PLURALITY AND PRECEDENCE: JUDICIAL REASONING, LOWER COURTS, AND THE MEANING OF *UNITED STATES V. WINSTAR CORP.*

INTRODUCTION

Plurality decisions of the United States Supreme Court have generated nearly unanimous negative outcry.[1] The reasons generally given for decrying plurality decisions fall into two related categories. Some critics argue that plurality decisions represent a failure of the Supreme Court to fulfill its responsibility as lawmaker.[2] Others argue that plurality decisions create confusion and inefficiency in the lower courts.[3] It seems unlikely,

---

1. *Compare* John F. Davis & William L. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 86 ("[T]he evil inherent in decision by plurality is not a minor one."), *and* Douglas L. Whaley, Comment, *A Suggestion for the Prevention of No-Clear-Majority Judicial Decisions*, 46 TEX. L. REV. 370, 370 (1967) (stressing the importance of preventing plurality decisions and "eliminating the havoc they create in the judicial system"), *and* Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127 (1981) [hereinafter Harvard Note], *and* Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419 (1992), *and* Ken Kimura, Comment, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 CORNELL L. REV. 1593 (1992), *and* Adam S. Hochschild, Note, *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective*, 4 WASH. U. J.L. & POL'Y 261, 287 (2000) (describing plurality opinions as "inherently muddled and fragmented"), *with* Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 760 (1980) (characterizing plurality opinions merely as Supreme Court admissions of uncertainty and as providing an opportunity for reasoned development of the law in the lower courts), *and* Comment, *Supreme Court No-Clear-Majority Decisions: A Study in Stare Decisis*, 24 U. CHI. L. REV. 99, 155 (1956) [hereinafter Chicago Study] (concluding neutrally that courts generally treat the lead opinion in a no-clear-majority decision with the same precedential weight as simple majority opinions), *and* Saul Levmore, *Ruling Majorities and Reasoning Pluralities*, 3 Theoretical Inquiries Into Law 87 (2002) (discussing how plurality voting, which is given some precedential weight by courts, might be used in legislatures and referenda), *and* Joseph M. Cacace, Note, *Plurality Decisions in the Supreme Court of the United States: A Reexamination of the* Marks *Doctrine After* Rapanos v. United States, 41 SUFFOLK U. L. REV. 97, 99–101 (2007) (arguing that a consistent method for interpreting plurality decisions can help harness the value these opinions possess).

2. *See* Harvard Note, *supra* note 1, at 1128 ("[The Supreme Court] must provide definitive statements of the law. . . . [W]ithout a majority rationale for the result, the Supreme Court abdicates its responsibility to the institutions and parties depending on it for direction. Each plurality decision thus represents a failure to fulfill the Court's obligations."); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province *and duty* of the judicial department to say what the law is.") (emphasis added); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 124 (1921) ("[T]he power to declare the law carries with it the power, and within limits the duty, to make law when none exists . . . .").

3. *See* Davis & Reynolds, *supra* note 1, at 62 (describing how "a collective confusion" results from plurality opinions); Thurmon, *supra* note 1, at 427 (asserting that plurality opinions "significantly

however, that the Supreme Court will stop issuing opinions in which a majority of Justices cannot agree on any one controlling rationale for the decision.[4] Many plurality decisions address fundamental—or even politically charged—legal issues.[5] Other pluralities address less headline-grabbing issues, but can still be important in the day-to-day practice of law.[6] A consistent method for interpreting plurality opinions would reduce some of the confusion pluralities generate. Not only would courts benefit from such a consistent method, but ordinary people and businesses could more effectively shape their behavior to avoid litigation if they had a better sense of how these decisions would apply.[7] Moreover, if lower courts more fully analyzed the reasoning in plurality opinions, it would help clarify and resolve the issues that split the Supreme Court in the first place.

This Note examines both the main criticisms of plurality decisions and the various methods of interpreting plurality decisions used by lower courts—through the lens of how lower courts have addressed one particularly complex plurality, *United States v. Winstar Corp*.[8] Part I.A of this Note examines the academic criticisms of plurality decisions and

---

increase[] the burden on lower courts that are required to follow its decisions"); Kimura, *supra* note 1, at 1594–95 ("The Supreme Court's failure to articulate a single rule of law creates confusion in the lower courts as [to] how to interpret and weigh that decision."); Whaley, *supra* note 1, at 371 ("[T]he court's inability to explain its decision in one majority opinion causes a breakdown in the judicial system.").

4. *See* Thurmon, *supra* note 1, at 427 ("[T]he Supreme Court has been unable to consistently reach the consensus necessary to exploit [the] advantages [of clear-majority decisions]."). Especially if plurality opinions represent irreconcilable differences between the Justices, the "practice" of issuing plurality opinions is probably unintentional.

5. *See, e.g.*, Hein v. Freedom From Religion Found., Inc., 127 S. Ct. 2553 (2007) (taxpayer standing to challenge federal appropriations for religious charities under the establishment clause); Hamdi v. Rumsfeld, 542 U.S. 507 (2004) ("enemy combatants" and constitutional protections); City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002) (free speech and pornography); Albright v. Oliver, 510 U.S. 266 (1994) (scope of civil action for deprivation of constitutional rights); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (abortion); Walton v. Arizona, 497 U.S. 639 (1990) (the death penalty); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (affirmative action). Others have compared plurality decisions to the "hard cases" described by Professor Ronald Dworkin. Kimura, *supra* note 1, at 1594 & n.8.

6. *See, e.g.*, Asahi Metal Indus., Co. v. Sup. Ct. of Solano County, 400 U.S. 102, 116–17 (1987) (splitting in part over the meaning of sufficient minimum contacts).

7. *Cf.* Whaley, *supra* note 1, at 371 (arguing that when plurality opinions control the law in a given area, "[p]otential litigants cannot safely formulate a policy that they know will conform with the law, nor can the legal profession properly counsel them so as to avoid costly and unnecessary litigation"); Harvard, Note, *supra* note 1, at 1128 (commenting that the Supreme Court "serves as a guide for private parties," who will presumably be unable to shape their behavior to the requirements of the law if the Supreme Court issues a plurality opinion). If a more reliable method of predicting lower court responses to plurality opinions were in place, these concerns would perhaps be alleviated.

8. 518 U.S. 839 (1996). *See also infra* note 46 (discussing why *Winstar* was selected for this Note).

catalogues methods others have proposed for interpreting these decisions. Part I.B describes the four opinions handed down by the Supreme Court in *Winstar*. Part I.C examines six lower court cases where lower courts have analyzed and applied *Winstar*. Part II discusses how examining these methods and criticisms in light of how courts have applied plurality opinions can clarify the strengths and weaknesses of this body of thought.[9] Part III defines and defends two new methods for interpreting plurality decisions—the simple reconciliation method and the policy space method—and shows how lower court analysis that builds on the reasoning of the Justices' opinions in plurality decisions leads to better reasoned, more helpful, and more persuasive results.

I. BACKGROUND

American courts are bound to follow two types of decisions: decisions by higher courts in the same jurisdiction[10] and their own past decisions.[11] Courts are not merely required to follow the outcomes of these binding prior decisions; they must also apply the reasoning articulated by the earlier court.[12] When the Supreme Court decides a case, the Court

9. *See* Chicago Study, *supra* note 1, at 101 (examining the way courts actually use "no-clear-majority decisions as precedent," and asking "whether or not [this use] is in accord with the theory put forth in the texts").

10. *See* Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 388 & nn.19–20 (2007) (describing how lower courts are absolutely required to follow the decisions of superior courts in the judicial hierarchy).

11. S*ee, e.g.*, Thurmon, *supra* note 1, at 422 & n.17 ("*Stare decisis* is simply a jurisprudential version of the common-sense notion that things decided should not be unsettled . . . [but] this doctrine does not require or create an *absolute* obligation to follow [the same court's own] earlier decisions.") (emphasis added). An obligation to follow the court's own earlier decisions *is* created, but it is not absolute. *See infra* note 12.

12. *See* RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW 72 (4th ed. 1991) ("[The binding] *ratio decidendi* of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury.").

When a case is factually distinguishable from an earlier case, stare decisis does not bind the court to follow the earlier decision. These factually distinguishable cases are not exceptions to the rule of stare decisis. The different facts create legal distinctions and the new case thereafter stands as precedent restricting the applicability of the original precedent. However, there are limits to differentiation based on facts. Professor Schauer commented that because "[n]o two events are exactly alike," an earlier case does not need to be totally identical to the present case. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 577 (1987) ("Were [total identity] required, nothing would be a precedent for anything else. . . . [I]t is clear that the relevance of the earlier precedent depends upon how we characterize the facts arising in the earlier case."). Otherwise, there would be no difference between plurality opinions and clear-majority opinions: if the new case is factually indistinguishable from the plurality, "result stare decisis" will control. *See infra* note 38. But if they are factually distinguishable, not even a clear-majority decision would control. As such, we admit that even with some degree of factual distinction, the earlier case controls. Nevertheless, because the earlier court did

generally accompanies its judgment with one or more written opinions explaining why it reached that decision.[13] As long as a majority of the Justices join the lead opinion supporting the judgment,[14] it is a clear-majority opinion and its rationale is binding on lower courts. If none of the opinions are joined by a majority, even though a majority agrees on the outcome, the resulting decision is called a no-clear-majority decision.[15] If one of the opinions from a no-clear-majority decision commands more support than the other opinions, it is a plurality opinion.[16]

But courts sometimes look to sources besides binding earlier decisions for guidance in deciding cases, such as scholarly treatises, academic articles, logical reasoning, intuition, norms, morals, or even religious values.[17] Courts also consider decisions from other jurisdictions that are

---

not agree on a single line of reasoning, extra doubt is thrown into the process of determining which factual differences make a difference.

13. The practice of writing and supporting opinions by groups of Justices was instituted by Chief Justice Marshall, replacing the earlier practice of filing opinions *seriatim*, or individually. Filing opinions *seriatim* probably derived from the practice of the English common law courts. *See* Hochschild, *supra* note 1, at 263; Whaley, *supra* note 1, at 372–73 & nn.21–24.

14. Justices who join the majority sometimes concur by writing their own separate opinion explaining the judgment. Sometimes, however, a Justice will support the outcome reached by the majority but not the reasoning, and will concur separately without joining the majority opinion. The Court calls this practice "concurring in judgment." *See* Sonja R. West, Essay, *Concurring in Part & Concurring in the Confusion*, 104 MICH. L. REV. 1951, 1953 (discussing the significance of the phrases "concurring," "concurring in part," and "concurring in judgment"); Davis & Reynolds, *supra* note 1, at 59 (noting that pluralities are introduced by some variation on "Mr. Justice A announced the judgment of the Court and an opinion in which Mr. Justice B, Mr. Justice C and Mr. Justice D join"); *see also* B. Rudolph Delson, Note, *Typography in the U.S. Reports and Supreme Court Voting Protocols*, 76 N.Y.U. L. REV. 1203, 1220–22 (2007). As long as five Justices "join" the majority opinion, it is still a clear-majority opinion.

15. The Court still rules on the disposition of the appeal—affirming, denying, or altering the decision of the lower court—but a majority of the Justices cannot agree on any one rationale for their ruling. *See* Thurmon, *supra* note 1, at n.1.

16. It is important to distinguish between the terms "plurality," "plurality opinion," and "plurality decision." A "plurality decision" is a no-clear-majority decision where one of the opinions is supported by a "plurality" of the Justices. A "plurality opinion" is an opinion joined by more Justices than any other opinion, the outcome of which is joined by a majority. The Supreme Court sometimes refers to plurality opinions as "principal" opinions, and others have referred to them as "lead" opinions.

Mathematically, on any nine-judge panel, there must be at least three opinions for a decision to lack an opinion joined by a majority of the Justices—a no-clear-majority decision. No combination of two numbers totaling nine will ever fail to produce a majority. *See* Kimura, *supra* note 1, at 1594 ("At least three opinions, resting upon diverse legal theories, are present in a plurality decision."). Of the possible combinations of three numbers that add up to nine, 4–3–(2) creates a plurality opinion (the number two in parentheses indicates two dissenting Justices). Other types of no-clear-majority decisions are 3–3–(3) and 4–4–(1) splits. However, in neither of these cases is there a plurality opinion. But in a 4–1–(4) case, the opinion supported by four Justices (not the dissent) would also be a plurality opinion, as would the decision supported by three Justices in a 3–2–(4) decision.

Occasionally, three-member courts will be unable to decide on one controlling rationale, producing a plurality decision. *See, e.g.*, Kandies v. Polk, 385 F.3d 457 (4th Cir. 2004).

17. *See, e.g.*, Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of*

not binding on them, as well as concurring and even dissenting opinions from earlier cases.[18] These sources, and any nonbinding sources courts consider, are called persuasive authorities. While courts are required to consider and follow binding authorities, they are free to disregard persuasive authorities, especially if they find them unpersuasive.

While courts and commentators generally agree that the *results* of no-clear-majority and plurality decisions are fully binding,[19] it is unclear whether the *rationale* of plurality opinions is either merely persuasive, or fully binding, or whether it exists at some level of authority between mere persuasive guidance and full-fledged binding authority.[20] While some have argued that plurality opinions are merely persuasive,[21] the more compelling view is that the rationale of plurality opinions is more than merely persuasive, even if it does not rise to the level of binding precedent.

There is a variety of evidence to support this theory of intermediate authority. First, the Supreme Court itself has asserted that lower courts should give great weight to any opinion supported by several Justices, even if it is merely a plurality opinion.[22] Second, most courts confronted

---

Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions, 65 OHIO ST. L.J. 491 (2004) (empirically testing and finding support for the hypothesis that judges' religious backgrounds influence their decisions about religious freedom).

18. *See, e.g.*, Muller v. Oregon, 208 U.S. 414, 419 n.† (1908) (citing foreign statutes presented by Louis Brandeis in the "Brandeis Brief" as persuasive authority for upholding an American state statute as constitutional).

19. Thurmon, *supra* note 1, at 420 & n.3.

20. Without a majority of Justices supporting a particular rationale, the traditional precedential value assigned to clear-majority opinions is absent. *See, e.g.*, Novak, *supra* note 1, at 758; Chicago Study, *supra* note 1, at 100 & n.10; Kimura, *supra* note 1, at 1596 ("The absence of a simple majority creates precedential uncertainty in plurality decisions."). In 1910, the Supreme Court ruled that any opinion not supported by a majority was not binding. Hertz v. Woodman, 218 U.S. 205, 213–14 (1910). However, *Hertz* is rarely cited for this proposition, and the way courts actually apply plurality opinions belies the statement that they have no weight whatsoever.

21. *Contra* Davis & Reynolds, *supra* note 1, at 61 (arguing that plurality opinions are purely advisory, "represent[ing] nothing more than the views of the individual justices who join in the opinion . . . [and] do not, therefore, essentially differ in character from either a concurring opinion or a dissenting opinion").

