Comments

Plurality Rule: Concurring Opinions and a Divided Supreme Court

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I. INTRODUCTION

Could an opinion of the Supreme Court signed onto by only four Justices become binding precedent? What about one signed by three Justices? Can you go so far as to say an opinion signed onto by only a single Justice can be binding precedent? The answer is yes, and many opinions signed onto by less than a majority of the Court are consistently cited by lower courts as precedent.[1] The reasons for this occurrence can be directly attributed to the use of concurring opinions, which has led to a mass of plurality opinions issued by the Court.[2]

The second half of the twentieth century has seen a significant rise in dissension in the Court.[3] That dissension has continued to exist, even in the current Court whose Chief Justice has made it a mission to promote unanimity.[4] Cases that include multiple concurrences and dissents are common, especially in high profile cases.[5] Justices continue to write concurring opinions for a majority of cases,[6] leading to a

1. *See, e.g.*, Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 483 U.S. 711, 731 (1987) (O'Connor, J., concurring); Nat'l League of Cities v. Usery, 426 U.S. 833 (1976) (Blackmun, J., concurring); United States v. Container Corp. of America, 393 U.S. 333, 338 (1969) (Fortas, J., concurring); Commonwealth Coatings Corp. v. Cont'l Casualty Co., 393 U.S. 145, 150 (1968) (White, J., concurring).

2. *See* Laura Krugman Ray, *The Justices Write Separately: Uses of Concurrence by the Rehnquist Court*, 23 U.C. DAVIS L. REV. 777, 811 (1989-90) (examining various types of concurring opinions and their relation to plurality opinions).

3. *See* Louis Lusky, *Fragmentation of the Supreme Court: An Inquiry Into Causes*, 10 HOFSTRA L. REV. 1137, 1138 (1982) (gathering data that shows the rise in concurrences).

4. *See* David Von Drehle, *The Incredibly Shrinking Court*, TIME, Oct. 11, 2007 at 40 (highlighting Chief Justice Roberts and his views on uniting a fractured Court).

5. Two of the most controversial cases of the Court's 2006 term had numerous concurring and dissenting opinions. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 *et al*., 127 S. Ct. 2738 (2007) (dealing with school segregation); Morse v. Frederick, 127 S. Ct. 2618 (2007) ("Bong Hits 4 Jesus").

6. *See The Supreme Court, 2007 Term*, 122 HARV. L. REV. 516 (2007) [hereinafter *Harvard Stats*] (compiling statistics of the Supreme Court's 2007 term).

fragmented Court whose decisions lack clear precedential value and lead to confusion amongst lower courts.[7] The problem will continue until a solution is found that will help unify the Court and eliminate the dissension.

This Comment will examine the problem of concurring opinions and their relation to plurality opinions. Part II will discuss the background and history of the Supreme Court's method of deciding cases, from the Court's inception to present day. It will trace the rise in the twentieth century of the concurring opinion, and the subsequent rise in the number of plurality opinions. Part II will also analyze several cases containing plurality opinions and the inherent ambiguity in plurality opinions. Part III will delve into the various solutions that legal theorists have proposed to deal with the problem and analyze the strengths and weaknesses of each solution. Part III will then propose a new solution to the problem of plurality opinions that, in general, consists of enacting a new Court rule that would eliminate concurring opinions altogether and force the Court to issue a single, majority opinion of the Court.

II. BACKGROUND

A. History of Supreme Court Decision Making

When the Supreme Court was originally created, it based its decision making process on the old English tradition of seriatim opinions.[8] In a seriatim opinion Court, each member of the Court writes his or her own opinion for the case.[9] This practice is very different than the modern day Court's practice of deciding cases with a majority opinion. The practice of seriatim opinions has no constitutional basis, as the Constitution is relatively silent on how the Supreme Court should decide cases.[10] As a result of seriatim opinions, ambiguities in the law existed, and the cases the Court decided lacked definitive reasoning.[11]

7. *See* Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 CORNELL L. REV. 1593, 1595 (1992); Ray, *supra* note 2, at 778; John F. Davis & William L. Reynolds, *Judicial Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 71 (1974).

8. *See* Adam S. Hochschild, *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective*, 4 WASH. U. J.L. & POL'Y 261, 263 (2000).

9. *See* Chisholm v. Georgia, 2 U.S. 419 (1793) (using a seriatim opinion to decide the case).

10. *See* U.S. CONST. art. III.

11. *See* Hochschild, *supra* note 8, at 263-67; Igor Kirman, *Standing Apart To Be A Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083, 2085-86 (1995).

Each member wrote how he interpreted the case, and it was up to those who read the opinions to discern what precedent the Court was establishing. This practice led to an early Supreme Court that was not very effective and did not establish itself as the head of a strong independent branch of government.[12]

When John Marshall became Chief Justice in 1801, he used his superior intelligence and natural leadership to revolutionize the Court.[13] His most revolutionary innovation was the use of majority opinions to decide cases.[14] Marshall realized that the practice of seriatim opinions was confusing and diminished the precedential value of the Court's decisions.[15] His solution was to use majority opinions that would establish a single precedent.[16] In most cases the opinions were unanimous, as Marshall believed having all the Justices behind one opinion gave it more force and respect.[17] The use of majority opinions enabled the Court to establish itself as a major force within the judicial branch of government along side the executive and legislative branches.[18]

The use of majority opinions reinforced the idea of majoritarianism, or the principle that lower courts must identify a "majority rule" that a majority of Justices have adopted.[19] This reliance on a majority echoes the tenants of democracy and fairness upon which the United States was founded.[20] In the United States, 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.[21] It seems logical that if cases are to be decided by a group of Justices, a majority of them must be required for the ruling to

12. *See* Kirman, *supra* note 11, at 2086.

13. *See* Charles F. Hobson, *Defining the Office: John Marshall as Chief Justice*, 154 U. PA. L. REV. 1421, 1423 (2005-06) (examining John Marshall's tenure on the Supreme Court).

14. *See* John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, 77 WASH. U. L.Q. 137, 141 (1999) (discussing the evolution of the way the Supreme Court decides cases); Kirman, *supra* note 11, at 2086-87.

15. *See* Hochschild, *supra* note 8, at 267.

