

The Appellate Advocate

State Bar of Texas Appellate Section Report



Vol. 20, No. 2

Winter 2007

OFFICERS

Douglas W. Alexander, Chair
Alexander Dubose Jones & Townsend LLP
512-482-9301 Fax: 512-482-9303
dalexander@adjtlaw.com

Daryl Moore, Chair-Elect
Daryl L. Moore, P.C.
713-529-0048 Fax: 713-529-2498
daryl@heightslaw.com

Marcy Hogan Greer, Vice-Chair
Fulbright & Jaworski L.L.P.
512-474-5201 Fax: 713-536-4598
mgreer@fulbright.com

David S. Coale, Treasurer
Carrington, Coleman, Sloman
& Blumenthal, L.L.P.
214-855-3073 Fax: 214-758-3788
dcoale@ccsb.com

Scott Rothenberg, Secretary
Law Offices of Scott Rothenberg
713-667-5300 Fax: 713-667-0052
scotr35@aol.com

COUNCIL

Terms Expire 2008:

Sharon E. Callaway, San Antonio
Elaine A.G. Carlson, Houston
Jeffrey S. Levinger, Dallas

Terms Expire 2009:

Lauren Beck Harris, Houston
Ann McGowan Johnson, Dallas
Andrew Weber, Austin

Terms Expire 2010:

Keith D. Calcote, Houston
Jerry D. Bullard, Bedford
Macey Reasoner Stokes, Houston

IMMEDIATE PAST CHAIR

Robert M. (Randy) Roach, Jr.

SECOND PAST CHAIR

Warren W. Harris

BOARD ADVISOR

Randall O. Sorrels

ALTERNATE BOARD ADVISOR

Janna W. Clarke

EDITOR

D. Todd Smith, Austin

ASSOCIATE EDITORS

Dylan O. Drummond, Dallas
James C. Ho, Dallas
William C. Little, Beaumont
Ruth E. Piller, Houston
Brandy M. Wingate, McAllen

Copyright © 2008
Appellate Section, State Bar of Texas
All Rights Reserved

IN THIS ISSUE

ARTICLES

CITATION WRIT LARGE
Dylan O. Drummond..... 89

DETERMINING THE PRECEDENTIAL VALUE OF SUPREME COURT
PLURALITY DECISIONS IN THE FIFTH CIRCUIT
Heather Bailey New..... 112

JUDICIAL SPOTLIGHT

AN INTERVIEW WITH FORMER CHIEF JUSTICE REX DAVIS
Hon. William G. ("Bud") Arnot III..... 85

REGULAR FEATURES

THE CHAIR'S REPORT
Doug Alexander..... 84

UNITED STATES SUPREME COURT UPDATE
Jeffrey L. Oldham and Lee B. Kovarsky... 117

TEXAS SUPREME COURT UPDATE
Kate David and Laurie Ratliff..... 121

TEXAS COURTS OF APPEALS UPDATE—SUBSTANTIVE
Joseph W. Spence..... 134

TEXAS COURTS OF APPEALS UPDATE—PROCEDURAL
Susan Dillon Ayers and Scott Powers 138

FIFTH CIRCUIT CIVIL APPELLATE UPDATE
Robert Fugate and Chris Brisack..... 150

TEXAS CRIMINAL APPELLATE UPDATE
Alan Curry..... 160

FEDERAL WHITE COLLAR CRIME UPDATE
Sarah M. Frazier, Rachel L. Grier, and Dustin Sullivan 163

SECTION WEB SITE: www.tex-app.org

Determining the Precedential Value of Supreme Court Plurality Decisions in the Fifth Circuit

Heather Bailey New, Haynes and Boone, LLP, Dallas

Plurality decisions are those in which a majority of the Court's members agree with the judgment or result, but no single rationale carries the support of at least five of the concurring justices. As a result, a minimum of three opinions, none with the support of more than four justices, come together to form a plurality decision. The lead opinion announces the outcome decided by at least five justices and proffers one of several competing rationales. *Muir v. Ala. Educ. Television Comm'n*, 688 F.2d 1033, 1045 n.30 (5th Cir. 1982) (explaining that a plurality opinion is one that "attract[s] more concurrences than d[oes] any other opinion leading to the result"). Concurring opinions articulate different legal rules that justify the outcome announced in the lead opinion. Often, a dissenting opinion rejects the outcome of the lead and concurring opinions and articulates yet another legal standard.

