THE ROLE OF DISSENTS IN THE FORMATION OF PRECEDENT

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ABSTRACT

I argue that dissenting opinions play an important role in the formation of precedent in the context of plurality decisions. Courts typically treat plurality cases as precedential. However, procedures for interpreting and following plurality decisions vary considerably across courts and judges, producing major inconsistencies in the adjudication of cases that are ostensibly governed by the same law. I suggest that, when a majority of judges agrees on legal principle, that principle should have binding effect, even if the judges in principled agreement disagree on result or case outcome. I explain why some courts and most commentators have categorically excluded dissents from the holding category, and why that move is mistaken. First of all, an analysis of the holdings/dicta distinction shows that, in some cases, dissenting views belong on the holding side. Second, if we think that principled decisionmaking is fundamental to the authority and legitimacy of case law, then judicial agreement at the level of rationale or principle merits precedential status, even where those who agree on principle disagree on how a case should come out.

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INTRODUCTION

Under stare decisis or the doctrine of precedent, judges are supposed to follow previously decided cases, regardless of whether they agree with them and even if these past cases were in fact incorrectly decided. The legal propositions that a case establishes or affirms might be difficult to discern and open to multiple competing interpretations; nevertheless, we know at least that we can find these propositions in the majority opinion. But what about plurality decisions—cases that are decided without the support of a majority opinion? Courts generally do treat this kind of decision as precedential. However, uniform procedures for interpreting and applying plurality decisions as precedent are lacking. Practices vary considerably across courts and judges, producing major inconsistencies in legal outcomes among cases that are ostensibly governed by the same law.

The United States Supreme Court has touched on the problem of the precedential effect of plurality decisions, but has failed to articulate any clear or definitive solutions. In December 2017, the Court granted *certiorari* in a case—*Hughes v. United States*—that turned on the interpretation of a plurality precedent.[1] *Hughes* concerned the rights of previously convicted defendants who had accepted plea bargains: the defendant argued that he should be eligible for a sentence reduction given that the Sentencing Commission had reduced the recommended sentencing range for his crime after he was sentenced. In the precedential case, *Freeman v. United States*, the Court had issued a plurality decision with four justices joining the lead opinion, one justice concurring in result only, and four joining in a dissent.[2] The plurality and concurrence had decided in favor of the defendant on different grounds entirely.

Depending on which opinion or combination of opinions a precedent-bound court takes as binding, an individual who took a plea bargain in the shadow of a now-obsolete recommended sentencing range may or may not be eligible for a sentence reduction. The federal circuits were divided on the issue because they disagree

1. Hughes v. United States, 138 S. Ct. 1765 (2018). Oral argument was held on March 27, 2018, and the Court issued its decision on June 4, 2018.

2. 564 U.S. 522 (2011).

about the appropriate method of interpreting plurality decisions as precedent. The parties in *Hughes* devoted considerable portions of their briefs to the plurality precedent issue, and multiple amicus briefs focused on the topic.[3] Oral argument also revolved largely around the question of how to follow a plurality decision as a precedent. Nevertheless, as with many other cases in the 2017-18 term, the Court ultimately dodged the difficult issue. Instead of showing courts how *Freeman* ought to be interpreted, it decided the sentencing question on the merits.

As Justice Kennedy explained, "it [was] unnecessary to consider [the plurality precedent issue] despite the extensive briefing and careful argument the parties presented to the Court concerning [it]."[4] Had the Court resolved the precedent issue, laws governing a wide variety of topics—including affirmative action, free speech, takings, and federalism—would have been affected, since the Supreme Court has issued plurality decisions on each of these topics. Nevertheless, the Court declined the opportunity to clarify or develop the doctrine of plurality precedent, and the issue remains a live one.

Both state and federal judges have proposed and applied different methods for following plurality decisions as precedent, and scholars and commentators have in turn endorsed, rejected, and elaborated various methods. Despite the disagreement regarding how courts ought to apply plurality decisions, scholars seem to largely agree on at least one point: dissenting opinions do not, and should not, count. I call this position the *conventional view*. I argue that the conventional view is mistaken. I propose the *dissent-inclusive view* as an alternative. On the dissent-inclusive view, dissenting opinions can be critical to a case's precedential effect. An approach to following plurality decisions that requires the consideration of dissenting opinions fits better with well-established doctrine and basic principles than does an approach that categorically excludes dissents. I argue that, accordingly,

3. *See, e.g.*, Brief of Petitioner at 37–59, Hughes v. United States, 138 S. Ct. 1765 (2018) (No. 17-155); Brief for the United States in Opposition at 8–17, Hughes v. United States, 138 S. Ct. 1765 (2018) (No. 17-155); Reply Brief of Petitioner at 12–25, Hughes v. United States, 138 S. Ct. 1765 (2018) (No. 17-155); Brief Amicus Curiae of Chantell and Michael Sackett and Duarte Nursery, Inc., in Support of Petitioner at 6–40, Hughes v. United States, 138 S. Ct. 1765 (2018) (No. 17-155); Brief Amicus Curiae for Agric., Bldg., Forestry, Livestock, Mfg., Mining, and Petrol. Bus. Interests in Support of Petitioner *passim*, Hughes v. United States, 138 S. Ct. 1765 (2018) (No. 17-155); Brief of Professor Richard M. Re as Amicus Curiae in Support of Neither Party *passim*, 138 S. Ct. 1765 (2018) (No. 17-155).

4. *Hughes*, 138 S. Ct. at 1772.

courts sometimes have an obligation to take dissenting material as binding.

The first Part of this Article lays out the problem that plurality decisions pose for the purposes of precedent, introduces different types of plurality decision, and delineates in detail the *dual-majority* type, which represents an important subset of plurality decisions. The second Part takes up the principled and widely accepted distinction between *holdings* or *ratio decidendi* and *obiter dicta*. I explain why some courts and the majority of commentators have categorically excluded dissents from the holding category and why that move is mistaken. I then present various possible methods for dealing with plurality decisions and discuss their deficiencies. Part III calls on the importance of principled decisionmaking in adjudication to further defend the claim that judicial agreement at the level of rationale or principle merits precedential status, even where those who agree on principle disagree on how a case should come out.

I. THE PLURALITY PROBLEM

A. *Pluralities and Dual Majorities Defined*

On any multi-member court, judges can agree or disagree on not only a case's outcome but also the reasoning behind a case's outcome. A plurality decision results when no single majority of the court agrees on both reasoning and outcome. Although outcome is generally binary—for example, holding for the plaintiff *versus* the defendant or affirming *versus* reversing the lower court—many alternative rationales might be endorsed to support either possible outcome. Accordingly, although disputes almost always generate a majority vote on outcome, in many cases no majority agrees on a single reasoning-plus-outcome bundle.

The kind of plurality case that I am most interested in for the purposes of this paper is the *dual-majority* decision. In dual-majority cases, some legal test, rationale, justification, grounds, or line of reasoning is endorsed by a majority of judges, but that majority is split with respect to outcome. For example, one set of judges might reach a conclusion in favor of the defendant based on some principle, X. Another set of judges endorses the same principle, but believes that it better supports an outcome in favor of the plaintiff. Together, those judges comprise a majority in support of principle X.

Any multi-member court with more than two members can create a dual-majority decision, and many permutations of this type of decision are possible. Here are some examples (where each number stands for one opinion, representing the number of judges voting for that opinion, and numbers in brackets represent dissenting opinions): a three-member court could issue a 1-1-(1) decision; a seven-member court could issue a 2-2-(3) decision, and a nine-member court could issue a 4-1-(4) decision. Supposing that the middle opinion endorses the same rationale or legal theory as the dissenting opinion, each of these scenarios represents a dual-majority decision. Figure 1 illustrates a simple permutation of a dual-majority decision issued by a nine-member court.

Figure 1. Model Example of a Dual-Majority Decision

Opinion	Rationales/Principles	Application of Principles to Facts	Result/Conclusion
Lead - 4	A, B, C	→	Affirm (plaintiff prevails)
Concurrence - 1	D, E, F	→	Affirm (plaintiff prevails)
Dissent - (4)	D, E, F	→	Reverse (defendant prevails)

In reality, cases are often more complicated, since any given opinion might contain multiple rationales, legal theories, or lines of reasoning, and two opinions might agree as to some rationales but not others. In my view, whenever a majority agrees as to some significant piece of reasoning, then (assuming the shared reasoning meets other conditions that I delineate below) that reasoning has, or should have, binding precedential effect. Here, I will focus mainly on the relatively straightforward dual-majority scenario where a majority that is split on outcome nevertheless largely agrees at the level of rationale—a scenario that has occurred many times, even if we look to only U.S. Supreme Court cases.[5] Moreover, I focus mainly on dual majorities of nine-member courts. This is only because most of my examples are

5. *See infra*, note 12 and accompanying material.

drawn from the U.S. Supreme Court and most of the literature on pluralities revolves around Supreme Court cases. However, I do not mean to restrict my argument for the precedential value of dissenting opinions to U.S. Supreme Court or even U.S. federal cases; my main conclusions extend to U.S. state courts, as well as courts in other common law systems, such as the federal and provincial courts of Canada.

B. *The Significance of Plurality and Dual-Majority Decisions*

Although plurality decisions amount to a relatively small minority of all judicial opinions, the U.S. Supreme Court has issued plurality decisions almost every term since the mid-1950s. And plurality decisions have become increasingly common over the past century.[6] Between 1955 and 2006 the Court issued 213 pluralities,[7] and between the 2007 and 2016 terms, it issued forty-one.[8] The federal courts of appeal have themselves issued many plurality decisions—these are particularly common in *en banc* scenarios—and those courts need to determine not only how to discern the precedential force of Supreme Court plurality decisions, but also what to make of their own. State supreme courts likewise issue plurality decisions with some regularity, and both state and federal courts have to make precedential sense out of those as well.

Moreover, plurality decisions seem to be particularly common in cases concerning highly salient and ideologically-charged subject

6. *See* U.S. Dep't of Justice, *Report to the Attorney General: A New Look at Plurality Decisions*, Office of Legal Policy, Washington, D.C., 1, 1988 (reporting that there were very few plurality opinions before 1957); Pamela C. Corley et al., *Extreme Dissensus: Explaining Plurality Decisions on the United States Supreme Court* 31 JUST. SYS. J. 180, 180–81 (2010) (reporting forty-five plurality opinions before 1955, with thirty-five of those occurring after 1900, and twenty-seven plurality opinions between 1938 and 1955). *See also* Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 800 (2017) (noting that, "[a]lthough Supreme Court plurality decisions were historically rare, they have grown more frequent since the mid-century and are now a familiar feature of the Court's decisionmaking"); Linas E. Ledebur, Comment, *Plurality Rule: Concurring Opinions and a Divided Supreme Court*, 113 PENN. ST. L. REV. 899, 900 (2009) (reporting a significant rise in dissenting opinions in the second half of the twentieth century).

7. Corley et al., *supra* note 6, at 181.

8. To count the Supreme Court plurality decisions for the 2007 to 2016 terms, I first collected all plurality decisions as identified by Wikipedia's Supreme Court term tables (*see, e.g.*, https://en.wikipedia.org/wiki/2010_term_opinions_of_the_Supreme_Court_of_the_United_States). I then crosschecked this data using Westlaw, and in that process eliminated some of the decisions that were initially identified as pluralities. Given this method, my numbers are conservative: they more likely underestimate than overestimate the frequency of plurality decisions.

matter— cases of the type that tend to catch the public's attention.[9] These cases often implicate or address fundamental values, which is perhaps why the Justices are less inclined to compromise in these cases than others. Pamela Corley and others have suggested that "plurality decisions are important to study because they tend to occur in highly salient issue areas such as civil liberties and civil rights."[10] Judge Christen of the Ninth Circuit Court of Appeals has observed that pluralities often arise "in the most contentious cases where . . . the stakes are significant."[11] Although plurality decisions do not constitute a large proportion of common law decision-making, they do make up an important subset.

And, although dual-majority cases make up only a subset of plurality cases, it is not unusual to find considerable agreement between a lead or concurring opinion and a dissenting opinion at the level of rationale or principle. The Supreme Court has issued dual-majority decisions in many important cases across a range of areas, including abortion, affirmative action, desegregation, free speech, takings, separation of powers, federalism, and environmental protection.[12] Although some decisions represent obvious cases of dual

9. As the Petitioner in *Hughes* observed, "[s]ome of this Court's most significant cases—involving such issues as abortion, gun control, voting rights, affirmative action, capital punishment, and the scope of congressional authority under the Commerce Clause—have been decided by a plurality decision." Petition for a Writ of Certiorari at 13, 19–20, Hughes v. United States, 138 S. Ct. 1765 (2018) (No. 17-155) (*cert. granted* Dec 7, 2017) [hereinafter *Hughes* Petition for a Writ of Certiorari].

10. *See* Corley, *Uncertain Precedent: Circuit Court Responses to Supreme Court Plurality Opinions*, 37 AM. POL. RES. 30, 32 (2009) (demonstrating empirically that plurality decisions are more likely in salient, complex, or difficult cases, and in particular in cases concerning civil rights or liberties); *see also* Corley, *supra* note 6, at 196, 192 (suggesting that pluralities are more likely when the case has a high degree of public salience, and demonstrating that cases about civil liberties and rights increase the chance of a plurality decision by 47%); James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 GEO. L.J. 515, 527 (2008) (observing that "plurality decisions tend to occur in difficult and highly salient cases, such as in the areas of civil rights and civil liberties—areas in which the law is often unclear and the Justices' ideological proclivities are most relevant"); Williams, *supra* note 6, at 800 (noting that "plurality decisions often occur in cases involving especially difficult and highly salient legal issues on which public opinion is sharply divided"); 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, 1374 (2008) (claiming that "[m]any plurality decisions address fundamental—or even politically charged—legal issues"); Ledebur, *supra* note 6, at 900–01 ("Cases that include multiple concurrences and dissents are common, especially in high profile cases.").

11. United States v. Davis, 825 F.3d 1014, 1028 (9th Cir. 2016) (Christen, J., concurring).

12. *See*, *e.g.*, Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (equal protection and desegregation); Rapanos v. United States, 547 U.S. 715 (2006) (environmental protection); E. Enters. v. Apfel, 524 U.S. 498 (1998) (takings); Waters v. Churchill, 511 U.S. 661 (1994) (free speech); Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (abortion); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (affirmative

majorities, other decisions are not as clear-cut. In any event, every plurality decision represents an opportunity for an interpreter to discover principled agreement across the judgment. And judges and litigants alike, I argue, should be on the lookout for such agreement.

C. *Clarifying and Illustrating Plurality Decisions*

This subsection is meant to clear up some of the confusion surrounding plurality decisions and their precedential effect. When a multi-member court decides a case, a majority of judges might agree as to rationale or principle, while disagreeing as to outcome: in that event, we would have a dual-majority decision. In the most straightforward dual-majority case, one majority of judges agrees on outcome or result, but disagrees on the appropriate grounds or rationale for that result; a different majority agrees on grounds or rationale, but disagrees on result.

Many commentators overlook the significance or even the possibility of this eventuality. For example, James Spriggs II and David Stras assert that, "[p]lurality opinions [in the context of the U.S. Supreme Court] result when five or more justices agree on the result . . . but no single rationale or opinion garners five votes."[13] Spriggs and Stras conflate rationale with opinion, failing to recognize that judges can agree on rationale without agreeing on any single opinion as a whole: judges can and sometimes do agree on the grounds that a decision should be based on, but disagree as to the result that those grounds generate or support.[14] Ryan Williams likewise writes that, "plurality decisions involve agreement on outcomes alone."[15] And Corley has made the same claim: "[i]n fact, cases with plurality opinions have at least three opinions, each relying on different legal theories."[16] Although plurality decisions do have at least three

action); Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978) (federalism and jurisdiction); Nat'l Mut. Ins. Co. of D.C. v. Tidewater Transfer Co., 337 U.S. 582 (1949) (separation of powers).

13. Spriggs II & Stras, *supra* note 10, at 519.

14. Ledebur, *supra* note 6, at 905 says similarly that "no view [in a plurality case] has a majority of the Court endorsing it." Based on that claim, he reasons that none of the opinions issued in a plurality case are "automatically-binding" as precedent. Ledebur conflates *view* and *opinion*, neglecting to recognize that judges might endorse the same view in some important respects—for example, they might agree on a governing theory for a case, which might comprise several legal principles—without reaching agreement on *opinion*, since an opinion generally contains a result in addition to reasoning.

15. Williams, *supra* note 6, at 828.

16. Corley, *supra* note 6, at 180; *see also* JOCYE J. GEORGE, JUDICIAL OPINION WRITING HANDBOOK 323 (5th ed., 2007) (asserting that, if no opinion secures majority support, then the decision has no precedential value because in that event no majority agreed on the reasoning);

opinions, each opinion does not necessarily rely on a different legal theory. In many plurality cases, two or more opinions rely on the same legal theory entirely or to a substantial extent.