16. *See* Hobson, *supra* note 13, at 1442; Hochschild, *supra* note 8, at 267; Kirman, *supra* note 11, at 2086-87.

17. *See* Hobson, *supra* note 13, at 1443; Kelsh, *supra* note 14, at 149.

18. *See* Hobson, *supra* note 13, at 1421; Kelsh, *supra* note 14, at 143-44. While history has legitimized Marshall's switch to majority opinions, at the time one of the most vocal critics of the switch was Thomas Jefferson. *See id.* at 145-46.

19. *See* Kimura, *supra* note 7, at 1596.

20. Both the Declaration of Independence and Constitution espouse the right of people to be fairly represented. *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776); U.S. CONST. art. I, § 2 & art. II, § 1 (instituting majority elections for the House of Representatives and the President being elected by a majority of electors).

21. *See* U.S. CONST. art. II, § 1, cl. 3.

be binding. The principle of majoritarianism is linked with the doctrine of *stare decisis*, under which lower courts must follow as binding precedent past Court opinions with a majority support of the Justices.[22] The American legal system relies heavily on *stare decisis* to help make the law more efficient and uniform.[23]

After the Marshall Court, use of majority opinions became the primary method for the Court to decide cases.[24] Yet, the principle of majoritarianism began to be chipped away at as dissension among the Justices began to rise in the twentieth century.[25] This dissension emerged as a result of the concurring opinion[26]—an additional opinion written in support of the majority judgment, but adding or subtracting reasoning to reach that judgment.[27] Although concurring opinions existed during the Marshall Court, they were rare.[28] Even after the Marshall Court, the use of concurring opinions did not substantially increase until the twentieth century, especially during the last half of the century.[29]

B. The Emergence of the Concurring Opinion

The trend began in the 1930s when Justice Frankfurter brought back the practice of writing concurring opinions.[30] In *Graves v. New York ex rel. O'Keefe*, Frankfurter wrote a concurring opinion which agreed in the judgment, but added Frankfurter's own reasoning as to why the Court should reach that judgment.[31] Frankfurter also specifically advocated the use of concurring opinions for Justices to express their own opinions on a case.[32] At the time, concurring opinions were very rare, and it was a bold step for Frankfurter to advocate for their use.[33] After Frankfurter restarted this trend, the Justices' use of concurring opinions skyrocketed

22. *See* Linda Novak, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 757 (1980). *See generally* James Hardisty, *Reflections on Stare Decisis*, 55 IND. L.J. 41 (1979) (discussing the doctrine of *stare decisis* in the United States).

23. *See* Parisis G. Filippatos, *The Doctrine of Stare Decisis and the Protection of Civil Rights and Liberties in the Rehnquist Court*, 11 B.C. THIRD WORLD L.J. 335, 339 (1991).

24. *See* Hochschild, *supra note 8, at* 270; Kelsh, *supra* note 14, at 152.

25. *See* Kirman, *supra* 11, at 2087.

26. *See id.*

27. *See* BLACK'S LAW DICTIONARY 245 (8th ed. 2005).

28. *See* Kelsh, *supra* note 14, at 146-52.

29. *See* Kirman, *supra* note 11, at 2087.

30. *See* Lusky, *supra* note 3, at 1143.

31. Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 487 (1939) (Frankfurter, J., concurring).

32. *Id.*

33. *See* Lusky, *supra* note 3, at 1143.

in the subsequent decades.[34] In the 1936-1937 term, there was only a single use of a concurring opinion out of 149 opinions of the Court.[35] By 1980 there were 79 concurring opinions out of 149 opinions of the Court.[36] In the 2007-2008 term, the percentage of concurring opinions remained constant, with the number of concurring opinions being more than half the number of opinions of the Court.[37]

In addition to Justice Frankfurter's use of the concurring opinion, another reason for the increase in concurring opinions can be attributed to the Court becoming less reliant on a textual analysis of the Constitution, causing more innovations in interpretation of the Constitution.[38] These innovations have created more ambiguity in constitutional law and more room for disagreement between Justices.[39]

Other reasons for the rise in concurring opinions that have been proposed by legal scholars include the passage of the Judiciary Act of 1925, the ineffective leadership of Chief Justice Harlan Fiske Stone, and the increased attention paid to the individual thinking of Justices.[40] It seems that the rise of concurring opinions and disagreement in the Court most likely is a convergence of many of these issues and cannot be reduced to merely one cause.

C. From Concurring Opinions to Plurality Opinions

This increase in concurring opinions has led to an increase in the number of plurality opinions.[41] A plurality opinion occurs when there is no majority opinion signed onto by five or more Justices.[42] In a typical case, the Court will have five or more Justices vote in favor of the judgment of the case, such as reversing or affirming the lower court's judgment.[43] Then the Court will issue a single opinion of the Court setting forth the reasoning for that judgment;[44] the opinion of the Court is signed onto by all the Justices that voted for the judgment.[45] The Justices

34. See *id.* at 1138; Ray, *supra* note 2, at 778.
35. Lusky, *supra* note 3, at 1138.
36. *Id.*
37. Although the caseload for the Supreme Court has declined dramatically since 1980, out of 70 cases decided in 2007-2008, there were 45 concurring opinions. *See Harvard Stats*, *supra* note 6, at 516.
38. *See* Lusky, *supra* note 3, at 1147-48.
39. *See id.*
40. *See* Kelsh, *supra* note 14, at 178-80.
41. *See* Hochschild, *supra* note 8, at 272-73.
42. *See* BLACK'S LAW DICTIONARY 922 (8th ed. 2005).
43. *See* LAWRENCE BAUN, THE SUPREME COURT 130-37 (7th ed. 2001) (explaining the typical decision-making process of the Supreme Court).
44. *See id.*
45. *See id.*

voting against the judgment, however, do not sign onto the opinion of the Court, and they might also write their own dissenting opinion.[46]

The problem arises when Justices write concurring opinions in addition to the single opinion of the Court. When this situation occurs, determining what part of the opinion, if any, is precedent becomes a numbers question as to how many Justices are agreeing with each opinion. If the votes for the judgment are five to four, and the fifth Justice for the majority writes his or her own opinion that does not agree with the opinion of the Court, the opinion of the Court has only four Justices assenting to it and becomes a plurality opinion. A plurality opinion is simply an opinion that has the most Justices agreeing to it, but not a majority of Justices.[47]