Because there are so many moving parts in a plurality opinion, it is often difficult for litigants and construing courts to identify any controlling rule of law announced by the plurality. In an attempt to end this confusion, the United States Supreme Court adopted the "narrowest grounds" doctrine in *Marks v. United States*, 430 U.S. 188 (1968). In *Marks*, the Supreme Court held:

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.

430 U.S. at 193 (internal quotation omitted). Although the "narrowest grounds" test is the only model of interpretation recognized by the Supreme Court, the Court has never fully explained what it entails. One court has opined that the "narrowest grounds" are simply understood as the "less far-reaching common

ground." *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1247 (11th Cir. 2001). And commentators have opined that "[o]ne way to determine the 'narrowest grounds' is to look for the opinion 'most clearly tailored to the specific fact situation before the Court and thus applicable to the fewest cases, in contrast to an opinion that takes a more absolutist position or suggests more general rules.'" Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 420-21 (1992) (quoting Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 763 (1980)).

PSS v. NEW CENTURY: ACCORDING PRECEDENTIAL VALUE TO JUSTICE WHITE'S NARROWEST-GROUND CONCURRENCE IN COMMONWEALTH COATINGS

The Fifth Circuit has applied *Marks*' narrowest grounds doctrine in a number of cases with little discussion.²⁴³ However, in its en banc decision in

²⁴³ E.g. *U.S. v. Hernandez*, 200 Fed. Appx. 283, 286 (5th Cir. 2006) (applying Justice Kennedy's concurrence in *Missouri v. Seibert*, 542 U.S. 600 (2004)); *Staley v. Harris County*, 461 F.3d 504, 512 (5th Cir. 2006) (finding that Justice Breyer's concurrence in *Van Orden v. Perry*, 545 U.S. 677 (2005), is controlling); *N.W. Enters. Inc. v. City of Houston*, 352 F.3d 162, 182 (5th Cir. 2003) (concluding that Justice Kennedy's concurrence in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), was a vote necessary to the Court's judgment); *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288, 296 (5th Cir. 2003) (concluding that Justice O'Connor's opinion in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), is binding precedent); *J & B Entm't, Inc. v. City of Jackson, Miss.*, 152 F.3d 362, 370 (5th Cir. 1998) (finding that Justice Souter's concurrence is the narrowest opinion in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991)); *Stegmaier v. Trammell*, 597 F.2d 1027, 1033 (5th Cir. 1979)

Positive Software Solutions, Inc. v. New Century Mortgage Corp., 476 F.3d 278 (5th Cir. 2007), cert. denied, 127 S. Ct. 2943 (2007) (“PSS”), the Fifth Circuit shed some light on how it determines the precedential value of plurality opinions using the narrowest grounds analysis. PSS was an arbitration case in which the losing party sought to have the award vacated because the arbitrator failed to disclose that he and an attorney for one of the prevailing parties had been two of 34 attorneys that had represented the same client in unrelated litigation seven years earlier. The legal basis for vacating the award was the arbitrator’s alleged “evident partiality,” one of the very few statutory grounds for vacating an arbitration award. The district court vacated the award, a three-member panel affirmed the vacatur, and the en banc panel reversed. *Id.* at 280. The Fifth Circuit held that vacatur was not warranted because the prior co-counsel relationship was so trivial that it did not amount to evident partiality. *See id.* at 283.

The en banc Court relied heavily on the Supreme Court’s 1968 plurality opinion in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), the only Supreme Court case that addresses the standard for determining arbitrator bias as a ground for vacating an arbitration award. Acknowledging its difficult task of determining the precedential value of the splintered opinions in the case, the Fifth Circuit commented that “*Commonwealth Coatings*, like many plurality-plus Supreme Court decisions, is not pellucid.” *See PSS*, 476 F.3d at 281.²⁴⁴

(concluding that Justice Stewart’s narrow position in *Elrod v. Burns*, 427 U.S. 347 (1976), is the Court’s holding).