The U.S. Courts government website reveals another type of confusion: it instructs readers that the *plurality* or *lead* opinion of a fractured decision "is the opinion that received the greatest number of votes of any of the opinions filed."[17] But that is not right. The lead opinion is the opinion that received the most votes *of the set of opinions that arrived at the conclusion with which a majority of the court agreed*.[18] It is possible, and not uncommon in the plurality context, for a dissenting opinion to receive the most support of all opinions.[19] For example, we could adjust the scenario in Figure 1 above such that the lead opinion received three votes, the concurring opinion received two, and the dissent four. However, by definition, an opinion that disagrees with the final judgment of the court is not a lead opinion, even if it receives more votes than any other opinion.

D. *A Non-Legal Example of a Dual-Majority Decision*

Here is a non-legal example to help illustrate the dual-majority scenario. Imagine a woman, Tamar, with an eight-year-old daughter, Shayna, who wants to train to be a competitive gymnast. Tamar is inclined to support her daughter's endeavor because she believes that as a parent she should make every effort to support her children's physical well-being. Let's say Tamar has a sister, Alanna, who agrees that Tamar should grant her daughter permission to participate in competitive gymnastics, but Alanna's reason is that parents should

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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, 831 ("[T]he reasoning behind [plurality] decisions' holdings by definition did not receive majority support.").

17. *Glossary – U.S. v. Alvarez*, UNITED STATES COURTS, http://www.uscourts.gov/educational-resources/educational-activities/glossary-us-v-alvarez.

18. The terminology is confusing, since *plurality decision* refers to the whole decision, including all the opinions, whereas *plurality opinion* refers to one of the opinions that comprise the plurality decision. Generally, a single plurality or lead opinion is identifiable, although in theory there could be more than one, a possibility that commentators tend to overlook. For example, a nine-member court could issue four opinions (A-D), where A-C support one judgment (say, affirm the lower court) and D supports the opposite judgment (reverse the lower court). If two judges vote for Opinion A, two for B, one for C, and four for D, then we would have a tie between A and B for most votes of the opinions that support the majority judgment, and determining a single lead opinion would require a further decision rule.

19. *See, e.g.*, Kerry v. Din, 135 S. Ct. 2128 (2015) (where a dissenting opinion received four votes, more than any other opinion); Town of Greece, N.Y. v. Galloway, 572 U.S. 565 (2014) (same).

make every effort to ensure that their daughters are popular at school. Let's give Tamar another sister, Marina, who thinks that Tamar should *not* allow her daughter to participate in competitive gymnastics because (like Tamar) she believes that parents should try to promote their children's physical well-being. Although Tamar and Alanna reach the same conclusion or outcome—that Tamar should allow Shayna to take up competitive gymnastics—they disagree as to the rationale that should govern such a decision. Tamar and Marina, on the other hand, agree at the level of rationale—they both believe that parents should make every effort to promote the physical well-being of their children—even though they disagree on outcome.

If the gymnastics decision were a legal dispute decided by a three-member court of Tamar and her two sisters, the result would be a dual-majority decision, with one majority of decisionmakers agreeing on the judgment and a different majority agreeing on the appropriate grounds for the judgment.

If Tamar and Marina actually agree at the level of principle and apply the same principles to the same set of facts, how could they reach different conclusions? Well, it would seem that Tamar and Marina likely disagree on some facts, and that this disagreement is responsible for their opposing conclusions. Whereas Tamar believes that gymnastics would be good for her daughter's well-being, Marina thinks that gymnastics would be detrimental to the girl's health.

In the judicial context, we can assume that at the appellate level the factual situation is basically settled.[20] Nevertheless, sometimes judges interpret the facts of a dispute differently or make different inferences based on those facts. For example, in *Will v. Calvert*, a U.S. Supreme Court case I discuss in more detail below, a district judge (Will) had issued a stay on proceedings in his court because parallel proceedings were already underway in state court.[21] The question for the Court was whether Will had an obligation to hear the case. Some of the justices believed that Will's stay order was effectively a dismissal of the case and based their reasoning on that interpretation of the facts. However, other justices viewed the stay order in its technical sense, as a suspension that could and might be set aside. In

20. At the stage of appellate review, findings of fact must be blatantly incorrect in order for courts to question them. Even if appellate judges have differing beliefs about the accuracy of the facts on the record, then, those beliefs should typically be suppressed. *See* FED. R. CIV. P. 52(a) (factual findings "must not be set aside unless clearly erroneous").

21. 437 U.S. 655 (1978).

this case, the factions that disagreed on the facts disagreed at the level of principle as well. Even if these factions had agreed on principle, however, they might have arrived at different results given their disagreement regarding the facts.

E. *Other Explanations for Dual-Majority Decisions*

In this section I describe other scenarios that might lead to dual-majority decisions. The survey is meant to illuminate some of the more likely paths to dual majorities and is not exhaustive of all possibilities. One might think that dual-majority decisions are illusions that occur when groups of judges appear to agree at the level of legal rationale, principle, or theory, when in fact there is some hidden disagreement at this level that causes them to reach different results.[22] This sort of disagreement might indeed explain some decisions that look like dual majorities, but I do not think it accounts for all or even most of them.

Moreover, such hidden disagreement might be slight, which would explain why it is not evident. For example, consider the model dual-majority decision represented by Figure 1 above. Even if there is some disagreement between the concurrence and dissent with respect to rationale (perhaps, for example, they endorse different versions of principle D), supposing that this disagreement is relatively minor, my main conclusions about the precedential value of dual majorities would be unaffected.

Plurality decisions are often the result of hard and contentious cases, cases where a small difference in principle could tip the scales to the opposing side on result. Let's say that rationales D, E, and F in Figure 1 represent a balancing test. The concurring and dissenting opinions agree on the factors that ought to be balanced; however, the factions might attribute slightly different weighting schemes to the factors (for example, 20/20/60 versus 20/30/50). Since the case is a close one, that difference could lead the factions to reach different results. This disagreement between the concurring and dissenting judges could be described as a difference in principle. Nevertheless,

22. Inversely, different groups of judges that come to the same conclusion in a case might appear to disagree on the proper legal theory to govern the dispute, when they actually agree on theory. I take it that this scenario represents what some commentators have referred to as a "false plurality" decision. *See, e.g.,* Michael L. Eber, Comment, *When the Dissent Creates the Law: Cross-Cutting Majorities and the Prediction Model of Precedent*, EMORY L.J. 207, 218 (2008).

we can recognize the substantial agreement on principle between the concurrence and dissent in such a case even if their principle schemes differ slightly and even if, as a result of that difference, the groups reached different conclusions.

A dual-majority decision can also arise when judges have differing views on some matter—for example, a procedural technicality—that is beside the point of the central legal dispute. In that event, two groups of judges might fully agree on both the appropriate governing principles for the dispute and the material facts, and make no errors of reasoning, but still reach different outcomes. This is what happened in the dual-majority case of *Will v. Calvert*.[23] The question in *Will* was whether and under what conditions a federal judge could decline to hear a case that falls within the court's jurisdiction. Judge Will (of the United States District Court for the Northern District of Illinois) had stayed proceedings of a case in his court on the ground that the Illinois state court system was already handling the dispute. The Court of Appeals for the Seventh Circuit reversed Judge Will's stay and the Supreme Court reversed the Court of Appeals, remanding the case back to the District Court.

One faction of Supreme Court justices (the plurality) endorsed and applied one set of principles (call this set *A*), and concluded on the basis of A that the district judge's stay order was permissible; accordingly, the plurality voted to reverse the lower court's decision against the district judge. Another faction (the concurrence) endorsed a different set of principles (call this set *B*), but did not apply B, and accordingly reached no definitive conclusion concerning the district judge's stay order; the concurrence voted to reverse the lower court's decision and remand the case to the district court so that the judge could reconsider his stay order in light of B. A third faction (the dissent), both endorsed and applied B, concluded that Judge Will's stay was improper, and affirmed the Court of Appeals accordingly. The concurrence and dissent agreed on the principles that should ultimately govern the case (and most likely on how the case should ultimately come out), but disagreed on whether the district court judge should have the chance to apply those principles himself.

Finally, mistakes in reasoning, even aside from factual errors, can lead to a dual-majority decision. Even if two groups of decisionmakers agree on all relevant principles and facts, one might

23. 437 U.S. 655 (1978).

commit an error in the application of principle to fact. For example, imagine that my friend and I are making plans to go to another friend's wedding, which is a few towns away, and we are taking the train. We agree on the start time of the wedding, the train speed, and the distance. We need to decide which of two afternoon trains to get, the one o'clock train or the two o'clock train. We reason according to the same principles: we both think it would be disrespectful to arrive late and we do not want to be disrespectful; we also think that it would be boring to arrive early and we do not want to be bored. But if one of us makes a computational error, we might nevertheless come to different conclusions regarding which train we ought to take.

F. *The Conventional View of Plurality Decisions and Precedent*

1. Excluding Dissents

Despite considerable scholarly disagreement about the proper precedential effect of plurality decisions, most commentators share the belief that material from dissenting opinions cannot be binding on subsequent courts. Jonathan Adler, for example, writes that a dissenting opinion, "like dicta from a majority opinion[,] does not—indeed cannot—form part of the *holding* of the Court."[24] In their recent treatise on the law of precedent, Bryan Garner and eleven U.S. judges acknowledge the substantial "uncertainty surrounding dual majorities' precedential weight."[25] According to Garner and his

24. Jonathan H. Adler, *Once More, with Feeling: Reaffirming the Limits of Clean Water Act Jurisdiction*, *in* THE SUPREME COURT AND THE CLEAN WATER ACT: FIVE ESSAYS 81, 94 (L. Kinvin Wroth ed., 2007); *see also* Adam S. Hochschild, Note, *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective*, 4 WASH. U. J.L. & POL'Y 261, 279 (excluding the possibility that any part of a dissenting opinion could bind subsequent courts); A.M. Honoré, Note, *Ratio Decidendi: Judge and Court*, 71 L.Q. REV. 196, 198 (1955) (claiming that "[dissenting] opinions . . . cannot form part of the *ratio decidendi* of a case [because] they are not reasons for the order made by the court"); Ken Kimura, Note, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 CORNELL L. REV. 1593, 1599–1603, 1615 (1992) (arguing that majority rationales of dual-majority decisions "should have limited precedential value"). Michael Eber's Comment on the topic goes the furthest of any work I have been able to find in endorsing the precedential value of dissents in dual-majority decisions. He argues that courts should treat dissenting opinions in dual-majority cases as highly persuasive because those opinions help to predict how future cases will be decided. *See supra* note 22, at 212, 231–39. (Confusingly, Eber calls dual majorities "cross-cutting majorities," and seemingly reserves the term "dual majority" for a very narrow class of cross-cutting majorities, the parameters of which are unclear from the comment.) For judicial statements against including dissents in the precedent calculus, *see, e.g.*, United States v. Davis, 825 F.3d 1014, 1029 (9th Cir. 2016) (Christen, J., concurring) (asserting that "[dissents] do not inform our analysis of what binding rule, if any, emerges from a fractured decision").

25. *See* GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT, 210, 207 (St. Paul, M.N.:

coauthors, "dual-majority alignments" are "not technically binding."[26] Nevertheless, they suggest that such alignments "should be given significant persuasive authority—particularly where decisions are so fragmented as to render the *Marks* framework inapplicable."[27]

2. Narrowest Grounds

In *Marks v. United States*, the Supreme Court articulated a method for following pluralities, at least of a specific type, but did not provide much detail, explanation, or justification for that method. In the Court's words, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[28] Most of the scholarship on plurality decisions focuses on the *Marks* rule.[29]

a. The Precedential Value of Freeman

The controversy in *Hughes v. United States* revolved around the correct interpretation of *Marks*. In *Freeman v. United States* (which had very similar facts to *Hughes*) the Court divided over the rights of defendants who took "(C) agreements"—plea bargains that include sentences as specified by the Federal Rules of Criminal Procedure 11(c)(1)(C).[30] The Sentencing Reform Act of 1984[31] enables a defendant who was sentenced based on a range specified in the Sentencing Commission's Guidelines to request a sentence reduction

Thomson Reuters, 2016).

26. *Id.*, at 212–13.

27. *Id.*

28. Marks v. United States, 430 U.S. 188 (1977).

29. *See, e.g.*, RANDY KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 142 (Cambridge University Press 2017) (stating that "the *Marks* principle . . . governs the binding effect of fractured Supreme Court decisions"); Maxwell L. Stearns, *The Case for Including* Marks v. United States *in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321 (2000); Williams, *supra* note 6 (suggesting that *Marks* determines the precedential effect of plurality decisions); Weins, *supra* note 16, at 832 (claiming that, "[a]fter the Supreme Court hands down a plurality decision, lower courts must discern its precedential value according to the *Marks* doctrine").

30. Freeman v. United States, 564 U.S. 522 (2011). Rule 11 of the Federal Rules of Criminal Procedure lays out the procedure for pleas. Rule 11(c)(1)(C) provides that the parties *may reach a plea agreement, which may specify* "that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement)."

31. Codified as 18 U.S.C. § 3582(c)(2).

if the Commission subsequently lowers the recommended range; in other words, reduced sentencing ranges can be applied retroactively.[32] The question in *Freeman* and *Hughes* was whether the sentence of a defendant who took a (C) agreement is "based on" the Commission's Guidelines so that the defendant would be eligible for a sentence reduction under 18 U.S.C. § 3582(c)(2).[33]

In *Freeman*, the defendant was convicted of a drug crime and accepted a plea agreement that expressly referenced the sentencing ranges for that crime as provided in the Commission's Guidelines. The Commission subsequently lowered these ranges, and the defendant moved for a reduced sentence.[34] A plurality of four (Justices Kennedy, Ginsburg, Breyer, and Kagan) argued that (1) judges are in charge of imposing sentences, not the parties, and (2) judges are required to consult the Sentencing Commission Guidelines when sentencing a convicted defendant.[35] A defendant's sentence, then, will typically be *based on* the Guidelines; accordingly, whether or not a defendant accepts a plea bargain, he will be eligible for a reduced sentence in the event that Sentencing Guideline ranges are lowered.[36]

The dissenting justices (Roberts, Scalia, Thomas, and Alito) agreed with the plurality that judges are the ones to impose sentences.[37] However, for the dissent, when a judge accepts a plea bargain, the judge necessarily bases the defendant's sentence on the agreement itself, and not on the Guidelines.[38] The dissent concluded that

32. *See* 18 U.S.C. § 3582(c)(2) ("The court may not modify a term of imprisonment once it has been imposed except that . . . in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 USC 994(o) . . . the court may reduce the term of imprisonment.").

33. *Freeman*, 564 U.S. at 525; Hughes v. United States, 138 S. Ct. 1765, 1772 (2018).

34. *Freeman*, 564 U.S. at 528.

35. *Id.* at 525–26, 529 (plurality opinion). The requirement that judges consider the Guidelines in the process of sentencing can be found in 18 USC § 3553(a)(4) ("Factors to be Considered in Imposing a Sentence"). Note, however, that in United States v. Booker, 543 U.S. 220, 245 (2005), the Court declared that § 3553(a) is unconstitutional to the extent that it requires judges to sentence defendants within the Guideline ranges. Post-*Booker*, the Guideline ranges are advisory: judges are required to consult them, to take them into account, but they are not required to adhere to them. The question of whether a judge who considers the Guideline ranges in a sentencing decision necessarily "bases" her decision on those ranges is a matter of interpretation.

36. *Freeman*, 564 U.S. at 534.

37. *Id.* at 547 (Roberts, C.J., dissenting).

38. *Id.* at 544.

defendants who accept plea bargains are not eligible for reduced sentences under 18 U.S.C. 3582.[39]

Justice Sotomayor concurred with the plurality's result, but reached that result by way of a completely different path of reasoning.[40] Like the dissent, Sotomayor claimed that if a judge accepts a plea agreement, the defendant's sentence is based on the agreement.[41] However, she acknowledged that the plea agreement itself could be based on the Sentencing Guidelines, in which case the defendant's sentence would be based on the Guidelines.[42] Since the sentence indicated in Freeman's plea agreement was based explicitly on the Guidelines, he was eligible for a reduced sentence.[43]

Most of the federal courts of appeal have relied on *Marks* to interpret *Freeman* and have determined that Sotomayor's reasoning, as the "narrowest grounds" for the judgment, represents the *Freeman* rule.[44] In *Hughes*, the Eleventh Circuit assumed that *Marks* governs the interpretation of *Freeman* and followed Sotomayor's opinion, determining that Hughes was not eligible to seek a sentence reduction.[45] Like several other circuits,[46] the Eleventh Circuit took a result-centric approach to *Marks* as applied to *Freeman*, reasoning that whenever the concurring faction of *Freeman* would find in favor of the defendant, so would the lead faction, whereas the converse is not true.[47] It is in this sense that the Eleventh Circuit viewed the concurrence as representing the "narrowest grounds" for the *Freeman* decision: "*Marks* requires us to find a legal standard which, when applied, will necessarily produce *results* with which a majority of the

39. *Id*. at 548–551.