The main problem that occurs when a case is decided by a plurality opinion is that two separate interpretations of law emerge from the Court. The main plurality opinion espouses one view of interpreting the case, while the concurring opinion espouses another view. In some cases there is even a third opinion that states a third view, such as when a Justice writes a dissenting opinion or a second concurrence. These views are frequently in direct conflict with each other; neither view has a majority of the Court endorsing it and, thus, neither is considered to be automatically-binding precedent.[48] Consequently, lower courts are uncertain as to the proper interpretation that should be used to decide future cases of a similar nature.[49] This uncertainty among the lower courts can lead to ambiguity in the law.[50]

D. Major Plurality Opinion Cases

1. *Teague v. Lane*

There are many Supreme Court cases that have plurality opinions, four of which particularly show the ambiguity inherent in these opinions. For example, in *Teague v. Lane*[51] an all white jury convicted Frank

46. For further discussion on dissenting opinions, *see* Edward McGlynn Gaffney, Jr., *The Importance of Dissent and the Imperative Judicial Civility*, 28 VAL. U. L. REV. 583 (1994); Meredith Kolsky, *Justice William Johnson and the History of the Supreme Court Dissent*, 83 GEO. L.J. 2069 (1995); Kevin M. Stack, *The Practice of Dissent in the Supreme Court*, 105 YALE L.J. 2235 (1996).

47. *See* BLACK'S LAW DICTIONARY 922 (8th ed. 2005).

48. *See* Kimura, *supra* note 7, at 1596-97.

49. *See* discussion *infra* Part II.D.

50. *See* Kimura, *supra* note 7, at 1595; Ray, *supra* note 2, at 778; Davis & Reynolds, *supra* note 7, at 71.

51. Teague v. Lane, 489 U.S. 288 (1989).

Teague, a black man, of attempted murder.[52] During jury selection the prosecutor used all ten of his peremptory challenges to exclude black jurors.[53] Teague appealed the conviction, and the case eventually reached the Supreme Court.[54] The Court looked at whether a recently-decided case[55] that would favor Teague could be applied retroactively[56] and, if it could not be applied, whether the previous law at the time would apply in overturning the conviction.[57] The Court upheld the conviction with a seven to two vote.[58] Of the seven that voted for the judgment, there was a main plurality opinion with multiple parts on which not all the Justices agreed.[59] Five Justices agreed to parts I and III of the opinion, seven agreed to part II, and four agreed to parts IV and V. In addition, two Justices agreed to a separate concurring opinion, and another Justice wrote a concurring opinion in which another Justice agreed to Part I, but not to Part II.[60]

Untangling plurality opinions is a difficult task for lower courts and one that can leave lower courts confused as to the case's actual precedential value. In the *Teague* plurality opinion, Parts I, II, and III would be considered precedent because at least five Justices signed onto those sections.[61] The remaining opinions all have less than five Justices signing onto them, making their precedential value questionable at best. Parts IV and V state the Court's reasoning on when to retroactively apply rules to decided cases,[62] yet only four Justices signed onto that reasoning with Justice White specifically disagreeing with the reasoning and writing his own interpretation of when to retroactively apply a Court decision.[63] Justice Stevens also wrote a separate concurring opinion, further muddling the precedent by stating his own interpretation on how to retroactively apply Court decisions, and disagreeing with the application of case law in the main plurality opinion.[64] To confuse things even further, Justice Steven's concurrence was joined by another Justice with respect to the first, but not the second part.

It is evident that the Supreme Court in *Teague* failed to articulate a clear standard for lower courts to apply in future cases. Instead, they

52. *Id.* at 292.
53. *Id.* at 293.
54. *Id.*
55. *See* Baston v. Kentucky, 476 U.S. 79 (1986).
56. *Teague*, 489 U.S. at 294.
57. *Id.* at 296, 299.
58. *Id.* at 288.
59. *Id.* at 291.
60. *Id.* at 291.
61. *Id.*
62. *Id.* at 299-316.
63. *Id.* at 316-18 (White, J., concurring).
64. *Id.* at 318-23 (Stevens, J., concurring).

created a confusing tangle of opinions, with several sections failing to secure majority support. This confusion does not promote the consistency of the law and hinders the Supreme Court's role as the deciding voice on questions of law.

2. *Branzburg v. Hayes*

Another particularly confusing plurality opinion appears in the case *Branzburg v. Hayes*.[65] In *Branzburg*, the Court ruled five to four that reporters do not have a constitutional right to refuse to testify about confidential sources before a grand jury.[66] Notably, Justice Powell wrote a concurring opinion, which many have interpreted to directly conflict with the opinion of the Court.[67] Justice Powell's opinion employs a more narrow interpretation of the holding and sets forth a balancing test to determine whether reporters have a constitutional protection against testifying before a grand jury.[68] Powell's opinion differs from the opinion of the Court, which gives no constitutional protection to reporters who are forced to testify before a grand jury.[69] Many have argued that Justice Powell's concurring opinion takes away his vote from the opinion of the Court, transforming the opinion of the Court to a mere plurality opinion that only has the assent of four Justices.[70]

The case is muddled further by the fact that Justice Powell began his concurring opinion with the phrase, "Mr. Justice Powell, concurring."[71] Usually a Justice will use the phrase "concurring in part," "concurring in the judgment," or "concurring in the result."[72] These phrases indicate that the Justice agrees with the judgment of the case but not with the Court's reasoning for that judgment. Justice Powell neglected to add any of these phrases to his opinion; he merely stated "concurring." Some lower courts have ruled that this phrase shows that Justice Powell concurred with both the judgment and reasoning of the Court, and that his opinion was simply a further addition to the main opinion of the

65. Branzburg v. Hayes, 408 U.S. 665 (1972).
66. *Id.* at 708.
67. *Id.* at 709 (Powell, J., concurring).
68. *Id.* at 710.
69. *Id.* at 708 (plurality opinion).
70. *See* Sonja R. West, *Concurring in Part & Concurring in the Confusion*, 104 MICH. L. REV. 1951, 1954 (2006); *see also* United States v. Smith, 135 F.3d 963, 968-69 (5th Cir. 1995); United States v. Model Magazine Distribs., Inc. (*In re* Grand Jury 87-3 Subpoena Duces Tecum), 955 F.2d 229 (4th Cir. 1992); *In re* Grand Jury Matter, Gronowicz, 764 F.2d 983, 990 n.2 (3rd Cir. 1985); Farr v. Pitchess, 522 F.2d 464, 467 (9th Cir. 1975).
71. *Branzburg*, 408 U.S. at 709 (Powell, J., concurring).
72. *See* West, *supra* note 70, at 1953.

