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The Case for Including Marks V. United States in the Canon of Constitutional Law

Maxwell L. Stearns

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I. INTRODUCTION

A. THE PROPOSAL

In this essay, I would like to suggest adding a single case, with appropriate commentary, to the canon of constitutional law, as presented in introductory casebooks. Specifically, I suggest including *Marks v. United States*,[1] as a principal case, or in the form of a detailed summary, immediately before or after the first major plurality decision. I should note that the case is rather short—nine pages in the U.S. Reports—and that it nominally involves obscenity doctrine. I would suggest, counterintuitively perhaps, that the case is more fruitfully presented toward the beginning of an introductory course in constitutional law, to be cross referenced in the materials on the First Amendment, than the other way around.

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1. 430 U.S. 188 (1977). For a more detailed analysis of this case from the perspective of social choice, see generally Maxwell L. Stearns, *Should Justices Ever Switch Votes?*: Miller v. Albright, in *Social Choice Perspective*, 7 Sup. Ct. Econ. Rev. 87 (1999). In that article, which analyzes the title case from a social choice perspective, I also analyze *Marks*, see id. at 111-17, and offer a taxonomy, based upon social choice theory, with which to analyze all Supreme Court plurality decisions. In my book, Maxwell L. Stearns, *Constitutional Process: A Social Choice Analysis of Supreme Court Decision Making* (U. of Michigan Press, 2000), I provide a more comprehensive analysis of Supreme Court decision making from the perspective of social choice. Throughout this essay, I will minimize the use of technical social choice terminology. Those seeking a more in-depth social choice analysis are referred to the above materials, and especially to Stearns, chapter 2, which provides a comprehensive overview of social choice. It is important to emphasize that the concepts I am seeking to convey can be taught to law students without any technical social choice analysis.

At a basic doctrinal level, *Marks* formalizes the "narrowest grounds doctrine."[2] This doctrine proves essential in explaining to students how to identify which opinion states the holding in the vast majority of fractured panel, or plurality, Supreme Court cases. My own experience reveals that without having considered *Marks*, students (and indeed many lawyers) systematically err in assuming that in the absence of a majority opinion, the Court's holding is stated in the plurality opinion. This mistake can lead students and lawyers to embrace serious misunderstandings, with potentially significant adverse consequences. In addition, the *Marks* opinion reveals the limits of the frequent assertion that when the Court decides a case without a majority opinion, the case resolves the dispute but does not establish a precedent. While that is certainly true for the Court as an institution—meaning that the Court is freer to disregard a plurality decision as a matter of stare decisis than it is to disregard a majority opinion—*Marks* reveals that in some important contexts, including most notably criminal law, litigants can succeed in pressing a due process claim premised on their reliance upon a narrowest grounds opinion in a fractured panel case. Finally, and from my perspective most importantly, *Marks* is a singularly important decision in encouraging students to think about the institutional dynamics of, and constraints upon, Supreme Court decision making. A proper analysis of *Marks* will allow students to gain an appreciation for the important strategic considerations that the justices routinely confront when casting votes in cases decided by a narrow margin and for how such strategic considerations can shape constitutional doctrine.

In this essay, I will begin with a somewhat detailed summary and analysis of *Marks*. I will then identify several cases that appear in virtually every introductory constitutional law text in which the *Marks* doctrine operates to identify the Court's holding. Without *Marks*, I will argue, it is difficult fully to appreciate these cases. I would suggest that for those considering including *Marks* in their casebooks and courses, it is quite possible to end the analysis at that point. I will go on, however, to suggest an additional layer of analysis, which my own students have found intriguing, namely an analysis of those rare cases in which the assumptions underlying the *Marks* doctrine do not hold and in which, as a result, no opinion resolves the case on the narrowest

2. Throughout this paper, I will use the terms "narrowest grounds doctrine" and "*Marks* doctrine" interchangeably.

grounds. It is important to emphasize here, however, that it is not necessary to go beyond the first layer of analysis for students to benefit substantially from having studied *Marks*.

B. THE MARKS DECISION SUMMARIZED[3]

The *Marks* petitioners had been convicted of distributing obscene materials pursuant to a set of jury instructions that were modeled on a case that the Supreme Court decided *after* their alleged criminal conduct. Petitioners maintained that the later decision relaxed the relevant legal standard for evaluating their conduct as compared with the most recent Supreme Court precedent issued before that conduct, which was not decided by a majority. In resolving the case in petitioners' favor, Justice Powell, writing for a majority of five,[4] clarified the rule for identifying the Court's holding in fractured panel cases and the extent to which litigants can rely upon such cases as a matter of due process.

Petitioners had distributed obscene materials between the time that the Supreme Court issued *Memoirs v. Massachusetts*,[5] a plurality decision that embraced a relatively strict standard for state prosecutions, and the time it issued *Miller v. California*,[6] a majority decision that embraced a more relaxed standard for such prosecutions. Prior to both of these cases, the Court had articulated the standard for punishable obscenity in *Roth v. United States*.[7] For purposes of the analysis to follow, it will be helpful to consider these three cases in the order in which they were decided.

