COMMENTS

SUPREME COURT NO-CLEAR-MAJORITY DECISIONS
A STUDY IN STARE DECISIS

One of the basic postulates of the American case-law system is that the decision of a majority determines the result and establishes a precedent for use in subsequent adjudications. In the Supreme Court, an "opinion of the Court" is written expressing the reasoning agreed upon by the majority. The result plus the reasoning found in the "opinion of the Court" determine the precedent value of any particular case. In some cases, however, the majority will agree only upon the result and not upon the supporting reasoning. Such no-clear-majority decisions are to be distinguished from cases decided by an equally-divided Court, where there is lack of majority agreement on the reasons for the decision and also on the disposition of the case.

A review of Supreme Court decisions indicates that since 1900 the Court has decided thirty-five cases which may be described as no-clear-majority decisions.

1 In the Supreme Court, the decision of a majority of the justices sitting determines the result. For a discussion of the problem of decision by less than a majority of the full Court consult Andrews, Decisions by Minority Court, 18 Fla. L. J. 238 (1944). This comment will consider only those cases where there is, in effect, decision by less than a majority of those justices sitting.

2 "Under the precedents of this court . . . an affirmance by an equally divided court is as between the parties a conclusive determination and adjudication of the matter adjudged, but the principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts." Hertz v. Woodman, 218 U.S. 205, 213 (1910). Consult also Durant v. Essex, 7 Wall. (U.S.) 107 (1868); Hartman v. Greenhow, 102 U.S. 672 (1880); United States v. Pink, 315 U.S. 203 (1942).

3 A few no-clear-majority cases did involve some disagreement by the members of the Court as to the disposition of the case. Nevertheless, the justices managed to reach some agreement as to disposition although they failed to reach agreement as to their supporting reasoning. E.g., Maryland Casualty Co. v. Cushing, 347 U.S. 409 (1954).

4 Prior to 1800 the Court rendered seriatim opinions. Since the Court adopted the system of rendering an "opinion of the Court," a grand total of forty-five no-clear-majority decisions has been rendered. The no-clear-majority decisions prior to 1900 will not be considered here. Also not included are several additional cases in which, though less than a majority of the Court specifically joined in one opinion, the separate opinions contain substantial agreement as to rationale. E.g., Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U.S. 437 (1955); Dennis v. United States, 341 U.S. 494 (1951). For other interesting types omitted here, consult Irvine v. California, 347 U.S. 128 (1954) (where one of the five majority justices would if possible overrule a decision which he joins the other four in following to reach the result); Allen v. Regents, 304 U.S. 439 (1938) (where there is five-justice agreement on the merits including two justices who would have denied jurisdiction, but have not done so because a clear majority—the other three and two dissenters—find jurisdiction to exist).
Three-fourths of these have been handed down since 1938. While the factors which have caused the increase in such decisions have been discussed, and their potential effect on our system of judicial precedent has been considered, the actual use made of no-clear-majority decisions as precedent has not been examined.

The Supreme Court has never discussed the precedent value of its no-clear-majority decisions, although members of the Court have often indicated that such cases lack authority. The textbooks on judicial precedent indicate that theoretically the no-clear-majority decision stands only for its general result.

It is actually becoming unusual for all the Justices to join in the so-called 'opinion of the court.' It happens not infrequently that votes of the Justices are divided three or more differently, so that there is no clear majority in favor of any single ground of decision. Ballantine, The Supreme Court: Principles and Personalities, 31 A.B.A.J. 113 (1945).

Consult McWhinney, Judicial Concurrences and Dissents, 31 Can. B. Rev. 595, 614-17 (1953), where the author suggests several reasons for the growth of multiple opinions in the Supreme Court including the Court revolution of 1937 and the overthrow of the laissez-faire Constitution, no polar issue for the new appointees to revolve around, personal differences among the individual judges and the presence on the Court of unusually independent thinkers. Also consult Palmer, Present Dissents, Causes of the Justices' Disagreements, 35 A.B.A.J. 189 (1949), giving twenty-six reasons for the growth of multiple decisions.

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Consult McWhinney, op. cit. supra note 6, at 614: "Critics of the practice of the United States Supreme Court in opinion-writing since 1937 point to a diminution in the value of the judicial precedent as a guide to future decisions, and a consequent increase in the problems of the business man and of the lawyer who must advise him." Also consult Ballantine, op. cit. supra note 5, at 167; Palmer, op. cit. supra note 6, at 189.