Court.[73] This argument, however, can be rebutted on the grounds that Justice Powell's opinion clearly opposes the main reasoning of the opinion of the Court.[74] This case is obviously confusing and has led to a circuit split on which of the two opinions to follow as precedent.[75]

3. *Commonwealth Coatings Corp. v. Continental Casualty Co.*

Commonwealth Coatings Corp. v. Continental Casualty Co. provides an example of a plurality opinion case where the concurring opinion is cited to far more often than the opinion of the Court.[76] In *Commonwealth Coatings*, the Court examined the standard of review for evident partiality in arbitration.[77] The Court decided the case by a five to four vote, yet only four Justices joined the main opinion of the Court.[78] The fifth Justice, Justice White, voted for the judgment, but wrote his own concurring opinion.[79] The main opinion of the Court uses the language "appearance of bias" as the standard of review for evident partiality.[80] Justice White, on the other hand, seems to advocate a less restrictive standard of review.[81] He does not embrace the "appearance" language, but he also does not specifically reject it.[82] The vagueness of

73. *See In re* Grand Jury Subpoena, Miller, 397 F.3d 964 (D.C. Cir. 2005) ("[W]hatever Justice Powell specifically intended, he joined the majority."); *In re* Grand Jury Proceedings, Scarce, 5 F.3d 397, 400 (9th Cir. 1993) ("Although Justice Powell wrote a separate concurrence, he also signed Justice White's opinion, providing the fifth vote necessary to establish it as the majority opinion of the Court."); Storer Commc'ns, Inc. v. Giovan (*In re* Grand Jury Proceedings), 810 F.2d 580, 585 (6th Cir. 1987) ("Justice Powell's concurring opinion is entirely consistent with the majority opinion, and neither limits nor expands upon its holding. . . .").

74. *See* West, *supra* note 70, at 1953.

75. *Compare* United States v. Smith, 135 F.3d 963, 968-69 (5th Cir. 1995); United States v. Model Magazine Distribs., Inc. (In re Grand Jury 87-3 Subpoena Duces Tecum), 955 F.2d 229 (4th Cir. 1992); In re Grand Jury Matter, Gronowicz, 764 F.2d 983, 990 n.2 (3rd Cir. 1985); Farr v. Pitchess, 522 F.2d 464, 467 (9th Cir. 1975) (stating White's concurrence makes the opinion of the Court a plurality opinion) *with* In re Grand Jury Subpoena, Miller, 397 F.3d 964 (D.C. Cir. 2005); In re Grand Jury Proceedings, Scarce, 5 F.3d 397, 400 (9th Cir. 1993); Storer Commc'ns, Inc. v. Giovan (In re Grand Jury Proceedings), 810 F.2d 580, 585 (6th Cir. 1987) (stating opinion of the Court is a majority opinion).

76. Commonwealth Coatings Corp. v. Cont'l Casualty Co., 393 U.S. 145 (1968).

77. Evident Partiality is defined as bias of the arbitrator towards or against one side in an arbitration. *See* 4 AM. JUR. 2D *Alternative Dispute Resolution* § 138 (2007).

78. *Commonwealth Coatings Corp.*, 393 U.S. at 145.

79. *Id.* at 150 (White, J., concurring).

80. *Id.* (Opinion of the Court).

81. *Id.* (White, J., concurring).

82. *Id.*

Justice White's concurrence has led to a large amount of debate and confusion over the Court's true holding.[83]

Lower courts have wrestled with what standard of review to use: the "appearance of bias" standard from the main opinion of the Court, or the less strict standard from Justice White's concurring opinion.[84] A majority of courts choose to adopt the standard from White's concurrence, even though it was signed onto by only two Justices.[85] The main opinion of the Court, on the other hand, has only been cited as precedent in a single circuit court.[86]

4. *Memoirs v. Massachusetts*

The case, *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Attorney General of Massachusetts*,[87] is another example of a case that had a problem-causing plurality opinion. *Memoirs* was a First Amendment, freedom-of-speech case where the Supreme Court of Massachusetts deemed a book written in 1790 as obscene.[88] The United States Supreme Court overruled that decision with a six to three majority vote.[89] In overruling the decision, there were three different interpretations on why that judgment should be reached. One interpretation was endorsed by three Justices, another by two Justices, and still a third had only one Justice.[90] The first interpretation set forth a three-part test for obscenity and ruled that the lower court incorrectly applied that test with respect to the third prong; therefore, the Court found the material was not obscene.[91] The second interpretation stated that the First Amendment protected all speech, and that a law banning expression, not coupled with illegal activity, was unconstitutional.[92] The third opinion only stated that any suppression of expression that is not

83. *See* Positive Software Solutions, Inc. v. New Century Mortg. Corp., 476 F.3d 278, 281-85 (5th Cir. 2007) (providing a detailed discussion on the current debate over *Commonwealth Coatings* and relevant court cases).

84. *See id.*

85. *See* Nationwide Mut. Ins. Comp. v. Home Ins. Comp, 429 F.3d 640, 645 (6th Cir. 2005); JCI Commc'ns, Inc. v. Int'l Bhd. of Elec. Workers, 324 F.3d 42, 51 (1st Cir. 2003); Morelite Const. Corp. v. N.Y. City Dist. Council Carpenter's Benefit Fund, 748 F.2d 79, 82-83 (2nd Cir. 1984); Ormsbee Dev. Comp. v. Grace v. Santa Fe Pac. R.R., 668 F.2d 1140, 1150 (10th Cir. 1982).