²⁴⁴ As a general rule, a simple majority decision is announced as “the Opinion of the Court” and a lead plurality opinion is introduced: “Justice X, joined by Justice Y, announced the judgment and an opinion of the Court.” *Commonwealth Coatings*, a 4-2-(3) decision, has commonly been described as a plurality opinion despite the fact that the lead opinion was announced with the terminology customarily reserved for a simple majority. *See id.* at 282 (collecting cases and noting that “[a] majority of circuit courts have concluded that Justice White’s opinion did not lend majority status to the plurality opinion”).

While six of the Supreme Court’s members agreed that the arbitration award should have been set aside because of the arbitrator’s evident partiality, no single legal rule carried the support of at least five of the Justices. Justice Black, who authored the opinion of the Court with the support of three other justices, applied the same legal standards that apply to Article III judges and imposed a requirement that “arbitrators disclose to the parties any dealings that might create an impression of possible bias.” *Commonwealth Coatings*, 393 U.S. at 149. Thus, according to Justice Black, arbitrators “not only must be unbiased but also must avoid even the appearance of bias” (the “appearance of bias standard”). *Id.* at 150.

Justice White, who was joined by Justice Marshall in his concurring opinion that supplied the fifth vote in the case, rejected Justice Black’s rationale, but did so very subtly. Justice White opened his opinion by stating that he was “glad to join [his] Brother Black’s opinion in this case,” but that he desired “to make these additional remarks.” Justice White rejected the idea that the same standard that applies to Article III judges applies to arbitrators by *redefining* what the lead opinion said. Justice White wrote: “The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges.” *Id.* at 150 (White, J. concurring).

Moreover, under Justice White’s test, arbitrators will not be automatically disqualified for failing to disclose a business relationship with the parties where the relationship is trivial or insubstantial. *Id.* at 152. Justice White practically concluded that an arbitrator “cannot be expected to provide the parties with his complete and unexpurgated business biography.” *Id.* at 151. This also differed from Justice Black’s lead opinion, which found it irrelevant that the arbitrator received only trivial amounts of money from his business relationship. *See id.* at 148 (citing *Tumey v. Ohio*, 273 U.S. 510 (1927)).

In *PSS*, the Fifth Circuit joined a majority of circuits and rejected Justice Black’s “appearance-of-bias standard.” *PSS*, 476 F.3d at 282. Citing *Marks*, the Fifth Circuit concluded that “Justice White’s concurrence, pivotal to the judgment, is based on a narrower ground than Justice Black’s opinion, and it becomes the Court’s effective *ratio decidendi*.” *Id.* (citing *Marks*, 430 U.S. at 193-94).

In its effort to determine which of the two opinions articulated the less far-reaching common ground, the Court acknowledged that there were two possible readings of *Commonwealth Coatings*. First, if the Court focused primarily on Justice White’s statement that he was “glad to join” the plurality, his opinion could be deemed reconcilable with that of Justice Black. Only under that view would the plurality opinion have binding effect.

However, noting that Justice White’s joinder was significantly qualified, the Court found a second reading more persuasive. Under that view, the Court focused on Justice Black’s employment of an egregious set of facts as the vehicle to require broad disclosure of “any dealings that might create an impression of possible bias,” whereas Justice White hewed closely to the facts and found it “enough for present purposes to hold” that an arbitrator must disclose his relationship when he has “a substantial interest in a firm which has done more than trivial business with a party.” *Id.* (citing *Commonwealth Coatings*, 393 U.S. at 149, 151-52). Read that way, the Court was able to accord scope to the full White opinion as opposed to his introductory “glad to join” sentence.

Thus, because Justice White’s concurrence was based on a narrower ground than Justice Black’s opinion, the Fifth Circuit found that the concurrence controlled and concluded that “in nondisclosure cases, an award may not be vacated because of a trivial or insubstantial prior relationship between the arbitrator and the parties to the proceedings.” *Id.* at 283. The Court reversed the district court’s vacatur of the arbitration award and remanded the case to the

district court for consideration of additional grounds that had not been decided.