In *Roth*, the Court articulated a three-part test for obscenity prosecutions: "whether to the average person, applying contemporary community standards, the dominant theme of the mate-

3. Portion of the discussion of *Marks* are taken and adapted from Stearns, 7 Sup. Ct. Econ. Rev. at 111-17 (cited in note 1), and Stearns, *Constitutional Process* at ch. 3 (cited in note 1).

4. While Justice Brennan, writing for three, and Justice Stevens, writing for himself, filed separate opinions concurring in part and dissenting in part, neither expressed disagreement with the narrowest grounds rule, a point on which the Court suggested unanimous agreement. Both separate opinions would have reversed, rather than remanding under a new standard, on the ground that the materials were protected under the First Amendment. See *Marks*, 430 U.S. at 197 (Brennan, J., concurring in part and dissenting in part); id. at 198 (Stevens, J., concurring in part and dissenting in part).

5. 383 U.S. 413 (1966).

6. 413 U.S. 15 (1973).

7. 354 U.S. 476 (1957).

rial taken as a whole appeals to the prurient interest."[8] In *Memoirs*, a plurality of three justices, Justices Brennan and Fortas and Chief Justice Warren, set out a stricter standard for obscenity prosecutions, stating that "three elements must coalesce" before material can be deemed beyond the protection of the First Amendment on the ground that it is obscene:

> [I]t must be established that (a) the dominant theme of the material taken as a whole appeals to the prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[9]

This opinion raised the *Roth* standard for punishable obscenity by adding prongs (b) and (c). As Chief Justice Burger, writing for the *Miller* Court, later observed, prong (c) of *Memoirs*, requiring that the material be "utterly without redeeming social value," imposed upon the prosecutor "a burden virtually impossible to discharge under our criminal standards of proof."[10] In two opinions concurring in the judgment in *Memoirs*, Justices Black and Douglas adhered to their "well-known position that the First Amendment provides an absolute shield against governmental action aimed at suppressing obscenity."[11] In a brief opinion concurring in the judgment, Justice Stewart incorporated by reference his belief that only "hard-core pornography" may be suppressed as obscene consistent with the First Amendment, as previously expressed in his dissenting opinion in *Ginzburg v. United States*.[12] Finally, in three separate dissents, Justices Clark and White adhered to the statement of obscenity articulated in *Roth*,[13] and Justice Harlan reasserted the view he had previously articulated in *Roth*, that, while the hard-core pornography standard articulated by Stewart is appropriate when the First Amendment is applied to the federal government,

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8. Id. at 498.
9. *Memoirs*, 383 U.S. at 418.
10. *Marks*, 430 U.S. at 194 (quoting *Miller*, 413 U.S. at 22) (internal quotations omitted).
11. *Marks*, 430 U.S. at 193 (discussing *Memoirs*, 383 U.S. at 421 (Black, J., concurring); id. at 424 (Douglas, J., concurring)).
12. *Memoirs*, 383 U.S. at 421 (Stewart, J., concurring in the reversal for reasons stated in his dissent in *Ginzburg v. United States*, 383 U.S. 463, 499 (1966)).
13. *Memoirs*, 383 U.S. at 441-42 (Clark, J., dissenting); id. at 460-61 (White, J., dissenting).

the First Amendment requires only that states "apply criteria rationally related to the accepted notion of obscenity."[14]

Finally, in *Miller*, a majority of the Supreme Court, in an opinion by Chief Justice Burger, redefined the standard for punishable obscenity as follows:

> The basic guidelines for the trier of fact must be: (a) whether the "average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[15]

The *Miller* Court added: "[w]e do not adopt as a constitutional standard the '*utterly* without redeeming social value' test of [*Memoirs*]."[16]

To summarize, before *Marks*, the Supreme Court issued three relevant decisions concerning the definition of proscribable obscenity. In *Roth* in 1957, the Supreme Court defined obscenity based upon whether, applying "contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." In *Memoirs* in 1966, the Supreme Court issued a fractured panel decision, which Justice Powell then construed in *Marks*. A minority in the *Memoirs* dissent continued to adhere to *Roth* or an even laxer standard, namely rational basis. A concurrence of two stated that no materials may be proscribed as obscene under the First Amendment. A concurrence of one stated that only hard-core pornography may be proscribed as obscene consistently with the First Amendment. And a plurality of three added two requirements beyond *Roth*, including most importantly that the material be utterly without redeeming social value to be proscribed as obscene. Finally, in *Miller* in 1973, the Court expressly rejected the *Memoirs* plurality's "utterly without redeeming social value" standard in favor of a refined version of *Roth*.