86. *See* Schmitz v. Zilveti, 20 F.3d 1043, 1047 (9th Cir. 1994) (applying the "appearance of bias" standard from the main opinion of the Court).

87. A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Attorney Gen. of Mass., 383 U.S. 413 (1966).

88. *Id.* at 415.

89. *Id.* at 421.

90. *Id.* at 414, 421, 424.

91. *Id.* at 418-19.

92. *Id.* at 426 (Douglas, J., concurring).

hardcore pornography is unconstitutional, and the book was not hardcore pornography.[93]

Because of these three different interpretations, lower courts had difficulty finding any binding precedent from this case.[94] Eventually, in response to the lower courts' confusion, the Supreme Court looked at the *Memoirs* case again and set forth the *Marks*'s Narrowest-Grounds Doctrine, the Court's answer to the question of how plurality opinions should be interpreted by lower courts.[95]

III. ANALYSIS

A. Solutions to the Problem of Plurality Opinions

The *Marks* Doctrine is amongst a number of solutions that have been proposed in dealing with the inherent confusion of plurality opinions. In addition to the Marks Doctrine, legal theorists have proposed using only the actual judgment itself as precedent,[96] having the plurality opinion itself be precedent,[97] using a hybrid application,[98] and using a legitimacy model of interpretation.[99] Each of these theories will be discussed in turn below.

1. Narrowest Grounds Doctrine

The Supreme Court addressed the problems with interpreting plurality opinions in *Marks v. United States*.[100] In *Marks*, the Court had to determine what was the actual holding of a case that it decided several years earlier. The prior case was *Memoirs v. Massachusetts*',[101] discussed earlier in this Comment. *Marks* hinged on the holding of *Memoirs*, and the Court laid out a narrowest-grounds doctrine to determine that holding.[102]

93. *Id.* at 421; *see also* Mishkin v. New York, 383 U.S. 502, 518 (1966) (Stewart, J., dissenting).

94. *See* Marks v. United States, 430 U.S. 188, 192 (1977) (discussing how lower court found *Memoirs* rule never became law because it never had the assent of more than three Justices).

95. *Id.* at 193.

96. *See* Mark Alan Thurmon, *When The Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 420 (1992).

97. *See* Kimura, *supra* note 7, at 1600-01.

98. *See* Thurmon, *supra* note 96, at 451.

99. *See* Kimura, *supra* note 7, at 1610.

100. *Marks*, 430 U.S. at 188.

101. A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Attorney Gen. of Mass., 383 U.S. 413 (1966).

102. *Marks*, 430 U.S. at 193.

Under a narrowest-grounds doctrine, "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[103] In other words, when applying the narrowest-grounds doctrine, lower courts must look at all of the opinions in a case that support the majority judgment, and the opinion that interprets the law using the narrowest approach becomes the binding precedent. In *Marks*, the Court found the plurality opinion of the Court was the narrowest application of the law and, therefore, the binding precedent.[104]

Since the *Marks* case, the narrowest-grounds doctrine has been applied by lower courts to interpret fragmented opinions, but results under this doctrine continue to vary.[105] The main problem with the doctrine is that lower courts are unclear as to which opinion is in fact the narrowest application.[106] If a lower court cannot determine conclusively the opinion with the narrowest application, there will still be confusion over which opinion's reasoning to apply as precedent.[107]

2. Making only the Judgment Precedent

Another solution to the precedential ambiguity of plurality opinions is to make only the judgment itself the binding precedent.[108] The judgment in the case would be binding, but the written opinions of the Court would be limited to mere persuasive precedent and not binding on lower courts.[109] Such a practice would mean that cases with plurality opinions would have limited precedential value in future cases, unless the future case had facts almost identical to the plurality opinion case.[110] No rules of law would flow out of the plurality opinion case that could be used to interpret future cases.

The advantage of employing such a scheme would be that it would end the confusion over how to interpret plurality opinions, simply because lower courts would not be bound by the plurality opinions. Lower courts could use the opinions as persuasive precedent, but could also ignore the opinions completely. The plurality opinion would

103. *Id.* at 193.
104. *Id.* at 194.
105. *See* Hochschild, *supra* note 8, at 279-83 (discussing various lower court's application of the narrowest-grounds Doctrine).
106. *See* Nichols v. United States, 511 U.S. 738, 745 (1994) ("[The Marks] test is more easily stated than applied. . . .").
107. *See* Hochschild, *supra* note 8, at 279-83 (discussing examples of lower courts confusion).
108. *See* Thurmon, *supra* note 96, at 420.
109. *See* Hochschild, *supra* note 8, at 278.
110. *See id.*

become similar to a dissenting opinion, in that it would merely be a non-binding guide set forth by the Court on its view of the applicable rules of law. The disadvantage, however, would be that many cases would have limited precedential value.[111] The Court would be deciding individual cases, but not advancing specific rationales that answer the broader questions of law. Producing merely a judgment with no binding opinion might be seen as a waste of time by the Court, and inconsistent with its history of interpreting the grand issues of law.

3. Making Plurality Opinion Itself Precedent

A third solution has been proposed under which the plurality opinion itself would be the precedent from the case.[112] This solution directs the lower court to count how many Justices supported each concurring opinion and the opinion with the most Justices would be the binding opinion.[113] The concurring opinion with the most Justices would be the "majority of the majority,"[114] or the plurality opinion by definition.[115] For example, a "majority of the majority" would be five Justices vote for the judgment but three Justices write one opinion in support and two Justices write a separate opinion. The opinion with three Justices would have the most support and be considered the binding precedent. Since this opinion would have the most Justices supporting it, it would seem just to have it be the binding opinion.

An advantage of this solution would be that lower courts would not have to choose between different opinions. Lower courts would simply find the opinion that had the support of the most Justices and apply that as binding precedent. The disadvantage with such a solution, however, would be that the binding precedent of the Court would come from less than a majority of Justices. Four or less Justices would be able to set law, which is contrary to the democratic tradition of majoritarianism.[116]

Another difficulty with this solution would occur when there are two plurality opinions supported by equal numbers of Justices. Under such circumstances, the rule would be unworkable, and lower courts would be left struggling to decide which opinion to use as precedent.