Five judges strongly dissented from the en banc opinion, taking the position that the Court had effectively “overruled” the Supreme Court’s decision in *Commonwealth Coatings*. Characterizing Justice Black’s opinion as the majority and arguing that it was reconcilable with Justice White’s concurrence, the dissent concluded that Justice Black’s appearance-of-bias standard was controlling precedent. *Id.* at 286-87 (Reavley, J., dissenting).

Like the dissent in *PSS*, the Texas Supreme Court has followed the broader reading of *Commonwealth Coatings* as articulated by Justice Black. See *Burlington N. R.R. Co. v. TUCO, Inc.*, 960 S.W.2d 629, 633 (Tex. 1997) (rejecting narrow standards adopted by federal courts that treat Justice Black’s opinion as a mere plurality).

WHEN THE SWING VOTE CONTROLS

Often a concurring opinion will be given precedential effect when a four-member coalition seeks to obtain a fifth, or “swing” vote. When the concurring Justice is necessary to effect a majority, a simple concurrence often represents a concession, in the absence of which the case would be decided differently. See Igor Kirman, *Standing Apart to Be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083, 2097 (Dec. 1995).

The Fifth Circuit has embraced this view, explaining: “While there is some awkwardness in attributing precedential value to an opinion of one Supreme Court justice to which no other justice adhered, it is the usual practice when that is the determinative opinion.” *J&B Entm’t, Inc. v. City of Jackson, Miss.*, 152 F.3d 362, 370 (5th Cir. 1998); see also *ANR Coal Co., Inc. v. Cogentrix*, 173 F.3d 493, 498 (4th Cir. 1999); *N.W. Enters. Inc. v. City of Houston*, 352 F.3d 162 (5th Cir. 2003) (applying the narrowest grounds analysis to *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) and concluding that the rationale contained in Justice Kennedy’s concurrence was

critical because he supplied the deciding vote necessary to the Court’s judgment); *Muir*, 688 F.2d at 1045 (finding that Justice White’s concurring opinion supplied the fifth vote and constituted the narrowest grounds for the judgment in *Board of Educ. v. Pico*, 457 U.S. 853 (1982)). Indeed, this precise scenario was present in *Commonwealth Coatings*. See *ANR*, 173 F.3d at 498 (listing cases and noting that “[b]ecause the vote of either Justice White or Justice Marshall was necessary to create a majority, courts have given this concurrence particular weight).

WHEN NO COMMON DENOMINATOR EXISTS

There are some instances in which the narrowest grounds analysis will not apply. According to the Fifth Circuit, “[t]he *Marks* ‘narrowest grounds’ interpretation of plurality decisions comprehends a least common denominator upon which all of the justices of the majority can agree.” See *United States v. Eckford*, 910 F.2d 216, 219 (5th Cir. 1990); see also *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006) (“*Marks* is workable—one opinion can be meaningfully regarded as ‘narrower’ than another—only when one opinion is a logical subset of other, broader opinions.”); *Martinez v. State*, 204 S.W.3d 914, 918-20 (Tex. App.—Corpus Christi 2006, pet. granted) (holding that “[w]hen the plurality and concurring opinions take distinct approaches, and there is no narrowest opinion representing the common denominator of the Court’s reasoning, *Marks* becomes problematic,” and that “*Marks* does not apply when the various opinions supporting the Court’s decision are mutually exclusive”).²⁴⁵

²⁴⁵ In *Martinez v. State*, the Corpus Christi Court of Appeals disagreed with the Fifth Circuit’s determination that Justice Kennedy’s concurrence was the holding in *Seibert*, surmising that the Fifth Circuit could find an internal rule coursing through the plurality and Justice Kennedy’s concurrence that it could not. See 204 S.W.3d 914, 918-20 (Tex. App.—Corpus Christi 2006, pet. granted) (citing *United States v. Courtney*, 463 F.3d 333, 338 (5th Cir. 2006); *United States v. Hernandez*, 200 Fed. Appx. 283, 286 n.1 (5th Cir. 2006) (per curiam)).