As Justice Powell explained, the district court in *Marks* rejected petitioners' argument that the jury instruction modeled on

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14. Id. at 455-57 (Harlan, J., dissenting) ("My premise is that in the area of obscenity the Constitution does not bind the States and the Federal government in precisely the same fashion.").

15. *Miller*, 413 U.S. at 24 (citations omitted).

16. Id.

Miller violated their Fifth Amendment due process rights not to be convicted based upon an obscenity formula announced after the acts giving rise to their prosecution, and which cast a "wider net than *Memoirs*," by which "petitioners charted their course of conduct."[17] Writing for the *Marks* Court, Justice Powell explained that for the petitioners to succeed, they had to demonstrate both that the *Memoirs* plurality announced the Court's holding and that, following *Memoirs*, *Miller* stated a new rule of law.[18] Like the district court, the court of appeals in *Marks* rejected the argument that *Miller* "unforeseeably expanded the reach of the federal obscenity statutes beyond what was punishable under *Memoirs*."[19] Because the standard announced by the *Memoirs* plurality never commanded the support of more than a minority of three Justices at one time, the Sixth Circuit, in a split panel decision, determined that "*Memoirs* never became the law."[20] As Powell explained, applying this reasoning, the issue in *Marks* would have been whether *Miller* significantly altered the obscenity standard articulated in *Roth*, which he agreed it did not.[21] But Powell went on to state:

> [W]e think the basic premise for this line of reasoning is faulty. 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. . . ."[22]

Applying the narrowest grounds rule, it was easy to determine that the plurality opinion announced the holding. Justices Black and Douglas would have prevented criminalizing any conduct on grounds that the material in question was proscribable obscenity and Justice Stewart would only have permitted hard-core pornography to be proscribed as obscene. The Brennan plurality opinion, in contrast, struck down the conviction but would have

17. See id. Petitioners' argument was analogous to one arising under the ex post facto clause, U.S. Const., Art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."), which, although only applying to legislation, prohibits the retroactive criminalization of conduct. By analogy, in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), the Court had extended the same protection under the Fourteenth Amendment Due Process Clause to strike down a conviction based upon an unanticipated judicial enlargement of a statute applied retroactively.

18. See *Marks v. United States*, 430 U.S. 188, 190 (1977).

19. Id. at 192.

20. Id.

21. See id. at 192-93.

22. Id. at 193 (quoting, in part, *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

permitted a broader range of state and federal statutes proscribing materials as obscene to be upheld.[23] As a result, while the plurality struck down the conviction, it did so on the narrowest grounds. Indeed, Powell observed that except for the Sixth Circuit in *Marks* itself, every federal court of appeals which had considered the question had so read *Memoirs*. Powell then went on to conclude that "*Memoirs* therefore was the law," and that "*Miller* did not simply clarify *Roth*; it marked a significant departure from *Memoirs*," by "expand[ing] criminal liability" relative to the *Memoirs*' "utterly without redeeming social value" standard for proscribable obscenity.[24]

The following table, which outlines the various opinions in *Memoirs*, will help to analyze Justice Powell's *Marks* analysis:

(A) Douglas & Black (concurring)	(B) Stewart (concurring)	(C) Brennan, Fortas, and Warren (plurality)	(D) Clark, Harlan, and White (dissenting)
No proscribable obscenity	Hard-core pornography only as proscribable obscenity	"Utterly without redeeming social value" standard for proscribable obscenity	*Roth* standard (Clark and White) or rational basis test (Harlan) for proscribable obscenity
Broad protection of obscenity		Narrow protection of obscenity	

The table reveals that the issues in *Memoirs* can be readily cast along a single dimension, namely the breadth or narrowness of the Supreme Court obscenity doctrine in its protection of sexually explicit materials. Justice Powell's formulation of the narrowest grounds rule is premised upon the intuition that by plotting each opinion along this single dimension continuum, it becomes possible to derive as the Court's consensus position that opinion which although not a majority first choice candidate, would defeat all others in direct binary comparisons.[25] To

23. The converse proposition also holds. In a case sustaining a law against a constitutional challenge, the opinion that resolves the case on the narrowest grounds is that opinion which would sustain the fewest laws.

24. *Marks*, 430 U.S. at 194.

25. In the language of social choice, such an option is referred to as a Condorcet

illustrate, the table includes a bolded line to separate those opinions, which are, and are not, consistent with the case outcome, to the left and right respectively, and thus which are, and are not, eligible for holding status under the narrowest grounds rule. While the dissenting opinions can still be plotted based upon the breadth or narrowness of the proposed holding, they are ineligible for holding status under the articulated narrowest grounds rule because the potential protections that each would have afforded for obscenity was, contrary to a majority of the Court, too narrow to include relief for Marks on the facts of the case.