40. *See id*. at 534 (Sotomayor, J., concurring) ("I agree with the plurality that petitioner William Freeman is eligible for sentence reduction under 18 U.S.C. § 3582(c)(2), but I differ as to the reason why.") and *id.* at 544 (Roberts, C.J., dissenting) ("The plurality and the opinion concurring in the judgment agree on very little except the judgment.").

41. *Id*. at 538 (Sotomayor, J., concurring).

42. *Id*. at 534.

43. *Id*.

44. *See* United States v. Hughes, 849 F.3d 1008, 1013 (11th Cir. 2017) (agreeing with "eight sister circuits" that, under *Marks*, Justice Sotomayor's view constitutes *Freeman*'s holding). *See also Hughes* Petition for a Writ of Certiorari, *supra* note 9, at 18 (asserting that ten circuits "have concluded that Justice Sotomayor's concurring opinion in *Freeman* controls [under *Marks*] because it reflects the narrowest *result*").

45. *Hughes*, 849 F.3d at 1013.

46. *See, e.g.*, *United States v. Thompson*, 682 F.3d 285, 289 (3d Cir. 2012); *United States v. Brown*, 653 F.3d 337, 340 n.1 (4th Cir. 2011); *United States v. Rivera–Martínez*, 665 F.3d 344, 348 (1st Cir. 2011).

47. *Hughes*, 849 F.3d, at 1012–13.

Court from that case would agree."[48] The opinion from the Eleventh Circuit Court of Appeals included no consideration of the *Freeman* dissent and dismissed in a single conclusory sentence the idea that dissents might factor into the interpretation of precedent.[49]

However, if *Marks* is interpreted in what we might call a *rationale- or principle-centric* way, there are no "narrowest grounds" in the *Freeman* opinions. On the principle-centric interpretation, the narrowest grounds view would have to represent a principle or set of principles that any judge signing onto the "broader" opinion would also endorse. As some courts have observed,[50] and as the petitioner in *Hughes* insisted, "the four-Justice plurality and Justice Sotomayor's concurrence shared no common rationale"; consequently, the *Freeman* concurrence does not represent binding precedent under *Marks*.[51] According to the D.C. Circuit, the "narrowest opinion must represent a common denominator of the Court's *reasoning*; it must embody a position implicitly approved by at least five Justices who support the judgment."[52] Both the Ninth and D.C. Circuits have determined that none of the *Freeman* opinions is controlling; they have followed the lead opinion on the grounds that it is the most compelling one.[53]

A case where the concurring opinion in fact represents a logical subset of the lead opinion (or vice versa) is not a true plurality decision, since a majority of judges agreed on a line of reasoning that is sufficient to support the judgment. We do not need *Marks* to understand that when a majority of judges agree on a ground for a decision together with a judgment, that agreement constitutes the controlling portion of the case. I think this is what some commentators have noticed in their criticisms of the logical-subset reading of *Marks*. For example, while he was a D.C. Circuit judge,

48. *Id.* at 1014–15 (internal quotation marks omitted).

49. *Id.* at 1012 ("When determining which opinion controls, we do not 'consider the positions of those who dissented.'").

50. *See, e.g.*, United States v. Davis, 825 F.3d 1014, 1021–22 (9th Cir. 2016) (en banc); United States v. Epps, 707 F.3d 337, 350 (D.C. Cir. 2013).

51. *Hughes* Petition for a Writ of Certiorari, *supra* note 9, at i, 31–34.

52. *Epps*, 707 F.3d at 348; *see also Davis*, 825 F.3d at 1021–22 ("A fractured Supreme Court decision should only bind the federal courts of appeal when a majority of the Justices agree upon a single underlying rationale and one opinion can reasonably be described as a logical subset of the other.").

53. *See Hughes* Petition for a Writ of Certiorari, *supra* note 9, at 10 (noting that "[t]hese two circuits . . . have thus found the *Freeman* plurality opinion more persuasive and on that basis have allowed district court reconsideration of defendants' sentences.").

now-Justice Kavanaugh endorsed a result-centric view of *Marks*, explaining that "in splintered cases, there are multiple opinions precisely because the Justices did not agree on a common rationale.'"[54] Kavanaugh recognized that *Marks* would be superfluous if it merely required courts to follow what are in effect majority opinions. Like many other observers, however, he overlooked the possibility that judges could share a common rationale but disagree on the outcome. In that event, a logical-subset view of *Marks* would not make the doctrine superfluous.[55]

In the materials filed by the parties in *Hughes*, both sides assumed unequivocally that if any case governed the application of *Freeman* to *Hughes*, it was *Marks*.[56] Although Hughes pointed out problems with the *Marks* doctrine and suggested that the Court might want to consider overruling that decision, he did not propose any alternative protocol for following plurality decisions; instead, he relied on a false dichotomy to suggest that abandoning *Marks* would mean denying any precedential effect to plurality decisions.[57] Neither party took seriously the possibility of considering dissenting opinions in the precedent calculus.[58]

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54. United States v. Duvall, 740 F.3d 604, 613 (D.C. Cir. 2013) (Kavanaugh, J., concurring in the denial of rehearing en banc).

55. Some courts have interpreted *Marks* to allow for the consideration of dissenting opinions. *See, e.g.*, United States v. Johnson, 467 F.3d 56, 65 (1st Cir. 2006). The language of the *Marks* opinion suggests that the *Marks* Court did not intend for dissents to count. However, that Court did not have to address the question of dissents, and so arguably the case left open the status of dissenting opinions.

56. *See, e.g.*, *Hughes* Petition for a Writ of Certiorari, *supra* note 9, at 10 (arguing that a writ of certiorari is appropriate because "[t]he courts of appeals are hopelessly divided [regarding] the *Marks* . . . rule"); Brief for the United States in Opposition, *supra* note 3, at 10 (contending that the Eleventh Circuit properly applied *Marks* in *Hughes*, 849 F.3d, and that "the general rule for ascertaining the holding of a case that lacks a majority opinion [comes from *Marks*]").

57. *See* Brief of Petitioner, *supra* note 3, at 56 (stating that, "the Court may conclude that the *Marks* enterprise has failed, and return to a rule that only an opinion joined by a majority of Justices establishes binding precedent").

58. Perhaps this should not be surprising given the nature of the Court's division in *Freeman*; the principled agreement between *Freeman*'s lead opinion and dissent is partial and, for the purposes of *Hughes*, does not definitively favor one party over the other. The plurality and the dissent agreed that judges are responsible for imposing sentences; accordingly, and contra Sotomayor's concurrence, whether or not a sentence is "based on" sentencing guidelines does not depend on the terms of a plea agreement. Freeman v. United States, 564 U.S. 522, 547 (2011) (Roberts, C.J., dissenting). The plurality argued that, "[b]y allowing modification only when the terms of the agreement contemplate it, the [concurrence's] proposed rule would permit the very disparities the Sentencing Reform Act seeks to eliminate. . . . There is no good reason to extend the benefit of the Commission's judgment only to an arbitrary subset of defendants whose agreed sentences were accepted in light of a since-rejected Guidelines range based on whether their plea agreements refer to the Guidelines." *Id.* at 533–34 (plurality

b. Criticisms of *Marks*

The *Marks* doctrine has been subjected to widespread criticism by courts and scholars alike. I won't rehearse all the criticisms here, but will touch on the most important ones.[59] As I see it, there are roughly three ways to interpret *Marks*. First, there is the logical-subset interpretation, which takes "narrowest grounds" to refer to the opinion that concurred in the court's judgment based on a subset of the principles or rationales contained in a broader opinion that reached the same result. On this interpretation, the narrowest grounds opinion is binding because it is implicitly endorsed by a majority of judges.[60] However, in true plurality decisions, no opinion achieves this kind of endorsement; on the logical-subset interpretation, then, the *Marks* rule does no work.[61] Second, there is the result-centric approach, which interprets "narrowest grounds" to refer to the opinion that would generate results that a majority of the court would endorse.[62] This approach depends on untenable and perverse assumptions, which I elaborate below in my discussion of the

opinion). The dissent expressed "agree[ment] with the plurality that the approach of the concurrence to determining when a Rule 11(c)(1)(C) sentence may be reduced is arbitrary and unworkable." *Id*. at 544 (Roberts, C.J., dissenting). However, the *Freeman* plurality maintained that judges are required to base sentences on the Guidelines, even in the context of plea bargains, whereas the dissent believed that when a judge accepts a (C) agreement, the judge bases the defendant's sentence on that agreement and not on the Guidelines. Moreover, the plurality believed that it would be unfair to plea bargainers to exclude them from the benefit of reduced sentences while allowing other defendants that benefit. The dissent viewed the disparity as appropriate, since the two groups of defendants are differently situated: defendants consensually forfeit the right to sentence reductions that they would otherwise have under 18 U.S.C. § 3582(c)(2) when they agree to sentences provided in plea agreements.

59. *See generally* Richard M. Re, *Beyond the Marks Rule* (Draft of Sept. 9, 2018), 132 HARV. L. REV. (forthcoming 2019) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3090620&download=yes) (arguing that the Supreme Court should abandon the *Marks* rule); Williams, *supra* note 6 (developing a novel method for following plurality decisions, which is motivated by problems with the *Marks* approach). *See also* Weins, *supra* note 16, at 832 (describing difficulties with *Marks*).

60. *See, e.g.*, United States v. Davis, 825 F.3d 1014, 1021–22 (9th Cir. 2016) (en banc) ("A fractured Supreme Court decision should only bind the federal courts of appeal when a majority of the Justices agree upon a single underlying rationale and one opinion can reasonably be described as a logical subset of the other."); United States v. Epps, 707 F.3d 337, 348 (D.C. Cir. 2013) ("[T]he narrowest opinion 'must represent a common denominator of the Court's *reasoning*; it must embody a position implicitly approved by at least five Justices who support the judgment.'").

61. For further discussion of this point, see the previous subsection (I.F.2.a.).

62. *See, e.g.*, United States v. Hughes, 849 F.3d 1008, 1014–15 (11th Cir.), *cert. granted*, 138 S. Ct. 542 (2017) ("*Marks* requires us to find a legal standard which, when applied, will necessarily produce *results* with which a majority of the Court from that case would agree.") (internal quotation marks omitted).

predictive account of precedent.[63] Third, there is the "swing vote" or "fifth vote" interpretation, which takes "narrowest grounds" to refer to the opinion that could tip either way on result, depending on factual details that would not affect the outcome for the other opinions. Like the result-centric version of *Marks*, the swing vote approach affords precedential status to outlier rationales and principles, which eight of nine justices might unequivocally reject.[64]

In practice, the *Marks* doctrine is a mess.[65] The Supreme Court itself has criticized and departed from *Marks* for both theoretical and logistical reasons. For example, in *Nichols v. United States*, the Court considered the precedential value of a plurality decision and noted that the *Marks* doctrine has "obviously baffled and divided the lower courts that have considered it"; the Court observed further that the "[the *Marks*] test is more easily stated than applied."[66] Although the Supreme Court has not explicitly overruled *Marks*, it has expressed a preference for alternative approaches in dicta as well as through its own efforts to follow plurality cases.[67]

As the petitioner in *Hughes* pointed out, the *Marks* doctrine fails to supply a sensible solution to the interpretation of *Freeman*. The petitioner was mistaken, however, to think that the only viable alternative to *Marks* is to deny any precedential authority to plurality decisions. On my view, the doctrine of precedent requires courts to follow decisions even where no majority agreed on a single opinion, provided that a majority agreed on principle or rationale. In the next Part, I develop an affirmative case for this position.

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63. *See infra*, Part II.C.3. The Seventh Circuit has referred to the narrowest grounds as the "most case-specific basis" for the court's judgment: this might represent yet another way to interpret *Marks*. *See* United States v. Dixon, 687 F.3d 356, 359 (7th Cir. 2012).

64. *See* Re, *supra* note 51, at 27 (criticizing the "median" approach); Williams, *supra* note 6, at 814–17 (elaborating multiple problems with the swing vote or "median justice" approach). I don't like the term "median" for the swing vote decisionmaker, since it implies that the swing-vote view represents a middle ground or compromise position, which is not necessarily the case.

65. *See, e.g.*, Corley, *supra* note 10, at 568 ("The interpretive rule for plurality decisions, as enunciated in the 1977 case of *Marks v. United States*, is notoriously difficult to apply and even impenetrable at times.").

66. Nichols v. United States, 511 U.S. 738, 745–46 (1994); *see also* Grutter v. Bollinger, 539 U.S. 306, 325, (2003) (quoting *Nichols* for its criticism of *Marks*).

67. *See infra* note 97 and accompanying material; *see also* Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 440–41 (1992) (noting that the "Court implicitly rejected the *Marks* doctrine" in Elrod v. Burns, 427 U.S. 347 (1976), Saffle v. Parks, 494 U.S. 484 (1990), and Butler v. McKeller, 494 U.S. 407 (1990)).

II. THE PRECEDENTIAL VALUE OF DISSENTING OPINIONS

A. *The Distinction between Ratio Decidendi and Obiter Dicta*

The resistance to the idea of treating principles or rationales from dissenting opinions as binding precedent can be explained, I think in large part, by mistaken assumptions that have been extrapolated from the distinction between holdings and dicta. Judicial opinions are comprised of both ratio decidendi (or holdings) and obiter dicta: by definition, holdings represent binding legal norms, whereas dicta represent all the other material contained in judicial opinions.[68] Dicta might provide persuasive guidance for future courts, but they do not constitute binding precedent. However, holdings and dicta are not typically labeled as such. Separating the two can be a tricky business, and legal interpreters often disagree on whether some part of an opinion counts as ratio or dicta.[69] The difference between holdings and dicta has been explained and justified primarily by way of two principles, which I call the *majoritarian principle* and the *limited authority principle*. In this part, I elaborate these principles and argue that the dissent-inclusive view of precedent is consistent with them.

1. The Majoritarian Principle

The majoritarian principle is straightforward: only a majority of the court's members can speak for the court as a whole, and only the court as a whole has the authority to make legal decisions that are binding on subsequent adjudication. Williams notes that "the commitment to majority decisionmaking is among the most deeply rooted features of the [U.S. Supreme] Court's institutional practices."[70] The commitment to the majoritarian principle is standard

68. *See, e.g.*, Ralph C. Chandler et al., *Obiter Dictum*, CONSTITUTIONAL LAW DESKBOOK, § 8:82 ("The positions represented by obiter dicta are . . . not binding on later cases. Dicta are not considered to be precedent and should be distinguished from the *ratio decidendi* which provides the basis of the court's ruling.").

69. *See*, *e.g.*, Adam N. Steinman, *To Say What the Law Is: Rules, Results, and the Dangers of Inferential Stare Decisis*, 99 VA. L. REV. 1737, 1738 (2013) (noting that "the ground rules for discerning the law-generating content and scope of a judicial decision remain remarkably murky").

70. Williams, *supra* note 6, at 845; s*ee also* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY, 356, 357–61 (2012) (observing that, "[f]rom its first day to the present day, the [Supreme] Court has routinely followed the majority-rule principle without even appearing to give the matter much thought"); Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 764 (1980) (claiming that the views of a minority of Supreme Court justices "should not be binding on lower courts"). For judicial pronouncements of the principle, *see, e.g.*, United

among multi-member courts broadly.[71] As Linas Ledebur explains, "this reliance on a majority echoes the tenets of democracy and fairness upon which the United States was founded. . . . congressmen are elected based on the recipient of the majority of votes, laws are passed only when a majority in congress votes on the law, and Presidents are elected if they secure a majority of electors."[72] A strong and settled majoritarian intuition underlies stare decisis jurisprudence.[73]

The dissent-inclusive view that I endorse respects the majoritarian principle: rationales or legal theories elaborated in a judicial decision are precedential if and only if a majority of the court agrees on them.

2. The Limited Authority Principle

According to the limited authority principle, the scope of judicial authority to pronounce the law is limited and not all material included in a judicial opinion has the force of binding law.[74] A court is empowered to decide a legal issue only if parties in interest raise the issue and litigate it.[75] Although judges have wide latitude concerning the material they include in an opinion, the legal effect of that material is limited to arguments and conclusions concerning the

States v. Davis, 825 F.3d 1014, 1036 (9th Cir. 2016) (Bea, J., dissenting) (asserting that, "our courts adhere to that most democratic of principles: as to how to decide this case, the majority rules").

71. Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 15, 33 n.120 (characterizing "[m]ultimember courts [as] majoritarian").

72. Ledebur, *supra* note 6, at 902; *see also* Kimura, *supra* note 24, at 1597 (suggesting that the "numerical [majoritarian] test for precedential legitimacy is justified by the incoherence of any approach that does not incorporate a numerical component").

73. *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 n.250 (2007). For an extended examination of the principle of majoritarianism in the context of adjudication, including a discussion of different conceptions of the principle, *see* Kimura, *supra* note 24, at 1597–98. *See also* Jeremy Waldron, *Five to Four: Why Do Bare Majorities Rule on Courts?* 123 YALE L.J. 1626 (2013) (asking why majoritarian decisionmaking is appropriate in the context of adjudication, and examining possible justifications for the practice).