22. Texas v. Brown, 460 U.S. 730, 737 (1983) (plurality opinion) (holding that while one particular plurality opinion was "not a binding precedent, as the considered opinion of four Members of this Court it should obviously be the point of reference for further discussion of the issue").

The Supreme Court's most famous ruling about the precedential value of plurality opinions came in *Marks v. United States*, 430 U.S. 188 (1977). In *Marks*, the Court ruled that some portions of plurality opinions could be treated as binding. "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." *Id*. at 193. However, both the Supreme Court as well as other courts and commentators have balked at treating the *Marks* approach as the default rule for interpreting pluralities. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 325 (2003) ("[The *Marks*] test is more easily stated than applied . . . ."

with plurality decisions accord them more weight than simple persuasive authority, sometimes even applying the plurality's reasoning as if it were from a clear majority.[23] Indeed, if courts do in fact give pluralities precedential weight above mere persuasive guidance, at the very least this internal valuation by courts indicates that the precedential authority of plurality decisions deserves greater consideration.[24]

A. Academic Criticisms and Interpretive Methods for Plurality Decisions

Commentators have raised four primary criticisms of plurality decisions.[25] First, pluralities are often complex and can cost lower courts resources in analyzing and applying them.[26] Second, pluralities are an abdication of the Supreme Court's duty to make law.[27] Third, pluralities obstruct the predictive function of law, rendering it more difficult for private parties to shape their behavior in order to avoid legal liability or to settle to avoid costly litigation.[28] Fourth, pluralities are symptoms of

---

(quoting Nichols v. United States, 511 U.S. 738, 745–46 (1994))); Hochschild, *supra* note 1, at 280–81.

While *Marks* and *Brown* alone might not prove the middle ground of authority suggested above, these cases are evidence that the Court takes these decisions seriously and wants other courts to do the same.

23. *See* Chicago Study, *supra* note 1, at 154–55 (discussing the value of "understanding actual citation practices" of lower courts regarding no-clear-majority decisions).

24. *See* KARL LLEWELLYN, THE BRAMBLE BUSH 11 (1930) (law is "[w]hat . . . officials do about disputes"); JULES COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY 25 (2001) (arguing that analytical models can fail if they "ignore[] . . . the actual inferential practices of participants" in the relevant institutions). If courts and lawyers feel that plurality decisions, and the opinions that comprise them, have some level of binding authority independent of any narrowest grounds justification, why not create a system for interpreting these decisions that preserves this unique status?

Of course, the mere fact judges give plurality opinions weight above that of mere persuasive authority does not stand as sufficient normative, ethical, or moral justification for this practice. There may be other reasons to apply the reasoning from plurality opinions as more than persuasive guidance. Nevertheless, when lower courts value plurality opinions as more than persuasive authority, this valuation is likely indicative of an implicitly perceived duty on the part of judges to apply these opinions in this way. This Note explores this perceived duty.

25. A fifth criticism leveled by some commentators is that plurality opinions reduce the public's faith in the judicial system. *See* Davis & Reynolds, *supra* note 1, at 62 ("[T]he fact that an opinion is supported by only a plurality of the Court may compromise its . . . public acceptance."). But this seems like an odd criticism, as probably only judges, lawyers, lawmakers, and certain academics are consciously aware that plurality decisions exist. *See, e.g.*, Bill Mears, *A Mixed Verdict for the Terror War*, CNN.com, July 6, 2004, http://www.cnn.com/2004/LAW/06/28/scotus.terror.cases/ index.html, (using phrases like "verdict", "ruled", and "the Justices said in a ruling" to describe *Hamdi*, but not mentioning that *Hamdi* was a plurality opinion joined by only four Justices).

26. *See supra* note 3.

27. *See supra* note 2.

28. *See supra* note 8.

substantive reasoning, as opposed to *process-based* reasoning, and as such represent arbitrary, pathological decision making.[29]

Commentators and courts have devised several methods to interpret plurality decisions. First, in *Marks v. United States* the Supreme Court articulated the "narrowest grounds" approach.[30] Under the narrowest grounds approach, courts may find binding rationale in plurality opinions, defined as "that position taken by those Members who concurred in the judgment on the narrowest grounds."[31] There are at least two formulations of the narrowest grounds approach.[32] The first looks for the opinion concurring in judgment that reached the judgment on the narrowest grounds, according that opinion full precedential weight.[33]

The second formulation looks for particular reasoning within the concurring opinions that a majority of the concurring Justices support, giving that reasoning full precedential weight.[34] However, neither formulation is applicable to plurality decisions when the plurality and concurrence agree on the judgment but disagree about how the law should apply to reach that judgment. Sometimes one of the concurrences and the dissent seem to agree about the reasoning and disagree only about the

---

29. Harvard Note, *supra* note 1, at 1128, 1140–46 ("[P]lurality decisions [are] symptomatic of a fundamental flaw in the Supreme Court's current approach to decisionmaking, which relies excessively on value-laden 'substantive reasoning.'").

30. Marks v. United States, 430 U.S. 188, 193 (1977). *See also* Novak, *supra* note 1, at 761–67 (describing the origins of the narrowest grounds test); Hochschild, *supra* note 1, at 280–81; *supra* note 24.

31. Kimura, *supra* note 1, at 1603–04; *see also* Novak, *supra* note 1, at 761–67; Thurmon, *supra* note 1, at 420–22, 427–50. There are a number of reasons why courts and commentators have been reluctant to accept the *Marks* approach as the final word on the subject of pluralities, not the least of which is the Supreme Court's own ambivalence about the *Marks* rule. *See* Thurmon, *supra* note 1, at 446 (arguing that the Supreme Court's reluctance to apply the *Marks* rule renders the rule a "legal fiction"). Moreover, the *Marks* rule cannot apply if none of the Justices concurring in judgment agrees on *any* rationale.

For recent treatments of the *Marks* rule, *see* Audio file: How Should the Courts Interpret Split Decisions?, teleconference panel held by the Federalist Society (June 21, 2007) (available at http://www.fed-soc.org/publications/pubID.328/pub_detail.asp) (remarks of Sentelle, J.); Cacace, *supra* note 1, at 113–21 (describing *Marks* in terms of social choice theory). While these commentators address the benefits and problems with the *Marks* rule, the purpose of this Note is to address the phenomena of Supreme Court plurality opinions more theoretically and offer an alternative to the *Marks* rule for interpreting plurality opinions.

32. Others point out that the term "narrow" itself is ambiguous. *See* Novak, *supra* note 1, at 763–65; Thurmon, *supra* note 1, at 428–42; Hochschild, *supra* note 1, at 279–81.

33. *See infra* notes 242–45 and accompanying text.

34. *See infra* notes 246–47 and accompanying text. The critical difference between this formulation of the narrowest grounds approach and the dual majority method is that the dual majority method allows reasoning supported by the dissent and one of the concurring opinions to be given precedential weight. The narrowest grounds approach as articulated by the Supreme Court is specifically restricted to opinions shared by Justices concurring in judgment.

particular outcome.[35] If in such cases a total of five Justices joined the dissent and concurrence, adherents of the dual majority method find two majorities: an *outcome* majority of the plurality and concurrence, and a *reasoning* majority of the concurrence and dissent.[36] This method focuses on numerical support and is typically applied so that any proposition of law from any of the opinions supported by a numerical majority of Justices is binding precedent.[37] Like the narrowest grounds approach, however, the dual majority method is only applicable in cases where the different opinions seem to employ similar reasoning.

Third, courts sometimes cite pluralities for their results only or disavow them as if they had never been decided. When a court cites a plurality for its specific result only, the court explicitly declines to apply the underlying reasoning and considers only the judgment.[38] When a court disavows a plurality decision, it rejects any application of the decision to facts beyond those contained in the original opinion.[39] Such open rejection is extraordinarily rare.[40]

---

35. Novak, *supra* note 1, at 767 ("[If] the concurring and dissenting opinions share a common line of reasoning, but differ in their application of the law to the facts . . there are in effect two majorities: the plurality and concurrence agreeing on the result, and the concurrence and dissent agreeing on the fundamental legal principals involved."). *See also* Thurmon, *supra* note 1, at 453.

36. Kimura, *supra* note 1, at 1602 (defining the dual majority method as "recogniz[ing] a binding legal rule . . . when the dissenting opinion and one of the concurring opinions advocate the same legal rule").

37. *See id.*

38. Novak, *supra* note 1, at 769 (defining the citation for specific result method as a resort to "result stare decisis," whereby the lower court "confin[es] the precedential value of a decision to its specific result and declin[es] to regard any particular line of reasoning as authoritative").

39. *Id.* at 773–74 & nn.80–84 (defining disavowal as a lower court's decision "to follow the dissenting rationale and come to a contradictory result on similar facts" when "faced with a plurality decision presenting clear majority agreement on result"); s*ee also* Kimura, *supra* note 1, at 1618 (arguing that certain "complex" pluralities are "analytically incoherent and should be completely disavowed").

40. Novak, *supra* note 1, at 773 (noting that "it is rare for a lower court" to completely disavow an on-point Supreme Court plurality). In writing this Note, I did not identify a single case that cited *Winstar* yet explicitly refused to apply both the reasoning and the judgment because the decision was a plurality. In fact, the commentators who have discussed the disavowal method have only identified one case as explicitly disavowing a United States Supreme Court plurality. *Id.* at 773 (citing State v. Baker, 289 A.2d 348 (Md. 1972)).

It is also possible that the lower court might simply ignore the plurality entirely. Under these circumstances, the court probably would not even cite to the plurality opinion. One possible example of this might be Charleston Hous. Auth. v. U.S. Dep't of Agric., 419 F.3d 729, 738 (8th Cir. 2005). In *Charleston*, the Eighth Circuit discussed the unmistakability doctrine, but cited only to a Supreme Court decision and an Eighth Circuit decision, both of which predated *Winstar*. *See Charleston*, 419 F.3d at 738 (citing Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 147 (1982) (an earlier Supreme Court case discussed in *Winstar*)); *id*. (citing Parkridge Investors, L.P. v. Farmers Home Admin., 13 F.3d 1192 (8th Cir. 1994)).

Fourth, there are two methods that I will refer to as the persuasive opinion methods. I group the persuasive opinion methods because they measure the relative persuasive worth of each of the different opinions in the plurality to determine which opinion controls as binding precedent. First, the full precedential weight method cites the opinion of the plurality as if it were a majority opinion, ignoring the fact that no numerical majority of Justices supported it.[41] Second, the persuasive effect method treats one opinion from the no-clear-majority decision as binding based on how persuasive the lower court finds that opinion to be.[42] Any number of factors can influence this decision—political, personal, the reputation of the Justice who wrote the opinion, how well reasoned the opinion is, or how applicable it seems.

Finally, courts could use either of two closely related methods that commentators have not previously described. The first of these two methods may be called the simple reconciliation method. If a lower court applying a plurality decision decides that both the plurality and concurring opinions would produce the same result in the case it is considering, it can avoid the ambiguous precedential value of plurality opinions and simply apply both the plurality and concurrence.

The second of these two methods is the policy space method, which the lower court can use when the plurality would reach one result, but the concurrence would reach a different result under the facts it is considering.[43] Under the policy space method, the lower court must determine whether to apply the plurality opinion, even though the lead concurrence would not have agreed.[44] This determination is based on the lower court's evaluation of the factual similarity between the earlier

41. Novak, *supra* note 1, at 774 ("Sometimes . . . there is no apparent justification for choosing one rationale over another other than the fact that it was contained in the plurality opinion."); Kimura, *supra* note 1, at 1600 (describing how courts sometimes look to "the concurring opinion that the largest coalition of Justices supports . . . for affirmative precedential guidance"); Thurmon, *supra* note 1, at 450 (commenting that some lower courts use a "method of according plurality opinions full precedential respect"); Chicago Study, *supra* note 1, at 155 ("[F]ew citing courts expressly note the lack of a clear majority in . . . no-clear-majority decisions.").

42. Kimura, *supra* note 1, at 1601 (describing how under the persuasive opinion method "a lower court might decide that a particular opinion is the most persuasive for any number of reasons" and award it full precedential status); Novak, *supra* note 1, at 774 ("In some instances, lower courts have regarded as authoritative a rule of decision that has not received majority support, perhaps because the opinion is particularly persuasive or is written by a prestigious Justice.").

43. Theoretically, a lower court could apply either the narrowest grounds or dual majority method in the second step if the simple reconciliation method does not produce agreement based on both the plurality opinion and the lead concurrence.

44. If the court automatically applied the plurality opinion regardless of whether the lead concurrence would have agreed, the policy space method would be indistinguishable from the full precedential weight method.

plurality and its own case, and partially on why the lead concurrence would not have agreed.[45]

To illustrate these methods, this Note analyzes how lower courts have applied one particular plurality opinion, *United States v. Winstar Corp*.[46] Looking at specific examples of how courts deal with plurality decisions can shed light on how this process both does work and should work.[47]

B. United States v. Winstar Corp.[48]

The issue in *Winstar* was whether the federal government, as sovereign, could be liable for breaching federal agency contracts that promised special regulatory treatment to three savings & loans ("thrifts"), when Congress subsequently prohibited this special treatment.[49] The Supreme Court ruled against the government 7–2, but none of the four

45. When the Supreme Court hands down a plurality decision, it grants the lower courts more de facto discretion than existed previously or would have existed under a clear-majority decision. The real issue is how lower courts should use that discretion. For an example of a constriction of lower court discretion, see Kim, *supra* note 10, at 431 ("[W]hen the [Supreme] Court changes the governing legal regime from an open-ended standard to a rule . . . the scope of the lower court's discretion to decide that particular issue is undeniably narrowed. Importantly, such an approach requires close attention to the *content* of Supreme Court opinions . . . .").

Thurmon's "Hybrid Approach" is distinct from the policy space method. Thurmon, *supra* note 1, at 451. Thurmon's approach divides dicta from *ratio decidendi*, searching for one controlling rule for each proposition of law. The policy space method, on the other hand, considers all of the tests put forward by each Justice in comparison with one another.

46. 518 U.S. 839 (1996). *Winstar* is appropriate for this project for several reasons. First, *Winstar* is complex and lengthy—ninety-nine pages in *United States Reports*. It would be disingenuous to talk about how lower courts can and should interpret plurality opinions by picking a short or simple plurality. Second, *Winstar* is now more than a decade old. This has given lower courts ample time to confront the issues raised in *Winstar*, but the Supreme Court has not yet reexamined the issues to provide firm resolution.

47. *See* Chicago Study, *supra* note 1, *passim* (empirically examining how lower courts make use of no-clear-majority decisions).