Assuming that all the participants agree that the sole issue in the case is the breadth of First Amendment obscenity protection, then, using the table, it is fairly easy to locate the dominant outcome. We can label each of the opinions in the order in which they appear in the table, A (Douglas), B (Stewart), C (Brennan), and D (White). Implicit in the assertion of a single issue dimension is the premise that if forced to choose among each of the remaining opinions, those writing or joining the opinions at the outer edge would most prefer the one closest to them and least prefer the one farthest from them.[26] To simplify the presentation, I have treated all three dissents as one, represented by Justice White. While I have included both the Douglas and Stewart opinions in the table, since both are eligible for holding status under *Marks*, I will simplify by treating the Douglas and Stewart opinions as a single opinion A/B, representing three Justices.[27] Based upon the above assumption, the ordinal rankings of the A/B camp are as follows: A/B,C,D. The ordinal rankings of the D camp are D,C,A/B. The ordinal rankings of the C camp are irrelevant because whether they are C,A/B,D or C,D,A/B, the result is the same. If the only options

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winner.

26. As explained below, when this assumption fails to hold, the narrowest grounds doctrine fails to identify a dominant opinion. Two conditions must arise before the *Marks* doctrine becomes inapplicable. First there must be more than a single issue dimension. And second, the various opinions must possess the following characteristic features (which I refer to as asymmetry, see note 1 and cites therein). The majority on the Court's judgment must be composed of two minority camps, each reaching opposite resolutions of the two dispositive issues, but also reaching the same judgment. In contrast, the dissenters, who by definition reach an opposite judgment, must resolve one of the dispositive issues in favor of each of the minority camps, which together comprise a majority for a contrary judgment. For an illustration, see infra at 62 (discussing *Kassel v. Consolidated Freightways Corp.*, 456 U.S. 662 (1981)).

27. This eases exposition by creating three camps any two of which contain the requisite five votes for a majority. Otherwise, Stewart, a one-justice camp, could join the plurality or dissent and still be in a minority.

available are A/B, C, and D, then option C, the narrowest grounds decision, is the dominant second choice (or Condorcet winner) for the Court as a whole.

II. FIRST LEVEL APPLICATIONS: APPLYING *MARKS* IN FREQUENTLY PRESENTED CASES

The above analysis suggests that under certain conditions, it is possible to identify the dominant opinion for the Court, even though no opinion commands majority support. In *Memoirs*, that opinion was issued by the plurality, but it is extremely important for students to appreciate that an opinion concurring in the judgment can potentially hold that status. As stated at the beginning of this essay, my own experience reveals that many, if not most, law students, and even many lawyers, fail to appreciate that the plurality opinion is simply the designation given to the opinion consistent with the outcome that obtains the largest number of votes. As the *Marks* doctrine makes plain, however, the plurality opinion does not necessarily state the holding, and thus, it might not have doctrinal significance.

Because the Supreme Court has proven increasingly prone to issuing plurality decisions in recent decades, the importance of the narrowest grounds rule cannot be overstated. And yet, I have come to realize that it is a doctrine that is rarely, if ever, taught. Because constitutional law is the first introduction for most students to Supreme Court decision making, I believe that it is the preferred course for introducing this case. To illustrate the benefits of this early introduction to *Marks*, I will now describe three cases that appear in virtually all constitutional law casebooks and in which an application of the narrowest grounds doctrine is essential in identifying the Court's holding.

Regents of the University of California v. Bakke

In *Regents of the University of California v. Bakke*,[28] the Court issued several opinions, of which three are the most significant. The University of California at Davis School of Medicine's affirmative action program set aside sixteen out of one hundred seats for specified minorities, whose applications were considered separate and apart from those applying for the remaining eighty-four seats. In striking this program down, the *Bakke* Court offered three different approaches to resolving the

28. 438 U.S. 265 (1978) (Powell, J., announcing the judgment of the Court).

case issues. Writing a partial concurrence in the judgment and partial dissent, Justice Brennan would have permitted U.C. Davis to use race as a means of remedying the present effects of past discrimination and would have upheld the quota-based program under intermediate scrutiny (rather than applying strict scrutiny), given that the state's use of race was benign.[29] Also writing a partial concurrence in the judgment and partial dissent, Justice Stevens concluded that any use of race in admissions violated Title VI of the Civil Rights Act of 1964,[30] implying that U.C. Davis's chosen method, namely a race-based quota, was necessarily impermissible. Finally, in the opinion issuing the Court's judgment, Justice Powell distilled the case to two issues: (1) Can Davis use race at all as a factor in its admissions decisions? and (2) If so, did Davis use race in a permissible manner. Justice Powell concluded that U.C. Davis could use race to further the objective of diversity in an academic setting, but in contrast with Justice Brennan, Powell further concluded that Davis could not use race for the purpose of remedying the present effects of past discrimination. Powell also concluded that while the U.C. Davis quota system violated equal protection, an alternative race-based affirmative action program employed by Harvard University would not. Under the Harvard approach, race was considered as one plus factor among many in a fully integrated admissions process.