74. *See* Williams, *supra* note 6, at 846 (noting that the U.S. Supreme Court "has repeatedly emphasized the distinction [between ratio and dicta] as a meaningful constraint on its own authority to establish binding precedent—for itself and for lower courts").

75. *See* Eber, *supra* note 22, at 229 ("Courts may disfavor even well-considered *dicta* for a structural reason, namely the concern that courts are not authorized to make law in the abstract." (*citing* Dorf, 2000–01)); *see also* A.W.B. Simpson, *The* Ratio Decidendi *of a Case and the Doctrine of Binding Precedent*, *in* 1 OXFORD ESSAYS IN JURISPRUDENCE 148, 160–61 (asserting that courts can issue binding legal norms only insofar as those norms are "relevant to the determination of the actual litigation before the court in which they are empowered to sit.").

dispute at hand.[76] When judges make claims about hypothetical cases, for example, those claims do not constitute binding precedent. As others have explained, "[t]his conservative position derives from the function of the common law judiciary to resolve only the dispute before the court," [77] a function that itself has multiple bases—including Article III of the U.S. Constitution.[78] Article III's Case or Controversy Clause provides that the judicial power extends to actual cases and controversies, suggesting that the judiciary does not have the power to decide issues that go beyond the facts of the disputes it is asked to resolve.[79] The distinction between ratio and dicta (along with other doctrines, including standing) fulfills the Constitution's case or controversy requirement and serves the values associated with that requirement—including separation of powers.[80]

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76. *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675 (2013) (Scalia, J., dissenting) (proclaiming that, "[the Court's] authority begins and ends with the need to adjudge the rights of an injured party who stands before us seeking redress.").

77. Thurmon, *supra* note 67, at 432; *see also* Williams, *supra* note 6, at 846–47 (discussing sources of and explanations for restricting the judiciary's power to the actual issues it is asked to resolve). For judicial opinions noting this limitation on judicial authority, *see* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006); Muskrat v. United States, 219 U.S. 346, 361 (1911); People of State of California v. San Pablo & T.R. Co., 149 U.S. 308, 314 (1893).

78. Although Article III does not apply to state judges, state courts generally assume or embrace similar limitations on their power to decide legal questions and declare what the law is. *See, e.g.*, Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2001 n.16 (1994) (noting that "parallel state law concerns about accuracy and legitimacy will typically inform the holding/dictum distinction in state courts"); Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 KY. J. EQUINE, AGRIC., & NAT. RESOURCES L. 349 (2015–2016) (discussing the issue in the context of standing). Courts in common law jurisdictions outside the U.S. also accept similar restrictions regarding the material in judicial opinions that counts as precedential, even though these court are not subject to Article III constraints. *See, e.g.*, Debra Parkes, *Precedent Unbound—Contemporary Approaches to Precedent in Canada*, 32 MAN. L.J. 135, 137 (2006) (discussing the Canadian context and observing that "[a] significant limitation on the vertical convention of precedent is the reality that courts are only bound to follow 'what was actually decided' in the earlier case").

79. U.S. CONST. art. III, § 2. For discussions of the case and controversy clause in the context of the holdings/dicta distinction, *see* A.W.B. Simpson, *The* Ratio Decidendi *of a Case and the Doctrine of Binding Precedent, in* 1 OXFORD ESSAYS IN JURISPRUDENCE 148, 161 (A.G. Guest ed., 1961) ("Without some criterion of relevance the judicial power of rulemaking seems to have no limit, and in a country wedded to the conception of the rule of law there is naturally a desire to state with precision where the limit lies."); Eber, *supra* note 22, at 229 n.169 (remarking that, "[t]he central feature that constitutes a 'case' or 'controversy' is that it results in a judgment"). For a judicial opinion discussing the point, *see* Flast v. Cohen, 392 U.S. 83, 95–96 (1968).

80. *See, e.g.*, Stern v. Marshall, 564 U.S. 462 (2011); Lujan v. Defs. of Wildlife, 504 U.S. 555, 576 (1992) (explaining that the case or controversy clause preserves the "separate and distinct Constitutional role of the Third Branch," and sets the "business of the courts" apart from the business "of the political branches"); N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Dorf, *supra* note 78, at 2001 (explaining that the ratio/dicta distinction "ensures that federal courts will make law only insofar as they are competent to do so and that

Although few would deny that the judicial power is and should be subject to constraints, those constraints are not given to precise definition. The traditional view is that a rationale from a precedential judicial opinion has binding force if and only if the rationale was necessary to the disposition of the case; otherwise, the material is dicta.[81] Courts often suggest, I think carelessly, that the line between holdings and dicta can be drawn at necessity.[82] According to Black's Law Dictionary, an obiter dictum is "[a] judicial comment made during the course of delivering a judicial opinion, but one that is *unnecessary* to the decision in the case and therefore not precedential."[83] Likewise, Rupert Cross and J.W. Harris define the ratio decidendi of a case as "any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion."[84]

However, the "necessary connection" definition of a ratio is overly restrictive; on this definition, barely any material would qualify as binding.[85] When judges articulate reasons for a decision, they rarely

in making law they do not usurp the proper role of another branch of government"); Judith Resnik, *Interdependent Federal Judiciaries: Puzzling about Why & How to Value the Independence of Which Judges*, 137 DAEDALUS 1, 16–19 (2008); *Resnik, Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 308 (2003). The ratio/dicta distinction would seem to serve many of the same purposes as the standing doctrine. For example, it helps ensure that judges do not declare or create law in the absence of "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 204 (1962). It also helps "confine[] the Judicial Branch to its proper, limited role in the constitutional framework of Government." *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring in part and concurring in the judgment). For a list of the purposes of standing and cases on point, *see* P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 117 (7th ed. 2015).

81. *See* Williams, *supra* note 6, at 801–03 (noting that "traditional conceptions of precedential legitimacy . . . limit precedential effect to statements that are both supported by a majority of the Justices and *necessary to the judgment in the precedent-setting case*") (emphasis added); *see also* Thurmon, *supra* note 67, at 432 (describing and adopting the traditional view, where the "ratio is comprised of the postulates or conclusions necessary to reach the result in that case."); Eber, *supra* note 22, at 223 (articulating the traditional view as follows: "each statement of law must . . . form a necessary connection with the judgment . . . to constitute a *ratio decidendi*").

82. For cases citing the necessary connection constraint, *see, e.g.*, Schwab v. Crosby, 451 F.3d 1308, 1327 (11th Cir. 2006) ("[T]hat which is not necessary to the decision of a case is dicta."); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."); Younger v. Harris, 401 U.S. 37, 50 (1971) (asserting that a previous Supreme Court case (Dombrowski v. Pfister, 380 U.S. 479 (1965)) does not stand as binding precedent for a particular proposition found in the case's opinion, because that proposition was not necessary to the case's outcome).

83. BLACK'S LAW DICTIONARY 1102 (Bryan A. Garner ed., 8th ed. 2004).

84. RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW 72 (4th ed. 1991).

85. *See* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953,

suggest that these reasons are the only possible reasons that would support the decision. Moreover, in many cases judges offer multiple possible rationales in support of their decision. In such cases, no single rationale is necessary for the conclusion, yet the rationales are generally treated as binding.[86]

Accordingly, many commentators have proposed some relaxed version of the necessary connection criterion, where the ratio of a case consists of the reasoning that is connected in some critical, although not strictly necessary, way to the conclusion.[87] For example, Michael Dorf suggests that the ratio of a case should be understood as any material that "forms an essential ingredient in the *process* by which the court decides the case, even if, viewed from a post hoc perspective, it is not essential to the *result*."[88] In a majority opinion for the Seventh Circuit, former Judge Richard Posner suggested that only "part[s] of the decision that resolved the case or controversy" qualify for the status of ratio.[89] I find Lewis Kornhauser and Lawrence Sager's formulation especially helpful: "[c]asual comments clearly not meant to be part of the process of deciding the case actually before the Court are disregarded as authority, but not formal determinations of issues treated by the Court as salient to the outcome."[90]

Despite this relaxation of the necessary-connection condition, commentators generally deny any precedential weight (at least

1027–29 (2005) and Dorf, *supra* note 78, at 2043–5 (explaining that most common law rules could not actually be binding on the strict logical necessity view); *see also* Williams, *supra* note 6, at 826.

86. *See id.*, at 827 (noting that, "[a]s a matter of practice, courts routinely treat both prongs of an alternative rationale as part of the holding"); Eber, *supra* note 22, at 223–24 (noting that when two rationales independently lead to the conclusion, although neither is strictly necessary, both are generally considered binding). For case law on the point, *see* Pruitt v. Levi Strauss & Co., 932 F.2d 458, 465 (5th Cir. 1991) ("[A]lternative holdings are binding precedent and not *obiter dictum*.").

87. *See, e.g.*, KENT GREENAWALT, STATUTORY AND COMMON LAW INTERPRETATION 185 (2013) (explaining that, "although the standard formulation [for the holding] is in terms of 'necessary to the resolution of the case,' in the United States at least 'important in' is substantially more accurate"); JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY, 184 (2009) (stating that the ratio is made up of "the reason(s) by which the court justifies its decision").

88. Dorf, *supra* note 78, at 2044–45; *see also* Abramowicz & Stearns, *supra* note 85, at 1027–29, 1065, 1075-76 (defining a case's ratio as any reasoning on the "decisional path" that led to the court's judgment); Caminker, *supra* note 71, at 15 (stating that the ratio is that which "justifies the disposition").

89. United States v. Crawley, 837 F.2d 291, 293 (7th Cir. 1988).

90. Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CALIF. L. REV. 1, 39 n.62 (1993).

beyond persuasive status) to reasoning from dissenting opinions.[91] The consensus in the scholarly literature is that the rationales endorsed by the dissenters in a case do not have the proper connection to the case's outcome. This position is in some sense intuitive, since the rationales from dissenting opinions did not lead the dissenters to the judgment of the court. By definition, dissenting judges reached a conclusion that opposes that of the court. Because in the context of adjudication the same set of principles might lead to different results in the hands of different decisionmakers, however, it is a mistake to categorically deny that dissenting rationales might constitute binding precedent.

In the case of dual-majority decisions, a set of principles that leads to the judgment of the court for one group (the plurality or concurrence), leads to a different result for another group (the dissent). Majority support for the result depends on the votes of both lead and concurring judges. In reaching their result, however, either the lead or concurring judges relied on the same rationales or theory as the dissenting judges.

Let's say, for example, that the plurality and concurrence agreed that the defendant should prevail, but to reach that result the concurrence relied on the same theory that the dissent relied on to reach its result. If the concurrence had rejected that theory, then the case might have come out differently. That theory, then, is integrally connected to the actual judgment of the court, even though no majority endorsed the theory and judgment together.

Many scholars have supposed, to the contrary, that in plurality decisions the proper "connection between result and rationale is lacking."[92] According to A.M. Honoré, "[t]he fundamental reason why the opinions of minority [i.e., dissenting] judges cannot form part of

91. *See, e.g.*, Williams, *supra* note 6, at 820 (asserting that, "[t]aking dissenters' views into account . . . conflicts with the longstanding view that only statements in judicial opinions that are in some way 'necessary' to the judgment in the precedent case are entitled to precedential effect. Because dissents, by definition, are not necessary to the judgment in the precedent case, they stand in a position similar to dicta and are thus, arguably, not entitled to precedential effect.").

92. *See, e.g.*, Adler, *Reckoning with* Rapanos*: Revisiting Waters of the United States and the Limits of Federal Wetland Regulation*, 14 MO. ENVTL. L. & POL'Y REV. 1, 14 (discussing *Rapanos* as a dual-majority case and asserting that, "[w]hile there is some amount of agreement between Justice Kennedy's concurrence and the dissenting justices, it would be wrong to view any part of Justice Stevens' dissent as a 'holding' of the Court. Nothing in the dissent constitutes a portion of the judgment of the Court, so nothing in the dissent is part of the actual holding of the case"); Williams, *supra* note 6, at 801.

the *ratio decidendi* of a case is that they are not reasons for the order made by the court."[93] Commentators seem to assume that rationales from dissenting opinions by necessity do not support the judgment of the court. These commentators thus conclude that, in the context of plurality decisions, no majority of the court agreed "on a judgment-supportive rationale."[94] In the case of a dual-majority decision, however, rationales from the dissenting opinion are judgment-supportive: either the plurality or the concurrence relied on the same rationales (as the dissent) to reach its conclusion in favor of the judgment of the court. And the votes of both the concurrence and the plurality were necessary to establish majority support for the judgment of the case.

Moreover, the purposes of restricting judicial power through the ratio/dicta distinction—including to ensure that courts only decide issues that have been presented to them and vigorously argued by parties in interest on both sides—suggests that dissents are fair game for the ratio category. If the dissent's rationale is directly related to the dispute the court has been asked to resolve and integral to the court's process of arriving at its judgment (because the plurality or concurrence relied on that rationale), then taking the dissent's rationale as binding precedent will promote, rather than undermine, the purposes underlying the ratio/dicta distinction. Although I accept the basic principles on which the standard rejections of dissents are purportedly based, on my analysis those very principles suggest that in some cases dissents have a legitimate role to play in the creation of precedential authority.

B. *Case-Based Support for the Dissent-Inclusive View*

Various courts have suggested, in line with the scholarly consensus, that dissenting opinions cannot contribute to binding precedent.[95] But the Supreme Court and many other courts, both

93. Honoré, *supra* note 24, at 198; *see also* CROSS & HARRIS, *supra* note 84, at 85 (asserting likewise that "[dissents] inevitably consist of statements which were unnecessary for the decision of the precise question before the court").

94. Williams, *supra* note 6, at 835. According to Williams, who endorses the conventional view regarding the precedential value of dissents, "like *dicta*, statements in dissenting opinions are neither 'necessary to' nor even supportive of the judgment in the precedent-setting case." *Id.* at 852.

95. *See, e.g.*, United States v. Duvall, 740 F.3d 604, 623 (D.C. Cir. 2013) (rejecting consideration of dissenting opinions and remarking that, "[d]issenting judges enjoy something of the liberty of a gadfly, as the outcome does not in fact depend on what they say. Dissents of course often prove bellwethers, but until they do so, they may inspire but not guide"); In re

federal and state, have also suggested that the views of dissenting judges in dual-majority cases do count for the purposes of precedent.[96] As the First Circuit Court of Appeals has observed,

> the Supreme Court . . . has moved away from the *Marks* formula. Since *Marks,* several members of the Court have indicated that whenever a decision is fragmented such that no single opinion has the support of five Justices, lower courts should examine the plurality, concurring and dissenting opinions to extract the principles that a majority has embraced.[97]

In *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, the Supreme Court (in a unanimous opinion) explicitly endorsed and relied on the dissent-inclusive approach.[98] *Moses Cone* concerned a federal district court's refusal to exercise jurisdiction over a controversy; the question was whether the district court could properly stay a diversity action while a state-court suit involving the same issues and parties unfolded.[99] In its argument for preserving the stay, the hospital in *Moses Cone* relied on the lead opinion of *Will v. Calvert*.[100] Recall that in this dual-majority decision the Supreme Court reversed the Seventh Circuit Court of Appeals' decision, which

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Kozeny, 236 F.3d 615, 620 (10th Cir. 2000) (following the test from the lead opinion in Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978) as binding precedent, when a majority made up of dissenters and a concurrer in that case formed a majority in favor of a different test); Ass'n of Bituminous Contractors, Inc. v. Apfel, 156 F.3d 1246, 1255 n.5 (D.C. Cir. 1998) (declining to follow the agreement between dissenting and concurring justices in E. Enters. v. Apfel, 524 U.S. 498 (1998) and stating that "dissenting votes have no precedential authority"); Sexton v. Kennedy, 523 F.2d 1311, 1314 (6th Cir. 1975) (following the plurality opinion of Arnett v. Kennedy, 416 U.S. 134 (1974), where the dissenting and concurring justices agreed on an alternative view).

96. *See, e.g.,* Wright v. North Carolina, 787 F.3d 256, 268–69 (4th Cir. 2015) (following a line of reasoning from Vieth v. Jubelirer, 541 U.S. 267 (2004) that was endorsed by concurring and dissenting justices, and rejecting the district court's attempt to follow the plurality opinion of *Vieth*); Alperin v. Vatican Bank, 410 F.3d 532, 552 (9th Cir. 2005) (following the line of agreement between concurring and dissenting justices in *Vieth*); Unity Real Estate Co. v. Hudson, 178 F.3d 649, 659 (3d Cir. 1999) (taking agreement between the concurrence of one and the dissent of four in *E. Enters.* as binding law); Yankee Atomic Elec. Co. v. United States, 112 F.3d 1569 (Fed. Cir. 1997) (following the concurrence and dissent from Winstar v. United States., 518 U.S. 839 (1996)); Minucci v. Agrama, 868 F.2d 1113, 1115 (9th Cir. 1989) (treating the rationale from the concurrence and dissent of Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978) as the majority view); In re Det. of Reyes, 184 Wash. 2d 340, 346 (2015) (taking agreement between concurring and dissenting justices in a plurality decision as binding precedent).

