that, in its application, produces results a majority of the court would agree, that standard becomes binding law.[135] The narrowest grounds will therefore be found in the position that is necessary to secure a majority.[136] *Marks*, thus, may produce binding law over lower courts, even if the controlling position was not embraced by the vast majority of the Court.[137]

Looking to *Webster v. Reproductive Health Services*, the court found Justice O'Connor's position, that a state could regulate abortion as long as it did not impose an undue burden on women seeking an abortion, controlled under *Marks*.[138] Her standard created a test that, if satisfied, would produce the same result as the standards described by the four concurring Justices.[139] That is, the three-Justice plurality, supporting a rational basis test for abortion, would always uphold a statute that did not place an undue burden on women.[140] Justice Scalia's position would certainly uphold any statute that does not create an undue burden on women, because he argued that *Roe* should be overturned.[141] In contrast, Justice O'Connor, by her narrower test, would not accept the substantial scaling back of *Roe* that the four other concurring Justices advocated.[142] In short, Justice O'Connor's position articulates the factually narrowest range of outcomes in context of the decision because it is the least sweeping change to existing precedent and would produce an outcome that the majority would support in cases where a state satisfies her standard; as such, her standard controls under *Marks*.[143]

5. Fifth-Vote Rule in Application

The fifth-vote rule is best applied to find the *Marks* holding by placing the various positions the Justices articulated, ranging across a spectrum from the broadest concurring position to the narrowest concurring position, in context of the facts of the case.[144] The position embraced by the fifth Justice is the

134. *Casey*, 947 F.2d at 693.
135. *Id.*
136. *Id.* at 694 n.7.
137. *Id.*
138. *Id.* at 695.
139. *Id.*
140. *Casey*, 947 F.2d at 695. A rational basis test is very deferential to state legislation. Under this test, the Constitution is violated only if the legislation is completely irrelevant to a state objective. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPALS AND POLICIES 677 (3d ed. 2006). Under this test, "[s]tate legislatures are presumed to have acted within their constitutional power despite the fact that . . . their laws may result in some inequality." *Id.*
141. *Casey*, 947 F.2d. at 695.
142. *Id.*
143. *Id.*
144. *See* Maxwell L. Stearns, *The Case for Including* Marks v. United States *in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321, 328 (2000) (discussing plotting of the Court's

position that produces the *Marks* holding.[145] Under this, the *Marks* holding may be illustrated by the following hypothetical.

Broadest Concurrence		Narrow Concurrence	Dissent
A----------B----------C----------D--			
Position A (concur)	Position B (concur)	*Position C (concur)*	Position D (dissent)
1 Justice support	2 Justice support	*2 Justice Support*	4 Justice Support

In this spectrum ranking the Justices' various positions, one Justice supported a sweeping position labeled as A. Two Justices support position B, which is narrower in terms of factual outcomes than position A. Two Justices support position C which is narrower than A or B. Because position C is the narrowest position to produce the result in the case, position C becomes controlling opinion under the *Marks* rule. Notably, the dissents are plotted in this spectrum. While the dissents cannot control the outcome of the case, some courts have found the dissents useful in identifying which opinion provided the swing vote between the various concurring opinions.[146]

Applying this approach to *Webster*, Justice O'Connor's position is plotted as the fifth vote, and therefore controlling.

***Webster v. Reproductive Health Services*[147] plotted:**

Broadest Concurrence		Narrow Concurrence		Dissent
A----------B----------C----------D----------E				
Concur	**Concur**	**Concur**	**Dissent**	**Dissent**
Scalia	Rehnquist	*O'Connor*	Stevens	Blackmun
	White			Brennan
	Kennedy			Marshall

6. Justifications for the Fifth-Vote Rule

There are two justifications offered for the use of the fifth-vote rule. The first is that *Marks* means that lower courts should predict how the Court would handle the case it is addressing by looking at the various opinions offered and determining which opinion best describes how the Court would handle the case before it. The second justification is found under social choice theory, which states that the broader Justices would join the fifth Justice's position if they were forced to join a single majority opinion.

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positions in reaching a *Marks* holding); *see also Casey*, 947 F.2d. at 694 n.7 (discussing that the votes not necessary to reach a majority need not be considered in *Marks* analysis).

145. *See Casey*, 947 F.2d. at 694 n.7.

146. *See, e.g.*, United States v. Gerke Excavating, Inc., 464 F.3d 723, 724–25 (7th Cir. 2006) (counting votes from the dissent to determine which of the concurring opinions should control under *Marks*).

147. 492 U.S. 490, 496 (1989).

The first justification for the fifth-vote rule is that the fifth-vote rule predicts how the Court would handle subsequent cases. In previous literature, the fifth-vote rule approach is called "the predictive approach,"[148] as the fifth Justice's position identifies the grounds in the decision that best predict what the Court would do in subsequent cases with similar factual scenarios.[149] That is, if the standard articulated by the fifth Justice to reach the outcome is satisfied in a subsequent factual scenario, the result the Court would reach in most cases would remain the same as the plurality decision, since the fifth Justice and four broader Justices would reach the same conclusion as the prior case.[150] However, if the fifth Justice's standard is not satisfied, that Justice would change his or her position and reach the opposite result he or she reached in the plurality decision, thus swinging the outcome to the opposite result reached in the prior case. While the fifth vote in a plurality decision may not accurately describe how the Court would have handled the lower court's case, the fifth vote provides a gauge of the outcome for the lower court to follow in subsequent cases. Thus, the lower court may duplicate the result the Supreme Court would reach without the Court having to grant certiorari.

The fifth-vote rule has also been justified in social choice theory, that if the Justices were forced to produce a single majority opinion, the four broader concurring Justices would have joined the position articulated by the fifth concurring Justice.[151] In other words, had the Justices formed a coalition around a single majority opinion, the fifth Justice's position would have been the controlling opinion. That is, while the Justices may not agree on the reasoning to reach the result, all five Justices agree on the potential results articulated by the fifth Justice's position, even if the fifth Justice's position is less sweeping than the broader Justices would prefer.[152] However, because the Justices were able to write separately and preferred a different rationale, they chose to articulate their position separately. Of the positions articulated by the concurring Justices, the broader Justices would approve of the narrower Justice's position if they had to join a single opinion, because the narrower Justice's position supports a range of factual outcomes they would accept in

148. Marceau, *supra* note 48, at 173.

149. Thurmon, *supra* note 4, at 436.

150. *Casey*, 947 F.2d at 693; *see also* Otto v. Pa. State Educ. Ass'n-NEA, 330 F.3d. 125, 138 (3d Cir. 2003).

151. *See* Maxwell L. Stearns, *Should Justices Ever Switch Votes?:* Miller v. Albright *in Social Choice Perspective*, 7 SUP. CT. ECON. REV. 87, 116–17 (1999) (arguing that the *Marks* rule is "best understood as an application of the Condorcet [social choice] criterion to Supreme Court decision making" and that ordinal rankings of the Justices' positions are the best source of producing a *Marks* holding). For additional discussion on social choice in the context of plurality decisions, see Joseph M. Cacace, Note, *Plurality Decisions in the Supreme Court of the United States: A Reexamination of the* Marks *Doctrine after* Rapanos v. United States, 41 SUFFOLK U. L. REV. 97, 129–30 (2007). The discussion in this paragraph draws generally from these articles as well as Stearns, *supra* note 144.

152. *Casey*, 947 F.2d at 693.

subsequent cases. In contrast, the narrower Justice does not want to extend the holding as far beyond the facts of the case as the broader Justices prefer, and may even prefer to dissent than join the broader Justice's positions. Thus, the fifth vote controls, because that is the favored choice of the fifth Justice, but the dominant second choice of the four broader concurring Justices, so the position draws majority support.[153] The Seventh Circuit expressly applied this approach to *Marks* to interpret *Rapanos v. United States.*[154]

In sum, the fifth-vote rule's primary justification is that the fifth vote best describes what the outcome should be in subsequent cases addressing the same legal issues raised involving similar factual scenarios.[155]

7. Critiques of the Fifth-Vote Rule

The primary criticism of the fifth-vote rule is that this approach allows the position of the single Justice who provided the fifth vote to become the law of the land, even if the other eight Justices rejected that approach.[156] To illustrate, assume the Court hands down a 5-4 decision, with a broad four-Justice plurality opinion, a four-Justice dissent, and a single narrow concurrence. Assume also that all three opinions expressly reject the reasoning offered by the other two opinions. Under the fifth-vote rule, the single Justice concurrence is the holding of the case. Thus, the ratio decidendi of this single Justice's position becomes controlling law with the same

153. Stearns, *supra* note 144, at 328–29.

154. *See* United States v. Gerke Excavating, Inc., 464 F.3d 723, 724 (7th Cir. 2006) (identifying the *Marks* holding as "the narrowest ground to which a majority of the Justices would have assented if forced to choose").

155. *Casey*, 947 F.2d at 693 ("Where a Justice or Justices concurring in the judgment in such a case articulates a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree, that standard is the law of the land."); *see also* United States v. Williams, 435 F.3d 1148, 1157 (9th Cir. 2006); Britton v. South Bend Cmty. Sch. Corp., 819 F.2d 766, 769–70 (7th Cir. 1987) (en banc) (analyzing how five Justices would handle a racial preference case). In practice, ranking the opinions across this spectrum does not involve a clear-cut science like the implicit consensus approach. However, all approaches point to the factually narrowest opinion in the context of the outcome. Where there is at least some agreement on the reasoning, a court may easily find the narrowest grounds. Novak, *supra* note 18, at 763–64 (discussing that narrowest grounds is easiest when the plurality relies on rational A while another set of Justices relies on rational A and B, i.e., an implicit consensus). Where there is no agreement, there is no "magical formula for determining which of the rationales" is narrower. *Id.* at 763. Thus, the term narrowest may have various meanings. *Id.* The narrowest grounds will usually be the position that is most clearly tailored to the factual scenario before the Court, and thus governing the fewest cases, in contrast to a more absolute position. *Id.*; *see also* United States v. Martino, 664 F.2d 860, 873 (2d Cir. 1981) (looking for the opinion that would control the fewest cases in the future). In other contexts, the narrowest grounds is the position that best preserves the status quo. Novak, *supra* note 18, at 763–64; *see also* United States v. Robison, 505 F.3d 1208, 1221 (11th Cir. 2007) (identifying the controlling opinion as the least restrictive under Clean Water Act jurisdiction); Rappa v. New Castle Cnty., 18 F.3d 1043, 1060 n.23 (3d Cir. 1994) (the opinion that would strike down the fewest laws controls). I suggest here that this analysis may be useful if it drives toward identifying the controlling opinion in future cases.