Critically, no other Justice joined the relevant portions of the Powell decision in which he distinguished the permissible use of race for purposes of promoting academic diversity from the impermissible use of race to remedy the present effects of past discrimination, and in which he distinguished the permissible use of race as one plus factor among many in a fully integrated admissions process, per Harvard, from the impermissible use of race in the form of a quota or set aside with a segregated admissions process, per Davis. And yet, while Justice Powell alone embraced these two analytical distinctions, the *Marks* narrowest grounds rule readily explains why Justice Powell expressed the Court's holding. While the Powell opinion is most easily understood as resting along two issue dimensions rather than one, thus formally preventing the characterization of Powell's opinion as resolving the case on the narrowest grounds, it nevertheless pos-

29. Id. at 361-62 (Brennan, J., concurring in the judgment in part and dissenting in part).

30. Id. at 412 (Stevens, J., concurring in the judgment in part and dissenting in part) (citing § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d).

sesses the requisite features of a dominant second choice, or Condorcet winner. The narrowest grounds doctrine is premised upon certain assumptions about how the Justices would rank the remaining opinions in the case. As applied to *Bakke*, we will first consider how the Brennan camp, which favored a liberal use of affirmative action, would rank the two principal alternatives, the Powell position, which would allow a limited use of affirmative action, but would disallow a quota, and the Stevens position, which would allow no use of race in admissions. Because the Powell position is closer to that of Brennan, the intuition is that Brennan would choose Powell over Stevens. Similarly, the Stevens camp, which would disallow all affirmative action, would also choose the seemingly more restrictive approach embraced by Powell to the substantially more liberal approach embraced by Brennan. This intuition is further borne out by the fact that the Powell opinion resolved one of each of the two critical issues in favor of each of the other camps. Consistent with Brennan, Powell determined that some use of race is permissible; consistent with Stevens, Powell determined that the manner in which Davis used race was impermissible. In contrast, Brennan and Stevens resolved both issues in opposite fashion, leading to opposite results. It is most implausible to assume that either Brennan or Stevens would prefer opposite resolutions of both issues, leading to an opposite judgment, to a favorable resolution of one of two issues, leading to a partially favorable holding. As a result, even though the case possessed two issue dimensions rather than one, and even though only Justice Powell embraced the two critical distinctions leading to his two-part holding, the analysis readily explains why his opinion has consistently been regarded as expressing the Court's holding.

Planned Parenthood of Southeastern Pennsylvania v. Casey

The same analysis explains why a majority of the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[31] empowered the joint authors—O'Connor, Kennedy, and Souter—to define and resolve the principal case issues in a manner explicitly or implicitly rejected by a majority of the Court. The joint authors resolved this major constitutional challenge to the abortion ruling in *Roe v. Wade*,[32] based upon a somewhat controversial rendition of the doctrine of stare decisis and of the

31. 505 U.S. 833 (1992).
32. 410 U.S. 113 (1973).

history surrounding the abandonment of two landmark precedents, *Plessy v. Furguson*[33] and *Lochner v. New York*.[34]

In *Casey*, two liberal Justices, Stevens and Blackmun, continued their adherence to *Roe* on the merits. A conservative coalition of four justices, Rehnquist, Scalia, White, and Thomas, voted to reject *Roe* both on the merits and as a matter of precedent. The jointly authored plurality opinion eschewed any formal inquiry into the original merits of *Roe* and instead chose to retain *Roe*'s essential framework. According to the joint authors, *Roe*'s essential framework did not include identifying abortion as a fundamental right, did not include the trimester framework, and permitted states and the federal government to place greater weight upon their respective interests in the potential life that the fetus represents than did *Roe*. In addition, the joint authors' stare decisis analysis allowed the overruling of two post-*Roe* abortion cases,[35] which did not satisfy these revised understandings.

Critical to the joint authors' analysis was their distinction of the bases for overruling *Plessy*, in the line of cases ending in *Brown v. Board of Education*,[36] and for overruling *Lochner*, in the line of cases ending in *West Coast Hotel v. Parrish*,[37] from the claimed bases for overruling *Roe*. While the joint authors conceded that the overturned decisions were decided incorrectly as an initial matter, they maintained that the overrulings also resulted in significant part from a change in actual or perceived facts regarding the premises of the earlier decisions. In contrast, the joint authors maintained that the factual premises giving rise to the abortion right announced in *Roe* had not changed. As stated above, the joint authors went on to apply their stare decisis analysis to offer a substantial revision of *Roe* and to overrule two post-*Roe* abortion cases.

The liberals' ideal point, meaning their first choice rationale, was to adhere to the original *Roe* formulation on the merits, although they agreed that stare decisis dictated declining to overrule *Roe*. The liberals were unwilling to join in the application of stare decisis, which suggested that the overrulings of

33. 163 U.S. 537 (1896).
34. 198 U.S. 45 (1905).
35. The *Casey* Court overruled *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) and *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983).
36. 347 U.S. 483 (1954).
37. 300 U.S. 379 (1937).