48. 518 U.S. 839. This account, limited by length, is by no means an exhaustive look at the *Winstar* decision. *See also* Joshua I. Schwartz, *The Status of the Sovereign Acts and Unmistakability Doctrines in the Wake of* Winstar*: An Interim Report*, 51 ALA. L. REV. 1177 (2000); Joshua I. Schwartz, *Assembling* Winstar*: Triumph of the Ideal of Congruence in Government Contract Law?*, 26 PUB. CONT. L.J. 481 (1997); Alan R. Burch, *Purchasing the Right to Govern:* Winstar *and the Need to Reconceptualize the Law of Regulatory Agreements*, 88 KY. L.J. 245, 254 (1999); Jonathan R. Macey, Winstar, *Bureaucracy and Public Choice*, 6 SUP. CT. ECON. REV. 173 (1998); Michael P. Malloy, *When You Wish Upon a* Winstar*: Contract Analysis and the Future of Regulatory Action*, 42 ST. LOUIS U. L.J. 409 (1998); Leo P. Martinez, *Of Fairness and Might: The Limits of Sovereign Power to Tax After* Winstar, 28 ARIZ. ST. L.J. 1193, 1214 (1996); K. McKay Worthington, Note, *Is Your Government Contract Worth the Paper It's Written On? An Examination of* Winstar v. United States, 1 COLUM. BUS. L. REV. 119, 125–29 (1996); Ling Ling Zou, Note, United States v. Winstar Corporation: *Implications for the Regulated Industries*, 16 ST. LOUIS U. PUB. L. REV. 477 (1997).

49. *Winstar*, 518 U.S. at 843 (Souter, J., plurality opinion). *See also* Schwartz, *Interim Report*, *supra* note 48, at 1184.

opinions was joined by a majority of five Justices.[50] Justice Souter's plurality opinion was joined by Justices Stevens, Breyer, and in part by O'Connor. No other Justices joined Justice Breyer's concurrence. Justice Scalia's concurrence was joined by Justices Kennedy and Thomas. Justice Rehnquist's dissent was joined in part by Justice Ginsburg.[51]

The dispute in *Winstar* was precipitated by high interest rates and high inflation in the early 1980s, which rendered hundreds of thrifts insolvent.[52] The crisis put mounting pressure on the government, which insured many thrifts through the Federal Savings and Loan Insurance Corporation (FSLIC).[53] In order to avoid having to bail out the insolvent thrifts, FSLIC—and the Federal Home Loan Bank Board (Bank Board), which administered FSLIC and oversaw all mergers within the thrift industry—encouraged healthy thrifts to merge with failing thrifts.[54] However, it would have been singularly unattractive for a healthy thrift to take on the liabilities of a failing thrift.[55] To encourage the mergers, the Bank Board entered into special agreements with the healthy thrifts. These agreements granted regulatory exclusions—largely in the form of accounting gimmicks—to the healthy, purchasing thrifts to make the mergers appear profitable.[56]

---

50. *See infra* note 51; *see also* Schwartz, *Interim Report*, *supra* note 48, at 1184.

51. *Winstar*, 518 U.S. at 843, 910, 919, 924. The Justices aligned 4–1–3–(2). The plurality opinion was joined by Justice O'Connor for parts I, II, III and IV-C. *Id.* at 843. Justice Ginsburg joined Chief Justice Rehnquist's dissenting opinion for parts I, III, and IV. *Id.* at 924 (Rehnquist, C.J., dissenting).

52. Thrifts profit on the difference between the interest they earn on mortgage loans and the interest they pay depositors. Many thrifts had written mortgages during the 1960s and 1970s when interest rates were low. Rising interest rates meant that the thrifts had to pay their depositors more, increasing expenses, while the fixed rate mortgages meant that the thrifts were generating steadily less money. Four hundred thirty-five thrifts failed between 1981 and 1983 alone. *Id.* at 845 (plurality opinion).

53. *Id.* at 846–47.

54. *Id.* at 847. Congress's first response was to deregulate the thrift industry, allowing cash-on-hand to fall from five percent to three percent, but loosening the investment discipline only deepened the crisis. *Id.* at 845–46.

55. *Id.* at 848.

56. The agreements were executed and incorporated at the same time as the Bank Board's formal approval of the merger deals. *Id.* at 848–56. The thrifts could count "supervisory goodwill" as an asset equal to the amount of insolvency on their financial statements. The thrifts amortized the supervisory goodwill over a forty-year period. Because few mortgages had that duration, the acquiring thrifts would seem increasingly profitable as the below-interest-rate mortgages were paid off and the goodwill remained on the books. Even though these mergers saddled the acquiring thrifts with substantial financial liability, these accounting gimmicks made the purchasing thrifts look more financially secure than they had looked premerger.

The three plaintiff thrifts in *Winstar*—Winstar, Glendale, and Statesmen—all had similar agreements with the Bank Board. *Id.* at 861–68. For example, after negotiating with FSLIC, Glendale thrift submitted a proposal to merge with a failing thrift to the Bank Board. *Id.* at 861. The Bank Board

For a variety of reasons, the crisis deepened further,[57] and in 1989 Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).[58] FIRREA forbade the special accounting gimmicks FSLIC and the Bank Board had granted to the healthy thrifts.[59] When FIRREA banned these gimmicks, many once-healthy thrifts that had merged with failing thrifts were rendered immediately insolvent.[60] The government seized and liquidated many of these now insolvent thrifts.[61] Dozens of thrifts, including the three plaintiff thrifts in *Winstar*, sued the government, claiming FIRREA breached the government's contractual obligation to give the thrifts special regulatory treatment.[62]

The government denied liability, citing four defenses based on its sovereign status.[63] First, the government relied on the unmistakability doctrine—a canon of contractual construction unique to government contracts requiring surrenders of the government's sovereign authority to appear in unmistakable terms.[64] Second, the government relied on the express delegation doctrine—the rule that an agent's authority to surrender any sovereign authority must be delegated to the agent in express terms.[65]

---

approved the merger, or "Supervisory Action Agreement" (SAA), which incorporated Bank Board Resolution No. 81-710, by which the Board ratified the SAA. *Id.* at 861–62. Resolution No. 81-710, in turn, referred to a letter by Glendale's independent accountant discussing the goodwill to be recorded on Glendale's books. *Id.* at 862. The letter referenced Bank Board Memorandum R-31b, which permitted Glendale to recognize goodwill as an asset subject to amortization. *Id.*

The government did not contest that the parties understood that goodwill would satisfy regulatory requirements. But the government claimed that the documents "simply reflect[ed] statements of then-current federal regulatory policy," not evidence that the government intended to be bound by the terms of the merger plan. *Id.* The Supreme Court did not re-evaluate whether these documents, taken together, created a contract, but instead relied on the Court of Federal Claims's judgment that a contract existed. *See infra* note 71.

57. *Winstar*, 518 U.S. at 856. By 1989, FSLIC itself was insolvent to the tune of $85 billion, while in 1980 FSLIC had carried a positive balance of $6.46 billion. *Id.* at 847. By the time the Supreme Court decided *Winstar* in 1996, the total cost of bailing out the thrift industry had grown to $140 billion. *Id.*

58. Pub. L. No. 101-73, 103 Stat. 183. Among other things, FIRREA abolished FSLIC and the Bank Board, merging the functions of these agencies into FDIC and the Treasury Department. *Winstar*, 518 U.S. at 856.

59. *Winstar*, 518 U.S. at 856–57.

60. *Id.*

61. *Id.* at 857–58.

62. *Id. Winstar* itself represented the claims of three thrifts out of hundreds of similar claims moving through the courts. *See also* Cuyahoga Metro. Hous. Auth. v. United States, 57 Fed. Cl. 751, 769 (Fed. Cl. 2003) ("*Winstar* . . . was one (actually a trio) of many cases spawned when the Congress enacted [FIRREA].").

63. *Winstar*, 518 U.S. at 860; *see also* Schwartz, *Interim Report*, *supra* note 48, at 1184.

64. *Winstar*, 518 U.S. at 860.

65. *Id.*

Third, the government relied on the reserved powers doctrine—that certain of its reserved powers may never be surrendered by contract.[66] Finally, the government relied on the sovereign acts defense—the principle that a government's sovereign acts cannot give rise to a claim for breach of contract.[67] The Federal Circuit, sitting en banc, rejected the government's defenses,[68] and the Supreme Court affirmed.[69] The Court's four published opinions in *Winstar*, however, advanced not only different reasons for denying or allowing the government's proposed defenses, but they also presented fundamentally different concepts of when and to what effect the government's defenses should apply.[70]

1. Justice Souter's Plurality Opinion

The plurality began by noting that the agreements between the thrifts and the Bank Board were contracts.[71] Justice Souter argued that these contracts did not bar the government from changing the way it regulates.[72] Instead, the contracts merely bound the government to recognize the accounting gimmicks it had approved.[73] This was a promise to provide something beyond the promisor's control—that the government would continue to recognize the gimmicks indefinitely.[74] As such, the plurality interpreted these agreements as risk-shifting agreements—promises to insure the promisee against the risk of loss of nonoccurrence, or in this case, the risk of loss from regulatory change.[75]

---

66. *Id*.
67. *Id*.
68. *Id.* at 859–60.
69. *Id.* at 871.
70. *See* Schwartz, *Ideal of Congruence?*, *supra* note 48, at 487.
71. *Winstar*, 518 U.S. at 860. The plurality reconstructed the documents in the contracts in some detail. *Id*. at 861–68; *see also supra* note 56. However, the plurality ultimately accepted the Court of Federal Claims's determination that these documents effectuated a contract without independently finding the existence of a contract. Justice Scalia and Chief Justice Rehnquist also apparently accepted the characterization of the agreements as contracts. *Id.* at 919, 929. However, some have argued that "*Winstar* avoids the logically prior issue in the case, whether the agreements involved are contracts, and provides insufficient guidance for future problems involving regulatory action ostensibly cast in the form of an 'agreement.'" Malloy, *supra* note 48, at 410, 447–49. Indeed, whether the government entered a contract has been an issue in several post-*Winstar* cases in which the unmistakability doctrine has been discussed. *See infra* note 134.
72. *Winstar*, 518 U.S. at 868.
73. *Id.*
74. *Id*. at 868–69.
75. *Id.* In the three instances in *Winstar*, the government became liable for breach "[w]hen the law as to capital requirements changed [rendering] the Government . . . unable to perform its promise . . . . In the case of Winstar and Statesman, the Government exacerbated its breach when it seized and liquidated [the] thrifts for regulatory noncompliance." *Id.* at 870. The plurality argued that courts

The government first raised the unmistakability defense, arguing that to hold it liable would threaten its sovereign authority.[76] Specifically, the government argued the agreements contained no unmistakable terms promising that the government would not exercise its sovereign authority to change the regulatory status of the accounting gimmicks.[77] Rejecting this argument, Justice Souter's plurality opinion held that the unmistakability defense was not available to the government in every contract claim precipitated by a legislative act.[78] After tracing the unmistakability doctrine's history,[79] the plurality stated that the doctrine's application depends on whether enforcement of the contract would actually inhibit the exercise of a sovereign power.[80] As long as enforcing

typically regard promises to provide something outside of the promisor's control as risk-shifting agreements. *Id.*

76. *Id*. at 860.

77. *Id*. at 871. The government argued that "the agreements . . . should not be construed to waive Congress's authority to enact a subsequent bar to using supervisory goodwill . . . to meet regulatory capital requirements." *Id*.

78. *Id*. Arguing that the government mistook "the scope of the unmistakability doctrine," Justice Souter emphasized that the thrifts did not want to enjoin the government from changing the law. *Id*. Instead, the thrifts "simply claim[ed] that the Government assumed the risk that subsequent changes in the law might prevent it from performing, and agreed to pay damages in the event that such failure to perform caused financial injury." *Id*.

79. *Id*. at 871–78. Justice Souter explained that one of the fundamental differences between the American and British parliamentary systems is the capability of the American Congress, under certain circumstances, to bind its successors. This ideal of limited government is reflected in the Constitution. *Id*. at 872–74. The unmistakability doctrine originated in Chief Justice Marshall's application of the Contract Clause to state governments' own contracts and served two purposes: first, to protect state sovereignty, and second to avoid constitutional issues about state authority to limit subsequent exercises of its own sovereign power by contract. *Id*. at 875. In the early cases applying the unmistakability doctrine, private parties who had contracted with states were suing to invalidate state laws that abrogated their contracts. *Id*. Since in some of these earlier cases the federal government had been deemed liable under its own contracts notwithstanding the unmistakability doctrine—which the Court had imported into contract suits against the federal government in the 1930s—Justice Souter concluded "it is clear that the National Government has some capacity to make agreements binding future Congresses by creating vested rights." *Id*. at 876.

80. *Id*. at 878. Justice Souter defined the doctrine as requiring that "a contract with a sovereign government . . . not be read to include an unstated term exempting the other contracting party from the application of a . . . sovereign act." *Id*. In a footnote, Justice Souter explicitly cross-referenced his discussion of the sovereign acts doctrine, supporting the argument that Justice Souter believed the two defenses were conceptually linked. *Id*. at 878 n.22; *see also* Schwartz, *Interim Report*, *supra* note 48, at 1194. Justice Souter noted that because the effects of enforcement are dispositive, the particular remedy sought is only dispositive if the effect of enforcement would be to block the exercise of a sovereign power. *Id*. at 879–80. Justice Souter then described a spectrum of potential contractual claims against the government. "At one end . . . are claims . . . that could not be recognized without effectively limiting sovereign authority. . . . At the other end are contracts . . . [in which] no sovereign power is limited by the Government's promise." *Id*. For example, "humdrum supply contracts" do not limit the government's sovereign authority. *Id.* at 880.

the contract does not block any sovereign powers, the unmistakability doctrine does not apply.[81]

Justice Souter then argued that enforcing the contracts in *Winstar* would not prevent the government from implementing the new regulations prospectively against all thrifts. Instead, as mere risk-shifting agreements, enforcing the contracts would merely require the government to pay damages to those thrifts that had been promised the regulatory treatment.[82] As such, awarding damages in *Winstar* would not amount to a limitation on the government's sovereign power, and the unmistakability doctrine was not implicated.[83] Finally, Justice Souter rejected the dissent's notion that "an unmistakably clear 'second promise'" is required to render the government liable.[84]

Justice Souter then disposed of the government's second and third defenses, the express delegation and reserved powers doctrines.[85] The plurality held that the reserved powers defense—that certain essential government powers cannot be bargained away—failed, because the contracts were risk-shifting agreements that granted no essential reserved powers.[86] The express delegation doctrine, on the other hand, requires that any government agency's authority to contract away the government's sovereign powers must be granted expressly by statute.[87] The plurality held that this defense also failed, because no sovereign power had been

---

81. Justice Souter also argued that this limited reading of the unmistakability doctrine, which applies only when the government is actually or constructively enjoined from exercising its sovereign power, is more in line with ordinary contract principles that damages are the default remedy for breach. *Id*. at 885.