97. United States v. Johnson, 467 F.3d 56, 65 (1st Cir. 2006) (the opinion goes on to list several Supreme Court cases that have applied the dissent-inclusive method that I endorse here).

98. 460 U.S. 1 (1983).

99. *Id. at 7–8.*

100. *Id*. at 16–17.

had enjoined the district court's stay order.[101] The lead opinion of *Will* relied on *Brillhart v. Excess Insurance*[102] to support its argument that federal district courts have considerable discretion over their own dockets.[103] The justices in the plurality gave little weight to the previous case of *Colorado River Water Conservation v. United States*[104] —which, concerning the same kind of jurisdictional question, would seem to have been on point for the purposes of *Will*, and which both the concurring and dissenting opinions took to be controlling.[105] In the *Moses Cone* case, the hospital contended that *Will*'s lead opinion had served to undermine or modify the test set out in *Colorado River*.[106] However, both the concurring and dissenting opinions in *Will* had endorsed (an expanded version of) the *Colorado River* test and had determined that this test should govern the jurisdictional dispute at hand.[107] Figure 2 illustrates the scenario in broad strokes.

Figure 2. The Will v. Calvert Decision.[108]

Opinion	Rationales/Legal Test		Conclusion
Lead - 4	District court's discretion (*Brillhart*)	→	Reverse Court of Appeals
Concurrence - 1	Exceptional circumstances test (*CO River*) plus federal-versus-state law factor	→	Reverse Court of Appeals
Dissent - (4)	Exceptional circumstances test (*CO River*) plus federal-versus-state law factor	→	Affirm Court of Appeals

101. Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978).
102. 316 U.S. 491 (1942).
103. *Will*, 437 U.S., at 662–65.
104. 424 U.S. 800 (1976).
105. *Will*, 437 U.S. at 668, 672–73.
106. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 16–17 (1983).
107. *See id*. at 17, 23–24.
108. There was a second, very brief, dissenting opinion in *Will*, by Chief Justice Burger. However, Burger expressed "general agreement" with the main dissenting opinion (by Justice Brennan) and signed onto Brennan's opinion. 437 U.S. at 668.

The *Moses Cone* Court, rejecting the hospital's arguments, explained:

> it is clear that a majority of the Court reaffirmed the *Colorado River* test in *Calvert*. Justice Rehnquist's [lead] opinion commanded only four votes. It was opposed by the dissenting opinion, in which four justices concluded that the *Calvert* District Court's stay was impermissible under *Colorado River*. . . . Justice Blackmun, although concurring in the judgment, agreed with the dissent that *Colorado River's* exceptional-circumstances test was controlling; he voted to remand to permit the District Court to apply the *Colorado River* factors in the first instance.[109]

The Court went on to note that when the Court of Appeals decided the *Will* case on remand, it "correctly recognized that the [Supreme Court dissent and concurrence] formed a majority to require application of the *Colorado River* test."[110] The justices in *Moses Cone* moreover asserted that *Will* reaffirmed (through the concurrence-dissent alignment) *Colorado River*, which suggests that the Court viewed the rationale shared by the concurrence and dissent as possessing binding precedential force.[111] And, the *Moses Cone* Court endorsed the court of appeals' treatment of the *Will* case on remand,[112] explaining that the court of appeals correctly followed the concurring and dissenting opinions from the Supreme Court's *Will v. Calvert* decision insofar as those opinions agreed with one another and mutually disagreed with the lead opinion.[113]

The *Moses Cone* Court could have said simply that the Court's decision in *Will* held no precedential weight and that accordingly *Colorado River* stood as if it were untouched by *Will*. Instead, the Court treated *Will* itself as a binding precedent that both reaffirmed *Colorado River* and expanded the *Colorado River* test. As the *Moses Cone* Court explained,

> [t]he state-versus-federal-law factor was of ambiguous relevance in *Colorado River*. In *Calvert,* however, both the four-vote dissenting

109. *Moses Cone*, 460 U.S. at 17.

110. *Id.*

111. A court or opinion is in a position to "reaffirm" some holding only if it has authority over that piece of law—authority to either overrule it or back it up, in which case it becomes another precedent with the same ratio. Lower courts cannot "reaffirm" the holdings of higher courts, nor can a dissenting judge on her own reaffirm the holding of a past case.

112. Calvert Fire Ins. Co. v. Will, 586 F.2d 12 (7th Cir. 1978).

113. *Moses Cone*, 460 U.S. at 17.

> opinion and Justice Blackmun's opinion concurring in the judgment pointed out that the case involved issues of federal law. . . . It is equally apparent that this case involves federal issues.[114]

Accordingly, "[b]esides the four factors expressly discussed in *Colorado River*, there is another that emerges from *Calvert*—the fact that federal law provides the rule of decision on the merits."[115] The *Moses Cone* Court applied the expanded test, reasoning along the same lines as the dissent in *Will* that "the presence of federal-law issues must always be a major consideration weighing against surrender."[116] In *Moses Cone*, the Supreme Court both asserted that dissenting rationales can contribute to the binding force of a case and followed the concurrence-dissent alignment in its *Will* decision as binding precedent. The Supreme Court has applied or endorsed the same method in several other cases.[117] Although the Court seems to accept the legitimacy of the dissent-inclusive approach, it has not offered any kind of sustained explanation or justification for it. Part of my aim here is to fill this gap.

C. *Alternative Possibilities for Plurality Decisions*

In this section I present and evaluate alternative approaches to the precedential effect of plurality decisions.

1. The Anti-Plurality Approach

a. No Precedential Effect for Plurality Decisions

Many commentators have thrown up their hands, insisting that there is no principled or coherent way in which courts might follow

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114. *Id.* at 24.
115. *Id.* at 23.
116. *Id.* at 26.
117. *See, e.g.*, League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 413–14, 483 (2006) (suggesting that majority agreement on principle in *Vieth* is authoritative, where the majority includes concurrers and dissenters); Alexander v. Sandoval, 532 U.S. 275, 280–81 (2001) (suggesting that agreement between concurring and dissenting justices in Guardians Assn. v. Civ. Serv. Comm'n of New York City, 463 U.S. 582 (1983) is authoritative); Vasquez v. Hillery, 474 U.S. 254 (1986) (interpreting Rose v. Mitchell, 443 U.S. 545 (1979) according to the dissent-inclusive approach); United States v. Jacobsen, 466 U.S. 109, 111 (1984) (including the dissenting opinion of Walter v. United States, 447 U.S. 649 (1980) in the precedent calculus). Note that *Vasquez*'s interpretation of *Rose* is a special case because, although the dissent in *Rose* rejected the judgment of the Court, it explicitly signed onto certain parts of the lead opinion—and it was one of those parts (Part II) that *Vasquez* took as controlling. Nevertheless, three justices in *Vasquez* rejected the authority of Part II from *Rose*'s lead opinion on the grounds that it "was not joined by five justices *who also joined in the judgment*." *Vasquez*, 474 U.S. at 270 n.4 (Powell, J., dissenting) (emphasis added).

plurality decisions as precedent. For example, according to Mark Thurmon and others, it is "impossible to avoid something in the nature of arbitrary rules to meet cases in which several [opinions] are delivered."[118] Some commentators simply assume that pluralities do not constitute binding precedent of any sort.[119]

As I have already argued, however, if federal courts were to deny precedential effect to dual-majority decisions, they would act inconsistently with settled jurisprudence concerning the holdings/dicta distinction.[120] Second, as I discuss below, stare decisis serves several worthy values, including judicial guidance, predictability, efficiency, and equality.[121] If courts were to reject the precedential effect of a subset of opinions, we would miss out on benefits that the doctrine of precedent can provide. Third, some commentators have argued that appellate courts are not entitled to issue non-precedential decisions.[122] Some have gone so far as to suggest that non-precedential decisions issued by Article III courts are unconstitutional.[123] If that is right, then, if we deprived plurality decisions of precedential effect, it would be impossible for courts to fulfill their precedent-setting duty in the event of a plurality decision. If, on the other hand, precedent-bound courts insisted on respecting plurality decisions as precedent, they would enable precedent-setting courts to fulfill their duties.

b. No Plurality Decisions

According to Linda Novak, "[t]he bulk of commentary on the subject has unequivocally condemned the practice [of plurality decisions], stressing the erosion of Supreme Court credibility and authority as a source of moral and legal leadership."[124] Some have suggested that we should get rid of plurality decisions altogether, possibly through the imposition of a rule that would prohibit courts

118. Thurmon, *supra* note 67, at 427 (quoting Cross & Harris).

119. *See, e.g.*, Corley, *supra* note 6, at 196 (asserting that, "[w]hen the Supreme Court fails to generate a controlling precedent [as it does in the case of plurality decisions], the result arguably is an erosion of the Court's credibility and authority as a source of legal leadership").

120. *See* discussion *supra* Section II.A.

121. *See* discussion *infra* Section III.A.

122. *See, e.g.*, Abramowicz & Stearns, *supra* note 85, at 1069 ("[G]ranting judges the power to resolve cases without creating any precedent at all threatens to undermine the rule of law . . . ."); Corley, *supra* note 6, at 185 (stating that the Supreme Court has a duty to "provid[e] final, national answers to important legal questions").

123. *See infra*, note 170.

124. Novak, *supra* note 70, at 759.

from issuing pluralities.[125] Richard Re encourages courts to form "compromise majorities" when they would otherwise be inclined to issue plurality decisions.[126]

Despite the difficulties that plurality decisions pose for precedent-bound courts, I do not share the negative view toward pluralities that many others have expressed. Plurality decisions exemplify, and illustrate for the public and legal community alike, the complexity and uncertainty inherent in adjudication. Judicial decisions may be deceptive insofar as they conceal the inescapable difficulties of judicial decisionmaking.[127] Moreover, empirical studies have found that lay people are more receptive to judicial decisions that acknowledge uncertainty and indeterminacy.[128]

In the context of plurality decisions, no matter how certain the rhetoric of any single opinion, a court wears its uncertainty on its sleeve, exhibiting the ambiguities and complexities of the law. Plurality decisions inevitably lay out competing legal theories, revealing the fraught and difficult nature of judicial decisionmaking. As others have argued, American judicial decisions gain legitimacy, actual and perceived, from this kind of transparency.[129] Moreover,

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125. *See, e.g.*, Corley, *supra* note 10, at 570 (raising the question of whether "plurality decisions [should] be discouraged by changing the institutional rules and norms of the [U.S. Supreme] Court"); Comment, *A Suggestion for the Prevention of No-Clear-Majority Judicial Decisions*, 46 TEX. L. REV. 370 (1968); Ledebur, *supra* note 6, at 914 (advocating for a rule that "would not allow any Justice to write a concurring opinion in addition to the single opinion of the Court"); Weins, *supra* note 16, at 873 (stating that "[n]obody likes plurality decisions," and remarking that "[h]opefully, the era of plurality precedents will soon be brought to a close.").

126. Re, *supra* note 59.

127. *See, e.g.*, Dan M. Kahan, *The Supreme Court 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 75–76 (2011) (arguing that "[t]he unflinching certitude characteristic of judicial opinions . . . provokes [public] suspicion").

128. *See* Dan Simon & Nicholas Scurich, *Lay Judgments of Judicial Decision Making*, 8 J. EMPIRICAL LEGAL STUD. 709, 710, 721 (finding that "[l]ay audiences . . . appear to appreciate a forthright exposition of the difficulties inherent in deciding human affairs, despite judicial protestations to the contrary," and that people are more willing to accept decisions "that admit to . . . complexity and underdeterminacy").

129. For example, consider Judge Easterbrook's contention in Matter of Krynicki, 983 F.2d 74, 75 (7th Cir. 1992), that "[a]ny step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat." As MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF TRANSPARENCY AND LEGITIMACY 3–4 puts it, "[i]ndividually signed opinions (including concurrences and dissents), the disclosure of judicial votes, the forthright recognition of interpretive difficulties, the candid discussion of judicial legal development, and public judicial debate over substantive policy issues combine to foster judicial accountability and control, to encourage democratic debate and deliberation, and thus to accord well-deserved legitimacy to American judicial power." *See also id.*, at 21–22, 248–50, 300–03, 306, 312–13, 338–40. This is not to say, however, that the American

judicial decisions and judges themselves are made accountable this way; the views and sensibilities of not only the court as a whole but also individual judges are on display so that readers can evaluate them individually.[130]

Finally, if plurality decisions were either prohibited or deprived of binding force, this would give judges incentive to conceal or hold back important parts of their reasoning. For example, consider an adjudicative scenario where a judge strongly believes that a particular legal theory governs the dispute, but disagrees with fellow judges over the result that the theory dictates given the facts of the case. In an anti-plurality regime, she might join with the judges who agree with her theory even though she believes that their application of the theory is mistaken: expressing this kind of false agreement might be the only way her preferred principles would gain binding force. Some might consider this effect to be desirable, since it would make for more unified decisions and greater actual or apparent judicial compromise. But since I place a high value on transparency and believe that litigants, as well as the legal community and public, have a right to know what judges are up to, I believe that we have more to lose than to gain from an anti-plurality regime.[131]

Plurality decisions showcase unsettled points of law and illuminate

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form of transparency is necessary to judicial legitimacy. Other systems achieve legitimacy by other means. For example, French judicial decisions are short and one-sided, unsigned, and leave no room for concurrences and dissents. The French judicial system is not illegitimate for that, but it does depend on other sources of legitimacy, which the U.S. system lacks: in France, unlike the U.S., judges receive rigorous and extensive formal training, the system of judicial selection means that judges are more representative of the people, and lawmaking authority is reserved to the political branch. *See id.*, at 300–03, 332. However, some commentators have suggested that terse and cryptic judicial decisions lack legitimacy precisely because they do not reveal the views of individual judges and disagreement among them. For example, commenting on the style of decisions issued by the European Court of Justice, Joseph Weiler says that "the Court should abandon the cryptic, Cartesian style which still characterizes many of its decisions and move to the more discursive, analytic, and conversational style associated more with the common law world"; Weiler also advocates "for the introduction of separate and dissenting opinions," since they "force the majority opinion to be reasoned in an altogether more profound and communicative fashion"; the dissent in particular, says Weiler, "often produces the paradoxical effect of legitimating the majority because it becomes evident that alternative views were considered even if ultimately rejected." *The Judicial Après Nice*, Gráinne De Búrca & Joseph Weiler (eds.), THE EUROPEAN COURT OF JUSTICE 215, 225 (Oxford UP, 2001).

130. *See* LASSER, *supra* note 129, at 315, 338, 344.

131. The state of Delaware provides an example of one form of anti-plurality regime. The Delaware Supreme Court (which is the only appellate court of the state) follows a strong unanimity norm, and only very rarely issues plurality decisions. *See* David A. Skeel, *The Unanimity Norm in Delaware Corporate Law*, 83 VA. L. REV. 127, 147 (1997). Skeel suggests that, "[i]n striking contrast to a nonunaminous regime, the unanimity norm [discourages] the justices [from] articulating their differing views on the appropriate doctrinal approach." *Id.*

different paths that the law might take. These decisions tend to expose the strongest reasons on both sides of disputes; accordingly, pluralities not only reveal just how close a case can be but also instruct future litigants on the most promising lines of reasoning to pursue.[132] Plurality decisions give us a better understanding of the various views represented on a single court and how those views interact.

Moreover, when judges issue multiple opinions in a case, they often respond to one another's positions: the publication of these conversations puts on display part of the adjudicative process—in particular disagreement and dialogue among judges, even among those who agree regarding judgment—that would be more likely to be concealed if judges were compelled to issue a majority opinion in each case. Some commentators suggest that courts should avoid issuing plurality decisions because they give the impression of judicial discord.[133] However, plurality decisions may contribute positively to the legitimacy, both real and perceived, of the adjudicative process. During his tenure as an Associate Justice of the Supreme Court, Charles Evan Hughes advocated for transparency and urged judges to record their individual convictions despite the cost of disunion, since judges "are not there simply to decide cases, but to decide them as they think they should be decided, . . . it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice."[134]

Finally, many important plurality decisions are already on the books and courts are likely to continue issuing plurality decisions despite anti-plurality sentiment. Moreover, precedent-bound courts continue to seek precedential value in plurality decisions, even while lacking the methodological guidance to follow pluralities in a confident and consistent manner. Current judicial practice suggests that either outlawing plurality decisions or directing courts to ignore them would conflict with judicial sensibilities.

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132. *See* Kornhauser & Sager, *supra* note 90, at 9 (arguing that, "for lower courts, the parties, and interested bystanders—concurring and dissenting opinions are important guides to the dynamic 'meaning' of a decision by the Court"). Moreover, Bernadette Meyler, *Law, Literature, and History: The Love Triangle*, *in* NEW DIRECTIONS IN LAW AND LITERATURE 160, 170–71 (eds. Elizabeth Anker and Bernadette Meyler, Oxford UP 2017), suggests that cases with multiple opinions offer a valuable pedagogical tool in the classroom, since they illustrate the contingency of judicial decisionmaking.