Plessy and *Lochner* turned on something beyond initial error and which allowed a fundamental revision of the original *Roe* holding. Similarly, while the conservatives' ideal point was to overrule *Roe* on the ground that it was erroneous as an initial decision and on the ground that principles of stare decisis did not warrant further adherence, as a second choice, the conservatives would clearly prefer adhering to a watered down version of *Roe* based upon even a criticized rendition of stare decisis (which would allow greater latitude for state and federal restrictions on abortion or abortion funding) to adhering to the original *Roe* formulation on the merits. Thus, while a majority of the Justices in *Casey* expressly or impliedly rejected the application of stare decisis as a basis for adhering to a revised rendition of *Roe*, *Marks* again explains why the joint opinion remains the dominant second choice or Condorcet winner.

Adarand Constructors, Inc. v. Pena: A Look at Strategic Decision Making Along a Single-Issue Dimension

For the final case illustration at the first level of analysis, consider *Adarand Constructors, Inc. v. Pena*.[38] In this decision, the Court for the first time articulated a clear majority standard for cases involving challenges to federal race-based set aside programs. In doing so, the Court overruled that part of *Metro Broadcasting, Inc. v. FCC*,[39] in which a plurality had relied upon a more relaxed standard, intermediate scrutiny, to sustain a federal race-based set aside. The *Adarand* Court rejected the use of intermediate scrutiny notwithstanding the argument that the use of race was benign, and instead embraced the same strict scrutiny standard employed in challenges to state-sponsored affirmative action programs.[40] In *Adarand*, the liberal justices—Stevens, Ginsburg, Souter, and Breyer—dissented, advocating continued adherence to the intermediate scrutiny standard, under which they would uphold the challenged program. In contrast, those voting to strike down the federal set aside program—Rehnquist, Kennedy, Thomas, and Scalia—all joined Justice O'Connor's majority opinion. The O'Connor opinion possessed two important features for present purposes. First, O'Connor insisted that even in challenges to the allegedly benign use of race by Con-

38. 515 U.S. 200 (1995).
39. 497 U.S. 547 (1990).
40. See, e.g., *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (applying strict scrutiny to strike down race-based set aside in construction industry for contractors employed by City of Richmond, Virginia).

gress, which unlike state legislatures is given express authority in section 5 of the Fourteenth Amendment to enforce the remaining substantive provisions, the relevant test was strict scrutiny. Second, in part III-D of her opinion, Justice O'Connor sought to dispel the notion that "strict scrutiny is 'strict in theory, but fatal in fact,'"[41] implying that at least in theory, some federal race-based set aside programs might survive the now-elevated standard of review.[42]

Including O'Connor, the *Adarand* majority opinion consisted of five justices, "except insofar its it might be inconsistent with the views expressed in Justice Scalia's concurrence."[43] In his separate concurring opinion, Justice Scalia emphasized that in his analysis, virtually all race-based classifications are unconstitutional, meaning that the test should be strict in theory *and* fatal in fact. Notwithstanding this obviously significant difference with III-D of Justice O'Connor's majority opinion, Scalia formally joined that part of her opinion, rather than writing his alternative analysis as part of an opinion concurring in the judgment. The critical question is why Scalia did not pursue this alternative strategy. The *Marks* analysis provides a ready and intriguing answer. The views of those in the major camps—the liberal dissenters; the O'Connor camp (minus Scalia); and Scalia—can readily be cast along a single issue dimension, namely the breadth or narrowness of equal protection limits upon federal race-based set-aside programs. The dissenters, who would have preferred to continue embracing intermediate scrutiny, would sustain the largest number of such programs. The O'Connor camp (minus Scalia), would apply strict scrutiny, but would allow some imaginable programs to survive. Finally, Justice Scalia would apply strict scrutiny and strike down virtually all such programs.[44]

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41. *Adarand*, 515 U.S. at 237.

42. I say in theory because I am not aware of any cases in which Justice O'Connor used her analysis to vote in favor of sustaining a race-based affirmative action program.

43. 515 U.S. 200. Part III-C of O'Connor's opinion, which is not relevant to the above analysis, was joined only by Justice Kennedy. In this part, Justice O'Connor explained why principles of stare decisis did not require adherence to *Metro Broadcasting*.

44. It is worth noting that in his separate opinion in *Croson*, Scalia had identified one circumstance in which a state could permissibly use a racial classification. While Scalia posited that actual victims of state race-based discrimination can generally be compensated as such and thus without the need for a racial classification, he further asserted that he would allow a temporary classification of prisoners by race to quell a race riot. See *Croson*, 488 U.S. at 521 (Scalia, J., concurring in the judgment). This obviously has no bearing in the context of federal race-based set aside programs.