156. *Casey*, 947 F.2d at 694.

precedential weight as a majority opinion, even though the position was rejected by eight other Justices.[157] Because the various Justices in this scenario may offer positions with no overlapping agreement, it is possible that the fifth Justice may articulate a position that leads to results, not to mention reasoning, in future cases upon which no other Justices in the opinion would agree.[158] Thus, in application, the rule may not satisfy its primary justification which is producing results a majority of the Court would accept.

Illustration of Fifth-Vote Rule Shortcoming:

Assume a four-Justice plurality embraces a position that leads to a range of potential outcomes D to E. The fifth Justice offers a narrower rational that leads to potential range A to C.

Fifth Justice: A____B_____C

Plurality D_____E

← Range of outcomes →

Here there is a set of outcomes—range A to B—that may result from the fifth Justice's rational that would not be reached by the logic of the plurality position.

In sum, the fifth-vote rule identifies the fifth vote that produced the result in a plurality opinion. This position produces the *Marks* holding as it best gauges how the Court would have addressed the factual scenario presented before a lower court in subsequent cases. However, this position gives majority status to the position that may not have implicit majority assent.

C. Comparisons Between the Implicit Consensus Approach and Fifth-Vote Rule

The key difference between the fifth-vote rule and the implicit consensus approach is that the fifth-vote rule does not require "overlap on [the] essential points in order to provide a holding that binds lower courts."[159] The implicit consensus approach will require agreement with the reasoning and the result, while the fifth-vote rule focuses on the result produced by the various Justice's

157. *Casey*, 947 F.2d at 694.

158. United States v. Gerke Excavating, Inc., 464 F.3d 723, 725 (7th Cir. 2006) (noting Justice Kennedy's position controlled most outcomes, but in some situations he would be outvoted 8-1).

159. Grutter v. Bollinger, 288 F.3d 732, 740 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003) (applying the predictive model).

reasoning. The fifth-vote rule will provide a *Marks* holding in cases where the implicit consensus approach would not recognize a *Marks* holding.[160] Thus, the fifth-vote rule allows *Marks* holdings in more cases than the implicit consensus approach.

Notably, the fifth-vote rule ultimately encompasses the implicit consensus approach in practice. That is, if there is a logical subset controlling opinion under the implicit consensus approach, that opinion will also be the controlling opinion under the fifth-vote rule. Specifically, the implicit consensus holding must "embody a position implicitly approved by at least five Justices who support the judgment."[161] The Justices from the broader opinion therefore must always agree with the result reached when the test created by the narrower Justice's position is satisfied.[162] This fits within the definition of the fifth-vote rule. The fifth-vote rule also seeks to provide a single standard that would produce results upon which a majority of the court would agree.[163] Thus, when an implicit consensus exists between five Justices, the narrower opinion provides the fifth vote—this position is also the controlling position under the fifth-vote rule.[164] Both approaches will ultimately point to a single position that would produce results in subsequent cases a majority of the Court would accept. Therefore, the narrowest grounds implicit consensus position is also the fifth vote.

IV. THE SUPREME COURT AND *MARKS* IN APPLICATION—THE COURT EMBRACES THE FIFTH-VOTE RULE

While the Supreme Court has yet to offer a detailed explanation of the *Marks* rule, such as the *King* court and the *Casey* court offered, the Supreme Court's explanations of the *Marks* rule and the application of *Marks* show that the Court has embraced the fifth-vote rule for identifying *Marks* holdings. The Court has identified the narrowest-grounds holding six times in controlling opinions: *Gregg v. Georgia,*[165] *Marks v. United States*,[166] *City of*

160. King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc) (requiring the narrower opinion to be a subset of the broader opinion).

161. *Id.*

162. United States v. Robison, 521 F.3d 1319, 1323 (11th Cir. 2008) (Wilson, C.J., dissenting from the denial of rehearing en banc).

163. Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d 682, 693 (3d Cir. 1991), *aff'd in part and rev'd on other grounds*, 505 U.S. 833 (1992).

164. There is one hypothetical exception to the comparison. This would occur when there are at least three concurrences producing six or more votes for an outcome. The fifth-vote Justice may articulate a position that is broader than the sixth Justice's position. Additionally, the fifth Justice's position is not an implicit consensus of the four broadest Justices, but the sixth Justice's position is an implicit consensus of the four broadest Justices. In this case, there is a conflict between the controlling opinions; but in most cases the controlling positions under the implicit consensus approach and fifth-vote rule will be the same when an implicit consensus exists.

165. 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). *Gregg* was a splintered opinion, so it too requires a *Marks* holding. The Supreme Court's subsequent treatment of *Gregg* indicates that it was the position of Justices Stewart, Powell, and

Lakewood v. Plain Dealer Publishing Co.,[167] *Romano v. Oklahoma*,[168] *O'Dell v. Netherland*,[169] and *Panetti v. Quarterman*.[170] This section will examine the Court's treatment of the *Marks* rule. This section will show that the Court, by both definition and by application, interprets the *Marks* rule as being the fifth-vote rule. Specifically, because the Court identifies the fifth Justice's position as controlling the *Marks* holding and does not require the narrower position to be a logical subset of broader opinions, the Court therefore has embraced the fifth-vote rule, rather than the implicit consensus approach.

A. The Court's Definition of the Marks *Rule Reflects the Fifth-Vote Rule*

The *Marks* rule states that the holding of the Court in a plurality decision is the position taken by the Justices who "concurred in the judgments on the narrowest grounds."[171] Notably, nothing in this statement indicates that the Court requires any agreement in the rational. Thus, the *Marks* rule's plain language supports the fifth-vote rule. The Court's subsequent treatment of *Marks* supports the fifth-vote rule, rather than the implicit consensus approach. Specifically, the Court looks for the fifth vote in any decision and does not require agreement on the rationale, only the result.

The Court's various statements about the *Marks* rule in its application of the narrowest grounds rule indicate that the Court interprets *Marks* to mean the fifth vote provides the controlling position in a plurality decision. First, in *Romano v. Oklahoma*, the Court specifically defined the *Marks* holding as the fifth vote concurring on narrower grounds than the other Justices.[172] That is, the Court looked to the fifth concurring vote, and did not require any implicit agreement. Further, in *O'Dell v. Netherland*, the Court defined the *Marks* holding as "the narrowest grounds of decision among the Justices whose votes were necessary to the judgment."[173] *O'Dell* interpreted the previous 6-3 decision of *Gardner v. Florida* and pointed to Justice White's position as controlling, even though a sixth Justice concurred without an opinion in the decision.[174] *O'Dell* therefore indicates the fifth concurring Justice's position

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Stevens that produced the *Gregg* holding. *See, e.g.,* California v. Ramos, 463 U.S. 992, 999–1000 (1983); Rhodes v. Chapman, 452 U.S. 337, 345–46 (1981).

166. 430 U.S. 188, 193 (1977).

167. 486 U.S. 750, 764–65 n.9 (1988).

168. 512 U.S. 1, 8–9 (1994).

169. 521 U.S. 151, 160 (1997).

170. 551 U.S. 930, 949 (2007).

171. *Marks*, 430 U.S. at 193 (internal quotation marks omitted).

172. *Romano*, 512 U.S. at 9.

173. *O'Dell*, 521 U.S. at 160.

174. *Id.*; Gardner v. Florida, 430 U.S. 349, 362–63 (1977) (Burger, C.J., concurring) (White, J., concurring). A concurrence without an opinion would certainly be narrower than any concurrence with an opinion, because a decision without opinion would limit the decision to the results in the case only. This necessarily follows because most any case with an opinion allows subsequent courts to expand the holding beyond the results of the case.

controls, even if there are additional concurring votes in support of the outcome. That is, the Court identified a fifth vote as controlling, and disregarded additional votes entirely. The Court thus defines the *Marks* holding as the fifth vote in a plurality decision.

Further, the Court's statements indicate that it does not require implicit agreement in the reasoning for a *Marks* holding to exist. In *Panetti v. Quarterman*, the Court identified the *Marks* holding as the position with the "more limited holding."[175] Because a holding can derive from any line of reasoning, this statement indicates there is no requirement that there be any agreement in the reasoning. Thus, the Court seemingly does not require any sort of agreement in reasoning. The *Panetti* Court elaborated further on this point, by indicating that every splintered decision should have a controlling opinion.[176] Specifically, the Court stated that the *Marks* rule meant, "[w]hen there is no majority opinion, the narrower holding controls."[177] Thus, *Panetti* indicates that *Marks* holdings are not confined to positions where the reasoning of the narrower opinion is a subset of the broader position. Taken together, a plain reading of the Court's statements on *Marks* reflects that the Court does not require an implicit agreement in the reasoning of the opinions for a *Marks* holding to exist.

In sum, based on these descriptions of the *Marks* rule, the Court seemingly identifies the fifth vote as controlling plurality decisions and does not require implicit agreement between the various positions. Therefore, the Court's treatment of *Marks* supports the fifth-vote rule.

B. The Supreme Court and Marks *in Application*

The Court's application of *Marks* indicates that the Court uses the fifth-vote rule, rather than the implicit consensus approach, when applying *Marks*. This section will examine the decisions of *Gregg v. Georgia, O'Dell v. Netherland,* and *Panetti v. Quarterman* to demonstrate that the Court applies the fifth-vote rule, not the implicit consensus approach. This section will also look at other non-majority opinions to show that the Court is adopting the fifth-vote rule. Specifically, in each of these cases, the Court determined that the fifth vote controlled the holding of the plurality decision, and that there was no implicit agreement between the concurring positions.

This section will show how each of the *Marks* holdings identified by the Court in the respective case interpreting a prior plurality decision derives from the position that was both the fifth concurring vote and also was the position that best dictates the outcome in subsequent cases a majority of the justices in the plurality decision would accept. Second, this section will show how there is no implicit consensus in the respective cases because the narrower positions are not logical subsets of the broader positions.

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175. *Panetti*, 551 U.S. at 949.
176. *Id.*
177. *Id.* (citing Marks v. United States, 430 U.S. 188, 193) (1977)).

1. *Gregg v. Georgia* Interprets *Furman v. Georgia*—Distinct Approaches That Do Not Overlap on All Issues That Could Arise in Subsequent Cases

In *Gregg v. Georgia*, the Court applied the narrowest grounds approach for the first time to identify the holding in *Furman v. Georgia*.[178] At the time of the *Furman* decision, African American death row inmates faced a greater chance of execution than European American death row inmates.[179] In the years prior to *Furman,* the number of executions nationally dropped to only a few per year.[180] In *Furman*, the Supreme Court decided by a 5-4 vote that the death penalty as applied in the cases before the Court violated the Eighth Amendment.[181] However, each of the concurring Justices offered separate opinions explaining the result.[182] Justices Brennan and Marshall clearly offered the broadest grounds as each concluded the death penalty was cruel and unusual punishment per se.[183] Justices Douglas, Stewart, and White offered narrower concurring positions.[184]

Justice Douglas concluded that a penalty was cruel and unusual if it was applied "selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board."[185] A penalty was "unusually imposed if it [was] administered arbitrarily or discriminatorily."[186] Under the current system of law, the death penalty was disproportionately administered on the poor, African Americans, and other unpopular groups.[187] The laws in question set no standards in the selection of the death penalty inmates; rather, judges and juries had unfettered discretion in imposing the death penalty.[188] This allowed the death penalty to be administered based on "prejudices against the accused."[189] The Eighth Amendment required "legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary."[190] As such, the death penalty was unconstitutional because the statutes were discretionary in

178. Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976).