The Second Circuit identified such a situation in *Doe v. Pataki*, 481 F.3d 69 (2d Cir. 2007). In *Doe*, a class of registered sex offenders sued New York in federal court to prevent the enforcement of new registration laws. *Id*. at 70–75. The new laws conflicted with less restrictive registration requirements in a consent decree entered into with the class in earlier litigation. *Id*. Because the relief sought by the sex offenders was an injunction prohibiting New York from enforcing the new laws, the Second Circuit held that the unmistakability doctrine applied and defeated the sex offenders' claims. *Id*. at 79.

82. *Winstar*, 518 U.S. at 881. Justice Souter commented that the thrifts "seek no injunction against application of the law to them" and that the thrifts "acknowledge that the Bank Board and FSLIC could not bind Congress . . . not to change regulatory policy." *Id*.

83. *Id*.

84. *Id*. at 887. Justice Souter stressed that the government had indicated that it would bear the costs of insolvent thrifts in the first instance by insuring the thrift industry through FSLIC. *Id*. at 883. He also noted that if the government were allowed to breach its contracts without being held liable for damages, it would "compromis[e] the Government's practical capacity to make contracts." *Id*. at 884–85.

85. *Id*. at 888–91.

86. *Id*. at 888–89.

87. *Id*. at 889–90.

contracted away, and that, in any event, FSLIC and the Bank Board had ample statutory authority to make the agreements they had entered into.[88]

The government's fourth and final argument was that FIRREA was a sovereign act, and the United States cannot be held liable for its sovereign acts.[89] The plurality rejected this for two reasons. First, the sovereign acts doctrine did not apply to the facts of *Winstar*, and second, even if it did apply it would not excuse the government.[90] According to the plurality, the applicability of the sovereign acts doctrine depends on the capacity in which the government acted when it enacted the statute rendering performance of the contract in question legally impossible.[91] If the government acts in its capacity as a contractor in enacting the statute, the sovereign acts defense does not apply and the government is liable.[92] But if the government acts as sovereign in enacting the statute, the sovereign acts defense places the government in the same capacity as a private contractor invoking the impossibility defense.[93] Justice Souter[94] explained that the government acts as sovereign when it passes statutes free from self-interest, but acts as a contractor when it passes statutes "tainted by a governmental object of self-relief."[95] Justice Souter defined governmental self-relief as "instances in which the Government seeks to shift the costs of meeting its legitimate public responsibilities to private parties."[96] Because FIRREA shifted the costs of the government's public

88. *Id*. at 890 (citing and explaining the statutory authority).
89. *Id*. at 891–92.
90. *Id*. at 891.
91. *Id*. at 895.
92. *Id*. at 895–96.
93. *Id*. at 896.
94. *Id*. at 896–900. Justice O'Connor did not join this portion of the opinion. *See id.* at 843.
95. *Id*. at 896.
96. *Id*. Justice Souter reasoned that this reflects the difference between an ordinary contractor, whose performance is rendered impossible by government regulation, and the government, who has the authority to render its own performance impossible by regulating. *Id.* at 897. Justice Souter stated that "[t]he greater the Government's self interest . . . the more suspect becomes the claim that its private contracting parties ought to bear the financial burden of the Government's own improvidence," and that "where a substantial part of the impact of the Government's action rendering performance falls on its own contractual obligations, the [impossibility] defense will be unavailable." *Id.* at 898. And even though Justice Souter noted that FIRREA was *intended* to breach the contracts at issue in *Winstar*, it is the substantial impact of a statute, rather than Congress's specific intent, that is relevant in determining the government's self-interest. *Id.* at 899–900; *see also id.* at 899 n.46 ("The difficulty, however, of ascertaining the relative intended or resulting impacts on governmental and purely private contracts persuades us that . . . [an intent based] test would prove very difficult to apply.").

Even though Justice Souter seems describe a test operating whereby greater governmental self-interest makes the sovereign acts doctrine less available to the government, at least one commentator on *Winstar* seemed to identify this as a "binary mode" rather than a "sliding scale." Schwartz, *Interim Report*, *supra* note 48, at 1195.

responsibilities to private parties, the plurality opinion deemed it general and not public, and tainted by governmental self-interest; consequently, the sovereign acts doctrine did not apply to protect the government.[97]

The plurality then argued that even if the sovereign acts doctrine applied, the government would still have been liable because the contracts were merely risk-shifting agreements.[98] Had the sovereign acts defense applied, the government could have raised the common law impossibility defense.[99] But to prevail under the impossibility defense, the government would have to show that the regulatory change rendering its performance impossible was "contrary to the basic assumptions on which the parties agreed."[100] Since the contracts at issue in *Winstar* specifically allocated the risk of regulatory change to the government, it would be absurd to say that the risk of regulatory change was beyond the original assumptions of the parties.[101] As such, the government could invoke neither the sovereign acts defense nor the impossibility defense, and it was liable for breach of contract damages. The plurality remanded to the Court of Federal Claims to compute the damages.[102]

2. Justice Breyer's Concurrence

Justice Breyer emphasized two points in his concurrence. First, as a general rule, the government is subject to the same rules in contract cases as ordinary (non-governmental) contracting parties.[103] Justice Breyer noted that courts ordinarily interpret contracts according to the parties' intent.[104] If the government clearly intended to be bound by a contract, then there

97. *Id*. at 900–04.

98. *Id*. at 904–10. Justice O'Connor rejoined the plurality in this part. *Id.* at 843.

99. *Id*. at 904.

100. *Id*. (citing RESTATEMENT (SECOND) OF CONTRACTS § 261 (1993)).

101. *Id*. at 906. In fact, the plurality pointed out that the government, both in its brief and at oral arguments, agreed that "FIRREA's tightening of regulatory capital standards was 'exactly the [type of] event that the parties assumed might happen when they made their contracts.'" *Id*. at 906 n.54.

The plurality also asserted that "any government contract that not only deals with regulatory change but allocates the risk of its occurrence will, by definition, fail the further condition of a successful impossibility defense." *Id.* at 907. Justice Souter argued these contracts were not merely statements of regulatory policy, "but in each instance were terms in an allocation of risk of regulatory change that was essential to the contract between the parties." *Id*. at 909. Justice Souter argued that it would have been "madness" for the thrifts to engage in these mergers without regulatory risk-shifting agreements, as most of them would immediately have been insolvent without the supervisory goodwill allowance. *Id.* at 910.

102. *Id.* at 910.

103. *Id.* at 910–14 (Breyer, J., concurring).

104. *Id.* at 911.

was no need to find an unmistakable promise.[105] In *Winstar*, the intent of the parties to shift the risk of regulatory change to the government was sufficiently clear to render the contracts enforceable.[106] Second, Justice Breyer questioned whether the unmistakability doctrine had ever been applied with the meaning the government argued in *Winstar*.[107] He argued that it was not clear whether any of the earlier Supreme Court cases adopting the unmistakability doctrine had actually based their decision on such an absence of contractual terms.[108] Moreover, in all of these prior cases, the relief sought by the plaintiffs would have prevented Congress from enacting or enforcing a law.[109]

3. Justice Scalia's Concurrence

Justice Scalia agreed with the plurality that the government was liable for breach due to the passage of FIRREA,[110] but disagreed with the plurality's characterization of the contracts as "risk-shifting agreements." Justice Scalia noted that the plurality's distinction between risk-shifting agreements and contracts was absent from precedent,[111] and disputed the plurality's conclusion that ordinary contract law would characterize the contracts as mere risk-shifting agreements.[112] Justice Scalia argued that

105. Justice Breyer also argued that holding the government liable is necessary to preserve the government's credit as a contracting partner, and pointed to the Tucker Act as evidence of Congress's intent allow such contractual liability. *Id.* at 913–14. Justice Breyer granted the fact that the government's status as one of the interested contractors "may well change the underlying circumstances, leading to a different inference as to the parties' likely intent—say, making it far less likely that they intend to make a promise that will oblige the government to hold private parties harmless in the event of a change in the law." *Id.* However, the same intent-centered analysis can be undertaken without resorting to the unmistakability doctrine. Under this formulation, the government's unmistakable promise to be held liable is at least presumptively evidence of such an intent, but its absence is not dispositive evidence of the lack of intent.

106. *Id.* at 913–14. Justice Breyer argued that the contracts expressly promised the government would indemnify the thrifts if the law changed, noting that in the past the government had been liable based only on implied promises. *Id.*

107. *Id.* at 914–18.

108. *Id.* at 914 ("[I]t is not clear that the 'unmistakability' language was determinative of the outcome in those cases."); *see also id.* at 918 (theorizing that the "doctrine" of unmistakability may have stemmed from special circumstances that would require more to convince the Court of the existence of an agreement than in ordinary government contract cases).

109. *Id.* at 916 ("A second reason to doubt the Government's interpretation of the 'unmistakability' language is that, in all these cases, the language was directed at the claim that the sovereign had made a broad promise not to legislate, or otherwise to exercise its sovereign powers."). Justice Breyer then distinguished a promise not to change the law from a promise to indemnify a contracting partner in the event the law changes. *Id.*

110. *Id.* at 919 (Scalia, J., concurring).

111. *Id.*

112. *Id.*

almost every contract can be seen not as a promise of particular future conduct, but rather as an assumption of liability in the event of nonperformance.[113] Justice Scalia also disagreed with the plurality's characterization of FIRREA as a non-sovereign act.[114]

While Justice Scalia agreed with the dissent that the unmistakability doctrine applied, unlike the dissent, he did not think it "foreclose[d]" the thrifts' claims.[115] Justice Scalia argued that the unmistakability doctrine is really a matter of implied intent, a simple extension of common law contract doctrine to determine the intent of the government.[116] It would be unreasonable to assume that the government intended to bind itself to pay damages for its own sovereign acts unless such an intent is clearly apparent.[117] However, despite believing that the doctrine applied, Justice Scalia determined that the thrifts met the burdens imposed by the unmistakability doctrine as the intent to be bound was clearly apparent.[118] Justice Scalia also stated, in response to the dissent, that "a *further* promise" should not be required to overcome the unmistakability doctrine.[119]

Justice Scalia also rejected the government's remaining three defenses.[120] He argued first that the doctrine of reserved powers does not apply if the private party to the government contract does not seek injunctive relief to prevent the government's exercise of its sovereign power.[121] Justice Scalia stated that any express delegation concerns were "satisfied by the statutes which the principal opinion identifies."[122] Justice

---

113. *Id.*

114. *Id.* at 920.

115. *Id.* Contrary to the plurality, Justice Scalia asserted that the Court had applied the doctrine of unmistakability to situations analogous to *Winstar* in the past "where a sovereign act is claimed to deprive a party of the benefits of a prior bargain with the government." *Id.*

116. *Id.*

117. *Id.* at 920–21. Justice Scalia noted:

> When the contracting party is the government, . . . it is simply *not* reasonable to presume an intent of that sort. . . . [I]t is reasonable to presume (*unless the opposite clearly appears*) that the sovereign does *not* promise that none of its multifarious sovereign acts . . . will incidentally disable it or the other party from performing one of the promised acts.

Id.

118. *Id.* The essence of the contracts—the totality of the government's consideration—was an unmistakable promise to indemnify the acquiring thrifts from regulatory change. *Id.*

119. *Id.* at 921.

120. *Id.* at 922–24.

121. *Id.* at 923.

122. *Id.* at 923. The difference between the plurality and concurrence on this point is subtle: the plurality felt the express delegation doctrine did not apply because no sovereign act was implicated, while the concurrence felt that the express doctrine did apply but was overcome by the statutes granting FSLIC and the Bank Board authority to make the agreements.

Scalia concluded by arguing that the sovereign acts doctrine "adds little, if anything at all, to the 'unmistakability' doctrine," because the sovereign acts defense would be avoided whenever unmistakability would be avoided.[123]

4. Chief Justice Rehnquist's Dissent

The Chief Justice's dissent set forward few positive statements of the law and instead largely attacked the other three opinions.[124] The Chief Justice asserted that the plurality's characterization of the contracts as risk-shifting agreements was precisely what the unmistakability doctrine was devised to guard against.[125] He also argued that applying the "public and general" test to *Winstar* should reach the opposite conclusion, as FIRREA was designed to be public and general, and was not merely intended to breach the contracts with the thrifts.[126] The Chief Justice argued that it was contradictory for Justice Scalia, despite claiming to apply the unmistakability doctrine, to enforce an *implicit* promise.[127] Moreover, the government could have promised certain regulatory treatment without further promising to pay in the event that the regulatory regime changed.[128] While the other Justices only afforded the government the same status as a private party, the Chief Justice argued instead that "men must turn square corners when they deal with the Government."[129] This requirement, according to the dissent, did not arise out of ancient sovereign privilege, "but from the necessity of protecting the federal

123. *Id.* at 923–24. Under this reading, both defenses would be avoided "whenever it is clear from the contract in question that the Government was committing itself not to rely upon its sovereign acts in asserting . . . the doctrine of impossibility, which is another way of saying that the Government had assumed the risk of a change in its laws." *Id.*

124. As such, its presentation here is greatly abbreviated. *Id.* at 926 (Rehnquist, C.J., dissenting).

125. *Id.* The Chief Justice also noted that despite the existence of the broader, harsher unmistakability doctrine, "[t]he Government's contracting authority has survived from the beginning of the Nation with no diminution in bidders, so far as I am aware, without the curtailment of the unmistakability doctrine announced today." *Id.* at 929.

126. *Id.* at 933. He noted that FIRREA applied generally to all thrifts, not merely to those that had contracted with the Bank Board to purchase failing thrifts. *Id.*

127. *Id.* The dissent argued that this was in fact the same rule that is applied to contracts between private parties, and that more should be required to show that the government breached its contract than is required under the ordinary rules of contract interpretation—a principle embodied in the unmistakability and sovereign acts doctrines. *Id.*

128. *Id.* The Chief Justice pointed out that Justice Breyer relied on this illusory fact while noting that "it might seem unlikely" that the government intended to "promise that . . . the Government . . . [would] hold private parties harmless in the event of a change in the law." *Id.* at 937.

129. *Id.* at 937 (citing Rock Island, Ark. & La. R.R. Co. v. United States, 254 U.S. 141, 143 (1920)).

fisc—and the taxpayers who foot the bills—from . . . possible improvidence on the part of the countless Government officials."[130] Finally, he argued that the thrifts had not met either the unmistakability or sovereign acts tests, and the case should be reversed.[131]

C. Lower Court Cases Examining Winstar

Winstar has arisen in a variety of contexts.[132] For *Winstar* to apply, there must be a contract between the government and a private party,[133] the government must legislate to alter the terms of the agreement,[134] and the government must raise the sovereign defenses in response to a claim that the legislation breached the agreement.[135]

---

130. *Id*. The dissent concluded that the unmistakability doctrine and the sovereign acts doctrine are linked, and it would be rare for one to arise without the other, but Justice Ginsburg did not join that portion of the dissent. *Id*. at 924, 937.