111. *See id.*
112. *See* Kimura, *supra* note 7, at 1600; Thurmon, *supra* note 96, at 448.
113. *See* Thurmon, *supra* note 96, at 449.
114. Kimura, *supra* note 7, at 1601.
115. *See* BLACK'S LAW DICTIONARY 922 (8th ed. 2005).
116. *See supra* text accompanying notes 19-23.

4. Other Solutions

In addition to these three traditional solutions to the problem with plurality opinions, scholars have also proposed more complex methods of interpreting plurality opinions.[117] Mark Alan Thurmon advocates a hybrid approach, using a hybrid of all three of the traditional methods of interpreting plurality opinions to achieve the fairest precedential outcome.[118] His method relies first on finding the *ratio decidendi* of each opinion.[119] The *ratio decidendi* is the main reasoning of the opinion that is needed to reach the result in the case.[120] Once the *ratio decidendi* is found, Thurmon advocates looking to see if a majority of the Court supports any of the *ratio decidendis*, even if the support is in separate opinions.[121] The *ratio decidendis* that have majority support would be deemed binding precedent.[122] The *ratio decidendis* that do not have majority support would then be considered persuasive precedent and ranked according to how many Justices supported each.[123]

The problem with this method is that figuring out each *ratio decidendi* can be a complex and tedious task. Lower courts would have to parse through each opinion and decide which reasoning is the *ratio decidendi*, and if that reasoning was similar enough amongst all the other opinions to garner enough votes to make it binding. Usually Justices do not lay out their reasoning in a set manner,[124] and write opinions that make it very difficult to decide what is their exact *ratio decidendi*. Inexact application of Thurston's method could potentially create more confusion than any of the traditional methods.

Another solution to interpreting plurality opinions has been proposed by Ken Kimura. Kimura's "Legitimacy Model" interprets plurality opinions by separating each type of opinion into five distinct classifications.[125] He takes each of these classes of opinions and decides which type would be precedentialy binding and which would not be.[126] The lower court would look at a plurality opinion and use it as precedent

117. *See* Kimura, *supra* note 7, at 1610; Thurmon, *supra* note 96, at 451.
118. *See* Thurmon, *supra* note 96, at 451.
119. *See id.*
120. *See id.* at 422 (1992) (explaining the concept of ratio decidendi).
121. *See id.* at 452.
122. *See id.* at 452-53.
123. *See id.* at 455.
124. Something as simple as the holding of the Court can be at the beginning of the opinion, the end, or interspersed throughout the opinion.
125. *See* Kimura, *supra* note 7, at 1610-21 (The five classifications are incoherent plurality decision, dual-majority plurality decision, narrowest grounds plurality decision, complex plurality decision, and legitimate plurality decision.).
126. *See id.* at 1611.

if it falls within a certain class; otherwise, the opinion would merely be persuasive, non-binding authority.[127]

The legitimacy model is problematic because of its inherent complexity. Each category is fairly complex and requires a great deal of parsing through each opinion to decide in which category it belongs. This complexity can lead to opinions that might fit into more than one category. If an opinion can not easily fit into one category, the method fails and confusion about precedent continues. Another problem is that some of the categories Kimura creates require that the opinions in those categories are not precedentialy binding. This would leave many Supreme Court cases without any binding precedent, assuming they fall within those categories Kimura does not consider precedentialy binding.

B. A Rule Change to Eliminate Concurring Opinions

It is clear that none of the current solutions provide a clear, unambiguous solution to the problems surrounding plurality opinions. Each of the proposed solutions assume that the Court should continue to be allowed to produce plurality opinions. However, what if the Court fundamentally changed the way it issued opinions? What if a rule was enacted that would disallow the use of concurring opinions, effectively eliminating plurality opinions completely? The Court would have a majority of Justices agree on the judgment, and then would issue only a single, majority opinion.[128] The rule would not allow any Justice to write a concurring opinion in addition to the single opinion of the Court.

The rule would be fairly straight-forward. After hearing a case, the Court would be forced to come to a consensus on a single, majority opinion of the Court during the decision-making process. If any of the Justices disagreed on the reasoning in the opinion, they would not be allowed to write a separate concurring opinion. They would either have to convince the majority to rewrite the opinion of the Court, or not vote for that opinion. The Court would then release a single, majority opinion, eliminating plurality opinions altogether.

1. Enacting the Rule Change

The first question concerning any rule change would be its constitutionality. The Constitution itself specifically mentions the Supreme Court only in Article III, stating, "The judicial power of the

127. *See id.*

128. In France, and other civil law countries, it is the norm for the court to issue only a single opinion, with no dissents or concurrences allowed. *See* Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 136 (1990).

United States, shall be vested in one Supreme Court. . . ."[129] The Constitution also mentions that the Court shall have a Chief Justice,[130] but makes no further mention of the rules or functioning of the Court. This silence suggests that the Framers had no specific rules in mind and thought it best for the Court itself to adopt its own rules. In fact, the rules of the Court have changed over time with no constitutional challenge.[131] There seems to be nothing concrete constitutionally that would bar a rule change.

If the rule change is not blocked by the Constitution, there are two main mechanisms for changing the Court rules. In most cases, the Court itself makes its own rules as to how the Court operates.[132] These rules lay out the daily functioning of the Court, covering issues such as bringing motions to the Court, procedures for *writs of certiorari*, and admission of attorneys to the Supreme Court bar.[133] The rules cover all aspects of the Court, and include a section on disposition of cases through opinions of the Court.[134] Yet, the rules make no mention on whether a majority of votes are needed to make an opinion binding, or whether concurring opinions are allowed. The practice of issuing concurring opinions is a tradition and has never been codified in the Supreme Court's rules. While the rules are silent on this tradition, it still could be altered through those rules.

The Supreme Court can change its rules with a simple majority vote, issuing an order similar to an opinion in a case.[135] Thus, the Court could simply change its rules to state that no concurring opinions are allowed in addition to the main opinion of the Court. This simple measure would be easy for any Court to effectuate; it would simply rely on garnering the support of five Justices to approve a rule change. While logistically the rule change is simple, the tradition of concurring opinions is so prevalent in the Supreme Court, that it would be a difficult task to convince five Justices to approve such a change.