See Alaska v. Troy, 258 U.S. 101, 111 (1922). The headnotes in no-clear-majority cases all follow a fixed pattern—a statement of the facts followed by the procedural disposition of the case. This is to be contrasted with the usual practice of including in headnotes to Supreme Court cases various rules of law gleaned from the case. The Reporter of Decisions attaches no special significance to the format of the headnotes. "As stated by the Court on several occasions, the preparation of the syllabi is the sole responsibility of the Reporter and the syllabi do not speak for the Court. Our practice with respect to [no-clear-majority decisions] is not absolutely uniform. For each decision we prepare the kind of syllabus which we consider most appropriate for that particular decision. Therefore, the value of any particular decision as a precedent should be weighed in accordance with the usual standards and should not be judged by the type of syllabus which we prepare. Such standards are very well stated in Wambaugh, The Study of Cases (2d Ed., 1894)." Letter of William Wyatt, Reporter of Decisions, dated November 15, 1955.


"Even when all the judges occur [sic] in the result, the value of the case as an authority may be diminished and almost wholly destroyed by the fact that the reasons given by the several judges differ materially. There must be a concurrence of a majority of the judges upon the principles, rules of law, announced in the case, before they can be considered settled by a decision. If the court is equally divided or less than a majority concur in a rule, no one will claim that it has the force of the authority of the court." Wambaugh, op. cit. supra note 8, at 50; "If all or a majority of the judges concur in the result... but differ as to the reasons which lead them to this conclusion, the case is not an authority except upon the general result." Black, Handbook of Judicial Precedent 135-36 (1912).

"The practice of this court is, not (except in cases of absolute necessity) to deliver any judgment involved, unless four judges concur in opinion, thus making the decision that of a majority of the court." Marshall, C.J., in New York v. Miln, 8 Pet. (U.S.) 118, 121 (1834). Also
It is the purpose of this comment to ascertain the actual use made of no-clear-majority decisions as precedent—whether or not it is in accord with the theory put forth in the texts. All the cases which have cited the principal no-clear-majority decisions have been examined.¹¹

The thirty-five principal no-clear-majority decisions have been classified into three groups: the "coordinate opinion," "dual majority" and "relative disparity" cases. This classification was dictated by the presence, in decisions which were utilized in the same general manner by later courts, of certain common elements. It is believed that these common elements furnish a significant basis by which the pattern of later citations may be understood and perhaps explained. This pattern may take several forms: citation for general result;¹² for particular reasoning;¹³ or for lack of authority.¹⁴

# Coordinate Opinion

Seven no-clear-majority decisions have been cited primarily for their general result. Each of these cases contains more than one majority concurring opinion. Furthermore, the concurring opinions, although in disagreement as to the rule of law applicable, are of approximately equal strength.¹⁵ This group of cases will be termed the "coordinate opinion" type, and may be divided into two sub-groups, depending on the numerical alignment of the majority.

consult Dubuque v. Illinois Central R. Co., 39 Iowa 56 (1874); Mapes v. Burns, 72 Mo. App. 411 (1897); State ex rel. People's Bank of Greenville v. Goodwin, 81 S.C. 419, 62 S.E. 1100 (1908). The Supreme Court of Georgia has intimated that, in order for a case to have precedent value, the rationale of the decision must have had the concurrence of the entire court. Walton v. Benton, 191 Ga. 548, 13 S.E.2d 185 (1941).

¹¹ The method followed in making this study has been to locate the no-clear-majority decisions, "shepardize" them, and see how they are used as precedent. This type of empirical approach seems unique in the field of stare decisis. One of the limitations that should be noted with respect to this study is that not all citing cases were read in their entirety. They were examined only to the extent necessary to determine the use made of the cited no-clear-majority decision.

¹² General result is used to indicate a citation which limits the precedent value of the cited case to its particular facts. Thus, it does not include citations which give weight to particular reasoning or rationale.

¹³ By definition, a court citing particular reasoning found in a no-clear-majority decision is citing a view not agreed to by a majority of the justices sitting in the cited case.

¹⁴ In general, courts which cite a no-clear-majority decision as lacking authority do so on the ground that it is a no-clear-majority decision. However, this is not always true. A citing court may recognize the lack of a clear majority and nonetheless give the no-clear-majority decision weight for particular reasoning or for the general result therein.