133. *See, e.g.*, GEORGE, *supra* note 16, at 281 (cautioning judges against issuing separate opinions, "whether dissenting or concurring," since these "give the appearance of conflict").

134. CHARLES EVAN HUGHES, THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS AND ACHIEVEMENTS, 67–68 (1928).

2. The Lead Opinion Fiat Model

Some scholars maintain that judges should afford precedential effect to the lead opinions of plurality decisions.[135] Advocates of this solution seem to be motivated by the pressure to settle on some method for dealing with pluralities in order to clear up the confusion, as well as by the belief that no principled method is available. The proposal that courts should simply follow the lead opinion as if it were a majority opinion does have the advantage of simplicity and practicality. However, the appeal of this approach seems to end there. For many, the principles or theories provided in a lead opinion are suspect, since no majority of judges necessarily endorsed them, and most judges might have gone out of their way, even, to oppose them. As James Bloom has observed, adopting lead opinions as binding precedent would "render meaningless the fact that the Justices themselves thought the issues were too important to compromise by joining a majority opinion, thereby endorsing an interpretation of the law with which they disagree."[136]

3. The Predictive-Result Model

On the predictive-result approach, a court faced with a precedent that takes the form of a plurality decision should run the facts of the dispute at hand through the reasoning of each opinion issued in the plurality case. The court then totals the results as if they were votes for each side, and decides the given dispute accordingly.[137] Advocates of the predictive approach generally exclude dissenting opinions from the process,[138] but the inclusion of dissents is a theoretical

135. *See, e.g.*, Douglas J. Whaley, Comment, *A Suggestion for the Prevention of No-Clear-Majority Judicial Decisions*, 46 TEX. L. REV. 370, 376 (1968) (arguing that the opinion that receives the most votes *from non-dissenting judges* should be taken as the binding one); *see also* Bloom, *supra* note 10, at 1377 (2008) ("While some have argued that plurality [i.e., lead] opinions are merely persuasive, the more compelling view is that the rationale of plurality opinions is more than merely persuasive, even if it does not rise to the level of binding precedent."); Comment, *Supreme Court No-Clear-Majority Decisions: A Study in Stare Decisis*, 24 U. CHI. L. REV. 99 (1956) (claiming that the lead opinion is typically treated as binding, as if it were a normal majority opinion).

136. Bloom, *supra* note 10, at 1408.

137. *See, e.g.*, Thurmon, *supra* note 67. The predictive approach can be understood in a retrospective way—predicting the outcome that the precedent-setting court *would have* reached given the facts of the current dispute—or in a contemporaneous way—predicting the outcome that the precedent-setting court would reach, given its present composition. According to the latter version, the opinions of the plurality case serve as nothing more than indicators of how the current judges might decide. Either version of the predictive results model is vulnerable to (I think fatal) criticisms.

138. *See, e.g.*, Bloom, *supra* note 10, at 1409 (claiming that lower federal courts following

possibility.[139] When the "narrowest grounds" opinion generates results that a majority of the precedent-setting court would endorse, *Marks* supplies a methodological shortcut for the predictive result approach.[140] A precedent-bound court need not bother running facts through multiple opinions if the narrowest grounds opinion would generate the same result.

Others have critiqued the predictive method in detail and it is beyond the scope of my efforts here to do the same, but I will point out a few of the more salient problems. As Dorf explains, the prediction model "over-emphasiz[es] the role of individual judges," and in the process "undermines the rule of law" and "the ideal of the impartial judge."[141] Courts have rejected the predictive approach on the same grounds.[142] Kornhauser and Sager argue that the ability of the predictive model "to deliver an outcome that will enjoy the support of a majority of the Justices depends on the Justices holding fast to the views that have placed them in a state of dissensus."[143] That assumption presupposes a noncollegial conception of the Court as only "the sum of its warring parts, and neither anticipates nor contributes towards the resolution of doctrinal disarray."[144]

The main merit claimed for the predictive result method is its predictive value. That claim assumes that higher courts will not follow stare decisis in the context of their own past plurality decisions, but instead that the judges will decide subsequent disputes consistently with their own individual approach to previous disputes (or that higher courts will themselves follow the predictive results method). However, the Supreme Court respects stare decisis even when the

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Supreme Court plurality decisions should "apply both [the plurality and concurring] opinions, [since courts can then] feel confident that the Supreme Court would have come to the same conclusion."). *See also* Cacace, *supra* note 73, at 130–31 (suggesting that courts should look to dissents only if applying all of the non-dissenting opinions fails to generate a result). For a sophisticated variation of the predictive approach (which also excludes dissenting opinions), *see* Williams, *supra* note 6.

139. Re, *supra* note 59, at 34 (evaluating the merits of this possibility, which he calls the "all opinions approach").

140. *See supra* notes 46–48 and accompanying material.

141. Michael Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 680–82, 715 (1995).

142. *See, e.g.*, Polk County, Ga. v. Lincoln Nat'l Life Ins. Co., 262 F.2d 486, 489 (5th Cir. 1959) (asserting that the predictive approach operates by "psychoanalyz[ing] state court judges rather than [rationalizing] state court decisions").

143. Kornhauser & Sager, *supra* note 90, at 47–48.

144. *Id.* at 48.

relevant past case is a plurality decision, and its prevailing approach is not the predictive one.[145]

4. The Result-Only Model

The result-only approach to plurality decisions represents a common perspective on how courts ought to deal with pluralities. On the result-only model (hereinafter the *result* model), a plurality decision is binding but only with respect to its specific facts and result.[146] This means that a court would be bound by the plurality decision only if it were to confront "a factual situation that does not differ in any material way from that before the plurality Court."[147]

Commentators and courts alike have suggested that the result model is in keeping with the operation of precedent in non-plurality cases and with the traditional distinction between ratio and dicta. According to Novak, "it seems clear that lower courts must adhere at the minimum to the principle of 'result' *stare decisis*, which mandates that any specific result espoused by a clear majority of the Court should be controlling in substantially identical cases."[148] Bloom contends that "even many of the harshest critics of plurality opinions agree that the results of plurality decisions are binding . . . ."[149] According to the U.S. Courts government website, a lead *opinion* is not binding, nor are the rationales contained in that opinion, since neither opinion nor rationales received majority support; however, plurality cases are precedential "in terms of the [result]."[150]

The result model of precedent is untenable. On the result view, a precedent-bound court is free to adopt its own rationales or grounds of decision, but must reach a result that is consistent with the facts and result of the precedent case.[151] But what does this kind of consistency

145. *See supra* II.B. As Dorf, *supra* note 141, at 683–84, notes, "a judge who dissents in one case will nonetheless generally apply its principles in a later case, recognizing that as precedent it stands on an equal footing with cases decided before she became a judge."

146. Some scholars have endorsed the result-only view in general (not just in the plurality context). *See, e.g.*, Arthur Goodhart, *Determining the Ratio Decidendi of a Case*, 40.2 YALE L.J. 161, 162 (1930) (claiming that "[t]he reason which the judge gives for his decision is never the binding part of the precedent"); Max Radin, *Case Law and Stare Decisis: Concerning "Präjudizienrecht in Amerika"*, 33 COLUM. L. REV. 199, 210 (1933) (asserting that "[i]t is the decision itself which must be followed and not the opinion").

147. Thurmon, *supra* note 67, at 455 n.166.

148. Novak, *supra* note 70, at 779.

149. Bloom, *supra* note 10, at 1412.

150. *Glossary – U.S. v. Alvarez*, UNITED STATES COURTS, http://www.uscourts.gov/educational-resources/educational-activities/glossary-us-v-alvarez.

151. *See* James Hardisty, *Reflections on Stare Decisis*, 55 IND. L.J. 41 (1979); Novak, *supra*

amount to? To determine whether a new case is the same as a past case for the purposes of stare decisis, we would need to know which facts are important and to what degree. But figuring that out would require engaging with the reasoning behind the past decision.

For example, recall the scenario of a mother deciding whether to allow her daughter to take up competitive gymnastics. Suppose that the mother has other children in addition to the aspiring gymnast. And suppose that gymnastics lessons are expensive. Is this a material fact in the mother's decision? We can ascertain its relevant only if we know which principles govern her decision. If the mother considers fair distribution of family resources across children as a guiding principle, then the cost of gymnastics lessons would be a material fact. However, if distributive justice principles do not factor into the mother's decision, then the cost of the lessons would be immaterial. As Williams has explained, "[l]ooking to the precedent court's own explanation of the reasoning through which it reached its result . . . provid[es] a set of criteria through which to assess the materiality of any discernible factual similarities and differences between the two cases."[152]

By definition, in a plurality case no single line of reasoning or legal theory is present. Plurality decisions offer legal theories that are in tension with and often even contradict one another. The lead opinion might have based its decision on facts x, y, and z, whereas the concurring opinion might have determined facts x and y to be immaterial and instead relied on facts z, p, and q. This is exactly what we should expect of decisions that are based on alternative theories. On the result model, courts are bound (and only bound) by the facts and result of a past plurality decision. These features, however, cannot be applied to new cases (or else have extremely limited applicability) in isolation from the past court's reasons for reaching its result.[153]

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note 70, at 7 (explaining that a court abiding by result stare decisis confines the "precedential value of a decision to its specific result and declin[es] to regard any particular line of reasoning as authoritative").

152. Williams, *supra* note 6, at 824; *see also* Steven Burton, *Comment on "Empty Ideas": Logical Positivist Analyses of Equality and Rules*, 91 YALE L.J. 1136, 1144 (1982) (explaining that the purposes underlying a court's decision indicate which facts were material to that decision); Dorf, *supra* note 78, at 2033; Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L REV. 741, 746–47 (1993) ("We cannot fully describe the outcome in case X if we do not know something about the *reasons* that count in its favor.").

153. *See* Williams, *supra* note 6, at 824 (discussing the result-only approach as "unworkable" because it does not provide a means of specifying "precisely which facts in the precedent case should matter to the precedent-following court in determining the binding effect

Given that the lead and concurring opinions relied on different rationales for the result, a precedent-bound court would be at a loss for determining which facts are material for the purposes of precedent.

If the facts of the case to be decided are identical to the facts of the plurality precedent to be followed, then the court need not worry about which facts are material. The facts of a new case, however, will almost never be exactly the same as those of a past case. (And if the facts were actually the same, then a court would be bound by the law of the case or *res judicata* rather than stare decisis).

Thurmon applies the result method to the plurality decision of *Memoirs v. Massachusetts*, a Supreme Court case that considered whether John Cleland's novel *Fanny Hill* was protected from censorship under the First Amendment. Thurmon maintains that the rationales or legal theories provided in the case's opinions are not binding, concluding that "*Memoirs*'s imperative authority is limited to its result that *Fanny Hill* is not obscene."[154] His analysis suggests that *Memoirs* would serve as binding precedent in a subsequent case only if the exact same question—the status of *Fanny Hill*—were under dispute. On the result model of stare decisis, plurality decisions will rarely if ever exert force over subsequent controversies.[155] The result model, then, is not actually a model of precedent at all. As Larry Alexander puts it, "restricting a rule to the facts of the precedent case is inconsistent with constraint by precedent,"[156] since the set of subsequent cases that would be constrained by the supposed precedent would be empty.

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of an earlier precedent"); *see also* Abramowicz & Stearns, *supra* note 85, at 1055 (explaining that, "facts, material or otherwise, do not speak for themselves. . . . Judges do not merely identify material facts; they develop legal reasoning that applies the facts and that eventually reaches a particular result"); Dorf, *supra* note 78, at 2036 (*citing* EISENBERG, THE NATURE OF THE COMMON LAW 53 (1988)) (describing the result-only model as incoherent, "because every material fact in a case can be stated at different levels of generality, each level of generality will tend to yield a different rule, and no mechanical rules can be devised to determine the level of generality intended by the precedent court."); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 764 (1988) ("The relevant facts . . . do not identify and classify themselves . . . .").

154. Thurmon, *supra* note 67, at 458.

155. *See* Novak, *supra* note 70, at 18 ("When a decision is cited for its 'specific result,' it is regarded as obligating subsequent courts to reach a similar outcome in a substantially identical fact situation."); *see also* Abramowicz & Stearns, *supra* note 85, at 1066–67 ("[If judges followed the method prescribed by the result-only model], cases [would] almost always be distinguishable based upon factual differences that most would agree have little or no relevance in terms of providing a material basis for different legal treatment.").

156. Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 20 (1989).

5. Relaxing the Result Model

We could relax the pure result model to construct a low-level rule approach, where a plurality decision stands for a rule that the lead and concurring opinions agree on, whether explicitly or implicitly. This is how some courts and commentators interpret the *Marks* "narrowest grounds" framework. By low-level rule I mean a proposition that is less abstract or general that what I have been referring to as principles, rationales, or theories. For example, the proposition *a book that depicts sex between non-married individuals in a positive light is obscene and therefore prohibited* is a low-level rule, which decisionmakers could attempt to justify by any number of higher-order rationales. The low-level rule model assumes that the lead and concurring opinions agreed on a rule. Although we should not take such agreement for granted, in some plurality cases agreement in the form of a low-level rule could be found or generated.

For example, Bloom lists a number of cases that apparently followed plurality decisions for their results only; the propositions he offers as "results" are actually low-level rules that have applicability beyond the facts of the plurality case itself.[157] For example, in *Ace Property and Cas. Ins. Co. v. Federal Crop Ins. Corp.*, the Eighth Circuit cited *United States v. Winstar Corp.* (a Supreme Court plurality decision) "for the proposition that damages could be awarded against a federal agency for breach of contract despite the fact that Congress required the federal agency to breach the contract at issue."[158] This is a proposition that the judges in both the plurality and concurring factions in *Winstar* must have accepted, given their shared conclusion in that case. The proposition has sufficient generality that it would be applicable to sets of facts beyond the particular facts present in *Winstar*; accordingly, if *Winstar* is taken to stand for this proposition, then the case has some degree of precedential authority. However, on the relaxed result model, given that the various opinions concurring in the judgment in *Winstar* did not agree on any rationale for the breach of contract rule, no rationale can claim precedential force.[159]

157. Bloom, *supra* note 10, at 1407 n.257.

158. *Id.*

159. Novak, *supra* note 70, at 770, provides an example with a similar form: "Lower courts have regarded [the U.S. Supreme Court's] determination in [*Cannon v. University of Chicago*] that title IX impliedly creates a private right of action as authoritative, even though the Court reached this result on the basis of several different rationales." Each of the opinions that agreed on the final judgment in *Cannon* at least had to agree that people have a private right of action under title IX, even if the opinions disagreed as to why this right of action exists. Because the

Why not accept the low-level rule approach to plurality decisions? For one, under the low-level rule approach the precedential reach of plurality cases would still be very limited. As others have explained, if the rationales or principles supporting a court's judgment in some case do not carry precedential weight, then subsequent adjudicators will be bound by that case only in the event of a dispute with exceedingly similar facts.[160]

Second, when courts generate rules of decision, these rules are meant to serve some legal or moral principles, and the rules are justified on the grounds of those principles. In the famous case of *Riggs v. Palmer*, for example, the New York Court of Appeals held that a person who murders his testator in order to effectuate the will is not entitled to his inheritance.[161] As a justification for this rule, the court depended on the intuitive principle that the law should not reward evil-doing.[162] In the case of a plurality decision, however, even if a majority agrees upon a low-level rule, that agreement does not reflect deeper agreement at the level of rationale or principle. Because such a rule does not enjoy the support of a justification that the court could agree on, one might reasonably question the legitimacy of affording the rule precedential status.

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In this Part, I have argued that the holdings of dual-majority decisions are a product, in part, of the reasoning expressed in dissenting opinions. I showed how this view is consistent with the prevailing conception of the holdings/dicta distinction. I also delineated and critiqued several alternative approaches to the precedential value of plurality decisions.

III. DUAL MAJORITIES AND THE PRIORITY OF PRINCIPLES

In this Part, I argue that principles are integral to effective, authoritative, and legitimate adjudication, and on that basis I defend the principle-centric, dissent-inclusive view.

point of agreement has applicability beyond the facts of *Cannon*, that point can constrain, to some extent, subsequent adjudicators.

160. See Cacace, *supra* note 73, at 104.

161. Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889).

162. *Id.* at 190.

A. *Stare Decisis Principles*

One might think that stare decisis itself provides the principles that would justify following low-level rules in the context of plurality decisions. The idea would be that we should follow rules from plurality decisions just because we should treat like cases alike, and following the rules would ensure that we do so. Stare decisis, however, is not a principle in and of itself, but rather a doctrine or policy that stands for, and is justified by, a set of principles—including judicial guidance and constraint, predictability, credibility or perceived legitimacy, efficiency, and equality or fairness.[163] In the case of plurality decisions, these principles are best served by following majority-endorsed rationales. Although it is beyond the scope of this paper to examine the stare decisis principles in detail,[164] I do want to give some indication of the ways in which the dissent-inclusive approach to precedent supports the principles and objectives of stare decisis better than alternative approaches.