179. Furman v. Georgia, 408 U.S. 238, 250 n.15 (1972) (Douglas, J., concurring).

180. Melissa S. Green, *History of the Death Penalty & Recent Developments*, JUST. CENTER, UNIV. ALASKA ANCHORAGE, http://justice.uaa.alaska.edu/death/history.html (last updated June 27, 2012).

181. *Furman*, 408 U.S. at 239–40.

182. *Id.* at 240.

183. *Id.* at 305 (Brennan, J., concurring); *Id.* at 360 (Marshall, J., concurring).

184. *Id.* at 256–57 (Douglas, J., concurring); *Id.* at 309 (Stewart, J., concurring); *Id.* at 313 (White, J., concurring).

185. *Id.* at 245 (Douglas, J., concurring).

186. *Id.* at 249 (Douglas, J., concurring) (internal quotations omitted).

187. *Furman*, 408 U.S. at 249–50 (Douglas, J., concurring).

188. *Id.* at 255.

189. *Id.*

190. *Id.* at 256.

operation.[191] Justice Douglas specifically declined to decide whether the non-discretionary death penalty was constitutional.[192]

While Justice Stewart recognized that the state did have a permissible interest in using punishment as retribution,[193] he concluded that the death sentences here were "cruel and unusual in the same way that being struck by lightning is cruel and unusual."[194] The *Furman* petitioners were "among a capriciously selected random handful" who had received a death sentence; others had committed similar crimes but were not facing the same fate.[195] Even though the petitioners had not proven that they were discriminated against, the Constitution did not permit the infliction of the death penalty in a wanton and freakish manner.[196]

Justice White recognized "that the death penalty could so seldom be imposed that it would cease to be a credible deterrent . . . ."[197] When the death penalty is infrequently administered, it is doubtful that any state interest in retribution could be measurably satisfied.[198] Also, the infrequent administration of the death penalty meant that the threat of execution would cease to significantly deter capital crimes.[199] As such, the death penalty did not address the social interests that it was intended to serve.[200] Therefore, Justice White concluded that the death penalty, as currently administered, was cruel and unusual because it was "so infrequently imposed that the threat of execution" did not serve the interest of criminal justice.[201]

Finally, Chief Justice Burger, joined by Justices Blackmun, Powell, and Rehnquist, dissented because they believed that the Eighth Amendment could not be construed to prohibit the death penalty.[202]

In *Gregg v. Georgia*, the controlling plurality recognized the position of Justices Stewart and White as the holding of the *Furman* Court.[203] The controlling joint opinion offered no explanation as to why Justices Stewart and White's positions controlled, but the fifth-vote rule provides the clear explanation: Their position is the factually narrowest because it least restricts the ability of state legislatures to implement the death penalty. Justices Brennan and Marshall provided the broadest possible grounds as each held that the death penalty could not ever be administered.[204] Justice Douglas' position is broader than Justices Stewart and White's positions. That is, Justice

191. *Furman*, 408 U.S. at 256–57(Douglas, J., concurring).
192. *Id.* at 257.
193. *Id.* at 308 (Stewart, J., concurring).
194. *Id.* at 309.
195. *Id.* at 309–10.
196. *Id.* at 310.
197. *Furman*, 408 U.S. at 311 (White, J., concurring).
198. *Id.* at 311.
199. *Id.* at 312.
200. *Id.*
201. *Id.* at 312–13.
202. *Id.* at 375 (Burger, C.J., dissenting).
203. Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976).
204. *Furman*, 408 U.S. at 287, 305 (Brennan, J., concurring); *Id.* at 360 (Marshall, J., concurring).

Douglas' opinion was far more sweeping than Justices Stewart's opinion and Justice White's opinion, as it effectively abolished non-mandatory death sentences and overhauled the sentencing procedure by removing any discretion from the judge and jury.[205] Justice Stewart and Justice White's position is the narrowest. They objected merely to the infrequency of the death penalty to achieve legitimate state interests in criminal justice.[206] They left to the states the means to achieve those ends. Thus, their position least restricts state authority. Therefore, Justices Stewart and White provide the factually narrowest opinions.

Further, the test described by Justices Stewart and White will generally describe the outcome in subsequent cases. That is, any time a state violates Justice Stewart's and Justice White's position by implementing a death penalty system that allows for the wanton and capricious selection of individuals for execution,[207] Justice Brennan and Justice Marshall would reach the same result, because they always found the death penalty unconstitutional.[208] Justice Douglas would also find the system problematic in most cases—though his position cannot be determined in all cases because he only addressed the discretionary death penalty in his opinion. Justice Douglas would find the system objectionable in almost all instances, though, because in his view any discretionary and arbitrary selection of individuals for execution is unconstitutional.[209] The only option Justice Douglas left open was a mandatory death sentence.[210] If there is a mandatory death penalty, it generally could not be administered wantonly and freakishly, as it would be applied systematically in a way that no one who qualifies for the death penalty could escape the death penalty. As such, Justice Stewart and Justice White articulate a position that best describes the outcome in subsequent cases.[211]

***Furman v. Georgia* Charted:**

Broadest Concurring		Narrow Concurring		Broadest Dissent
A	B	C		D
Concurring	**Concurring**	**Concurring**	**Dissent**	**Dissent**
Brennan	Douglas	*Stewart*	Stevens	Burger
Marshall		*White*		Blackmun
				Powell
				Rehnquist

205. *Furman*, 408 U.S. at 256–57 (Douglas, J., concurring).

206. *Id.* at 309–10 (Stewart, J., concurring); *Id.* at 313 (White, J., concurring).

207. *Id.* at 309–10 (Stewart, J., concurring), *Id.* at 313 (White, J., concurring).

208. *Id.* at 287, 305 (Brennan, J., concurring); *Id.* at 360 (Marshall, J., concurring).

209. *Id.* at 249 (Douglas, J., concurring).

210. *Id.* at 257.

211. *Furman*, 408 U.S. at 310 (Stewart, J., concurring); *Id.* at 312–13 (White, J., concurring).

Further, there is no implicit consensus in *Furman*. The ratio decidendi of Justice Stewart and Justice White's positions are not subsets of Justice Douglas's opinion. Specifically, Justice Douglas took a very different approach to the death penalty than Justices Stewart and White.[212] Justice Douglas concluded that the death penalty was unconstitutional because it was discriminatory;[213] Justices Stewart and White concluded that the death penalty was so infrequently and randomly administered that it did not achieve legitimate state penal interests.[214] These approaches may lead to similar results, but the Justices all approached the question from different angles, so their approaches do not overlap. There is little in any of these opinions that shows an implicit agreement. Justice Douglas saw the current state laws as problematic because they created a system that led to discrimination, whereas Justices Stewart and White saw them as inadequate because they created a system that led to infrequent use of the death penalty. Justice Douglas' position is thus not an extension of Justice Stewart and Justice White's positions; it is an entirely different approach from a different angle. Further, the implicit consensus approach cannot explain the narrowest grounds holding of *Furman*; the different approaches could produce conflicting results in some circumstances because Justice Douglas only addressed mandatory death sentences, while Justice Stewart and Justice White, by the logic of their position, did address cases that would include mandatory death sentences.[215] As such, the only explanation for the *Furman* holding identified in *Gregg* is the fifth-vote rule.

2. *O'Dell v. Netherland* Identifies the Holding of *Gardner v. Florida*—No Overlap in Rationale as Each Approach Drew From Different Constitutional Provisions

In *O'Dell v. Netherland*, the Court recognized the *Marks* holding of *Gardner v. Florida*.[216] In *Gardner*, a judge sentenced a murder defendant to death based on a confidential pre-sentence investigation report that determined that the murder "was especially heinous, atrocious or cruel" and there were no

212. *Furman*, 408 U.S. at 249 (Douglas, J., concurring).

213. *Id.*

214. *Id.* at 309 (Stewart, J., concurring); *Id.* at 313 (White, J., concurring).

215. The lack of agreement can be illustrated by the following example. Assume the legislature in state X is divided over implementing the death penalty. The legislature wants a strong death penalty law, but the governor is concerned about possible execution of innocent accused inmates. As a compromise, a law is enacted that mandates that the judge impose a death sentence when the jury convicts the defendant and finds that the defendant's DNA was at the scene of the crime. In all other cases, the judge is prohibited from sentencing the defendant to death. Suppose criminals begin shooting down their victims to avoid leaving DNA at the scene and only one defendant is found to have left DNA at the scene. Under Justice Douglas' test, the state's death penalty statute is satisfactory, because the jury has no discretion. The jury merely is a fact finder. Under Justice Stewart and Justice White's approach, the statute is unconstitutional because it results in the infrequent implementation of the death penalty.