Had Scalia written an opinion concurring in the judgment, he knew that his opinion would not have stated the Court's holding in any event. That is because Scalia's rationale for striking down the federal race-based program was broader than that of Justice O'Connor. While O'Connor voted to strike down this program but suggested that some others might survive, Scalia voted to strike down this program and suggested that no others should survive. Because he would not have stated the holding had he written a separate opinion concurring in the judgment, Scalia joined even a part of the majority opinion with which he expressly disagreed to afford the Court the opportunity to create the first majority precedent expressing a single standard on this important question of constitutional law. In *Adarand*, Scalia strategically aligned himself with a narrower position than that expressed as his ideal point to elevate Justice O'Connor's ideal point, and Scalia's second choice over the remaining alternatives, from what would have been a narrowest grounds plurality opinion to majority opinion status. In doing so, Scalia afforded the O'Connor opinion greater precedential effect and provided the requisite majority needed to overrule the part of *Metro Broadcasting* that relied upon a more relaxed standard than strict scrutiny in sustaining a federal race-based set aside.

III. LEVEL TWO ANALYSIS: THE BREAKDOWN OF THE NARROWEST GROUNDS RULE

In this section, I will take the analysis one level deeper and consider the implications of the narrowest grounds doctrine in those rare fractured panel cases in which the doctrine's assumptions do not hold. I will focus on a single case that remains prominent in most casebook presentations of the dormant commerce clause, *Kassel v. Consolidated Freightways Corp.*[45] As noted earlier, it is not necessary to engage in this deeper level of analysis to allow students to benefit from an introduction to *Marks*.

In *Kassel*, a fractured Supreme Court struck down an Iowa statute that prohibited certain trucks, including sixty-five foot twin trailers, from traveling through the state, but that included a series of exceptions benefiting in-state interests. The Court is-

45. 450 U.S. 662 (1981). For readers interested in applying the same analysis to *Miller v. Albright*, 523 U.S. 420 (1999), see Stearns, 7 Sup. Ct. Econ. Rev. (cited in note 1).

sued three relevant opinions: Justice Powell, writing for a plurality for four; Justice Brennan, writing a concurrence in the judgment for two; and then-Associate Justice Rehnquist, writing in dissent for three. The three opinions can be analyzed according to their resolution of two dispositive case issues: (1) What is the relevant standard of review, the balancing test in which the trial court independently weighs the asserted safety justifications for the law against the burden on commerce, or the more deferential rational basis test, in which the court engages in no independent weighing? and (2) Whichever test applies, is the court limited to that evidence considered contemporaneously by the Iowa legislature, or is it permitted to consider evidence in support of novel justifications introduced for the first time at trial?

Writing for a plurality, Justice Powell was willing to consider evidence presented for the first time at trial but evaluated that evidence in light of the relatively more stringent balancing test.[46] The analysis led him to conclude that the federal interest in commerce outweighed the state's asserted safety justifications.[47] In concurrence, Justice Brennan embraced the more lenient rational basis test but insisted that the only relevant evidence was that contemporaneously considered by the Iowa legislature in support of the law.[48] Because he determined that all contemporaneous evidence evinced a protectionist motive, Brennan concluded that the legislature lacked even a rational basis in support of the law. Brennan thus asserted that the challenged law was subject to a virtual *per se* rule of invalidity.[49] Finally, Justice Rehnquist agreed with Justice Brennan that the trial court should not independently weigh costs and benefits of alleged safety justifications and, thus, applied the rational basis test.[50] But unlike Brennan, Rehnquist was willing to consider novel justifications introduced first time at trial to identify a rational basis in support of the law.[51]

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46. 450 U.S. at 678-79 (Powell, J., for a plurality) (applying balancing test in light of evidence admitted at trial).

47. Id. at 678-79.

48. Id. at 680-81 (Brennan, J., concurring in the judgment). That at least was his stated position. In truth, he also considered the governor's statements in vetoing a bill that would have lifted some of the more onerous restrictions. Nevertheless, he did reject consideration of lawyer-generated justifications introduced for the first time at trial.

49. One of the interesting and clever characteristics of the Brennan opinion is that by excluding the novel trial evidence, he effectively raised the lowest standard of review, rational basis, to the highest, the per se rule of invalidity, on the *Kassel* facts.

50. Id. at 689-91 (Rehnquist, J., dissenting).

51. Id. at 681 (Brennan, J., concurring in the judgment) (noting reliance by Justices

Kassel reveals the anomaly that on an issue-by-issue basis, the majority resolutions generate a voting path leading to the dissenting result. To illustrate, it will be helpful to articulate an assumption that is fully consistent with all three opinions in the case: If we assume that the relevant test is rational basis scrutiny and that the trial court can consider evidence in support of novel justifications presented by the state's trial lawyers, then the result should be to sustain the law. Now consider the majority resolution of each dispositive issue. One majority agrees that the governing test is rational basis (the Brennan plus Rehnquist camps, for a total of five), and another majority agrees that evidence in support of novel justifications introduced for the first time at trial is admissible (the Powell plus Rehnquist camps, for a total of seven). This leads logically to the dissent's conclusion that the law should be sustained. And yet, a third majority (the Powell plus Brennan camps, for a total of six) votes to strike the law down.