1. Guidance, Constraint, and Predictability

As we have already seen, the kind of low-level rules we can derive from plurality decisions would cover very few disputes.[165] A principle

163. For discussion of the judicial restraint function of stare decisis, *see, e.g.*, Regents of Univ. of Mich. v. Titan Ins. Co., 791 NW.2d 897, 910 (Mich. 2010) (Weaver, J., concurring); Steven Burton, *The Conflict Between Stare Decisis and Overruling in Constitutional Adjudication* 35 CARDOZO L. REV. 1687, 1697; Lewis F. Powell, *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 286, 287 (1990). For discussion of the predictability and reliance value of precedent, *see, e.g.*, BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCES 29–30 (1930); NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 118–19, 160–61 (2008); Goodhart, *Precedent in English and Continental Law*, 50 L.Q. REV. 40, 58 (1934); David Lyons, *Formal Justice and Judicial Precedent* 38 VAND. L. REV. 495, 496 (1985); Earl M. Maltz, *The Nature of Precedent*, N.C. L. REV. 367, 368 (1988); Radin, *supra* note 146. For discussion of credibility or perceived legitimacy as a justification for stare decisis, *see, e.g.*, Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 599–600 (1987); John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 2 (1983). For discussion of judicial efficiency as a value of stare decisis, *see, e.g.*, Westfield Ins. Co. v. Galatis, 797 N.E.2d 1256, 1273 (Ohio 2003) (Sweeney, J., dissenting); *George v. Ericson,* 736 A.2d 889, 893–94 (Conn. 1999); William Landes and Richard Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J. L. & ECON. 249, 263 (1976). For discussion of the equality or formal justice value of precedent, *see, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 116 (1977); Neil MacCormick, *Why Cases Have Rationes and What These Are*, *in* PRECEDENT IN LAW 155, 160 (Laurence Goldstein ed., 1987) at 160.

164. I discuss these values in more detail in *How to Realize the Value of Stare Decisis: Options for Following Precedent*, 30 YALE J.L. & HUMAN. 62 (2018).

165. For this reason, "[a]lthough precedents will necessarily constrain deciding courts, facts-plus-outcome holdings leave courts with a great deal of flexibility." Abramowicz & Stearns, *supra* note 85, at 1069.

or rationale for a low-level rule covers a wider range of scenarios, and accordingly can provide greater guidance to courts and other actors. Scholars have criticized the Court for issuing narrow, fact-specific rulings that fail to give useful guidance to lower courts and other participants in the legal system.[166] For Frederick Schauer, when the Court neglects to support its decisions with broadly applicable norms, it "relinquishes the coordinating and certainty-providing benefits that justify the law itself."[167]

Schauer criticizes the Court's plurality decisions on the same grounds, claiming that these decisions represent an abdication of the Court's duty to guide subsequent actors.[168] But Schauer's two objectives—broader rulings and fewer pluralities—are in tension. When courts are inclined to issue plurality decisions, no majority agrees on a reasoning-plus-outcome bundle. If judges compromise and issue a majority-supported opinion, that opinion is likely to be highly fact-specific—providing guidance to courts and prospective litigants in only a very narrow set of scenarios. My dissent-inclusive approach supports the guidance and reliance function of judicial decisions, because it enables judges to establish norms with meaningful scope, such that they are likely to be applicable to future cases, even when those judges cannot agree on the outcome that the norms require in the precedent-setting dispute.

Moreover, my review of the case law suggests that courts (in particular higher courts, including the U.S. Supreme Court) favor the dissent-inclusive approach and are moving away from alternatives.[169] This tendency creates expectations regarding how courts will treat plurality decisions going forward. So not to upset these expectations, courts should embrace the dissent-inclusive method.

2. Perceived Legitimacy

If an important part of the judiciary's job is to articulate the law through judicial opinions—in other words, to issue decisions that

166. *See* Schauer, *Abandoning the Guidance Function:* Morse v. Frederick, 2007 SUP. CT. REV. 205, 207 (reporting "an increase in narrow and fact-specific rulings, rulings that may in theory produce the right outcome for the particular case before the Court, but which in practice gain little if anything in accuracy but nevertheless entail the cost of providing virtually no assistance for lower courts expected to make their decisions in light of what the Supreme Court has said, and for officials and citizens desiring to know what the law is as they plan their actions").

167. *Id.* at 229.

168. *Id.* at 231.

169. See discussion *supra* II.B.

subsequent courts can follow[170]—then we might think that judges would neglect their responsibilities if they were to issue decisions without establishing usable precedent. As Adam Steinman argues at length, "[s]ince our nation's earliest days, the federal judiciary has claimed for itself 'the province and duty . . . to say what the law is.'"[171] Robert Cover argues that there are two central functions of common-law adjudication: dispute resolution and norm articulation.[172] On my dissent-inclusive view of dual-majority decisions, adjudicators can make good on their duty to articulate legal norms even while being transparent about their points of disagreement. For this reason, the dissent-inclusive approach might be conducive to the stare decisis value of credibility or perceived legitimacy.

3. Efficiency and Judicial Resources

Approaches that deny or severely restrict the precedential effect of plurality decisions squander resources because they fail to capitalize on the judicial reasoning contained in these decisions. A great deal of labor goes into plurality decisions, with several often complex and lengthy opinions issued; on the dissent-inclusive model, principles or theories that gather majority support will have real currency in subsequent cases.[173]

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170. Commentators have often addressed this duty in discussions of unpublished, non-precedential opinions. For example, the Eighth Circuit has held that a judicial rule (8th Circuit Rule 28A(i)) allowing for non-precedential opinions is unconstitutional, since the federal judiciary does not have the power to decide cases without also establishing precedent. Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000), *opinion vacated on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000). Writing for the Court, Judge Arnold asserted "that 8th Circuit Rule 28A(i), insofar as it would allow us to avoid the precedential effect of our prior decisions, purports to expand the judicial power beyond the bounds of Article III, and is therefore unconstitutional." *Id.* at 900. Approaches to plurality decisions that do not treat plurality decisions as binding, or that limit the binding force to the specific facts of the case (which effectively amounts to the same), suggest that the judiciary is entitled to make decisions that have little or no force beyond the particular case and moreover that subsequent courts are entitled to ignore those decisions. Accordingly, these approaches are subject to the same kinds of criticisms that have been leveled against courts for issuing unpublished, non-precedential opinions.

171. Adam N. Steinman, *To Say What the Law Is: Rules, Results, and the Dangers of Inferential Stare Decisis*, 99 VA. L. REV. 1737, 1738 (2013) (*quoting* Marbury v. Madison, U.S. (1 Cranch) 137, 177 (1803)).

172. Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1980).

173. For a discussion of the labor- and resource-saving function of precedent (a function that can be realized only when courts have applicable precedents to follow), *see* William Landes & Richard Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J. L. & ECON. 249, 263 (1976).

Moreover, if legal theories or standards provided in any opinion, whether or not dissenting, could constitute binding precedent (provided those standards received majority endorsement), then we should expect higher quality reasoning than in an alternative regime where only the reasoning presented in opinions endorsing the majority outcome could possibly be authoritative. On the dissent-inclusive approach, all rationales would be competing with one another for majority support, rather than just those rationales presented in opinions that endorse the majority conclusion. Accordingly, compared to alternatives, the dissent-inclusive method gives dissenting judges increased incentive to present compelling principles and theories, and makes more room for cooperation and dialogue among decisionmakers, since disagreement on result does not preclude the legal significance of agreement on principle or theory.

The dissent-inclusive approach would also help to balance responsibility across judges, because a judge's views, no matter her ultimate disposition in a case, might reaffirm or establish legal norms.

4. Fairness

On the one hand, we might think that, given two cases with very similar facts, it is only fair that litigants receive the same outcome in each case; on the other hand, though, we might think that it is more important for fairness that litigants are treated according to the same principles. On the latter view, if the majority of a court in Case A followed some principle, X, in its treatment of the litigants, then the court should follow principle X in its treatment of similarly situated litigants in Case B. If Case A was a plurality decision, then the results of the two cases might differ. To see why, consider again the model dual-majority decision illustrated in Figure 1 above.[174] A precedent-constrained court would be required to follow rationales D, E, and F in the event of a case with the same facts. However, in the precedent case, four of five judges applying D, E, and F reached a decision in favor of the defendant (whereas the disposition of the case was in favor of the plaintiff).

This might be a counterintuitive result of the dissent-inclusive view. It would be cold comfort for the plaintiff in Case B to assure him that, even though he lost his case and the past plaintiff won on

174. *See supra* Part I.A.

the same facts, he was treated according to the set of principles that was endorsed by a majority of the court in the past case. In theory, then, my preferred approach comes with a fairness cost.[175]

In reality, though, facts do not repeat themselves. The dispute in Case B might look a lot like the dispute in Case A, but the disputes couldn't be exactly the same. Suppose (as illustrated in Figure 1) that two factions of decisionmakers in Case A reached different results but applied the same principles (D, E, and F). The series of opinions in that case gives some indication to the precedent-constrained court of the tipping point with respect to those principles: the threshold at which they no longer point to a decision in favor of the defendant. On the facts of Case A, the applicable principles favored the defendant (at least according to four of the five judges who endorsed them), but presumably just barely (assuming that the judge who voted in favor of the plaintiff on the basis of principles D, E, and F had a plausible argument for doing so).

The precedent-constrained court would consider whether the facts in Case B are stronger or weaker for plaintiff's case compared to the facts of Case A, in light of the majority-supported rationales from Case A. Even a slight factual difference across Cases A and B might justify a different outcome in Case B, since Case A was likely a difficult, borderline case (as evidenced by the dual-majority decision). Accordingly, although two cases that appear very similar might receive different outcomes on the dissent-inclusive approach, the differential treatment might be justified by some relevant, even if slight, difference between the facts of the two cases.

B. *Principled Decisionmaking*

1. The Intuition

Intuitively, agreement at the level of principles or standards seems to be deeper, more important, and more deserving of respect than

175. I am not convinced that it really is unfair that the plaintiff in Case B lost his case whereas his counterpart in Case A won, since the court as a whole treated the plaintiffs according to the same principles. Perhaps fairness tolerates unequal outcomes so long as adjudicators make a genuine and competent effort to apply the same principles across similar cases (whereas unequal outcomes would be unfair if they were the result of negligence or intentional discrimination). However, it is beyond the scope of my efforts here to develop a theory of fair legal treatment and I recognize that for some the incongruity might seem problematic for reasons of fairness.

agreement at the level of results.[176] Let's return to the hypothetical case of the mother faced with the question of whether to let her daughter participate in competitive gymnastics. The mother decides in favor of granting permission to her daughter based on the principle that she should promote her daughter's physical well-being. The mother seems to be aligned in a deeper and more important way with the sister who also bases her decision on the physical well-being principle, but comes out against allowing the child to take up gymnastics, than she does with the other sister, who comes out in favor of granting permission based on the principle that parents should act to promote their daughters' popularity.

Consider again *Will v. Calvert*: the concurrence and dissent agreed on the test or set of principles that should be taken into account in determining whether a federal court judge has an obligation to adjudicate a particular dispute. The principles that both opinions endorsed were articulated in a previous case, *Colorado River*, and had to do with "[w]ise judicial administration," in particular the "conservation of judicial resources and comprehensive disposition of litigation."[177] Nevertheless, the concurrence and dissent disagreed on outcome: the concurrence voted to reverse the decision of the Seventh Circuit Court of Appeals (against the district judge's stay) and remand the case, whereas the dissent voted to affirm the decision of the court below.[178] This disagreement was a product of a particular

176. For more on the importance of principles or higher-level rationales in adjudication, *see* Neil MacCormick, *Why Cases Have Rationes and What These Are*, *in* PRECEDENT IN LAW 155, 157 (Laurence Goldstein ed., 1987) (arguing that "it is as *justificatory* reasoning that judicial opinions are normative, and it is only as being normative that they can go toward the construction of normative law"); *see also* Lewis A. Kornhauser and Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 115 (1986) (discussing the value of conceptual unity in adjudication); Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CALIF. L. REV. 1309, 1343 n.113 (1995). For historical discussions of the point, *see* Lord Mansfield, Fisher v. Prince. 3 Burr. 1363, 1364 ("The reason and spirit of cases make law; not the letter of particular precedents."); Lord Holt, Cage v. Acton, 12 Mod. 288, 294 (stating that the reason for a resolution should be given more consideration than the resolution itself) (both *quoted in* Beck, J., in Dubuque v. Illinois Central Railroad Co., 39 Iowa 56, 79–80 (1874)); EUGENE WAMBAUGH, THE STUDY OF CASES, Sec. 16 (1884) ("[W]e have always considered it a most undignified piece of perverseness to affect to ascribe a sort of infallibility to a judge's decision at the same time that discredit is thrown upon his powers of reasoning."); *see also Vasquez v. Hillery,* 474 U.S. 254, 261 n.4, (1986) (denouncing the notion that "a statement of legal opinion joined by five Justices [where some are in dissent] does not carry the force of law").

177. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

178. Will v. Calvert Fire Ins. Co., 437 U.S. 655, 668, 677 (1978).

procedural detail—that *Colorado River* had been decided after the district court issued its stay.[179]

The plurality and concurring factions in *Will*, on the other hand, evidenced no agreement at the level of principle, but happened to agree on the decision to reverse the court below.[180] Whereas the plurality reached its conclusion based on factors that led it to judge the district court's stay as acceptable, the concurrence reached its conclusion based on a completely different, procedural rather than substantive, consideration.[181] The agreement between the plurality and concurrence was a coincidence, a product of the procedural peculiarities of the case.[182] The agreement between the concurrence and dissent, on the other hand, ran deeper: their agreement was a matter of principle, and therefore warrants greater consideration and respect than the concurrence-plurality agreement, which concerned only the outcome.

In plurality cases, judges often make a special point of noting in their opinions that, although they agree with other factions on result, they disagree with those same factions on fundamental points of rationale or principle. For example, consider the case of *National Mutual Insurance Company v. Tidewater Transfer Company*, where the Supreme Court determined that a statute permitting District of Columbia citizens to sue citizens of the states in federal district courts was constitutional, reversing the Fourth Circuit's judgment to the contrary.[183] The plurality reached this decision based on its conviction that Congress is permitted, under its Article I powers, to expand as it sees fit the jurisdiction accorded federal courts under Article III.[184]

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179. *See id*. at 668 (Blackmun, J., concurring) (explaining that, "[b]ecause Judge Will's stay order was issued prior to this Court's decision in *Colorado River*, and he therefore did not have such guidance as that case affords in this area, I join in the Court's reversal of the Court of Appeals' issuance of a writ of mandamus," and asserting that, "[t]he Court of Appeals should have done no more than require reconsideration of the case by Judge Will in light of *Colorado River*").

180. *See id.* at 667–68.

181. *See id.* at 661–667, 668.

182. As Judge Thompson writing for the Ninth Circuit Court of Appeals put it, "Justice Blackmun, who provided the deciding vote in *Calvert,* concurred in the judgment *solely to allow the district court to reconsider its stay in light of the Colorado River case*. *Calvert,* 437 U.S. at 668 . . . (Blackmun, J., concurring in the judgment). Both Justice Blackmun and the four dissenters agreed that *Colorado River* controlled the outcome in *Calvert. See Moses H. Cone,* 460 U.S. at 17 . . . . Thus, the *Calvert* plurality opinion . . . is actually the minority opinion in the case." Minucci v. Agrama, 868 F.2d 1113, 1115 (9th Cir. 1989).

183. Nat'l Mut. Ins. Co. of Dist. of Col. v. Tidewater Transfer Co., 337 U.S. 582, 604 (1949).

184. *Id.* at 600.

Even though the concurring justices (Rutledge and Murphy) also deemed the Act in question to be constitutional, the concurring opinion emphasizes their deep disagreement with the plurality view.[185] The concurring justices based their decision on principles of "justice, convenience, and practicality," which "point to the conclusion that [District citizens] should [have access to federal courts] as other citizens and even aliens do"—rather than on the broad principle of Congressional discretion over the jurisdiction of federal courts on which the plurality relied.[186] Highlighting the significance of the disagreement between the concurrence and plurality, Rutledge proclaimed (in the concurring opinion) that he would sooner accept the opposite result than accept the reasons endorsed by the plurality.[187]

The majoritarian principle provides that we should accord precedential authority to a point that receives majority support. On the refined majoritarian principle that I endorse, if one majority agrees as to point A and another majority agrees as to point B, and we can give full authority to only one of points A and B, then we should give authority to the deeper or more important point. In my view, points of principle are generally deeper and more important than points of result, at least in the context of adjudication. Even if we set

185. Judge Bea of the Ninth Circuit Court of Appeals explained that, "Justice Rutledge, joined by Justice Murphy, strenuously disagreed that Congress had the power to expand Article III jurisdiction beyond the bases enumerated in the Constitution. . . . The four remaining Justices [making up the dissent] would have declined to overrule *Hepburn*; *but they—like Justice Rutledge—also vehemently rejected Justice Jackson's suggestion that Congress had the power to create subject-matter jurisdiction not conferred by Article III*." United States v. Davis, 825 F.3d 1014, 1040 n.9 (9th Cir. 2016) (Bea, J., dissenting). For an example of a case where factions disagreed on outcome but nevertheless evidenced strong agreement with respect to principle or standard to be applied, *see Walter v. United States,* 447 U.S. 649 (1980) (where, as Justice Stevens observed in the majority opinion of a subsequent case, "the disagreement between the majority and the dissenters . . . with respect to the [application of law to fact] is less significant than the agreement on the standard to be applied"). United States v. Jacobsen, 466 U.S. 109, 117 n.12, (1984). Indeed, Justice Blackmun, writing for the dissent in *Walter*, began by recognizing the agreement between the plurality and dissent on the standard that should govern the case. Blackmun went on to explain that his disagreement with the plurality opinion involved the plurality's "parsing of the case's 'bizarre facts'"; it was this difference that led the factions to reach different conclusions despite their higher-level agreement. *Walter*, 447 U.S. at 662–63 (Blackmun, J., dissenting).