216. O'Dell v. Netherland, 521 U.S. 151, 160 (1997).

mitigating circumstances to outweigh any aggravating factors.[217] The defendant was not given a copy of this report to review prior to the sentence.[218] In a plurality decision, a majority of the Court vacated the death sentence.[219]

The three-Justice plurality concluded that the death sentence was improper based on the Due Process Clause.[220] Specifically, Due Process was violated because the defendant had "no opportunity to deny or explain" the information in the report.[221] The report could have been based on information that was incorrect or misinterpreted by the reporter.[222]

Justice White, expressly rejecting the plurality's Due Process approach, concurred in the judgment based on the Eighth Amendment.[223] Justice White took his view from *Woodson v. North Carolina*, which stated that the judge's review of the report violated the Eighth Amendment procedure by "selecting persons who will receive the death penalty."[224] Gardner's sentence was based on information in the report to which Gardner could not respond.[225] Justice White thus concluded that this procedure of reviewing secret information violated the Eighth Amendment because it permitted review of information that was "relevant to the character and record of the individual offender," which was essential in making a reliable determination as to the appropriateness of the death sentence.[226]

Justice Blackmun concurred in the judgment based on the Court's judgments in *Woodson v. North Carolina* and *Roberts v. Louisiana*.[227] Justice Blackmun provided no further elaboration to the applicability of these cases to the case at hand. However, his basis must be similar to the position expressed by Justice White, who also relied on *Woodson*.[228] *Woodson* required that the death penalty process must accord "significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense" and consider "compassionate or mitigating factors . . . ."[229] Further, justice requires consideration of the "character and propensities of the offender" along with "the circumstances of the offense."[230] *Roberts* also

217. Gardner v. Florida, 430 U.S. 349, 353 (1977) (plurality opinion).
218. *Id.*
219. *Id.* at 362.
220. *O'Dell*, 521 U.S. at 160 (citing *Gardner*, 430 U.S. at 362).
221. *Id.*
222. *Gardner*, 430 U.S. at 359.
223. *Id.* at 362–64 (White, J., concurring).
224. *Id.* at 363.
225. *Id.* at 363–64.
226. *Id.* at 364 (citation omitted) (internal quotation marks omitted).
227. *Id.* at 364 (Blackmun, J., concurring).
228. *Gardner*, 430 U.S. at 362–64 (White, J., concurring).
229. Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion).
230. *Id.* (citation omitted) (internal quotation marks omitted).

required consideration of the "personal characteristics and previous record of an individual defendant" in death penalty sentencing.[231]

Finally, Chief Justice Burger concurred in the judgment without offering any opinion.[232]

In *O'Dell*, the Court concluded that Justice White's opinion was "the narrowest grounds of [the *Gardner*] decision among the Justices . . . necessary to the judgment," and as such produced the *Marks* holding.[233] The Court provided no further elaboration as to why it concluded that Justice White's opinion controlled, but it is clear that his opinion is the least far reaching and is most confined to the facts of the case in limiting a judge's ability to review evidence. The plurality opinion in *Gardner* concluded that due process was denied because the defendant had no chance to deny or explain information in the report.[234] This holding could reach well beyond the facts of the case and apply to non-capital criminal cases where a judge reviews any information that a defendant did not review. On the other hand, Justice White's position is limited to questions relating to the character and record in the death penalty sentencing procedures.[235] Therefore, his opinion was most confined to the facts of the case and would require fewer changes to criminal sentencing procedures than the plurality position, as his position only applies to death penalty sentencing.

Justice White's position is narrower than Justice Blackmun's position, though the distinction is very slight. Both Justices based their reasoning on *Woodson*, but Justice White's position is narrower because he imported only a portion of the reasoning from *Woodson*, while Justice Blackmun applied the entire *Woodson* and *Roberts v. Louisiana* reasoning to the case at hand.

Chief Justice Burger offered no rationale, so his position is limited entirely to the facts of the case and amounts to a sixth concurring vote not necessary for the judgment. Justice White's position, therefore, is the fifth concurring vote.

Looking to each Justice's reasoning, it is clear that Justice White's position is the fifth vote and controls the outcome of subsequent cases involving the right to review evidence for a person facing a possible death sentence. Justice White's position applied to the right to review all evidence in capital cases relating to the character and record of the offender.[236] By applying *Woodson* in its entirety, Justice Blackmun's position would produce the same result as Justice White in subsequent cases. The plurality would also reach the same result as Justice White when evidence is relating to the character and record of the offender, and is withheld from the offender, because it took the position that Due Process requires a defendant be permitted to review and explain all

231. Roberts v. Louisiana, 428 U.S. 325, 335 n.11 (1976).
232. *Gardner*, 430 U.S. at 362 (Burger, C.J., concurring).
233. O'Dell v. Netherland, 521 U.S. 151, 160 (1997).
234. *Gardner*, 430 U.S. at 362 (plurality opinion).
235. *Id.* at 364 (White, J., concurring).
236. *Id.* at 363.

evidence used against him.[237] In short, if the state fails to meet the standard articulated by Justice White, as Florida did in *Gardner*, then five Justices would agree that the state's standard is unconstitutional. Thus, the fifth-vote rule provides the *Marks* holding recognized by the Court in *O'Dell*.

***Gardner v. Florida* Charted:**

Broadest Concurring			Narrowest Concurring			Broadest Dissent
A	B	C	D	E	F	G
Concurring Stevens Stewart Powell	**Concurring** Blackmun	**Concurring** *White*	**Concurring** Burger	**Opinion** Brennan	**Dissent** Marshall	**Dissent** Rehnquist

Further, the implicit consensus approach cannot provide any explanation to the Court's recognition of the *Marks* holding. The plurality and Justice White take completely different approaches to the case altogether. The plurality relied on the Due Process Clause,[238] whereas Justice White relied on the Eighth Amendment.[239] Namely, the plurality was concerned about the opportunity to be heard as part of Due Process,[240] while Justice White was concerned about selection of death penalty candidates.[241] The reasoning in the opinions cannot possibly be subsets of each other as the starting points of analysis are completely different constitutional provisions. Specifically, the plurality's ratio decidendi drew from the Due Process Clause, while Justice White's ratio decidendi drew from the Eighth Amendment. The plurality did not address the Eighth Amendment in its opinion, so there is no overlap with Justice White's position. Justice White entirely rejected the plurality's line of reasoning based on the Due Process Clause, so his position does not overlap with the plurality's position.[242] Thus, there clearly is no common constitutional denominator upon which the Justices agree, as each drew their reasoning from separate constitutional doctrines. Therefore, there is no implicit consensus. As such, *O'Dell* shows that the Supreme Court embraces the fifth-vote rule.

3. *Panetti v. Quarterman* interprets *Ford v. Wainwright*—Distinct Approaches to Due Process

237. *Gardner,* 430 U.S. at 362 (plurality opinion).
238. *Id.*
239. *Id.* at 364 (White, J. concurring).
240. *Id.* at 362.
241. *Id.* at 364.
242. *Id.*

A third example of the Court rejecting the implicit consensus approach is *Panetti v. Quarterman*.[243] In *Panetti*, the Court decided the *Marks* holding of *Ford v. Wainwright*.[244] In *Ford*, the Court determined that the Constitution prohibited the execution of the insane.[245] In 1974, Alvin Ford was sentenced to death for murder in Florida.[246] Though he was sane at the time of the sentencing, his behavior began to change in 1982.[247] He became obsessed with conspiracies, began to call himself Pope John Paul III, and spoke in an incomprehensible code.[248] He was diagnosed with "a severe, uncontrollable, mental disease . . . ."[249] In accordance with state statute, the governor appointed a panel of three psychiatrists to determine if Ford understood the nature of the death penalty and why he was being executed.[250] The doctors found him competent, and thereafter the governor signed Ford's death warrant.[251] Ford filed a habeas corpus suit objecting to his execution.[252] A majority of the Court agreed that the Eighth Amendment prohibited the execution of an insane individual.[253] The majority split, however, on the procedural requirements to determine if the condemned was insane.

The four-Justice plurality concluded that the procedure for determining sanity required that the finding of mental capacity "must be determined with the high regard for truth that befits a decision affecting the life or death of a human being."[254] Thus, the determination of sanity required a standard that was "no less stringent . . . than those demanded in any other aspect of a capital proceeding."[255] This standard could not be met with review by the Governor or an administrative agency.[256] As such, the Florida statute was inadequate to protect Ford's interests.[257] The plurality did not require a full sanity trial, but left to the State the responsibility to develop ways to meet these standards.[258]

Justice Powell wrote separately, claiming his views on the matter differed substantially from the plurality's views.[259] Justice Powell felt, contrary to the plurality's claim, that the plurality's position required a full sanity trial.[260]

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243. 551 U.S. 930, 949 (2007) (explaining that "[w]hen there is no majority opinion, the narrower holding controls").

244. *Id.* at 941, 949.

245. Ford v. Wainwright, 477 U.S. 399, 401 (1986).

246. *Id.*

247. *Id.* at 402.

248. *Id.* at 402–03.

249. *Id.* at 402.

250. *Id.* at 403–04.

251. *Ford,* 477 U.S. at 404.

252. *Id.*

253. *Id.* at 409–410.

254. *Id.* at 411 (plurality opinion).

255. *Id.* at 411–12.

256. *Id.* at 416.

257. *Ford*, 477 U.S. at 418 (plurality opinion).

258. *Id.* at 416–17.

259. *Id.* at 418 (Powell, J., concurring).

260. *Ford*, 477 U.S. at 425.

Justice Powell felt Due Process entitles an individual to "an opportunity to be heard."[261] Ford was denied that right.[262] Under the statute, the governor was not obligated to consider any material submitted by the condemned, so the determination of sanity was made solely by the state appointed psychiatrists.[263] This system invited "arbitrariness and error," because the condemned could not offer evidence or point out errors in the state's examination.[264] Justice Powell stated that the procedures for determining sanity could be "far less formal than a trial."[265] The prisoner needed a substantial showing of insanity to get a hearing.[266] The hearing could be performed by an "impartial officer or a board that can receive evidence and argument from the prisoner's counsel," including the opportunity to rebut the state's psychiatrists.[267] Beyond these requirements, the state has "substantial leeway" to decide the best procedure to balance all the "interests at stake."[268]

The *Panetti* Court recognized that Justice Powell's position was the more limited holding.[269] As such, it was the narrower holding, and thus was the controlling position under *Marks*.[270] The Court, notably and correctly, must be applying the fifth-vote rule here. Justice Powell's position is narrower for several reasons. First, his reasoning for the basis of Due Process is considerably more confined to the facts of the case than the plurality's decision. Specifically, his position merely required the right to be heard by being able to present evidence and to rebut the state's evidence,[271] whereas the plurality required the full Due Process rights afforded in any capital proceeding.[272] More significantly, though, Justice Powell allowed the state flexibility to determine the procedures for determining insanity, as long as the hearing was performed by an impartial officer.[273] The plurality removed the process from the executive branch entirely, seemingly requiring the hearings be performed by the judiciary, while Justice Powell's position left the door open for an administrative hearing. States would have to alter their procedures to a less drastic degree under Justice Powell's approach than the plurality's approach. Thus, Justice Powell's position was less sweeping and less restrictive on the states' hearing procedures. Therefore, his position is the narrowest factual position in reaching the outcome.

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261. *Id.* at 424 (internal quotation marks omitted).
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.* at 427.
266. *Ford*, 477 U.S. at 426 (Powell, J., concurring).
267. *Id.* at 427.
268. *Id.*
269. Panetti v. Quarterman, 551 U.S. 930, 949 (2007).
270. *Id.*
271. *Ford*, 477 U.S. at 424, 427 (Powell, J., concurring).
272. *Id.* at 411–12 (plurality opinion).
273. *Id.* at 427 (Powell, J., concurring).