In addition to the Court changing its own rules, Congress also has the power to change the Court's rules. Congress created the Court with the Judiciary Act of 1789 and, in the past, has passed legislation affecting

129. U.S. CONST. art. III, § 1, cl. 1.

130. *See id.* at art. I, § 3, cl. 6 (stating the Chief Justice shall preside over any trial for Presidential impeachment).

131. Chief Justice Marshall changed the way opinions were issued, switching from seriatim opinions to majority opinions. *See supra* text accompanying notes 13-18; *see also* Supreme Court Order 551 U.S. (July 17, 2007) (revising the rules of the Supreme Court).

132. *See Court Rules*, United States Supreme Court (2007).

133. *See* SUP. CT. R. 5, 10, 21.

134. *See id.* at R. 41.

135. *See* Supreme Court Order 551 U.S. (July 17, 2007).

the Court.[136] Congress could pass a law stating that the Supreme Court must issue only one majority opinion, and no other concurring opinions are allowed. While this tactic is technically possible, it most likely would be protested by the members of the Court. The Court, in recent years, is so entrenched in issuing concurring opinions[137] that it is unlikely it would simply acquiesce to Congress' attempts to eliminate the concurring opinion. The Court's only legal recourse would be to hear a case challenging the law, and strike it down as unconstitutional.

This situation could lead to a constitutional crisis in which the power of the Court would be pitted against the power of Congress. Assuming the law was challenged and appealed all the way up to the Supreme Court, it would lead to a number of issues. First, since the Justices would be involved directly in the case, they would most likely be required to recuse themselves.[138] Second, even if the Court heard the case, it seems likely that the law could not on its face be deemed unconstitutional. The Constitution is silent on the Court's rules and nothing forbids Congress from changing them.[139] The only other valid argument that could be made would be that Congress is infringing on the separation of powers.[140] It could be argued that Congress is improperly exercising its power over the internal structure of the Court, disrupting the balance of powers embodied in the Constitution. This argument could be used to strike down nearly any law Congress could pass to change any Court rules of the Supreme Court.

Theoretically, Congress could pass a law changing the Court rules, but most likely it would cause such controversy that Congress would never attempt to pass such a law. The Court adopting a rule change on its own would be the best way to change the rules to institute a single, majority opinion and to ban all concurring opinions.

136. *See* Judiciary Act of 1789 (establishing the Court as a Chief Justice and five associate Justices); *see also* 28 U.S.C. § 1-5 (laying out the number of Justices, term of Court, and other rules relating to the Court); *id.* at § 1251 (setting rules on when the Supreme Court will have original jurisdiction in a case); *id.* at § 2241 (giving Supreme Court power to issue writs of habeas corpus).

137. *See supra* text accompanying notes 34-37.

138. *See* 28 U.S.C. § 455 (laying out criteria for judicial recusal, including having, "[I]nterest that could be substantially affected by the outcome of the proceeding."); *see also* Lori Ann Foertsch, *Scalia's Duck Hunt Leads to Ruffled Feathers: How the U.S. Supreme Court and Other Federal Judiciaries Should Change Their Recusal Approach*, 43 Hous. L. Rev. 457 (2006) (discussing generally Supreme Court recusal).

139. *See* U.S. CONST. art. III.

140. *See* U.S. CONST. art. I, II, III; *see also* Arthur C. Leahy, *Mistretta v. United States: Mistreating the Separation of Powers Doctrine?*, 27 SAN DIEGO L. REV. 209 (1990) (discussing generally separation of powers doctrine).

2. Effects of a Rule Change

If the Court successfully adopted the rule, it would have significant effects on the Justices themselves, the opinions issued, and the general state of the law in the United States.

a. Effects on the Justices

The rule would impact the Justices' ability to write their own opinions and to articulate their specific views on the law. With a concurring opinion, Justices can go beyond what the majority opinion states, thereby adding more depth, clarification, modification, and personal nuance to the opinion.[141] The Justices can explore issues that they deem important and that might be ignored by a consensus majority opinion.[142] Prohibiting a Justice from writing a concurring opinion would deprive them of this tool for discussing issues that might otherwise be ignored.

One of the reasons there are so many concurring opinions is that Justices want to express their own views on the case and the law in general.[143] Most Supreme Court Justices have an independent streak and shy away from merely going along with the majority.[144] The concurring opinion is a way for them to vote for an outcome in a case, but still add their own view on the reasons the outcome was reached, instead of simply going along with the majority. This is a change from past Courts that thought it insulting to add a concurring or dissenting opinion unless it was of significant importance.[145] Justices in the modern Court have deviated from this tradition, and instead seem content to express their own personal opinions without much restraint.[146]

While eliminating concurring opinions might take away from Justices' personal expression, it would also reinforce the ideal of the Court as an institution,[147] not simply individual Justices espousing

141. *See* Ginsburg, *supra* note 128, at 143.

142. *See id.* at 143-44. *See generally* Ray, *supra* note 2, at 778 (discussing different types of concurrences and reasons Justices choose to use them).

143. *See* Kelsh, *supra* note 14, at 166-67 (discussing how Justices are driven to writing separate opinions to remain consistent with their own personal views, rather then acquiescing to the majority view).

144. When asked what he thought about Chief Justice Robert's goal of achieving more unanimity in the Court, Justice Scalia laughed and said, "Lots of luck." *See* Tony Mauro, *Scalia, Breyer Debate Unanimity on the High Court*, LEGAL TIMES, Dec. 13th, 2006, *available at* http://www.law.com/jsp/article.jsp?id=1165917921878.

145. *See* Lusky, *supra* note 3, at 1139.

146. *See* Ray, *supra* note 2, at 778.

147. *See* BERNARD SCHWARTZ, THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT 361 (1957) (arguing concurring opinions can lead to the Court losing its prestige in the public).

various personal views. The Court is a group of Justices that must come together to decide issues of law, and, in many cases, must lose their individuality to form a majority to decide cases. Traditionally, a majority of the Court has always been necessary to make a binding decision;[148] thus, the Court promotes consensus. The fact that a concurring opinion written by a single Justice can be applied as binding law in future cases[149] destroys that consensus. It also goes against the ideas of majoritarianism[150] and calls into question the Court's status as an impartial institution. Concurring opinions leave decisions more meaningless and filled with Justice's own personal views, agendas, and biases.