131. *Id*. at 937.

132. *See, e.g.*, Tamarind Resort Assocs. v. Virgin Is., 138 F.3d 107 (3d Cir. 1998) (environmental protection); United States v. Westlands Water Dist., 134 F. Supp. 2d 1111 (E.D. Cal. 2001) (natural resources distribution); Cuyahoga Metro. Hous. Auth. v. United States, 57 Fed. Cl. 751 (Fed. Cl. 2003) (low income housing).

133. *See* R.I. Bhd. Corr. Officers v. Rhode Island, 264 F. Supp. 2d 87, 96–97 (D.R.I. 2003) (holding that statutorily created incentive pay programs were not contracts and as such *Winstar* did not apply, because "[t]he dispositive fact in *Winstar* was the existence of a bargained-for exchange between the regulators and the acquiring institutions"); Celtronix Telemetry, Inc. v. FCC, 272 F.3d 585, 590 (D.C. Cir. 2001) (denying plaintiff's claim that change in FCC rules was a breach of contract as no contract existed); First Annapolis Bancorp, Inc. v. United States, 75 Fed. Cl. 263, 275–76 (Fed. Cl. 2007) (*Winstar*-type FIRREA litigation extensively examining whether a contract was formed between FSLIC and the acquiring thrift). *See also supra* note 71.

134. *See* Pitney Bowes, Inc. v. United States Postal Serv., 27 F. Supp. 2d. 15, 23 (D.D.C. 1998) (holding that cooperation "between a federal agency and a private entity, wherein the government sought to benefit from the private entity's undertaking," along with the allegation of "the existence of a contractual arrangement" and the government's exercise of "its authority as a sovereign to enact law that had the effect of changing the alleged contractual relationship" sufficiently implicated *Winstar* to deny the government's motion to dismiss).

135. Mobil Oil Exploration & Producing Se., Inc. v. United States, 530 U.S. 604, 619–20 (2000) (noting that the government did not raise unmistakability or other sovereign defenses on appeal). *But see* Rio Grande Silvery Minnow v. Keys, 333 F.3d 1109, 1138–41 (10th Cir. 2003) (Seymour, J., concurring) (questioning why the unmistakability doctrine was not raised by the parties, because enforcement of the defendants' demands that no water be taken for conservation of endangered species amounted to an injunction against the government's sovereign power).

At least one court has held that a prerequisite to any discussion of the sovereign defenses is that the government must waive sovereign immunity as to that type of claim. *See* Research Triangle Inst. v. Bd. of Governors of the Fed. Reserve Sys., 132 F.3d 985, 989–90 (4th Cir. 1997). On the other hand, Chief Justice Rehnquist in his *Winstar* dissent argued that sovereign immunity had not been waived under the Tucker Act as to the type of claims that the plaintiff thrifts had asserted, as the government waived sovereign immunity as to promises implied in fact. *Winstar*, 518 U.S. at 930–31 ("[T]he principal opinion's reading of additional terms into the contract so that the contract . . . insure[s] the promisee against loss arising from the promised condition's nonoccurrence seems the very essence of a promise implied in law, which is not even actionable under the Tucker Act.").

1. Yankee Atomic Electric Co. v. United States[136]

The first case to significantly confront *Winstar* was *Yankee Atomic*.[137] Beginning in 1963, the Yankee Atomic Electric Company purchased uranium enrichment services from the Department of Energy (DOE).[138] This enrichment occurred at publicly owned DOE facilities.[139] The enrichment purchasing contracts provided that Yankee Atomic would pay for these services based on a fixed DOE pricing schedule.[140] In 1992, however, Congress passed the Energy Policy Act (EPA), which required collection of clean-up costs from utilities that had benefited from the enrichment of uranium at the public facilities.[141] Yankee Atomic paid $3 million in clean-up costs assessed by the DOE under the EPA, but then sued the government in the Court of Federal Claims.[142] Yankee Atomic argued that that the contracts had a fixed price, thereby shifting all risk—including the risk of regulatory change—onto the government.[143] Since the clean-up costs arose out of regulatory change and raised the price Yankee Atomic had to pay under the fixed-price 1963 contract, Yankee Atomic alleged the EPA breached the contract.[144] The Court of Federal Claims granted Yankee Atomic's summary judgment motion,[145] but the government appealed and the Federal Circuit reversed.[146]

The Federal Circuit cited the *Winstar* plurality's expression of the sovereign acts doctrine as asking whether "on balance, that legislation was designed to target prior governmental contracts."[147] If so, the court reasoned, the government is liable for breach of the contract. Because the

136. 112 F.3d 1569 (Fed. Cir. 1997).

137. *See* Schwartz, *Interim Report*, *supra* note 48, at 1201 (discussing the relevance of the first case to apply a plurality).

138. *Yankee Atomic*, 112 F.3d at 1572.

139. *Id.*

140. *Id.* Neither party disputed that all obligations under the original 1963 agreement had been fulfilled. In fact, Yankee Atomic Electric Company actually ceased operations prior to the passage of the Energy Policy Act. *Id.* at 1573.

141. *Id.* at 1572.

142. *Id.*

143. *Id.*

144. *Id.* at 1573.

145. *Id.*

146. *Id.* at 1582.

147. *Id.* at 1574–75 (citing *Winstar*, 518 U.S. at 891–93). But the *Winstar* plurality had rejected an intent-based test; instead, the plurality measured the substantive impact of the regulatory change on the contract obligations. *Winstar*, 518 U.S. at 897–899 & n.46. Had the Federal Circuit applied an effects-based test, perhaps *Yankee Atomic* would have been decided the other way. The substantial effect of the legislation at issue in *Yankee Atomic* was to burden the government's contract partners, as these were the only parties that had benefited from the uranium enrichment.

purpose of the EPA was to "solv[e] the problem of decontamination" rather than burden the Government's contracting partners, the court found that the sovereign acts doctrine protected the government from liability.[148] The Federal Circuit then asserted that all of the Justices in *Winstar* agreed about what the unmistakability doctrine was, at least at a minimal level,[149] despite having divided as to the doctrine's applicability.[150] The court noted that the plurality would not apply the doctrine to mere risk-shifting contracts that do not block sovereign power.[151] But the court reasoned that five Justices—three concurring and two dissenting—disagreed with the plurality and would apply the unmistakability doctrine to all government contracts.[152] Because these five Justices would have constituted a majority, the court applied the unmistakability doctrine, holding that the contracts did not unmistakably surrender the government's power to assess the clean-up costs.[153] As such, the Federal Circuit ruled in favor of the government.[154]

2. United States v. Westlands Water District[155]

In 1963, the United States Department of the Interior, Bureau of Reclamation, entered into a contract to sell water to Westlands Water District.[156] In 1987, Congress enacted the Reclamation Reform Act (RRA), requiring the Secretary of the Interior to charge the "full cost" for all water sold by the government.[157] For Westlands, the "full cost" assessed by the Secretary was higher than the 1963 contract price.[158] In 1989, the United States sued Westlands for the difference between the contract price paid and the "full cost" for the period between 1987 and 1989.[159] Westlands counterclaimed that the RRA breached the 1963

148. *Yankee Atomic*, 112 F.3d at 1575.
149. *Id.* at 1578 & n.7.
150. *Id.* at 1578.
151. *Id.*
152. *Id.* at 1578–79.
153. *Id.* at 1579–80 ("Based on the reasoning contained in the *Winstar* opinions, we conclude that the unmistakability doctrine applies in the present case. This conclusion respects the views of the five justices who stated that the application of the doctrine is unrelated to the nature of the underlying contracts.").
154. *Id*. at 1581–82.
155. 134 F. Supp. 2d 1111, 1114 (E.D. Cal. 2001).
156. *Id*. Westlands Water District was a nongovernmental agency comprised of member corporations, such as the Boston Ranch and Westhaven Farming Company. *Id.* Westlands sold the water it purchased from the government to its member agencies. *Id.*
157. *Id*. *See also* 43 U.S.C. § 390ww(h) (2000).
158. *Westlands*, 134 F. Supp. at 1114–15.
159. *Id.* The ensuing litigation was lengthy and complex. *See id.* at 1114–28.

contract, and the government raised the sovereign acts and unmistakability defenses.[160]

The United States District Court for the Eastern District of California held that neither doctrine shielded the government from liability on the counterclaim.[161] Although seven *Winstar* Justices held the government liable, the Eastern District pointed out that the opinions were highly fragmented.[162] The district court identified four components of the unmistakability analysis from *Winstar*, counting how many Justices supported each component.[163] First, six Justices had agreed that the unmistakability doctrine applied to all government contracts.[164] Second, six Justices had agreed that the unmistakability doctrine requires a second promise not to legislate over the contract.[165] Third, only four Justices had agreed that the applicability of the unmistakability doctrine turns on the implication of a sovereign power.[166] Fourth, Justice Scalia had characterized the unmistakability doctrine as the converse of the ordinary contract presumption that parties promise not to make their own performance impossible.[167]

Despite counting six Justices who had agreed that the unmistakability doctrine applies to all government contracts, the district court did not apply the doctrine.[168] Instead, it found that the *Winstar* plurality and Justice Scalia's concurrence would have agreed about the judgment under the facts of *Westlands*. According to the court in *Westlands*, the *Winstar* plurality would not have applied the unmistakability doctrine because the contract at issue did not implicate a sovereign power.[169] Because the contract's essential term was the price of water, under Justice Scalia's

160. *Id.* at 1144.

161. *Id.* at 1154. The court began by discussing the implications of not holding the government liable for breaches of contract. *Id.* at 1144–46. For example, allowing the government to routinely breach its contracts with impunity would threaten public credit and increase the government's costs of doing business. *Id.*

162. *Id.* at 1146–47.

163. *Id.* at 1147.

164. *Id.* The court did not state which six Justices would support this proposition. *Id.*

165. *Id.* at 1147.

166. *Id.* This is a reference to the plurality's distinction between cases where enforcing a contract either would or would not block the exercise of a sovereign power. *Id.* at 1146.

167. *Id.* at 1147. Essentially, under this reading, the government does not implicitly promise not to make its own performance impossible.

168. *Id.* at 1151.

169. *Id.* The court likened the contract to a simple governmental supply contract, which Justice Souter stated does not implicate sovereign power, *see supra* note 80, a contract, and to which the unmistakability doctrine does not apply. *See Westlands*, 134 F. Supp. at 1151 ("Charging 'full cost' for all water implicates a water-pricing term in a water-delivery contract, but does not implicate a sovereign power . . . .").

analysis the unmistakability doctrine would have been overcome even if it applied.[170] Since both the plurality's and Justice Scalia's tests were satisfied, the court held that the unmistakability doctrine did not shield the government.[171]

3. Cuyahoga Metropolitan Housing Authority v. United States[172]

In 1978, Cuyahoga Metropolitan Housing Authority (Cuyahoga) and the United States Department of Housing and Urban Development (HUD) entered into an agreement for Cuyahoga to provide "Section 8" housing to low income residents of Cleveland, Ohio.[173] HUD promised, pursuant to the Housing Act of 1937, to pay Cuyahoga the difference between the rent which low-income residents were able to pay and a variable contract rate.[174] However, HUD began to worry that the variable contract rate was well above the real market value of the rent.[175] In 1994, Congress amended the Housing Act to link the variable contract rates to the real market value as determined by HUD.[176] Cuyahoga sued the government in the Court of Federal Claims, alleging the 1994 amendments breached the 1978 contract,[177] and the government raised the unmistakability defense.[178]

The Court of Federal Claims noted that five *Winstar* Justices seemed to reject the plurality's limitation on the unmistakability doctrine's applicability.[179] However, citing the narrowest ground method, the court distilled four principles that all four *Winstar* opinions would have supported.[180] First, the application of the unmistakability doctrine hinges on whether the challenged legislation involves the exercise of a sovereign

170. *Id.*
171. *Id.* at 1151.
172. 57 Fed. Cl. 751 (Fed. Cl. 2003).
173. *Id.* at 753.
174. *Id.* at 753–54.
175. *Id.* at 754. In the early 1980s, HUD commissioned "comparability studies" to determine the rent charged at comparable housing units and amended its regulations to cap payments to Section 8 project owners—such as Cuyahoga—at the rate determined by the comparability studies. *Id.*
176. *Id.* at 757.
177. *Id.* at 758. The damages sought by Cuyahoga were based on the difference between the variable contract rates and the lower rents actually paid by the government between the years 1994 and 1999, the year suit was filed.
178. *Id.* at 763.
179. *Id.* at 770. The court conducted an extremely thorough analysis of all the opinions in the *Winstar* plurality and exhaustively analyzed the history of the unmistakability doctrine. *See id.* at 763–69.
180. *Id.* at 763–69. The court argued that even Chief Justice Rehnquist hinted that certain governmental acts might make the government liable for breach. *Id.* at 772 n.9.

power.[181] Second, not all legislation implicates sovereign powers.[182] Third, the sovereign powers protected by the unmistakability doctrine are similar to the sovereign acts protected by the sovereign acts doctrine.[183] Finally, the court concluded that the dispositive question is the nature of the legislation—if the legislation targets the government's contractual obligations merely to obtain a better deal, neither the sovereign acts nor the unmistakability doctrines protect the government.[184] The court ruled that the unmistakability defense was unavailable to the government because the 1994 amendments specifically targeted contracts like Cuyahoga's.[185] The government was therefore liable for breach.[186]

4. Kimberly Associates v. United States[187]

In 1981, Kimberly Associates, the owner of a low-income housing project in Twin Falls, Idaho, entered into a loan agreement with the Rural Housing Service (RHS).[188] Congress had authorized RHS to make low-interest loans to encourage construction of rural rental property.[189] The 1981 loan agreement contained a number of restrictions on Kimberly, including a cap on Kimberly's annual profits from the project, a prohibition on other borrowing, and a covenant to use the property as low-income housing for twenty years even if Kimberly prepaid the loan from the RHS.[190] Kimberly executed a promissory note in the amount $620,000, payable over fifty years, and the note contained a provision that

181. *Id.* at 772.

182. *Id.*

183. *Id.* The court found two indications that the unmistakability doctrine and sovereign acts doctrine were conceptually linked in the plurality opinion. *Id.* at 770–71. First, the plurality hinged the unmistakability doctrine's applicability on whether the contract implicates sovereign powers—and the concept of sovereign powers is similar to the concept of sovereign acts. *Id.* Moreover, the plurality held that the more the government targets its contractual obligations with legislation, the less the sovereign acts doctrine protects the government. *Id.* Thus, under the plurality's reading, both the sovereign acts doctrine and the unmistakability doctrine are limited by the manner in which the government breached the contract. *Id.* The court described this link as a "leitmotif" found throughout the three opinions concurring in judgment in *Winstar*. *Id*. at 771.