As I stated earlier, in some fractured panel Supreme Court cases, the assumptions of the *Marks* doctrine do not apply. We can now illustrate this using *Kassel*. To uphold the Iowa statute, it is necessary to satisfy two conditions: the standard of review must be the lenient rational basis test, and the evidentiary rule must be liberal, meaning that evidence in support of novel justifications introduced for the first time at trial can be considered. Because the *Kassel* Court struck down the Iowa statute, under *Marks*, the narrowest grounds opinion is that opinion consistent with the outcome that would strike down the fewest laws. The anomaly is that none of the opinions meets this test. To illustrate, consider each of the two issues. On the question of which standard of review to apply, the Brennan opinion is narrowest. Because Brennan applies the more relaxed standard, rational basis, he would strike down the fewest laws. On the evidentiary rule, however, the Powell opinion is narrowest. Because Powell would allow in more evidence with which to find support for the law, he would strike down the fewest laws. The problem is that because both the laxer substantive standard and the laxer evidentiary rule must be selected to uphold the challenged Iowa statute, neither trumps the other for purposes of the narrowest grounds doctrine.

Powell and Rehnquist upon novel trial evidence); id. at 689-91, 702 (Rehnquist, J., dissenting) (rejecting Brennan's insistence upon contemporaneous legislative justification in support of Iowa statute).

Another way to illustrate the anomaly is to recognize that for each of the two dispositive issues—the chosen standard of review and the chosen evidentiary rule—the Powell and Brennan camps come to opposite conclusions, with Powell applying the stricter standard of review but the laxer evidentiary rule, and Brennan applying the laxer standard of review but the stricter evidentiary rule. And yet, Powell and Brennan reach the same judgment, namely to strike the law down.[52] In contrast, Rehnquist resolves one issue in favor of each of the remaining camps. Consistent with Powell, Rehnquist applies the laxer evidentiary rule, but consistent with Brennan, Rehnquist applies the laxer substantive test. Unlike either of those camps, however, Rehnquist votes to sustain the law. Because Powell and Brennan reach opposite resolutions of both issues but reach the same judgment, while Rehnquist reaches the same resolution on one issue as each of the remaining camps while reaching the opposite judgment, there is no logical means of determining a dominant second choice for either the Brennan or Powell camps. We cannot know whether as a second choice the Powell camp would prefer a closer rational (Rehnquist who agrees on one issue out of two) leading to an opposite judgment, or a farther rational (Brennan, who disagrees on both issues) but leading to the same judgment. The same analysis applies to Brennan. As a result, unlike the other cases discussed in this essay, there is no means of identifying which, if any, of the opinions, represents a dominant second choice, or Condorcet winner.[53]

IV. CONCLUDING COMMENTS

Throughout this essay, I have minimized the technical presentation of social choice. I do not believe it necessary to employ sophisticated terminology to convey the important insights that a

52. As stated previously, see note 26 supra, this is the characteristic feature of multidimensionality and asymmetry, which exists in all cases in which the narrowest grounds doctrine fails to apply.

53. For a formalized presentation explaining that this case possesses the characteristic features of mulitidimensionality and asymmetry, see generally Stearns, 7 Sup. Ct. Econ. Rev. (cited in note 1); see also Stearns, *Constitutional Process* at ch. 3 (cited in note 1). As explained in the article and book, the same analysis explains the voting anomaly in *Miller v. Albright*. In that case, separate issue majorities conclude that petitioner has standing to raise her father's equal protection challenge to the sex-based distinction in the Immigration and Nationality Act, that the relevant test is heightened scrutiny under which virtually all laws would fail to survive, and that separation of powers is not an independent barrier to relief, all leading to the conclusion that relief should be granted. And yet, a separate majority employs three different rationales, each embraced by only two Justices, to deny relief.

proper analysis of *Marks* offers students in evaluating the processes of individual case decision making in the Supreme Court.[54] I do think, however, that introducing students to the narrowest grounds rule, including its proper applications, its importance in considering potential judicial strategies in casting votes in individual cases, and its limits will help students to gain both a practical ability to construe fractured panel cases and a better appreciation for the nature of decision making in that important institution.[55]

54. For those interested in providing students with a more systematic introduction to public choice and social choice (and some game theory), see Maxwell L. Stearns, *Public Choice and Public Law: Readings and Commentary* (Anderson Pub. Co., 1997).

55. For the true social choice enthusiast, one can even go one level beyond, and explore the relationship between the Court's use of outcome voting and the narrowest grounds rule to that between stare decisis and standing. While such an analysis is beyond the scope of this essay, it is developed in Stearns, *Constitutional Process* at chs. 4 and 6 (cited in note 1); see also Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 Cal L. Rev. 1309 (1995); Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. Pa. L. Rev. 309 (1995).