186. *Tidewater*, 337 U.S. at 617 (Rutledge, J., concurring).

187. *See id.* at 626 (Rutledge, J., concurring) ("I am not in accord with the proposed extension of 'legislative' jurisdiction under Article I for the first time to the federal district courts outside the District of Columbia organized pursuant to Article III, and the consequent impairment of the latter Article's limitations upon judicial power; and I would dissent from such a holding even more strongly than I would from a decision today reaffirming [Chief Justice Marshall's] Hepburn ruling [under which the Act in question would be unconstitutional].").

aside the practical difficulties of a result-centered approach, then, we have good reason to prioritize principles.

2. The Particularist Caveat

I do not mean to suggest that decisionmakers necessarily feel more strongly about the principles they endorse than the results they favor, nor do I want to suggest that principles are necessary for effective decisionmaking. In some cases, judges might have firmer convictions about outcomes than they do about the principles that best justify those outcomes.[188] This phenomenon is not uncommon in the context of moral decisionmaking: sometimes an action seems definitively wrong, even if we do not know exactly why. And sometimes we might set aside a moral principle that we otherwise accept if, as applied to a particular case, it prescribes a course of action that seems morally unacceptable.

Indeed, some philosophers argue that, in the moral domain, principles are dispensable; they defend this view (known as "particularism") over the more conventional and common notion of moral decisionmaking as necessarily grounded in principles.[189] Whatever we might think of moral particularism, however, a particularist view of adjudication is highly problematic. Even if we do not have a general moral duty to consider or act on principles, judges have special responsibilities that can only be fulfilled through the provision of principled justifications for their decisions. The following subsection addresses these responsibilities.

3. Legitimacy, Authority, and the Rule of Law

If plurality decisions were binding as to their facts and results only, then even if those facts and results could constitute rules with some degree of generalizability, the body of case law that plurality decisions represent would be unprincipled. This is troubling if, as many scholars have argued, case law derives its legitimacy and authority, at least in part, from the legal rationales or principles that justify judicial

188. As Kornhauser and Sager, *supra* note 90, at 56, observe, "In some hard cases . . . a judge's view about the outcome of the case may be considerably more clear and more deeply held than her understanding of how an evolving doctrine should be shaped to support not just that outcome, but the correct outcome in future cases as well."

189. *See generally* Jonathan Dancy, *Moral Particularism*, *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Winter 2017 Edition) (ed. Edward N. Zalta) https://plato.stanford.edu/archives/win2017/entries/moral-particularism/; JONATHAN DANCY, ETHICS WITHOUT PRINCIPLES (Oxford: Clarendon Press 2004).

decisions.[190] As Dorf writes, "judicial accountability and legitimacy derive from judicial rationality, which in turn will be found in the rationales offered by courts to justify their decisions."[191]

Many commentators, both scholars and judges, have suggested that the rule of law requires judges to base their decisions on transparent and principled reasons. For example, Herbert Wechsler famously argued that, "the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."[192] Judges have an obligation, as part of their judicial role, to apply general principles in the process of adjudication and to articulate these principles publicly.[193] My favored model of precedent enables precedent-setting courts to fulfill this obligation even when they issue plurality decisions. On other models, a plurality decision does not stand for general principles that were endorsed by a court—accordingly, on these models, this type of decision represents an abdication of the judicial role.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Justice Scalia's partial dissent criticized the O'Connor, Kennedy, and Souter plurality for failing to articulate underlying principles that would justify their conclusion and enable future decisionmakers to

190. *See* Judge Easterbrook in Matter of Krynicki, 983 F.2d 74, 75 (7th Cir. 1992) ("Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason."); Dorf, *supra* note 78, at 2059 ("[T]he precedential force of an earlier case ultimately rests upon the reasons underlying the court's decision. This is true both because absent a consideration of reasons, namely, abstract principles, there is no such thing as precedent, and because precedents derive their legitimacy from their reasoning."); Novak, *supra* note 70, at 757 ("A coherent majority rationale is particularly important in the American legal system, which has traditionally placed special emphasis on the reasoning underlying a particular decision to determine its precedential value."); G. Edward White, *The Evolution of Reasoned Elaboration* 59 VA. L. REV. 279 (1973). Whether on pragmatic or normative grounds, some courts have explicitly rejected the idea that results in themselves could be binding. *See, e.g.*, People v. Anderson, 205 N.W.2d 461, 467 (1973) ("The clear rule in Michigan is that a majority of the Court must agree on a ground for decision in order to make that binding precedent for future cases. If there is merely a majority for a particular result, then the parties to the case are bound by the judgment *but the case is not authority beyond the immediate parties*.") (emphasis added).

191. Dorf, *supra* note 78, at 2040.

192. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

193. For an argument to this effect, see Leslie Green, *Law and the Role of a Judge*, 17–18, Oxford Legal Studies Research Paper No. 47/2014 (September 13, 2014), https://ssrn.com/abstract=2495953.

extend their reasoning to other cases.[194] Scalia explained, as follows, that he does not

> have any objection to the notion that, in applying legal principles, one should rely only upon the facts that are contained in the record . . . . But what is remarkable about the joint opinion's fact-intensive analysis is that it does not result in any measurable clarification of the "undue burden" standard. . . . We do not know . . . in what respects the record would have had to differ before an opposite conclusion would have been appropriate. The inherently standardless nature of this inquiry invites the district judge to give effect to his personal preferences about abortion.[195]

Scalia's purported concern (whether or not he was correct in his analysis) is that the three justices in the plurality listed some facts and reached the conclusion that on those facts the provision at issue imposed a substantial obstacle to abortion. However, in the absence of an explanation for *why* given those facts the provision imposed such an obstacle, future courts would lack guidance as to how to apply the decision—effectively, they would be unconstrained by it. Or at the least, future courts would not be bound by the decision in a principled way because (according to Scalia) there were no principles, or at least no readily discernible ones, behind the rule.

Unsurprisingly, the justices who signed onto the lead opinion did not understand themselves to be reaching an unprincipled decision; those justices too espoused the virtues and necessity of principled decisionmaking in adjudication, acknowledging that "our contemporary understanding is such that a decision without principled justification would be no judicial act at all."[196] Similar pronouncements can be found in many other cases. In *Vieth v. Jubelirer*, for example, Scalia wrote that "[l]aws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions."[197] He traced that obligation to the meaning of "'[t]he judicial Power' created by Article III, § 1[] of the Constitution."[198] Alternatives to the principle-centric, dissent-

194. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 979–1002 (1992) (Scalia, J., dissenting).

195. *Id.* at 991–92. For a related discussion of Scalia's point here, *see* Dorf, *supra* note 78, at 2032 n.131.

196. *Casey*, 505 U.S. at 865.

197. Vieth v. Jubelirer, 541 U.S. 267, 278 (2004).

198. *Id.*

inclusive approach to plurality decisions are in tension with the judiciary's explicit commitment to decisionmaking consistency at the level of principle.

In the context of a plurality decision, when some members of the court (those signing onto the lead opinion) come to the same conclusion as other members (those signing onto a concurring opinion), the agreement is the result of coincidence rather than principle. This poses a legitimacy and authority problem. The court (unless possibly if we look to dissenting opinions) did not agree on rationale, so the result was not generated by some rationale that the court has endorsed (given the majoritarian premise that no less than a majority of judges on a court can speak for the court as a whole). Judicial decisions are authoritative over subsequent cases not because a majority of judges voted in favor of some party, but rather because and to the extent that they reflect the principled reasoning of a court. In a plurality decision, then, the only authoritative portion of the case comprises the rationales and principles, if any, that a majority of judges endorsed.

Some courts have discussed the problem of accepting as binding a rule where no majority of the precedent-setting court agreed on a rationale that would support the rule. For example, the Third Circuit Court of Appeals had an opportunity to comment on the issue in *U.S. v. Donovan*, where *Rapanos v. United States*, a Supreme Court dual-majority decision, served as a central precedent.[199] The court acknowledged the difficulty of following a decision where no majority agreed at the level of rationale or principle, while observing that such majority agreement is, fortunately, present in *Rapanos*. As the Third Circuit Court explained, "[b]ecause the four *Rapanos* dissenters explicitly endorsed both the plurality's and Justice Kennedy's jurisdictional tests, we are not faced with a concern . . . that combining the votes of Justices who joined in different opinions would lead to unprincipled outcomes."[200] The Third Circuit explained further that,

> [w]e need not "combine" the votes of Justices relying on different rationales to find that a majority of the *Rapanos* Justices would come out a particular way in a given case. Two separate rationales *each independently* enjoy the support of five or more *Rapanos*

199. United States v. Donovan, 661 F.3d 174 (3d Cir. 2011); Rapanos v. United States, 547 U.S. 715 (2006).

200. *Donovan*, 661 F.3d at 184 n.8.

> Justices, without any need to "count[ ] the votes" of Justices relying on different rationales.[201]

In *Donovan*, the Third Circuit Court of Appeals recalled its decision in *Rappa v. New Castle County*: the *Rappa* court criticized the predictive approach to following plurality decisions, where a court tries to determine how the past court would have ruled given the present facts and decides the present case accordingly.[202] Writing for the majority in *Rappa*, Judge Becker observed that "count[ing] votes in this manner and giv[ing] them precedential value . . . would be unprincipled."[203] This is because the result generated by the vote counting method is not necessarily supported by any rationale that did or would receive the minimum necessary (i.e., majority) support: "[t]hus, giving precedential value to a matrix predicting results would produce a system of low level . . . formal rules but a system not rooted in any consistent constitutional values."[204]

With dual-majority cases, however, courts can find majority endorsement of a single rationale (or set of principles) if they are willing to consider the reasoning of dissenting opinions—as we saw, for example, in *Moses Cone* and *Donovan*. Accordingly, dual majorities possess the features necessary for legitimate, authoritative, and accountable adjudicative products: we have majority agreement on rationale, where the rationale is integrally connected to the decision or case outcome, and we have public expression of that rationale.

If the authority possessed by a dual-majority case is a matter of the principled agreement between the plurality or concurrence and the dissent, then subsequent, precedent-constrained courts should treat that principled agreement as the binding portion of the case. The other parts of the decision have no legitimate grounds for authority and accordingly should not be taken to exert binding force over subsequent disputes.

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201. *Id.* (*quoting* Rappa v. New Castle Cty., 18 F.3d 1043, 1060 n.24 (3d Cir. 1994)).

202. Rappa v. New Castle Cty., 18 F.3d 1043, 1060 n.24 (3d Cir. 1994).

203. *Id*.

204. *Id*. The *Rappa* opinion cites for support Rehnquist's dissent in Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 569 (1981), where the justice "lamented that it was 'a genuine misfortune to have the Court's treatment of the subject [the constitutionality of billboard regulations] be a virtual Tower of Babel, from which no definitive principles can be clearly drawn." *Id*. at 1057.

CONCLUSION

The recent case of *Hughes v. United States* raised awareness about the problem that plurality decisions pose for the purposes of a precedent analysis, and the case generated vigorous debate about the issue. Nevertheless, the Supreme Court ultimately declined to address the question, leaving it to other courts to figure out how best to ascertain the precedential effect of plurality decisions.[205] Many courts, including the U.S. Supreme Court on multiple occasions, have taken the dissent-inclusive approach to following dual-majority decisions. These courts, however, have not adequately explained why they chose to count dissents in the precedent calculus. Courts that take the dissent-inclusive view seem to find it self-evident that if a majority agreed on a set of governing principles in the precedent case, then future courts are obligated to apply that set of principles. Other courts though, and the majority of extra-judicial commentators, instead take it as self-evident that dissenting opinions cannot establish binding law. So not only are opinions divided on the matter, but productive dialogue between the sides has been limited.

I began this paper by defining plurality and dual-majority decisions, and explaining why and when we might expect a dual-majority case to arise. I then defended the dissent-inclusive method for following dual-majority decisions and evaluated that method against alternatives. I argued that the very reasons commentators have offered for excluding dissents actually push in the opposite direction. I argued further that the principles underlying stare decisis itself would seem to favor, on balance, the dissent-inclusive view, as would the virtues of principled decisionmaking and considerations concerning the source of precedential authority and legitimacy.

The confusion surrounding plurality decisions and their precedential value has driven many commentators to disparage plurality decisions altogether, claiming that these decisions represent an abdication of judicial responsibility and guarantee precedential chaos. In my view, this attack on plurality decisions is unwarranted. Plurality decisions offer unusually rich and revealing collections of judicial reasoning and theorizing. From dual-majority decisions in particular, one can see how the very same theory can generate completely different results depending on, for example, how a given fact is interpreted. By studying dual majorities, one can see how a

205. *See* Hughes v. United States, 138 S. Ct. 1765, 1772 (2018).

concurrence is sometimes more deeply aligned with the dissent than it is with the plurality with which it "concurs." The dissent-inclusive view of precedent accords this kind of alignment the respect that it deserves.

Although many commentators have suggested that affording precedential status to dissenting opinions is contrary to basic common law intuitions, the dissent-inclusive view is heretical only on its face. In practice, judges typically do not formally concur in an opinion or even part of an opinion in the event that they disagree in full with the judgment.[206] The designation "concurring in part and dissenting in part" has generally been reserved for disputes with multiple judgments.[207] A judge who "concurs in part" agrees with some of the judgments and disagrees with others. Formally, the mark of "dissent" is given to an opinion that disagrees in full with the judgment(s) of the court, even if that opinion agrees with principles or theories espoused in opinions that come out the other way on judgment. Perhaps courts should reform their practices so that judges who disagree with the court's judgment but agree with some of the reasoning from opinions concurring in the judgment would formally concur in that reasoning. I imagine that such a reform would make scholars and judges alike more amenable to the idea of affording precedential status to majority agreement on principle even if that means including the

206. *See, e.g.*, Allstate Ins. Co. v. Hague, 449 U.S. 302, 332 (1981) (Powell, J., dissenting) (where, in an opinion labelled a "dissent," Justice Powell expresses considerable agreement with the lead opinion on principle, but disagrees on the outcome); Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978) (where the concurrence and dissents largely agree except on result, but there is no formal or meta-textual recognition of this agreement); Kulko v. Superior Ct. of Cal. In and For City and Cty. of San Francisco, 436 U.S. 84, 101–02 (1978) (Brennan, J., dissenting) (where the justices in the dissent expressed agreement with standards that the majority applied, but those justices reached a different result from the majority, based on their "independent weighing of the facts"); United States v. Desmond, 670 F.2d 414, 420–21 (3d Cir. 1982) (Aldisert, J., dissenting) (where the opinion marked as a "dissent" agrees with the majority opinion on everything except "the bottom line"). Rose v. Mitchell, 443 U.S. 545 (1979), is a rare example of a case where the dissent disagreed in full with the judgment but formally signed onto a portion of the lead opinion. *See supra* note 117.

207. *See, e.g.,* RUGGERO J. ALDISERT, OPINION WRITING, 155 (2d ed., AuthorHouse 2009) ("A dissent in part is a dissenting opinion which disagrees only with some specific part of the majority decision. In decisions that require multi-part holdings because they involve multiple legal claims or consolidated cases, judges may write an opinion 'concurring in part and dissenting in part.'"); *Dissent in Part Law and Legal Definition*, USLEGAL (accessed June 30, 2018), https://definitions.uslegal.com/d/dissent-in-part/ (emphasis added) ("The term 'dissent in part' is an opinion by one or more judges who disagree in part with *the decision reached* by the majority of judges. . . . In decisions that need multi-part holdings because they involve multiple legal claims or consolidated cases, judges may write an opinion 'concurring in part and dissenting in part.'").

views of judges who rejected the majority conclusion.

But the doctrine of precedent represents a collaborative enterprise between precedent-setting and precedent-bound courts, and the latter courts ought to do their best with the material that they are given. Even in unanimous decisions, precedent-setting courts typically do not explicitly specify which portions of the opinion represent binding precedent and which are dicta. That kind of parsing is largely left to subsequent courts attempting to interpret the precedent and apply it to new disputes.

I believe that it is likewise up to precedent-bound courts, when interpreting a fractured decision, to determine whether the decision contains a majority position on principle and to give any such position precedential effect.