184. *Id.* at 773.

185. *Id.*

186. *Id*. at 777. The court also listed several other reasons for supporting this reading of the unmistakability doctrine, including the fact that there is no logical limit to the government's interpretation of the doctrine. *See id*. at 776 ("Carried to its logical extreme, the government's position would transform the unmistakability doctrine from a shield into a meat axe that would allow the Congress to reserve the choicest portions of the government's contracts and discard the rest . . . .").

187. 261 F.3d 864 (9th Cir. 2000).

188. *Id*. at 866.

189. *Id*.

190. *Id*.

prepayments could be made at any time without penalty.[191] Congress became concerned that the RHS loans were subject to prepayment, and if the loans were prepaid, the properties would no longer be used as low-income housing. Thus, the purpose of the RHS program would be defeated.[192] In response, Congress passed the Housing and Community Development Act of 1992 (HCDA), which sought to discourage prepayment by establishing elaborate requirements for prepaying loans like Kimberly's.[193] Kimberly, however, went through the elaborate procedures and tendered a payment for the remainder due on the loan in 1997.[194] RHS refused to accept the payment, pointing to a regulatory provision called the "Prepayment and Displacement Prevention" program.[195] Kimberly sued the government, and the United States District Court for the District of Idaho ruled that the unmistakability doctrine barred Kimberly from any contract remedies.[196]

Kimberly appealed and the Ninth Circuit reversed, holding that the unmistakability doctrine did not apply.[197] The Ninth Circuit laid out a two-part test for the unmistakability doctrine derived from the *Winstar* plurality's analysis: first, whether the government acted as sovereign when it breached its contractual obligations; and second, if the government acted as a sovereign, whether the contract waived sovereign rights in unmistakable terms.[198] The court found that the 1992 HCDA and Prepayment and Displacement Prevention program were narrow and targeted, meant only to relieve the government of its contract liability.[199] As such, the government was not acting in its sovereign capacity and the unmistakability doctrine did not apply.[200]

---

191. *Id*.
192. *Id*. at 867.
193. *Id*.
194. *Id*.
195. *Id*.
196. *Id*.
197. *Id*. at 866.
198. *Id*. at 869.
199. *Id*. at 870.
200. *Id*.

5. Tamarind Resort Associates v. Virgin Islands[201]

In 1964, the government of the United States Virgin Islands[202] entered into an agreement with the Hans Lollik Corporation. The Lollik Corp. owned the 500-acre, uninhabited Great Hans Lollik Island.[203] Through the agreement, the Virgin Islands approved the use of the island for a resort hotel.[204] The agreement provided for construction of a hotel with no less than 50 rooms and 150 residences.[205] The agreement also contained a clause that "the Government [of the Virgin Islands] will not adopt any legislation impairing or limiting the obligations of this contract."[206] The agreement was enacted as law, containing provisions described as "contractual and proprietary in nature."[207] In 1978, however, the Virgin Islands enacted the Coastal Zone Management Act (CMZA)[208] to harmonize environmental protection and economic development.[209] Under the CZMA, development on Great Hans Lollik Island could only be accomplished by obtaining a permit from the Coastal Zone Management Commission (CZMC).[210] In 1990, Tamarind Resort Associates purchased Hans Lollik Island from the Lollik Corporation.[211] Tamarind developed a plan to construct an 800-unit resort and a 150-room hotel, for which the CZMC denied a permit.[212] The CZMC denied Tamarind's permit application for the initial plan and a subsequent revised plan calling only for a 675-unit resort.[213]

After losing an administrative appeal, Tamarind sued the government of the Virgin Islands in federal court, alleging the CZMA breached the

201. 138 F.3d 107 (3d Cir. 1998).

202. *Id*. at 109. The fact that the government of the Virgin Islands is not the federal government should not impact the unmistakability analysis, because, as Justice Souter noted in *Winstar*, the unmistakability doctrine originated in the states. *See supra* note 79. Since the unmistakability doctrine addresses the implications of sovereign authority generally under the American constitutional system, any sovereign authority—federal, state, or territorial—with the capacity to make law and enter contracts can theoretically raise the unmistakability defense.

203. *Id*.

204. *Id*.

205. *Id*.

206. *Id*.

207. *Id*.

208. V.I. CODE ANN. tit. 12, §§ 901–14 (1982).

209. *Tamarind*, 138 F.3d at 109.

210. *Id.*

211. *Id.* at 110. The court held that TRA was the successor-in-interest to the Hans Lollik Corporation's 1964 agreement. *Id.*

212. *Id*.

213. *Id*.

1964 contract.[214] Tamarind argued that the absence of a provision setting a maximum development level in the initial contract gave it unlimited discretion in the scope of the construction.[215] On appeal, the Third Circuit noted that after *Winstar* it was unclear to which contracts the unmistakability doctrine applied.[216] The court held that it was clear, on the other hand, that "one of the basic principles underlying the doctrine" is the belief that it is unreasonable to assume that the government contracted away its sovereign power without an express contractual waiver.[217] The Third Circuit then applied the unmistakability doctrine.[218] Because the contract did not unmistakably limit the government's ability to set a maximum development size, such a limitation could not be implied.[219] The court ruled in favor of the Virgin Islands.[220]

6. Franklin Federal Savings Bank v. United States[221]

Morristown Thrift became insolvent when interest rates and inflation rose in the 1970s.[222] The Bank Board suggested that Morristown seek to merge with a healthy thrift.[223] Instead, Morristown's board of directors formed a holding company called Franklin Financial.[224] The board of directors then submitted a proposal to the Bank Board asking that Franklin Financial be allowed to acquire all of Morristown's assets and treat Morristown's liabilities as an intangible asset.[225] The Bank Board approved this plan via an agreement with Franklin;[226] however the approval documents not only contained language incorporating then-

214. *Id*.
215. *Id*. at 112.
216. *Id*.
217. *Id*.
218. *Id*.
219. *Id*. For purposes of illustration, had the CZMC denied a permit for a resort at or below the minimum level guaranteed by the contract—150 units—then a breach might have existed for which the unmistakability doctrine would not have protected the government.
220. *Id*.
221. 431 F.3d 1360 (Fed. Cir. 2005).
222. *Id*. at 1361.
223. *Id*. at 1362.
224. *Id*.
225. *Id*. The intangible asset was supervisory goodwill, amortized over a twenty-five year period. *Id.* at 1362–63. This scheme is similar to the accounting schemes agreed upon in *Winstar*. *See supra* note 56 and accompanying text. But in *Winstar*, the defunct thrifts had been acquired by the plaintiff thrifts, which were distinct corporate entities. In *Franklin*, the acquiring thrift was a new company set up by the defunct thrift's owners to hide its own liabilities. *See id*. at 1361 ("[The insolvent thrift] prepared a business plan . . . under which [it] would be acquired by Franklin Financial, a holding company formed by [the insolvent thrift's own] board of directors.").
226. *Id*. at 1362.

existing regulations, but also incorporated "any successor regulation . . . [which] may increase or decrease [Franklin]'s obligation under this Agreement."[227] Eight months after entering the agreement, Congress enacted FIRREA, barring the treatment of liabilities as intangible assets.[228] Franklin sued the government in the Court of Federal Claims, alleging FIRREA breached the approval agreement.[229] The Court of Claims agreed that FIRREA breached the approval agreement, and the government appealed.[230]

The Federal Circuit characterized the unmistakability question from *Winstar* as "whether the contracts should be presumed to promise only temporary forbearance (until regulatory change occurred) or long-term forbearance."[231] The court explained that the plurality opinion had required—in the absence of the unmistakability doctrine's application—clear language to limit a promise to temporary forbearance.[232] Justice Scalia, on the other hand, applied the unmistakability doctrine but did not shift the risk of regulatory change to the thrifts because such a promise for a temporary forbearance would render the contracts illusory.[233] The court then portrayed the Chief Justice's dissent as applying the unmistakability doctrine, yet promising only temporary forbearance.[234] The court noted

---

227. *Id*. at 1363.

228. *Id*. at 1364. Franklin, like the thrifts in *Winstar*, was rendered immediately insolvent by FIRREA. *Id*. But Franklin was able to avoid government seizure by recapitalization through a loan from the board of directors to the corporation, which was repaid by a sale of stock that reduced the board's ownership from 100% to 62.3%. *Id*.

229. *Id.*

230. *Id.*

231. *Id.* at 1367.

> In *Winstar*, a primary focus of the various Supreme Court opinions was on the unmistakability doctrine—that is, whether the contracts should be presumed to promise only temporary forbearance (until regulatory change occurred) or long-term forbearance. The plurality held that the unmistakability doctrine did not apply in actions seeking to recover monetary damages for breach of contract, and that there thus was no presumption that the contracts promised temporary forbearance only. The particular contracts were construed as promising long-term forbearance. But, as we shall see, the plurality agreed that clear language in such contracts could limit the promise to temporary forbearance and shift the risk of regulatory change to the thrift. Justice Scalia's concurrence urged that the unmistakability doctrine applied to such contracts, but that the agreements did not shift the risk of regulatory change to the thrifts. Justice Scalia indeed believed that a promise for temporary forbearance was illusory, and would render the contracts unenforceable. The dissent urged that the unmistakability doctrine applied and that the contracts should be construed as promising only temporary forbearance even without the clear language demanded by the plurality.

Id. (internal citations omitted).

232. *Id.*

233. *Id.* The thrifts in *Franklin* urged the court to adopt Justice Scalia's reasoning that a promise for temporary forbearance is illusory, but the Federal Circuit declined. *Id.* at 1367–68.

234. *Id.* at 1367.

that Justice Souter and the Chief Justice "agreed that the parties could have contracted only for temporary forbearance, but disagreed as to whether a clear statement was necessary."[235] The court, citing *Marks*, held that because the plurality "required a clear statement to legitimate a temporary forbearance," it was the narrowest and as such was binding.[236] However, despite finding that the plurality from *Winstar* controlled, the Federal Circuit concluded that Franklin could not recover on the contracts because the successor regulation clause was a clear statement that shifted the risk of regulatory change to the thrift.[237]

II. ANALYSIS

By examining how lower courts actually apply plurality decisions, some conclusions can be drawn about what the law is and should be regarding the application of plurality opinions as precedential authority.[238] It is significant that all six of these courts applied *Winstar*—none openly rejected the reasoning as courts are presumably entitled to do with mere persuasive authority—even though all of these courts noted that *Winstar* was merely a plurality decision.[239] All of these courts applied the substance of the statement in *Texas v. Brown* that, even though plurality opinions may not be binding precedent, "as the considered opinion of four Members of this Court it should obviously be the point of reference for further discussion of the issue."[240] Nevertheless, only one of the six opinions actually cited *Brown* in its discussion of *Winstar*.[241] This indicates that courts instinctively begin their analysis by considering the

235. *Id.* at 1368.

236. *Id.* (citing Marks v. United States, 430 U.S. 188, 193 (1977)).

237. *Id.* at 1371–72. In *Winstar*, the plurality held that the contract was a risk-shifting agreement, but the risk was shifted from the acquiring thrift to the government. *See supra* note 75 and accompanying text.

238. *See* Chicago Study, *supra* note 1, at 154–55.

239. *See* Franklin Federal Sav. Bank v. United States, 431 F.3d 1360, 1366 (Fed. Cir. 2005); Kimberly Assocs. v. United States, 261 F.3d 864, 869 (9th Cir. 2000); Tamarind Resort Assocs. v. Virgin Is., 138 F.3d 107, 112 (3d Cir. 1998); Yankee Atomic Elec. Co. v. United States, 112 F.3d 1569, 1574–75 (Fed. Cir. 1997); United States v. Westlands Water Dist., 134 F. Supp. 2d 1111, 1146 (E.D. Cal. 2001); Cuyahoga Metro. Hous. Auth. v. United States, 57 Fed. Cl. 751, 770 (Fed. Cl. 2003).

240. Texas v. Brown, 460 U.S. 730, 737 (1983) (plurality opinion).

241. *Cuyahoga*, 57 Fed. Cl. at 772 n.29 (citing, but not quoting, *Brown* for the proposition that "a plurality view that does not command a majority is not binding precedent"). The court seemed uncertain about how much precedential weight to accord plurality opinions, citing first *Marks* for the proposition that the narrowest grounds were binding precedent, then *Brown* as described above, and then *Hertz v. Woodman*, 218 U.S. 205, 213–14 (1910), for the proposition that pluralities are not binding. *Cuyahoga*, 57 Fed. Cl. at 772 n.29.

rationale from plurality opinions, and suggests that lower courts accord *Winstar* and other plurality opinions more than just persuasive authority.

A. How Courts Apply Plurality Opinions

1. The Marks*/Narrowest Grounds Method*

In *Marks v. United States*, the Supreme Court ruled that "[w]hen a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[242] There are at least two formulations of the narrowest grounds approach.[243] The first identifies the opinion supporting the judgment that is the narrowest in its scope, granting that opinion binding precedential weight. The second searches for rationale common to opinions that a majority of Justices joined, granting all of these grounds binding precedential weight.

The court in *Franklin* explicitly applied the first formulation of the narrowest grounds method, identifying Justice Souter's plurality opinion as the narrowest opinion and granting it full precedential weight.[244] But at the very least, characterizing Justice Souter's plurality opinion as the narrowest opinion from *Winstar* is open to debate, as it is not fairly characterizable as a subset of Justice Scalia's concurrence. Moreover, despite applying Justice Souter's opinion, the court in *Franklin* reached the opposite conclusion about the unmistakability doctrine's applicability than that reached by the *Winstar* plurality.[245]

In *Cuyahoga* the court cited *Marks* and sought common grounds among all of the *Winstar* opinions, nominally applying the second formulation of the *Marks* test.[246] The court found four grounds in common, and based on these four common grounds, the court refused to apply the unmistakability doctrine.[247] However, there are two flaws in the court's application of the *Marks* test. First, the narrowest grounds test articulated

---

242. Marks v. United States, 430 U.S. 188, 193 (1977) (citing Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

243. *See supra* notes 31–36 and accompanying text.

244. *Franklin*, 431 F.3d at 1368.

245. In fact, the clear statement shifting the risk of regulatory change to the thrift in *Franklin* would probably have been enough to render the thrift liable, even if the unmistakability doctrine did not apply as it did under Justice Souter's plurality.

246. *Cuyahoga*, 57 Fed. Cl. at 772 n.29.

247. *Id.* at 777. In reaching this conclusion, the court purported to find grounds that all nine *Winstar* Justices would agree with. *Id.*

in *Marks* was explicitly restricted to the opinions of those Justices concurring in judgment. The *Cuyahoga* court, on the other hand, sought grounds it asserted the dissent would also agree with. Second, it is unclear that any of the Justices would have agreed fully with the four grounds found by the court.