These two competing interests of the Justices, one of maintaining their individuality, and the other of being part of a consensus of the Court, are in direct conflict. Continuing to allow concurring opinions would allow Justices to keep their individuality, but sacrifice the Court's ability to speak with one voice and rule as a group. Eliminating concurring opinions would allow the Court to speak as a group more forcefully, but, in turn, would also sacrifice some of the Justice's individuality. It is up to the Court to decide whether it prides its individuality enough to keep concurring opinions at the cost of speaking in a unified and forceful voice.

b. Effects on Opinions Issued

In addition to affecting the Justices themselves, abolishing concurring opinions would also have a significant effect on the opinions the Court issues. The addition of concurring opinions allows for more Justices to sign onto an opinion. Justices might sign onto an opinion because they know they can write a separate concurring opinion that gives an alternate reasoning for the case.[151] Without the availability of concurring opinions, many Justices might not vote for the majority because they will only give their vote if they can also give their own alternate reasoning. Eliminating the Justices' ability to do that will almost certainly take many votes away from future cases, which could change the outcome of those future cases.

Another change that might occur if concurring opinions were eliminated is that many majority opinions might be watered down to ensure they secure a majority vote. If a Justice can not write a

148. *See supra* text accompanying notes 19-23 (discussing majoritarianism).

149. *See* Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 483 U.S. 711, 731 (1987) (O'Connor, J., concurring).

150. *See supra* text accompanying notes 19-23.

151. *See* Ray, *supra* note 2, at 800.

concurring opinion, he or she might only sign onto a majority opinion if it is less broad and only touches on the issues with which he or she agrees. Majority opinions might be written more narrowly to satisfy all the Justices. This practice would restrict the Court from issuing broad opinions that affect a broad area of the law. Instead, Justice's might merely be deciding more individual issues that only affect the case at hand, instead of addressing any larger issue of law. This situation would have a negative impact on the Supreme Court, since it has traditionally been seen as a body that operates to address the broad issues of law in the country.[152]

Despite the potential negative effects on the opinions the Court decides, positive effects would also result from a rule change. While opinions might grow narrower and address less broad issues of law, there will only be a single opinion emanating from each case, as opposed to multiple concurring opinions. The Court will speak with one voice and issue a single view on what the law is and how it should be applied. A rule change will eliminate the confusion lower courts struggle with in trying to determine the precedential value of plurality opinions.[153] The Supreme Court would act as a single authoritative body that would issue a single opinion. A rule change would also strengthen the public view of the Court, and help to create a more stable and uniform body of precedent.

c. Effects on the Law in General

The most far-reaching effect of eliminating concurring opinions is the effect on the general state of the law in the United States. The Supreme Court's main objective is not just to settle cases, but to answer grand questions of law.[154] All lower courts look to the Supreme Court's opinions to answer questions of law.[155] In furthering this objective, it is imperative that the Supreme Court clearly states the rules of law so lower courts can follow those rules in a clear and uniform way. It has been shown how plurality opinions confuse the Court's rulings and lead to inconsistency and ambiguity in the law.[156] Eliminating concurring opinions would make the law more consistent and clear.

All the confusing plurality opinions would simply vanish, because there would be no plurality opinions at all. The Court would be forced to

152. *See* Baun, *supra* note 43, at 129.
153. *See supra* Part II.D (discussing examples of confusing plurality opinion cases).
154. *See* Baun, *supra* note 43, at 129.
155. *See* U.S. CONST. art. III, § 2, cl. 2("[T]he Supreme Court shall have appellate jurisdiction, both as to law and fact. . . .").
156. *See supra* Part II.D.

issue a single, majority opinion that would be the binding precedent for lower courts. Instead of courts having to parse through the Supreme Court's various split opinions, courts would have a single opinion to look at and would have a much clearer statement on what the applicable precedent is. The law, as a whole, would become more straightforward, uniform, and clear.

The problem of circuit splits related to plurality opinions would be lessened. Many circuit splits over plurality opinion cases are the result of each circuit relying on a different opinion of the Court, with some using the main opinion of the Court as precedent, and others using one of the concurring opinions as precedent.[157] If the lower courts had only one opinion to analyze, the circuit splits would be reduced, as they all would be using the same opinion as precedent. While circuit splits would still exist because the interpretation of Supreme Court opinions would still not be the same in every court, the existence of only a single opinion would make that interpretation clearer to lower courts, and, thus, promote much more uniformity in the law.

IV. CONCLUSION

Dissension in the Supreme Court does not seem likely to end anytime soon. While the current Chief Justice strives for more unanimity,[158] the rate of concurrences is still high,[159] particularly in some of the current high-profile cases.[160] Concurring opinions in many cases lead to plurality opinions that lack strong precedential value and produce confusion in lower courts.[161] They also allow opinions signed onto by less than a majority to become binding precedent.[162] While there are a number of solutions to the problem of interpreting these plurality opinions, all assume the Court must keep the tradition of concurring opinions.[163]

I believe the only way to solve the problem completely is to institute a rule change eliminating the use of concurring opinions. While concurring opinions are an established tradition in the Court, their abuse in recent years has led to a divisive and weakened Court that issues far too many confusing plurality opinions. A rule change is a radical step, but the Justices seem too addicted to writing concurring opinions to stop on their own. If concurring opinions were eliminated, it would first

157. *See* cases cited *supra* note 75 (showing a clear circuit split).
158. *See* Von Drehle, *supra* note 4, at 40.
159. *See Harvard Stats*, *supra* note 6, at 436.
160. *See* cases cited *supra* note 5.
161. *See supra* Part II.D.
162. *See* cases cited *supra* note 1.
163. *See supra* Part III.A.

eliminate the anti-majoritarianism practice of opinions supported by less than a majority becoming binding precedent. More importantly, it would facilitate the Court in regaining its strength by only issuing a single, majority opinion that would more clearly advance the rule of law and set unambiguous precedent for lower courts to follow.