Because Justice Powell's position is the narrowest, his position dictates the outcome. The result in the case was that Florida's procedure for determining sanity was insufficient to satisfy Due Process. Therefore, the outcome analysis of *Ford* is based on when a state's test does not satisfy the concurring Justices' tests. That is, the resulting stare decisis of this case derives from the failure of the state to satisfy Due Process. Thus, if Justice Powell's standard is satisfied, the outcome of the case no longer commands majority support. If a legislature passes a law that provides an inmate the opportunity to be heard before an impartial officer in an insanity hearing, then the outcome of the case would change, as Justice Powell would find the procedure constitutional, even though the plurality would not support this statute. Thus, the outcome expressed in *Ford*, that the state's procedures were insufficient, would no longer command majority support. In contrast, anytime the plurality standard is satisfied, Justice Powell's test would likely be satisfied, because the plurality requirement that the finding of fact must be made by the same procedures as a trial would satisfy Justice Powell's requirement, as the hearing would be before an impartial officer and include the right to rebut the state's evidence.[274] Therefore, Justice Powell's position is determinative of the outcome in the case. In sum, Justice Powell's position is factually the narrowest and dictates the outcome of the case, therefore it is controlling under the fifth-vote rule.

***Ford v. Wainwright* charted:**

Broadest Concurring		Narrowest Concurring	Broadest Dissent
A	B	C	D
Concurring	**Concurring**	**Dissent**	**Dissent**
Marshall	*Powell*	O'Connor	Rehnquist
Brennan		White	Burger
Blackmun			
Stevens			

Further, the implicit consensus approach does not explain the Court's recognition of the *Marks* holding in *Ford*, as neither the plurality nor Justice Powell accept the others' position. The plurality would not accept Justice Powell's narrower test granting significant leeway to the states to implement the decision. The plurality determined that the executive branch could not make the determination of sanity.[275] Justice Powell's standard leaves the door open for the executive branch to make this determination, provided that the hearing is before impartial officers and the right to be heard is exercised. This difference between Justice Powell and the plurality inevitably would lead to conflicting results. A state may thus satisfy Justice Powell's test with an administrative hearing, but that would not satisfy the plurality test. The implicit consensus approach requires that when a narrower test is satisfied, the

274. *Ford*, 477 U.S. at 427.
275. *Id.* at 416 (plurality opinion).

broader test will also be satisfied,[276] which is not applicable here; hence, no implicit consensus exists.

Further, Justice Powell also expressly rejected the plurality approach in his opinion.[277] Thus, there is no agreement between the two positions. While there is overlap between the two positions that the inmate has a right to be heard, each applies the test differently in a matter the other side would not accept. The plurality and Justice Powell are clearly articulating distinct standards on how hearings should be performed, which is precisely the reason that the *King* Court declined to recognize a *Marks* holding in *Delaware Valley II*.[278] As such, there is no implicit consensus in *Ford*.

4. Non-Controlling Support for the Fifth-Vote Rule

Besides these majority opinions, there are non-majority opinions that offer persuasive support for the fifth-vote rule. First, in 2009, four dissenting Justices in *Gross v. FBL Financial Services, Inc.*[279] disagreed with the majority's decision not to apply *Price Waterhouse v. Hopkins* in a case involving the Age Discrimination in Employment Act of 1967.[280] In his dissent, Justice Stevens identified the *Marks* holding from *Price Waterhouse*.[281] In *Price Waterhouse*, a four-Justice plurality announced the judgment of the Court, and Justices White, and O'Connor offered separate opinions explaining the result.[282] In *Gross*, Justice Stevens expressly disregarded Justice O'Connor's position as a non-controlling sixth vote.[283] Rather, Justice White "provided a fifth vote for the rationale explaining the result of the *Price Waterhouse* decision . . . ," so his position was the controlling opinion under *Marks*.[284] Thus, the four Justices agreed that the fifth Justice's vote provided the *Marks* holding in a plurality decision.

A second example in support of the fifth-vote rule comes from a chamber opinion. In 1994, Justice Souter issued an opinion as circuit Justice explaining the holding of the Supreme Court's decision in *Planned Parenthood v. Casey*.[285] Citing *Marks*, Justice Souter concluded that the joint opinion of Justice O'Connor, Justice Kennedy, and himself was the controlling opinion under

276. United States v. Robison, 521 F.3d 1319, 1323 (11th Cir. 2008) (Wilson, C.J., dissenting from the denial of rehearing en banc).

277. *Ford,* 477 U.S. at 418 (Powell, J., concurring).

278. King v. Palmer, 950 F.2d 771, 783 (D.C. Cir. 1991) (en banc).

279. 557 U.S. 167 (2009).

280. *Id.* at 181 (Stevens, J., dissenting).

281. *Id.* at 188.

282. *Id.* at 188–89.

283. *Id.*

284. *Id.* at 188 (citation omitted).

285. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 510 U.S. 1309 (1994).

Casey.[286] The only plausible explanation is that Justice Souter was applying the fifth-vote rule, rather than the implicit consensus approach. The essential basis for the *Casey* Court upholding the Pennsylvania abortion regulations was the joint opinion's recognizing that the government could regulate abortion, as long as it did not impose an undue burden on a woman seeking access, by creating a substantial obstacle in her path.[287] However, the undue burden test was rejected by six of the other Justices who all expressly dissented from this standard.[288] The undue burden standard by itself would have no authority because the vote on this issue was three to six, so there can be no implicit consensus on the undue burden test as there is no implicit majority agreement on this standard. However, the joint opinion becomes controlling law under the fifth-vote rule. The three-Justice opinion is the opinion that solely explains the result and falls between Justice Blackmun and Justice Stevens, who would strike all the abortion regulation statutes based on strict scrutiny,[289] and the four Justices who would uphold the Pennsylvania statutes because they viewed *Roe* as being wrongly decided.[290] Rather, *Casey* is similar to *Delaware Valley II*, where the various Justices offered three distinct approaches, which caused the *King* court to determine that there was no implicit consensus.[291] While there is no agreement on the undue burden standard, the undue burden standard articulates a standard that produced the outcome in the case. That is, if the undue burden test is satisfied, seven Justices (the three Justices plus the four who would overturn *Roe)* would uphold the government regulation. However, if the undue burden test is not satisfied, five Justices (the three Justices plus Justice Blackmun and Justice Stevens) would find the law unconstitutional. As such, the fifth-vote rule explains the outcome of *Casey*, but the implicit consensus approach cannot.

In sum, the Supreme Court embraces the fifth-vote rule as the authoritative interpretation of the *Marks* rule. The Court actively seeks to find the position taken by the fifth Justice in a decision in determining the *Marks* holding in prior decisions. Further, the Court does not require logical agreements between the various opinions. Therefore, because the Court is identifying the fifth vote as controlling the *Marks* holding and does not require agreement

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286. *Casey*, 510 U.S. at 1310 n.2.

287. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 876–77 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.).

288. *Casey*, 505 U.S. at 914–18 (Stevens, J., concurring in part and dissenting in part) (disagreeing with the plurality's refusal to apply strict scrutiny to abortion); *Id.* at 934 (Blackmun, J., concurring in part and dissenting in part) (disagreeing with the plurality's refusal to apply strict scrutiny to abortion); *Id.* at 944 (Rehnquist, C.J., concurring in part and dissenting in part) (stating *Roe v. Wade* should be overruled entirely).

289. *Id.* at 914–18 (Stevens, J., concurring in part and dissenting in part) (disagreeing with the plurality's refusal to apply strict scrutiny to abortion); *Id.* at 934 (Blackmun, J., concurring in part and dissenting in part) (disagreeing with the plurality's refusal to apply strict scrutiny to abortion).

290. *Id.* at 944 (Rehnquist, C.J., concurring in part and dissenting in part) (stating that *Roe v. Wade* should be overruled entirely).

291. King v. Palmer, 950 F.2d 771, 782 (D.C. Cir. 1991) (en banc).

between the rationales of the positions, the Court embraces the fifth-vote rule as its definition of *Marks*.

V. POLICY JUSTIFICATIONS FOR USE OF THE FIFTH-VOTE RULE

This section addresses the second part of this Article's thesis: the policy justifications for the use of the fifth-vote rule. This section argues from a policy standpoint that the fifth-vote rule is the proper approach to the *Marks* doctrine. At the outset, because the implicit consensus approach will generally identify the same controlling position as the fifth-vote rule, the implicit consensus approach remains a relevant and useful way to apply *Marks* where an implicit consensus exists. However, this section identifies the shortcomings that arise when courts solely apply the implicit consensus approach, rather than the fifth-vote rule. This section takes the position that courts are best off recognizing a *Marks* holding even when there is not an implicit consensus. This section first argues that the fifth-vote rule allows the preservation of precedent, because there are points of agreement in every plurality decision that should not be ignored.[292] Second, the fifth-vote rule avoids the problem of demonstrating agreement between the various positions when such agreement is not always clear.[293] Third, the fifth-vote rule allows Supreme Court Justices the advantage of expressing their own views and the opportunity to view the effectiveness of their positions in practice at a later time.[294] Finally, the fifth-vote rule allows a greater degree of judicial economy as lower courts can base their decisions on what the Court actually would do if they were presented with a similar case, thus avoiding the need for the Court to review the decision.[295]

A. Applying the Fifth-Vote Rule in Situations Where There is No Implicit Agreement Preserves Precedent.

The fifth-vote rule allows the preservation of precedent because the approach allows duplication of results a majority of the Court would accept and overturns prior lines of reasoning the majority of the Court rejected in a plurality decision.

Clearly, plurality decisions that lack substantial agreement on the reasoning for the outcome do not preserve stare decisis as effectively as decisions that have majority agreement on the reasoning. For this reason, the *King* court determined that no *Marks* holding could come from a decision that lacked implicit agreement on the reasoning of a decision by a majority of the

292. *See infra* notes 296–313 and accompanying text.
293. *See infra* notes 314–325 and accompanying text.
294. *See infra* notes 326–40 and accompanying text.
295. *See infra* notes 341–52 and accompanying text.

Justices.[296] However, courts that only apply the implicit consensus approach overlook two important lines of agreement that arise from a plurality decision. First, a majority of the Justices in the plurality decision agree on the results in subsequent cases involving similar facts.[297] Second, in cases where there is contrary prior precedent, a majority of the Court agrees that prior precedent should no longer control subsequent cases involving similar facts arising from the specific legal issues addressed by the plurality decision.[298]

These points are well illustrated by the abortion cases following *Roe v. Wade*. The specific issue before the *Roe* Court was whether a Texas statute that criminalized all abortions, except on the medical advice of a doctor to save the life of the mother, violated the Constitution.[299] The *Roe* Court identified a woman's right to an abortion as a fundamental right, which the state could only regulate when it had a compelling interest.[300] The state's interest became compelling at different stages of the pregnancy.[301] *Roe* held that the state could not prohibit abortion in the first trimester.[302] In the second trimester, the state could not prohibit abortion, but could regulate abortions provided that the regulation was "reasonably related" to the mother's health.[303] In the third trimester, the state could regulate and even proscribe abortions, except when necessary to protect the mother's health.[304]

In *Webster v. Reproductive Health Services*, the Court upheld a Missouri statute that permitted abortions after twenty weeks only if a viability test was performed to ensure the fetus was not viable.[305] As mentioned in Section III.B., Justice O'Connor provided the fifth vote in *Webster*. She objected to the trimester framework in *Roe*, and concluded that the Missouri statute was constitutional as it did not impose an undue burden on a woman seeking an abortion.[306] Justice O'Connor reached her conclusion because the procedure

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296. *King*, 950 F.2d at 781.

297. Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d 682, 694 (3d Cir. 1991), *aff'd in part and reversed in part on other grounds*, 505 U.S. 833 (1992) (explaining that the controlling opinion is the opinion that produces a results in which a majority would agree).

298. *See* Marks v. United States, 430 U.S. 188, 194 (1977) (stating that the plurality decision in *Memoirs v. Massachusetts* controlled over the prior majority decision of *Roth v. United States*); *see also Casey*, 947 F.2d at 693:

> *Marks* thus stands for a very important proposition: a legal standard endorsed by the Court ceases to be the law of the land when a majority of the Court in a subsequent case declines to apply it, even if that majority is composed of Justices who disagree on what the proper standard should be.

299. Roe v. Wade, 410 U.S. 113, 117–18 (1973).
300. *Id.* at 155.
301. *Id.* at 162–63.
302. *Id.* at 164.
303. *Id.*
304. *Id.* at 164–65.
305. Webster v. Reprod. Health Servs., 492 U.S. 490, 520 (1989) (plurality opinion).
306. *Id.* at 530 (O'Connor, J., concurring).

for determining viability was cost effective and routine.[307] Notably, she did not address how this regulation related to the health of the mother.

The outcome of *Webster* conflicts with the *Roe* second trimester restrictions, which prohibit state regulation of abortions in the second trimester, unless the regulation is "reasonably related" to the mother's health.[308] Specifically, viability—the point addressed by the Missouri statute—is related to the state of the fetus, not the state of the mother.[309] Under *Roe*, the state has no interest in the fetus until the third trimester.[310] However, Justice O'Connor's position upholding the regulation based on the undue burden test conflicts with *Roe's* holding: The outcome of *Webster* was reached based on the interest of the fetus while placing a burden on the mother, rather than protecting the health of the mother. Thus, there was a majority agreement that despite the holding of *Roe*, states may require viability tests prior to abortions after the twentieth week. Further, as noted in Section III.B., because the four other concurring Justices would reach the same result as Justice O'Connor in subsequent cases, there is majority agreement with the outcomes produced by the undue burden test Justice O'Connor articulated in *Webster*. Thus, there is majority agreement on how lower courts should resolve subsequent cases where the state does not impose an undue burden on a woman seeking an abortion. That is, the undue burden test, when satisfied, dictates an outcome that would draw majority support from Justice O'Connor plus the four other concurring Justices.

It is clear that there is no implicit consensus in *Webster*, as Justice O'Connor offered a distinct approach to abortion cases from the plurality and Justice Scalia.[311] A court that applies the implicit consensus approach would be left adrift on how to resolve subsequent abortion cases, because a majority of the *Webster* Court modified part of the *Roe* holding. However, implicit consensus courts overlook the purpose of precedent. Precedent exists so future cases will be decided the same way as prior cases were decided.[312] Precedent thus requires that Justice O'Connor's position should control the abortion cases following *Webster*, as the same result can be achieved when Justice O' Connor's undue burden test is satisfied, as if her position were a majority opinion, because the four other concurring Justices would reach the same result she articulated when her standard is satisfied. Courts that only apply the implicit consensus approach thus overlook the requirement that precedent requires similar facts tried before a court to produce results similar to the prior case.[313] Here, five Justices agreed that a prior precedent (*Roe v. Wade*) should no longer

307. *Webster*, 492 U.S. at 530 (O'Connor, J., concurring).
308. *Roe*, 410 U.S. at 164.
309. *Webster*, 492 U.S. at 541 (Blackmun, J., dissenting).
310. *Id.*
311. *Id.* at 530 (O'Connor, J., concurring).
312. Schauer, *supra* note 23, at 597.
313. *Id.*

govern the state's ability to regulate abortion. Courts solely relying on the implicit consensus approach would thus reject the application of *Webster*, and reach a result contrary to the one agreed to by a majority of the *Webster* Justices. The fifth-vote rule allows for duplication of the results upon which a majority of the Court agreed in the splintered opinion, and therefore should guide lower courts.

B. Ease of Use for Lower Courts and Litigants

One of the key shortcomings of the implicit consensus approach is that it requires finding logical agreement between various opinions. However, the existence of an implicit consensus is not always clear. The task of finding an implicit consensus is difficult because the implicit consensus approach requires finding agreement between positions that may have been expressly or implicitly rejected by the other set of concurring Justices.[314] Further, the broader Justices may take different approaches to issues than the narrower Justices and may not have addressed the issues that the narrower Justices addressed, thus making an implicit consensus difficult to find.

Even when there is overlap on the reasoning, an implicit consensus may not be clear. The holding of any opinion may be narrowly interpreted or broadly interpreted. Thus, a lower court is not merely left with the task of determining if there is an implicit consensus between the opinions, but it must also determine how broadly or narrowly to read each concurring opinion. *Caldwell v. Mississippi* illustrates this point. In *Caldwell*, the Court addressed the question of whether a death sentence is valid when a jury is misled by a prosecutor about its responsibility in deciding whether a death sentence is appropriate.[315] Specifically, the prosecutor in *Caldwell* told the jurors that their decision regarding a death sentence was not final and that the defendant would not be "strung up" outside of the courthouse right after their verdict, because their decision would be automatically reviewed by the state Supreme Court.[316] The U.S. Supreme Court vacated the death sentence because the prosecutor had minimized the "jury's sense of responsibility for determining the appropriateness of [the] death [sentence],"[317] but a four-Justice plurality and Justice O'Connor disagreed about the standard for misleading jury instructions in capital cases.

The plurality determined that the district attorney's statement about the appeal to the state Supreme Court was neither "accurate [n]or relevant to a valid state penological interest."[318] The statement was "inaccurate . . . because it was misleading as to the nature of the appellate court's review and because it depicted the jury's role in a way fundamentally at odds with the role that a

314. *See supra* notes 104–116 and accompanying text.
315. Caldwell v. Mississippi, 472 U.S. 320, 323 (1985).
316. *Id.* at 325–326.
317. *Id.* at 341.
318. *Id.* at 336.

capital sentencer must perform."[319] The role of appellate review is "not linked to . . . [a] valid sentencing consideration" and is "wholly irrelevant" to determining a death sentence.[320] That is, the statements led the jurors to believe that they were taking the first step in deciding if death was an appropriate sentence, but the ultimate determination would be made by others.[321] The creation of this image by the prosecutor was not a valid state goal.[322]

Justice O'Connor wrote separately that the instruction was impermissible because the statements were "inaccurate and misleading in a manner that diminished the jury's sense of responsibility."[323] There was no "valid state penological interest" in providing information that diminished "the importance of the jury's deliberations in a capital sentencing case."[324]

The plurality decision in this case presents two possible readings. A narrow reading of the plurality holding would be that this decision is limited to cases where the prosecutor makes references to post-trial sentencing or other considerations relevant to death sentences. A broad reading, though, would find any inaccurate statements not relevant to a state interest as impermissible. The reading of the breadth of the plurality holding determines if there is an implicit consensus between the plurality opinion and Justice O'Connor's position. If the broader reading controls, the decision is a classic implicit consensus: that is, the plurality accepts Justice O'Connor's reasoning in full that the prosecutor cannot mislead the jury in his closing statements, except the plurality would extend her application to prohibit any post-trial references in closing comments. However, if the narrower reading controls, then there is no implicit consensus, because the plurality would take a different approach to the question than Justice O'Connor: one opinion is addressing the accuracy of statements made and the other opinion is addressing post-trial review. As such, the courts that apply the implicit consensus approach only are left in a quandary over the breadth of the plurality opinion, and may find no precedential value to this decision.

The fifth-vote rule would find precedential value under this decision (as the Supreme Court did find in *Romano v. Oklahoma*[325]), as there is at least agreement on a narrow issue that misleading statements relating to post sentencing procedures are unconstitutional. Thus, the fifth-vote rule is advantageous over the implicit consensus approach because it allows lower courts to find instruction from the Supreme Court in cases where there is

319. *Caldwell*, 472 U.S. at 336 (plurality opinion).
320. *Id.*
321. *Id.*
322. *Id.*
323. *Id.* at 342 (O'Connor, J., concurring).
324. *Id.*
325. 512 U.S. 1, 9 (1994).

obvious agreement on the outcome without having to determine the breadth of the holding of each opinion.

C. Advantages to Justices Being Able to Express Their Views

While *Marks* certainly gives Justices the incentive to write separately instead of joining a single opinion,[326] giving the Justices the ability to write separately does create benefits for the Supreme Court itself. Of course, the ideal for lower court judges is that the Supreme Court always issue a single-majority opinion, but from a Supreme Court Justice's perspective, there are advantages to offering multiple rationales for the result in some cases.

First, there are cases in which the Justices genuinely disagree on the rationale for the outcome. The broader concurring Justices may feel their position should control in the long run and choose to write separately in hopes that one day the Court will revisit the decision and adopt their rational.[327]

Second, the Justices are concerned with maintaining consistency and intellectual integrity with their prior positions. If a Justice took a strong position in a prior case, he or she may feel that it is necessary to retain that position is subsequent cases, even if it means refraining from joining a position that produces a result he or she may otherwise accept.[328]

However, the critical advantage of the *Marks* rule is that the rule allows the Court flexibility to reconsider issues where the proper resolution was unclear at the time the Court made its initial decision. In this sense, *Marks* provides "a sound bas[is] for the future development of the law."[329] Justice Brandeis recognized one of the values of a federal system was that the various state legislatures could experiment on the most effective laws for addressing society's problems.[330] *Marks* serves a similar function for the Supreme Court. That is, *Marks* should not be viewed as the Court abdicating its responsibilities to resolve cases and controversies; rather, it is turning to the lower courts to apply the Court's decision in subsequent cases so the Court may obtain more information as to how its decision actually plays out in practice before the Court fully commits to one approach.[331] Thus, in a plurality decision, the

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326. Berry et al., *supra* note 76, at 306.

327. Even opinions of no precedential value can influence the Court in subsequent cases. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 214–15 (1986) (Stevens, J., dissenting), *overruled by* Lawrence v. Texas, 539 U.S. 558, 577–78 (2003). In *Bowers v. Hardwick*, Justice Stevens dissented from a decision upholding a statute criminalizing sodomy. 478 U.S. at 214–15. Justice Stevens concluded that the Due Process Clause protected "intimate choices" between married and unmarried individuals. *Id.* at 216. This reasoning was later embraced by a majority of the Court in overturning *Bowers*. *Lawrence*, 539 U.S. at 577–78.