The *Marks* rule has been subject to criticism by courts and commentators, and the Supreme Court has not consistently applied the narrowest grounds rule it laid down in *Marks*.[248] Most critics of the narrowest grounds rule agree that it is not applicable to complex plurality decisions in which the plurality and lead concurrence do not agree on the reasoning but reach the same result. While there are some plurality decisions to which the narrowest grounds rule can apply,[249] the simple reconciliation and policy space methods I propose below would presumably provide the same result as an application of the narrowest grounds rule in the cases in which the narrowest grounds rule can apply. But the new methods I propose also provide an interpretive rule for complex plurality decisions to which the narrowest grounds rule cannot apply.

2. The Dual Majority Method

The court in *Yankee Atomic* applied the dual majority method in analyzing the *Winstar* plurality.[250] The dual majority method recognizes binding legal rules when the dissent and one of the concurrences advocate the same reasoning, so long as the dissent and concurrence together were joined by at least five Justices.[251] The court in *Yankee Atomic* noted that five Justices, those dissenting and those joining Justice Scalia, agreed that

248. *See supra* note 31.

249. *See, e.g.*, Hernandez v. New York, 500 U.S. 352, 372 (1991) (plurality) (O'Connor, J., concurring in judgment) ("I agree with the plurality that we review for clear error the trial court's finding as to discriminatory intent. . . . I write separately because I believe that the plurality opinion goes further than it needs to in assessing the constitutionality of the prosecutor's asserted justification for his peremptory strikes."). In Hernandez, the plurality opinion seems clearly narrower on the issue of the standard of review for findings of discriminatory intent.

250. Several other cases applied this method to *Winstar*. *See, e.g.*, Adams v. United States, 42 Fed. Cl. 463, 485 (Fed. Cl. 1998) ("The conclusion of this court . . . that the government did not breach the contracts based on the unmistakability defense[] appears to reflect the views of a majority of the members of the *Winstar* court"). *Winstar* seemingly lends itself to this type of analysis, as the concurrence and dissent "agreed" that the unmistakability doctrine applies to all government contracts, while the plurality argued that the unmistakability doctrine applies only when the government's sovereign power is implicated. However, the scope of the unmistakability doctrine is very different in the dissent and Justice Scalia's concurrence. *See infra* note 252.

251. *See supra* note 38 and accompanying text.

the unmistakability doctrine is universally applicable to all government contracts.[252]

Although the dual majority analysis in *Yankee Atomic* was superficially correct in that Justice Scalia's concurrence and Chief Justice Rehnquist's dissent both purported to apply the unmistakability doctrine, the application of the dual majority method in *Yankee Atomic* exposes serious problems with this method. Seven Justices in *Winstar* held the government liable.[253] Despite seeming to agree with the dissent about the applicability of the sovereign acts and unmistakability defenses, Justice Scalia's understanding of the actual effect of the defenses was very different from that of the Chief Justice.[254] Even though Justice Scalia would have applied the sovereign acts and unmistakability defenses in *Yankee Atomic*, as he did in *Winstar*, he probably would have also saddled the government with liability in *Yankee Atomic* despite applying these defenses.

The dual majority method often misses the differences that can fall between concurrences and dissents. After all, if a concurrence and a dissent truly agreed about the reasoning and rules they discussed, they would not have reached different results.[255] The dual majority method is thus inherently unstable, and creates amalgams of propositions, interpretations of rules, and results that none of the Justices from the earlier no-clear-majority decision would have endorsed in their entirety.

---

252. Yankee Atomic Elec. Co. v. United States, 112 F.3d 1569, 1579 (Fed. Cir. 1997).

253. *See infra* note 254.

254. In *Winstar*, Justice Scalia and Chief Justice Rehnquist used similar words to describe the unmistakability doctrine, and both claimed to apply the doctrine. Under Justice Scalia's application of the sovereign acts and unmistakability defenses, the government's liability turns on the risks it assumes in the contract. In entering into fixed-price agreements for the sale of enrichment services, the government probably assumed the risk of regulatory change under Justice Scalia's analysis. Justice Scalia felt that an implied promise was satisfactory to overcome the unmistakability doctrine if the issue was central to the parties' contract and the government clearly intended to assume the risk. Justice Scalia felt that each of these conditions were satisfied in *Winstar*. Winstar v. United States, 518 U.S. 839, 919–24 (1996). The Chief Justice, on the other hand, felt that the unmistakability doctrine blocked all implicit promises to shift the risk of regulatory change to the government, and that such promises had to take the form of unmistakably clear second promises. *Id.* at 924–37. The Chief Justice felt that this standard applied even to damage suits, while Justice Scalia seemed to differentiate between suits for damages and suits to enjoin the enforcement of a law. *Id.* at 923, 926. These differences between the Chief Justice's and Justice Scalia's conceptions of the unmistakability doctrine make the dual majority method particularly unsuitable for *Winstar* analyses.

255. Kimura, *supra* note 1, at 1602–03. In the abstract, it is possible that the concurrence and dissent may be using the same phrases to mean the same thing in some instances. But the likelihood that the concurrence and dissent actually mean somewhat different things, even though they use the same phrases in some instances (as evidenced by *Yankee Atomic*'s misapplication of Justice Scalia's use of the phrase "unmistakability doctrine"), cautions against borrowing bits and pieces of each opinion. Nevertheless, if the dissent contains language such as "we agree with the concurrence as far as propositions *x* and *y*, but disagree as to *z*, and thus reach a different result," it may be safe to assume that these Justices actually agree as to propositions *x* and *y*.

However, some Justices have indicated that it may be appropriate, in some instances, to draw controlling principles of law from majorities made up of dissenters as well as those joining plurality and concurring opinions in plurality decisions.[256]

3. The Citation for Specific Result and Disavowal Methods

As of the writing of this Note, no case could be found that cited *Winstar*, but refused to apply it because it was a plurality decision.[257] The closest any case came to open disavowal was *Tamarind*, where the court cited *Winstar* as potentially controlling, but did not apply the reasoning from any of the opinions.[258] Instead, the court simply cited Justice Scalia's concurring opinion for a definition of the unmistakability doctrine, and then applied that definition to reach the opposite result of both the plurality and Justice Scalia's concurrence.[259]

Despite the ambiguous precedential value of plurality opinions, the American judiciary is hierarchical. In a hierarchical system, it would be striking for a court to openly reject the opinion of a higher court, even if a majority of the higher court's members did not formally join the

256. *See* Waters v. Churchill, 511 U.S. 661, 685 (1994) (Souter, J., concurring) (arguing that a controlling majority can be drawn from propositions supported by majorities made up of Justices who either dissented or concurred); *see also* United States v. Johnson, 467 F.3d 56, 65–66 (1st Cir. 2006).

257. Many cases have cited *Winstar* for its result only. S*ee, e.g.*, Ace Prop. and Cas. Ins. v. Fed. Crop Ins. Corp., 440 F.3d 992, 1001 (8th Cir. 2006) (citing *Winstar* for the proposition that damages could be awarded against a federal agency for breach of contract despite the fact that Congress required the federal agency to breach the contract at issue).

As noted, I have not identified any cases that have explicitly rejected *Winstar*'s reasoning because it was a plurality. On the other hand, one case that cited *Winstar* disavowed the reasoning of a different plurality decision, holding that only the result was binding. In *Commonwealth Edison Co. v. United States*, 46 Fed. Cl. 29, 39–40 (Fed. Cl. 2000), the Court of Federal Claims rejected the reasoning from *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998), because the lack of common ground between the opinions rendered the *Marks* test inoperative. *Commonwealth Edison*, 46 Fed. Cl. at 39 ("[N]o part of the plurality's reasoning constitutes binding precedent. The plurality [and] concurrence agree in result and focus on similar facts, but share no common denominator in terms of legal rationale. As such, the only part of the plurality opinion that is binding is the specific result . . . .").

258. Tamarind Resort Assocs. v. Virgin Is., 138 F.3d 107, 112 (3d Cir. 1998).

259. Admittedly, it is unclear whether the result in *Tamarind* would have changed had the court applied the reasoning from *Winstar*. While the contract in *Tamarind* may not have contained unmistakable terms limiting the government's right to limit development, the contract did contain a clause that the government would not change the law to impair the contract, arguably shifting the risk of regulatory change to the government. This clause might even have been interpretable as an unmistakably clear second promise not to change the law, satisfying even the Chief Justice's rigorous standards. On the other hand, the CZMA might have been a public and general act, so that even if the unmistakability doctrine did not relieve the government from liability, the sovereign acts doctrine might have. In any event, future courts undoubtedly would have benefited from a more detailed analysis of these issues by the Third Circuit.

opinion.[260] This might explain why there are so few disavowals or citations for result only.

4. The Persuasive Opinion Methods

a. The Full Precedential Weight Method

In *Kimberly*, the court adopted the reasoning of the *Winstar* plurality without commenting on any of the other opinions.[261] In fact, even though the court in *Kimberly* cited *Winstar* three times, the *Kimberly* opinion only noted in reference to the third cite that *Winstar* was a plurality, suggesting that the district court in Kimberly simply adopted plurality opinion from Winstar as if it was a clear-majority decision. As such, *Kimberly* seems to be an example of the full precedential weight method—the lower court adopts the plurality opinion as binding in the same way a majority opinion would be binding. While much is to be said for the judicial economy afforded by this method, the full precedential weight method neglects the complex precedential texture of plurality decisions. Even though plurality opinions should not be dismissed as merely persuasive, they should not automatically be adopted as binding precedent either. To do so renders meaningless the fact that the Justices themselves thought the issues were too important to compromise by joining a majority opinion, thereby endorsing an interpretation of the law with which they disagree.

b. The Persuasive Effect Method

No cases were found that cited as controlling Justice Scalia's, Justice Breyer's, or the Chief Justice's opinions from *Winstar* without reference to the plurality. While the Third Circuit in *Tamarind* explicitly cited Justice Scalia's concurrence for a controlling statement of the law, the discussion of *Tamarind* above[262] indicates that the Third Circuit did not really adopt the *Winstar* concurrence's reasoning. A true application of the persuasive effect method would require the adoption of either the concurrence's or dissent's reasoning and judgment as fully binding.

The rarity of these cases is perhaps to be expected for much the same reason that the disavowal methods are rarely used. It would be odd for a

260. *See supra* note 40.
261. Kimberly Assocs. v. United States, 261 F.3d 864, 869 (9th Cir. 2000).
262. *See supra* notes 201–20.

court to adopt an opinion that was neither a majority nor a plurality without some basis besides the opinion's persuasive appeal.

B. Some Responses to the Academic Criticisms of Plurality Decisions

Critics argue that plurality decisions are complex, costing courts many hours in analyzing the opinions.[263] But not every application of a plurality decision raises the need for such lengthy devotion of resources by the lower court. In fact, there is only difficulty in applying a plurality if the lower court feels that the plurality and any concurring opinions would come to different conclusions over the facts before the lower court.[264] Otherwise, the court can use the simple reconciliation method, apply both opinions, and feel confident that the Supreme Court would have come to the same conclusion.[265]

On the other hand, the complexity of plurality opinions often reflects the underlying complexity of the normative, ethical, or moral issues involved.[266] This claim is distinct from the claim that the Supreme Court discovers rather than makes law. The Supreme Court makes law with every judgment it hands down.[267] However, the law-making process can be seen as an institutional response to the discovery and resolution of normative, ethical, or moral problems. In the case of plurality opinions, there is a disconnect between the need to address these issues and the institutional process designed to address them. This disconnect does not necessarily render the Supreme Court a lesser institution for not being able to immediately and satisfactorily resolve these thorny normative problems.

---

263. *See supra* note 3. Critics of plurality opinions might point out that beyond the superficial factual and legal complexity often found in plurality opinions, the uncertain precedential weight inherent in plurality decisions further frustrates lower courts in attempting to apply pluralities. Admittedly, with each application of a plurality decision, a second tier of analysis might need to be engaged. We must not only ask how factually analogous the cases are to determine whether the plurality is applicable, but we must also ask to what degree the plurality serves as binding authority.

264. *See* United States v. Westlands Water Dist., 134 F. Supp. 2d 1111, 1151 (E.D. Cal. 2001).

265. If the personnel on the Court has changed since the plurality, some might argue that this analysis should take into account how the current Court, as opposed to the Court that handed down the plurality, would resolve these issues. But this analysis could also be used in predicting the persuasive force of clear-majority decisions, and it seems similarly inappropriate in both instances. While litigants may want to take such changes into account in deciding whether to settle or what arguments to pursue, for courts, at least, respect for stare decisis would require an earlier precedent to be obeyed regardless of current changes to the higher court's personnel. If the higher court wants to change the precedent, it can do so on appeal from the lower court.

266. Novak, *supra* note 1 *passim*.

267. *See* Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 557 (2006) (discussing the difference between judicial discovery and manufacture of law).

Some argue that plurality opinions represent an abdication of the Supreme Court's duty to make law. But the Court is still resolving disputes, and some commentators have argued that the primary function of the Court is to resolve disputes.[268] While I do not seek to diminish the importance of the Supreme Court's law-making function, it seems strange to impose an affirmative normative duty on a lawmaker to make law in every case. Even if there is a positive norm associated with making law, or with preventing inefficiency by crafting broadly applicable legal rules, there should not be a corresponding negative norm for the Supreme Court's "failure" to do so.[269] Concerns of efficiency and fairness certainly place an affirmative moral duty on the Supreme Court to issue binding decisions as often as possible. However, concerns that the Supreme Court may hand down a bad ruling—or a ruling that does not fully address all of the issues presented in a case—suggest that the Court does not have an affirmative moral duty to issue a binding decision in every case.

Moreover, the Court is not exactly failing to make law when it hands down a plurality. Lower courts still internalize plurality opinions and attempt to apply them, even if they apply them differently than clear-majority opinions.[270] If judges follow and apply plurality opinions, it might reflect an intuition on the part of judges that they have a normative duty to do so. Since a central identifying feature of law is application by courts to resolve disputes, pluralities are, in some sense, law.[271] If judges are giving plurality opinions more than just persuasive weight, perhaps the

268. *See* West, *supra* note 14, at 1955 ("[T]he principal job of the Supreme Court is to decide cases by making judgments. Coming in a strong second is the duty to issue opinions, which 'are simply explanations of those judgments or those votes on judgments.'"); *see also* Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 WM. & MARY L. REV. 643, 661 (2002) ("The fundamental job of a court is to decide cases by issuing judgments; the fundamental job of a judge on a multimember court is to vote on the judgment to be entered by that court. Opinions are simply explanations of those judgments or those votes on judgments."); Novak, *supra* note 1, at 757 ("The Supreme Court performs two essential functions: it resolves the particular controversies that come before it and provides guidance for lower courts in deciding similar cases in the future. . . . [Both] are better served when the Court sets out a clear and persuasive rationale assented to by a majority of Justices.").