Indeed, the Supreme Court itself has observed that “[t]his test is more easily stated than applied,” adding, “[w]e think it not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it.” See *Nichols v. United States*, 511 U.S. 738, 745-46 (1994).

For example, *United States v. Eckford* involved the collateral use of uncounseled misdemeanor convictions at sentencing, which had been addressed by the plurality in *Baldasar v. Illinois*, 446 U.S. 222, 230 (1980) (Blackmun, J., concurring). The Court held that, in the absence of an underlying platform of common agreement among the majority justices in *Baldasar*, it was precluded from engaging in a fresh examination of the official position of the Supreme Court. *Eckford*, 910 F.2d at 219. Concluding that *Baldasar* did not provide persuasive influence, the Fifth Circuit relied on its own precedent in holding that uncounseled misdemeanor convictions could be considered in imposing the sentence under the facts involved. *Id.* at 220.

The Fifth Circuit similarly refused to consider the rationale adopted by Justice Powell in *Regents of the University of California v. Bakke*, 438 U.S. 265, 363 (1987), when he wrote in his concurrence that student-body diversity is a legitimate justification for a race-based admission criterion at the University of Texas law school. See *Hopwood v. State of Texas*, 236 F.3d 256, 275 n.66 (5th Cir. 2000) (citing *Bakke*). The Court explained that although *Bakke* stands for the proposition that the government can use racial preferences under some circumstances, no controlling rationale emerged from that decision to delineate precisely what those justifying circumstances are. *Id.* at 275. Therefore, in deciding whether the system of racial preferences employed by the University of Texas was constitutional, the court was free to determine which among the competing rationales offered by the Justices in *Bakke* was constitutionally valid. *Id.*

In so holding, the Court expressly disagreed with the Ninth Circuit’s holding that Justice Powell’s

diversity rationale was binding Supreme Court precedent because it provided “the narrowest footing upon which a race-conscious decision-making process could stand.” *Id.* at 275 n.66 (citing *Smith v. Univ. of Washington*, 233 F.3d 1188, 1199-1200 (9th Cir. 2000)). The Fifth Circuit took issue with the Ninth Circuit’s decision to adopt Justice Powell’s rationale as binding because (1) no justice other than Justice Powell even discussed diversity; and (2) despite the fact that no other Justice joined that part of Justice Powell’s concurrence, the Ninth Circuit hypothesized that Justice Brennan and three other justices “would have embraced [the diversity rationale] if need be.” *Id.* (citing *Smith*, 233 F.3d at 1199-1200). As the Fifth Circuit explained, “we do not read *Marks* as an invitation from the Supreme Court to read its fragmented opinions like tea leaves, attempting to divine what the Justices ‘would have’ held.” *Id.*

Federal district courts in Texas have also struggled with the practical limitations of *Marks*. In a recent decision involving the interpretation of “navigable waters” under the Clean Water Act, the Northern District of Texas refused to follow any of the Justices’ legal reasoning from the Supreme Court’s plurality decision in *Rapanos v. United States*, 126 S. Ct. 2208 (2006). *See United States v. Chevron*, 437 F. Supp. 2d 605, (N.D. Tex. 2006) (citing *Rapanos*). Because *Rapanos* did not provide a clear legal standard and because Justice Kennedy failed to elaborate on the meaning behind the standard he employed, the Northern District concluded that it would look to prior reasoning within the Fifth Circuit and accept Chief Justice Roberts’ invitation to “‘feel [its] way on a case-by-case basis.’” *Id.* at 613 (citing *Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring)).

The Supreme Court recently passed on an opportunity to clarify how plurality opinions should be interpreted when *Marks* does not easily apply, as was the case with the *Rapanos* plurality. *See United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), cert. denied, 128 S. Ct. 375 (combining a dissent with a concurrence to find the ground of decision embraced by the majority

of the Justices in *Rapanos*). Considering the Supreme Court’s denial of review in *Johnson*, litigants and courts will likely continue to have to feel their way on a case-by-case basis when *Marks* proves unworkable.