328. *See, e.g.,* Gardner v. Florida, 430 U.S. 349, 364–65 (1977) (Brennan, J., opinion) (agreeing with the plurality opinion that due process is violated when a defendant is not permitted to review pretrial investigations, but declining to join their position because they did not vacate the death sentence, which, as he previously stated, was per se cruel and unusual).

329. Novak, *supra* note 18, at 781.

330. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

331. Novak, *supra* note 18, at 781.

Court is turning to lower courts for their wisdom and experimentation because the full Court is not ready or capable of resolving the issue at that time.[332] The Court may revisit the *Marks* holding in a later case, depending on how the decision was applied by lower courts.[333] By the time the Court reconsiders the issues raised in the plurality decision, the Court can make a more informed decision in light of the independent analysis offered by the lower courts reviewing the decision.[334]

The Court's treatment of *Marks* in *Nichols v. United States*[335] and *Grutter v. Bollinger*[336] demonstrates how the Court can use *Marks* to reevaluate prior plurality decisions. In both cases, the Supreme Court revisited two plurality decisions that lower courts struggled to apply. In *Nichols,* the Court determined that the circuit split over the interpretation of *Baldasar v. Illinois* provided sufficient justification to reconsider *Baldasar* entirely.[337] Rather than determine the *Marks* holding, the *Nichols* Court relied on the concurring opinion of Justice Stewart and the dissenting opinion from *Baldasar*[338] to produce a single majority opinion.[339] In *Grutter*, a majority of the Court adopted Justice Powell's view from the affirmative action case, *Bakke v. Davis*, without determining the *Marks* holding of *Bakke*.[340] *Nichols* and *Grutter* thus demonstrate the value of *Marks* to the Court itself in monitoring the application of the plurality decision. Both cases revisited plurality decisions that caused considerable confusion between the circuits. After seeing how the positions expressed in the prior splintered positions played out in practice, the Court was able to revisit the decisions and agree on a single approach by relying on opinions expressed from the prior plurality decision.

The fifth-vote rule allows the lower courts to apply the Court's decision in a greater number of cases than the implicit consensus approach because it does not require agreement between the reasoning and the result. This allows the Court to gauge the effectiveness of the controlling opinion in a plurality decision and determine whether that approach or another one of the approaches offered in the plurality decision should control in subsequent cases. However, courts that exclusively apply the implicit consensus approach would rarely apply splintered decisions, and thus offer the Court little guidance regarding the effectiveness of the controlling opinion in practice. Thus, the

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332. Berry et al., *supra* note 76, at 348–49.

333. *See* Weins, *supra* note 4, at 839–40 (arguing the Court applies *Marks* when there is no confusion between the circuits, but declines to apply *Marks* when there is confusion).

334. *See* Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 54 (1994) (discussing the benefits of open legal questions being resolved by lower courts).

335. 511 U.S. 738, 745–46 (1994).

336. 539 U.S. 306, 325 (2003).

337. *Nichols*, 511 U.S. at 746.

338. *Id.*

339. *Id.* at 740.

340. *Grutter*, 539 U.S. at 325.

fifth-vote rule is advantageous to the long-term development of the law when the Court cannot agree on one approach.

D. Judicial Economy

One final advantage of the fifth-vote rule is that it promotes judicial economy by allowing lower courts to duplicate results that a majority of the Supreme Court would accept, without the Court having to grant certiorari in the case. The Supreme Court, as the court of last resort, has a very small caseload—to date, the Roberts Court has decided fewer than 100 cases per term.[341] The Court simply cannot take on every case that arises from the same issues addressed in a prior plurality decision. However, the Court rarely changes membership, so it is unlikely that the members of the Court will change their positions on an issue from a prior case. Therefore, the Court will likely apply the same reasoning and reach the same outcome to the factual scenario before the Court as it did in prior cases. As such, lower courts should look to the positions articulated by the Justices in prior plurality decisions to avoid reversal by the Supreme Court.

Justice Holmes expressed his view that the law "prophesi[zes] . . . what the courts will do in fact."[342] With the plurality decision, the Court has provided lower courts with "strongly probative predictive data" regarding how the Supreme Court would resolve the case, and the lower court may resolve the question it is addressing by relying on the positions expressed in the Court's plurality decision.[343] By resolving the case before it according to the prior plurality decision, the lower court is able to duplicate the outcome that the Supreme Court would have reached, thus eliminating the need for the Court to reconsider the case.[344] By duplicating the outcomes that a majority of the Court would accept, lower courts follow Holmes' dictum and prophesy what the Court would do. The lower court is thus likely to have closed the case by avoiding unnecessary review and reversal by the Supreme Court.[345]

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341. In the 2009 term, the Court decided 92 cases. *2009 Term Opinions of the Court*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/opinions/slipopinions.aspx?Term=09 (last visited May 26, 2013). In the 2008 term, the Court decided 83 cases. *2008 Term Opinions of the Court*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/opinions/slipopinions.aspx? Term=08 (last visited May 26, 2013). In the 2007 term, the Court decided 73 cases. *2007 Term Opinions of the Court*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/opinions/slipopinions.aspx? Term=07 (last visited May 26, 2013). In the 2006 term, the Court decided 75 cases. *2006 Term Opinions of the Court*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/opinions/slipopinions.aspx?Term=06 (last visited May 26, 2013).

342. Oliver W. Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 461 (1897).

343. *See* Caminker, *supra* note 334, at 6.

344. *Id.* at 19 (discussing the predictive model of precedent as the lower court asking: "If I were the Supreme Court, how would I [address] this . . . question?" then answering by applying the same interpretive techniques the Court would apply).

345. Michael L. Eber, Comment, *When the Dissent Creates the Law: Cross-Cutting Majorities and the Prediction Model of Precedent*, 58 EMORY L.J. 207, 232–33 (2008).

To illustrate, in *Baze v. Rees*, the Court determined the constitutionality of the lethal injection.[346] The Court offered seven opinions in the case, without a majority opinion.[347] The concurring opinions are divergent, and no implicit consensus exists between the opinions.[348] However, the fifth-vote rule offers guidance for future cases. A three-Justice plurality of Chief Justice Roberts, Justice Kennedy, and Justice Alito concluded that the standard for reviewing a method of execution was whether the method posed "substantial risk of serious harm."[349] Justice Thomas, joined by Justice Scalia, rejected the plurality view and concluded, based on the history of the Eighth Amendment, that "a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain."[350] Under the fifth-vote rule, the plurality opinion clearly controls. Justices Thomas and Scalia would always reach the same result as the plurality when the plurality test is satisfied, because any method that is designed to inflict pain certainly creates a substantial risk of serious pain. As the states seek to implement more humane methods of execution,[351] lower courts can correctly rely on the plurality decision because the outcome expressed by five current members of the Court relating to execution methodology would not change unless the state failed to meet the plurality's standards.

Courts applying the fifth-vote rule thus promote judicial economy considerably more than the courts who solely apply the implicit consensus approach. Under the implicit consensus approach, lower courts will decline to reach a result that a majority of the plurality Court would agree upon, unless there is implicit agreement on the reasoning.[352] The limitations of the implicit consensus approach require lower court judges to turn a blind eye to the outcome a majority of the current Justices would agree upon, and continue to rely on old precedent that the majority of the Court determined should not govern the question before the Court. As such, the Supreme Court would be forced to take up the issue on certiorari to restate its position and reach an outcome that it already expressed in its views. Thus, the fifth-vote rule

346. *See* Baze v. Rees, 553 U.S. 35 (2008) (plurality opinion).

347. *Id.* at 39.

348. *See* Marceau, *supra* note 48, at 214–15. Marceau notes a possible implicit consensus between Justice Stevens' position and the plurality position and Justice Thomas' position. *Id.* at 213. However, Justice Stevens' position is practically a concurrence on the result alone. *Id.*; *see also* Ryan Ellersick, Comment, *Perpetuating the Constitutional Uncertainty of Lethal Injection Protocols: A Comment on* Baze v. Rees, 44 GONZ. L. REV. 553, 572 (2009) (noting the "deeply rooted disagreement" in *Baze* may fall "within the class of cases in which there is no 'lowest common denominator . . . .'").

349. *Baze,* 553 U.S. at 50 (plurality opinion).

350. *Id.* at 94 (Thomas, J., concurring).

351. *See, e.g.*, Andrew Welsh-Huggins, *Ohio Switches to 1 Lethal Injection Drug*, TELEGRAPH HERALD (IOWA), Nov. 15, 2009, at A4 (discussing that the one-drug method "would eliminate the potential for pain").

352. King v. Palmer, 950 F.2d 771, 781 (D.C. Cir 1991) (en banc).

enables the lower courts to clear the dockets of the federal court system more effectively than the implicit consensus approach.

VI. ADDRESSING THE SHORTCOMINGS OF THE FIFTH-VOTE RULE

The fifth-vote rule presents one obstacle that the implicit consensus approach attempts to avoid. Specifically, fifth-vote rule does not require the agreement between the rationale and the result of the case that the implicit consensus approach requires. This section will address solutions to the situations where the Justices do not reach an implicit consensus on the reasoning of a case. This section first argues that the problem with the precedential value of a decision where there is a lack of an agreement can be resolved by limiting the *Marks* holding. Second, this section addresses the situations where the fifth vote Justice describes potential outcomes that were not addressed or supported by the broader Justices. Finally, this section concludes by recognizing that there may be situations where no position is meaningfully narrower that the broader position and there is little overlap on the potential outcomes between the various Justices. In this final scenario, the Court should recognize no opinion is truly narrowest. In these cases, lower courts should treat the outcome alone as controlling and only apply the decision to cases where the facts are substantially identical to the facts decided in the plurality decision.

A. Reading the Marks *Holding Narrowly*

Plurality decisions where the reasoning of the fifth Justice's position is not a logical subset of broader opinions should be narrowly construed by lower courts to be confined as closely to outcomes a majority of the Court would accept. Not all precedents carry equal weight.[353] The Supreme Court recognizes a limitation on the stare decisis effect of a decision based on how well the decision was reasoned.[354] In a plurality decision, the reasoning for a decision is clearly not as strong as a majority opinion because there is no majority agreement on the rationale for the outcome. Further, there are instances where the Court limits its holding closely to the facts of the case and instructs lower courts to limit the holding of its decision closely to the facts described in the case.[355] The *Marks* rule follows this policy of very narrow limitations to the holding. That is, the stated policy behind the *Marks* rule is that the stare decisis effect should be limited in plurality decisions to the

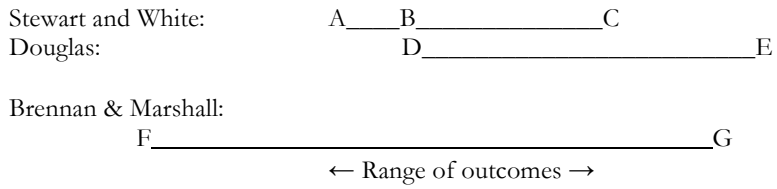
353. *See* 20 AM. JUR. 2d *Courts* § 137 (2005) (noting that the stare decisis effect in some cases is weak and in others is strong depending on the legal points argued and the number of cases the precedent has been applied to).

354. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 363 (2010) (quoting Montejo v. Louisiana, 556 U.S. 778, 791–93 (2009)).

355. *See, e.g.,* Bush v. Gore, 531 U.S. 98, 109 (2000) (per curium) ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982) (stating that the holding in a takings case was "very narrow.").

narrowest grounds.[356] *Marks* holdings, thus, should be treated as weaker stare decisis authority than a conventional majority opinion, and confined more closely to the facts of the case than a majority opinion. Because precedent involves either following or distinguishing the prior case from the subsequent case,[357] lower courts should not extend the fifth Justice's position to the furthest logical extent the reasoning could apply, but rather confine the holding as reasonably close to the outcomes a majority of the Justices in the decision would support. In other words, the lower courts should consider the positions articulated by the various Justices in the plurality decision before extending the holding of the fifth Justice's position beyond the facts of the case.

However, even a narrow reading of the fifth Justice's position may not resolve all of the potential conflicts with the fifth-vote rule: there may be potential factual scenarios that the fifth Justice's position addresses that the broader concurring Justices either rejected or did not address. In these cases, lower courts should exercise caution before extending the fifth Justice's position to encompass potential factual scenarios broader Justices did not embrace. As discussed earlier, *Furman v. Georgia* illustrates this point. In *Furman*, Justice Stewart and Justice White provided the narrowest votes, as both objected to the infrequent use of the death penalty. Their position made no limitation to the types of death penalty cases they were addressing—whether mandatory or discretionary.[358] Justice Douglas, who concurred on broader grounds, only addressed the discretionary use of the death penalty, but specifically declined to address whether the mandatory use of the death penalty was constitutional.[359] Thus, the *Furman* opinions do not overlap: the narrowest grounds potentially reach a factual scenario that a broader position declined to address. *Furman's* concurring positions appear as follows:



Justice Douglas, Justice Brennan, and Justice Marshall all agreed that a discretionary death penalty was unconstitutional.[360] Justice Douglas did not address the constitutionality of a mandatory use of the death penalty. Justice

356. *See* Marks v. United States, 430 U.S. 188, 193 (1977) (the holding is the "narrowest grounds . . . ."); *see also* Panetti v. Quarterman, 551 U.S. 930, 949 (2007) (stating that the more limited holding controls under *Marks*).

357. Schauer, *supra* note 23, at 594.

358. *See* discussion *supra* notes 185–201 and accompanying text.

359. Furman v. Georgia, 408 U.S. 238, 257 (1972) (Douglas, J., concurring).

360. *See* discussion *supra* notes 185–201 and accompanying text.

Stewart and Justice White agreed that the infrequent use of the death penalty was unconstitutional. The potential gap in outcomes in *Furman*, which was only addressed by four Justices, is the area between A and B. This area covers mandatory death sentences which led to insufficient use of the death penalty to address a sufficient state interest.

The question becomes how to address the gaps in potential outcomes expressed in the narrower opinion that were either not addressed or rejected by broader opinions. One solution is simply to reject the application of the *Marks* rule altogether in these situations.[361] However, this approach conflicts with the letter of the *Marks* rule, which plainly indicates that every opinion should have a controlling opinion.[362] More significantly, the Court recognized a narrowest grounds holding in *Furman*,[363] so in practice the Court will not reject the use of *Marks*, even though there is not logical agreement on every possible outcome. Even though four Justices' reasoning would extend to scenarios that would include statutes for mandatory death sentences, the specific factual scenario before the *Furman* Court involved discretionary death penalty statutes.[364] Despite the lack of overlap in reasoning and potential results, the three controlling Justices in *Gregg* were still willing to find a narrowest grounds holding,[365] so this gap in potential results is not fatal to a *Marks* application.

A better solution to the problem of possible result gaps in the tests articulated in the various opinions may be found in *Gregg v. Georgia's* companion case, *Woodson v. North Carolina*, which decided the question of the constitutionality of mandatory death sentences.[366] Rather than apply narrowest grounds analysis from *Furman* to *Woodson*, the Court framed the question of mandatory death sentences in *Woodson* as a novel issue the Court had not addressed previously.[367] The plurality reached its result on reasons outside of *Furman*, though the plurality did rely on *Furman* as persuasive authority.[368] The *Woodson* plurality chose to address mandatory death sentences as a separate issue entirely from the issues the Justices discussed in *Furman*, even though the narrowest positions potentially reached mandatory death penalty statutes.

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361. The Third Circuit took this approach, which is a narrow, but consistent, reading of its prior *Casey* decision. *See* Rappa v. New Castle Cnty., 18 F.3d 1043, 1060 (3d Cir. 1994) (declining to recognize a *Marks* holding in a case that did not produce results "which, when applied, [would] necessarily produce results with which a majority of the Court from the case would agree.") (quoting Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d 688, 693 (3d Cir. 1991).

362. The Court later restated the *Marks* rule as: "When there is no majority opinion, the narrower opinion controls." Panetti v. Quarterman, 551 U.S. 930, 949 (2007).

363. Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

364. *Furman*, 408 U.S. at 256–57 (Douglas, J., concurring).

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

366. 428 U.S. 280, 282 (1976) (plurality opinion).

367. *Id.* at 298.

368. *Id.* at 297.

Woodson suggests that gaps in outcomes that were not addressed in the broader concurring opinions may be resolved by addressing the issue separately. In other words, the gap in potential results should be treated as a separate issue than the issue discussed in the prior plurality decision. This proposition derives from the concept that decisions should be applied narrowly by factually distinguishing the case from prior cases.[369] Therefore, it is useful to compare the reasoning offered in each concurring opinion to the potential issues the decision should reach. To illustrate, in *Furman*, a majority of the concurring Justices did not address whether mandatory death sentences were constitutional. Thus, because a majority of the Court did not address this specific issue, the Court treated this potential set of facts on mandatory death sentences as a separate issue in subsequent cases.

Lower courts should implement the same practice as the *Woodson* Court in situations where there are gaps in the reasoning because some of the broader Justices either chose not to address or rejected potential outcomes that the narrower Justice's position could reach. Therefore, just because the narrower Justice expresses a position that does not entirely overlap with the issues addressed by the broader Justices, lower courts need not refuse to apply *Marks* entirely in subsequent cases. Rather, *Marks* may apply to situations where there is agreement on the result, but lower courts may distinguish the case where there is no majority agreement on the result. Thus, separate issues outside the range of results that a majority of the Court addressed in a plurality decision should be addressed as a novel question separate from the questions addressed in the plurality decision.

In sum, lack of agreement on potential results between the fifth Justice and the broader Justices does not mean *Marks* is completely inapplicable in subsequent cases. Lower courts should narrowly apply the fifth Justice's position to cover results that a majority of the Court would accept, but treat potential outcomes not accepted by the broader Justices as a separate issue.

B. Marks *When There Are No Narrowest Grounds*

Finally, it is useful to consider that *Mark*s may not provide a fifth vote holding in every case. Even commentators who recognize readings of *Marks* that would produce a holding in almost any case point out that there are simply cases where there are no recognizable narrowest grounds.[370] There are some cases where there are so many different opinions expressing so many different positions that it is difficult to determine a governing standard.[371]

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369. Schauer, *supra* note 23, at 597.

370. Stearns, *supra* note 144, at 337 ("[I]n some fractured panel Supreme Court cases, the assumptions of the *Marks* doctrine do not apply.").

371. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 569–70 (1981) (Rehnquist, J., dissenting); Rappa v. New Castle Cnty., 18 F.3d 1043, 1061 (3d Cir. 1994).

> *Marks* is practically unworkable in situations where there is significant disagreement on the reasoning and potential outcomes. The following illustration demonstrates a situation where Marks provides no meaningful guidance.
>
> Position 1 (2 Justice support):
> A_____B
> Position 2 (2 Justice support):
> C_____D
> Position 3 (2 Justice support):
> E_____F
>
> ← Range of outcomes →

In these situations, a lower court is still confronted with how to handle the plurality decision. The plurality decision is not completely useless for the lower court. The lower court may still find meaningful guidance from the case. First, no matter how divergent the opinion, the lower court is still bound by the result in the case.[372] In other words, the lower court may still follow the Supreme Court decision if the facts of the case the lower court is deciding are substantially identical to the facts addressed in the plurality decision.[373] For example, if the Supreme Court found an ordinance unconstitutional in the plurality decision, the lower court should find an identical or very similar ordinance unconstitutional in subsequent cases.[374]

Second, the various opinions may have value as persuasive authority and the lower court may find guidance examining the various positions of the Justices, which may be valuable in cases where the Court has not provided prior guidance on the specific issue addressed in the plurality decision.[375] Thus, *Marks* should not apply to every plurality decision, but lower courts may still find some guidance from the most divided opinions.

CONCLUSION

Like it or not, the *Marks* rule is here to stay. The Court has readily adopted and applied *Marks* in situations even when there is no agreement between the outcomes and the result. Of course, the ideal is for the Supreme Court to write a single majority opinion explaining their reasoning for reaching the result, but when the views of the Members of the Court diverge on issues they address, *Marks* provides guidance on how to apply the decision in subsequent cases. The goal of precedent is to ensure that similar facts on similar issues

372. *Rappa*, 18 F.3d at 1061.
373. *Id.*
374. *Id.*
375. *See, e.g.*, United States v. Johnson, 467 F.3d 56, 64 (1st Cir. 2006) (identifying the dissent in *Rapanos v. United States* as "a simple and pragmatic way to assess what grounds would command a majority of the Court").

before a court reach an outcome consistent with the prior case. [376] The fifth-vote rule provides lower courts a meaningful standard that would allow the lower court to reach a result with which the majority of the Supreme Court would agree. The Court's interpretation of *Marks* is the fifth-vote rule, so lower courts should comfortably apply this rule when interpreting a plurality decision. Additionally, the implicit consensus approach is too limited. Courts that solely apply the implicit consensus approach may fail to duplicate the outcomes that the Court would reach. Because of the advantages the fifth-vote rule allows and because the Court recognizes the fifth-vote rule as the proper interpretation of *Marks*, lower courts should apply the fifth-vote rule, rather than confine themselves to the implicit consensus approach when interpreting plurality decisions.

376. Schauer, *supra* note 23, at 597.