269. If Congress considered fifty proposed bills and passed only forty-nine of them, has Congress abdicated its lawmaking authority? Not in a sense that renders it a normatively lesser institution. In fact, if Congress passed *every* proposed bill, or enacted law covering *every* area of its authority under the Constitution, it would almost certainly be a lesser institution.

270. Some have argued that there are no external constraints on judges to apply any precedent at all. *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994). Courts and judges are not punished for not applying precedent, so the source of obedience to precedent is internal—self-imposed by judges on themselves. *Id.*

271. *See supra* note 24.

legal community as a whole should recognize that plurality opinions have an important and even valuable role to play in the law.

Critics might argue that even if we acknowledge a consensus view in lower courts that plurality opinions have some weight, we still dodge the real question of *why* we want these opinions to have precedential weight. Once the Supreme Court has invested substantial judicial resources addressing the divisive issues in case, even if the Court only resolves the dispute with a plurality decision, it would be a waste of those resources to disavow or disregard the reasoning and insight in the Court's opinions. Granting pluralities some measure of precedential authority will "force" lower courts to address these issues more completely. The additional resource investment by the lower courts can help move towards a satisfying resolution of the law's response to these complex issues. Professors Kornhauser and Sager have suggested that lower court analysis in applying the plurality might be useful to the Supreme Court when it faces the same issue again.[272]

Critics also argue that plurality opinions obstruct the predictive function of the law, rendering it more difficult for private parties to shape their behavior in order to avoid legal liability or to reach settlement agreements to avoid costly litigation.[273] While it would seem easy to dismiss this criticism on the grounds that there are no crystal balls in law, lawyers do serve an important role in advising clients about how they should do business and about the potential results of choices in litigation. Because pluralities, by nature, are more complex than simple majorities, it may inevitably be more difficult to predict how a court will apply a plurality decision. On the other hand, the functional difference between applying a plurality opinion and applying ordinary binding court decisions need not be so great.[274] In both instances, the court can simply identify both the plurality's and main concurrence's views of the controlling law, and then apply both by analogy to the new situation. Lawyers are just as capable as judges of engaging in this analysis, and can advise their clients accordingly. Furthermore, if the policy space method and the simple

---

272. Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 45 (1993):

> Given the doctrinal disarray that leads to plurality opinions of the sort we have been considering, the participatory approach seems superior. In the face of such disarray, predictions about future doctrinal equilibria are dicey at best, and in the face of such disarray, lower court judgment, experience, and argument are especially useful to the high court.

273. *See supra* note 7.

274. In fact, prior to Chief Justice Marshall's reforms doing away with *seriatim* opinions, this was the dominant method of legal analysis.

reconciliation method garner more widespread acceptance, these predictive concerns might be even more assuaged.

Finally, one critic of plurality opinions has argued that pluralities are symptoms of substantive reasoning instead of process-based reasoning, and as such are examples of arbitrary, pathological decision making.[275] To the extent that so-called substantive reasoning is based on reasons and justifications linked to real-world concerns and factual distinctions, it seems odd to characterize either plurality opinions, or any other symptom of substantive reasoning, as "arbitrary." It is especially unclear why substantive reasoning would be more arbitrary than process-based reasoning. As long as the reasons for the decision—both substantive and procedural—exist and are announced so as to be subject to public debate, it seems contradictory to characterize these reasons as arbitrary.

III. PROPOSAL: THE NEW METHODS

A. The Simple Reconciliation Method

The Eastern District of California in *Westlands* applied the unmistakability tests articulated by the plurality and Justice Scalia.[276] The court noted that even though the tests were different, they both rendered the same result under the facts of *Westlands*.[277] The court in *Westlands* found that Justice Scalia and Justice Souter would have come to the same result as they had in *Winstar*—that the government was liable for breach. As such, the court found the government liable.[278]

If the Supreme Court would have split the same way under the facts of the new case as in the earlier plurality decision, the lower court can simply apply the reasoning from the plurality and the lead concurrence, and reach the same judgment as the Supreme Court reached in the plurality. Going through the process of applying each opinion still sheds light on the ethical and normative issues that split the Court in the first place. Moreover, even many of the harshest critics of plurality opinions agree that the results of plurality decisions are binding, and this method respects the binding force of the results of no-clear-majority decisions.

---

275. Harvard Note, *supra* note 1, at 1128 ("[P]lurality decisions [are] symptomatic of a fundamental flaw in the Supreme Court's current approach to decisionmaking, which relies excessively on value-laden 'substantive reasoning.'"); *see also id.* at 1140–46.

276. United States v. Westlands Water Dist., 134 F. Supp. 2d 1111, 1151 (E.D. Cal. 2001).

277. *Id.*

278. *Id.*

Unlike the dual majority method, this method does not apply the reasoning of the dissent, assuming that some difference in the dissent's understanding of the law motivated the dissenting Justices to argue for a different resolution. Unlike the narrowest grounds method, this method does not seek out one controlling opinion or one set of controlling propositions from the concurring opinions. It simply finds that these opinions would not produce different results under the facts of the new case, and then it reaches that result.

However, there are at least two instances where it would be inappropriate to apply the reconciliation method. First, if the plurality and concurring opinions would produce different results, a more thorough analysis should be undertaken to explain why the different opinions would reach different results. Second, if the plurality and concurrence would reach the same result, but it is a different result than in the original plurality decision, further analysis is again called for.[279]

B. The Policy Space Method

If the simple reconciliation method fails to resolve the dispute, as when the plurality and lead concurrence would reach different results from each other in the new case, courts can apply the policy space method. To apply the policy space method, the court thoroughly deduces all the tests and factors employed by the plurality opinion and lead concurrence, just as it would using the simple reconciliation method. The results of this analysis should reveal a "policy space," a theoretical range between the plurality and lead concurrence. The court must compare the facts of the new case to the facts of the plurality opinion, and it must then determine whether the reasoning from the plurality (suggesting one result) or the reasoning from the concurrence (suggesting a different result) is more applicable to the new facts.

In comparing the facts of the new case to the facts that lead to the plurality decision, the lower court might find significant differences suggesting that one result or the other should be reached. If the applying court explains this process in detail, the court will not only resolve the dispute before it, but it will also provide guidance to other courts

279. How much further analysis is necessary depends on which of these two instances is implicated. If the plurality and lead concurrence reach different outcomes from each other in the new case, the court should apply the greater analysis of the policy space method. If, on the other hand, the plurality and concurrence seem to agree in the new case, but reach a different outcome from the earlier case, the court should explain why, but need not undertake the policy space method.

struggling with the plurality decision. Provided that the court explicitly states how and why it reached its conclusion, the policy space method should generally increase the coherence of the law and provide guidance to other courts confronting similar issues. If the Supreme Court revisits the issue, it will also be framed more clearly and perhaps can be definitely resolved. On the other hand, if courts ignore this level of analysis, the issues that prevented the Supreme Court from writing a majority opinion may remain confused.[280] Fully engaging the plurality opinion should clarify the underlying issues and how the law should respond.[281]

For example, a court applying the policy space method to *Winstar*'s treatment of the unmistakability doctrine might organize the leading opinions in order of lowest to highest standard that the plaintiff-contractor suing the government would have to overcome.[282] The lower court should first ask whether the agreement was risk-shifting and whether it contained an unmistakably clear second promise to shift the risk of regulatory change onto the government. Justice Souter would not apply the unmistakability doctrine if the contracts were risk-shifting, and he would not require an unmistakably clear second promise if the doctrine applied.[283] Justice Scalia would apply the doctrine, even if the government did not explicitly promise not to change the law, so long as the "sole

280. *See supra* note 259.

281. *See* Kornhauser & Sager, *supra* note 272. Others have argued that "it seems more profitable to regard [plurality] decisions as admissions of uncertainty and, in a sense, a call for help to the lower courts." Novak, *supra* note 1, at 781 ("The insight and experience of lower court judges, and the opportunity to gain more information through feedback from the bench, bar, and general public, may be invaluable resources for the Supreme Court to draw upon . . . .").

Take for example case *xyz* before the Supreme Court. The Court issues a plurality opinion holding *h* for reasons *p* (plurality) and *c* (concurrence) but not *d* (dissent). Later, when a lower court considers situation *wxy*, it might also reach conclusion *h*. The court might find *p* particularly relevant, as well as a new consideration, *n*, that has some relationship to fact *w*. Moreover, the court might also find a good reason why *p* should not apply to *w* situations. Thus the lower court has held that part of the crucial difference between *w* & *z* is the applicability of reasons *p*, *d* & *n*. Even though other courts might disagree with this lower court's assessment, its analysis nevertheless helps clarify the normative and legal dimensions of concepts *w*, *z*, *p*, *d* and *n*. When the Supreme Court again takes up an *xy* situation, it will be able to look to the lower court's analysis to get a better idea about what other factors to consider.

One might ask how this is different from a clear-majority decision. To a certain extent, pluralities can serve the same dialectical function as majority decisions.

282. Professor Schwartz has also proposed syntheses of the different opinions in his two articles on *Winstar*. *See* Schwartz, *Ideal of Congruence*, *supra* note 48, at 552–65; Schwartz, *Interim Report*, *supra* note 48, at 1193–97. While the goal of the simple reconciliation and policy space method are not to synthesize but to reconcile the opinions from a plurality decision, or at least to find the points at which the opinions are irreconcilable, these detailed explanations of plurality opinions can be helpful to lower courts in working through complex pluralities.

283. *See supra* notes 71–102 and accompanying text.

essence" of the agreement was to indemnify the thrifts in the event of regulatory change.[284]

If the contract shifted the risk of regulatory change to the government and contained an unmistakably clear promise to pay damages in the event of regulatory change, the lower court should certainly rule in favor of the contractor. If the contracts do not implicitly or explicitly shift the risk to the government, or shift the risk to the contractor, then the lower court should rule in favor of the government. But if the contracts shifted the risk to the government, but the sole essence of the contracts was not to indemnify against the risk of regulatory change, this places the lower court in between the risk-shifting lower bounds and Justice Scalia's sole-essence upper bounds. The lower court would then have to decide whether the facts of the new case implicated more directly the risk shifting concern of the plurality or the sole essence concerns of the concurrence. The court might consider, for example, how likely the party would have been to enter into the agreement with the government without the promise of indemnification.

Critics might argue that this method requires too much independent decision making by the lower court, as the question how to rule on facts between the upper and lower bounds will be left, at least before any appeals, to the lower court's discretion. However, courts frequently engage in subjective decision making about the law and about how it should apply to facts. If the court feels that some analysis should not apply because it does not seem to fit, its ruling still helps flesh out the normative and ethical differences that should make a difference in similar cases, as long as the court explains the poor fit between fact and legal concept.

The policy space method can also retain a certain amount of predictive power. Admittedly, lower courts' reactions to facts between the upper and lower bounds will be somewhat unpredictable. But since courts and potential litigants draw on similar ethical and normative foundations, potential litigants and their lawyers might be able to guess whether certain facts will prove dispositive to a court between the upper and lower bounds. Lawyers can look at factors identified by the different opinions in the plurality, as well as factors identified by other courts interpreting the plurality, and look at the facts of the case in front of them to see where the weight of the evidence lies. The more lower courts apply the policy space method, presumably examining how other courts have interpreted the plurality decision, the better defined the internal conflicts and distinctions

284. *See supra* notes 110–23 and accompanying text.

within the plurality will become and the easier it will be for future cases to address these issues.[285]

The most important goal of the policy space method is to encourage analysis based on clearly articulated reasons. This method seeks to combine the basic fairness concern embodied in the maxim of treating like cases alike, the related predictive value of reliance on precedent, and the value of explicitly articulated reasoning derived from analysis and application of the plurality decision to new situations.[286]

CONCLUSION

Obedience to precedent ensures that like cases are treated alike and that the legal system continues to function efficiently. Plurality decisions, however, exist on the margin of the system of precedent, and are symptoms of the normative complexities in the facts before the Court, often arising in difficult cases with no easy answers. Should the Supreme Court be criticized for handing down plurality decisions? No. Supreme Court Justices should not forget their own insights or discard their own analysis to join an opinion for the sake of apparent unanimity. If a Justice disagrees with the reasoning of other Justices, that Justice should articulate

---

285. It is possible that the Court may, in some instances, intentionally issue plurality opinions. *See* Davis & Reynolds, *supra* note 1, at 86 (considering whether the Court may have "deliberately chosen" to issue plurality opinions). Perhaps the Justices decided that the binding legal rule that would result from a clear majority in a specific case might have unforeseen or undesirable results in analogous situations.

Carrying this speculation to *Winstar*, the Court may not have wanted to adopt a rule that would repeatedly saddle the government with liability in other types of contract disputes. By issuing a plurality, the Court made it less likely that lower courts would apply the anti-government precedent without questioning whether it was the right rule in a particular circumstance. Assuming for a moment that the Court really does issue plurality decisions intentionally, part of this motivation may be to resolve a particular dispute without creating an ironclad rule that will not be questioned, but instead will generate dialogue about the various reasons for adopting an opinion. This is all the more reason to use the simple reconciliation and policy space methods, as these methods are designed to generate this dialogue.

286. *See* Herbert Wechsler, *Toward Neutral Principals of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959) ("[T]he main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."); G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 285, 301 (1973) (describing "Reasoned Elaboration" as a "dialectical process" that places an affirmative normative duty on judges "to give reasons for [their] decisions . . . to allow the public to evaluate the manner in which [they were] performing [their] office"); s*ee also* In re Krynicki, 983 F.2d 74, 75 (7th Cir. 1992) (Easterbrook, J.) ("Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat . . . ."); Novak Note, *supra* note 1, at 758 n.9.

those reasons. Then, lower courts can take up and expand on these issues in light of new situations. When the Court again addresses the issue, it should have plenty of lower court analyses to review. Plurality decisions thus initiate a type of normative dialogue between the Supreme Court and the lower courts, one which can contribute to the development of the law and help the law meet the demands of a changing society,

The most compelling post-*Winstar* results have been in cases with the most thorough analysis, both detailing the similarities and differences between the new facts and those of *Winstar* and analyzing the implications of ruling in favor of either the government or the injured contractor. If the plurality is applicable, lower courts should analyze how and why each of the arguments in the plurality opinion should or should not apply. The recognition that plurality opinions are and should be more than merely persuasive opens the door for the kind of analysis that can best resolve the dispute that split the Supreme Court in the first place.

James A. Bloom[*]

---

* B.A. History and Philosophy (2003), Tulane University; J.D. Candidate (2008), Washington University School of Law. I would like to thank Pauline Kim, Margo Schlanger, and Bruce LaPierre for their insight and encouragement, as well as Eoghan Keenan, Scott Koelker, Ryan Wilkins, Lisa DeBord, Ben Warr, Bryan Pennington, and Matt Walczewski for their comments. I am especially grateful to Camille and my friends and family for their support.