¹⁵ It is difficult to define "strength" in a precise manner. For the most part, an opinion is strong if it lays down a clear rule of law which is general in its application. However, an opinion which is limited, particular or technical may sometimes be strong simply because it is so confined (although this rarely is the case). Other considerations such as the nature of the prior law, the judicial needs of the citing judges and the prestige of the justice writing the opinion may also be important. However, as used herein, "strength" does not depend on the number of justices supporting a particular opinion.
In the first subgroup, there is no plurality or minority opinion. Rather, the prevailing justices have split into two opinions, each containing equal numerical support. Citation for general result may thus be expected, since two conflicting opinions of equal strength, each of which is supported by an equal number of justices, leave later courts with little basis for choosing between them. Three cases fall into this first subgroup: *Newark Fire Insurance Co. v. State Board of Tax Appeals*,\(^7\) *United States v. John J. Felin & Co.*,\(^8\) and *Hague v. C.I.O.*\(^9\)

In *Newark*, the Court agreed 8-(1)\(^{10}\) on the result but split 4-4-(1) as to the reasoning. In issue was a tax imposed upon the capital stock and surplus of a New Jersey corporation by the state of New Jersey. The corporation claimed that this was a violation of due process under the 14th Amendment on the grounds that the business situs of the corporation's intangibles, and its tax domicile, were in New York. Justices Reed,\(^{11}\) Hughes, Butler and Roberts concurred, stating that the facts were insufficient to establish that the corporation's intangibles had a business situs in New York and to overcome the presumption of a taxable situs in the domiciliary state of New Jersey. Justices Frankfurter, Stone, Black and Douglas agreed with the result of the Reed opinion, but stated that the situs of the intangibles was not decisive in disposing of the case. Rather, this was simply a constitutional exertion of the taxing power of the state which created the corporation here involved. Mr. Justice McReynolds dissented without opinion.\(^{22}\)

Few subsequent cases have used the *Newark* decision as precedent. Those which have, cite it primarily for its general result.\(^{23}\) For example, Justice Stone, joined by Justice Roberts, has stated that "the fact that the income-producing property is physically located in the [foreign jurisdiction] does not foreclose the [domiciliary] state from taxing its own corporations on the income derived from the property,"\(^{24}\) with a reference to *Newark*. These cases usually recognize the

\(^{16}\) "Plurality opinion" as used in this comment refers to the opinion on the winning side in which more justices concur than any other. "Minority opinion" refers to the opinion(s) on the winning side to which a lesser number of justices lend their names. "Dissent" is given its normal meaning.

\(^{17}\) 307 U.S. 313 (1939).

\(^{18}\) 334 U.S. 624 (1948).

\(^{19}\) 307 U.S. 496 (1939).

\(^{20}\) Parentheses will be used throughout this comment to indicate the dissenting justices. Numbers not in parentheses represent the concurring opinions.

\(^{21}\) Unless the context otherwise indicates, the first justice named in a reference to a particular opinion is the justice who wrote the opinion.

\(^{22}\) The views stated by dissenting justices, unless important for an understanding of the decision, will in general be given only brief notice.


\(^{24}\) *Superior Bath House Co. v. McCarroll*, 312 U.S. 176, 181–82 (1941).
lack of a clear majority. The rest give Newark little weight or cite the Frankfurter opinion. Newark has been declared to be an “interesting discussion” but “not clear” and, at best, “the decision [of the lower court was] not overruled.”

Upon initial inspection, the Felin and Hague cases appear to present different problems. Felin is a 3-3-1-(2) decision; Hague is a 2-2-1-(1-1) decision. The first two opinions in each are equal in numerical support and are of approximately equal strength. However, the third concurring opinion in each partakes of and supports the first two opinions. The result is that Felin is numerically equivalent to a 3\frac{1}{2}-3\frac{1}{2}-(2) decision and Hague a 2\frac{1}{2}-2\frac{1}{2}-(1-1) decision. They are thus similar in numerical alignment to Newark.

The Felin case arose from a governmental wartime purchase of pork chops. The petitioner refused to sell at ceiling prices. The government nevertheless took the goods, paying half the ceiling price on account. Petitioner obtained judgment in the Court of Claims for the difference between the amount paid and replacement cost at the time of the taking, the latter being greater than the ceiling price. The Supreme Court reduced this recovery to the difference between the amount previously paid and the ceiling price for the products under the Emergency Price Control Act.

Justices Frankfurter, Vinson and Burton concluded that recovery was limited by the ceiling price unless the petitioner proved a loss in total hog operations—in which case greater compensation would be allowed. In the absence of such proof, this opinion found it unnecessary to reach the constitutional question of due process. Justices Reed, Black and Murphy concurred. They agreed that the ceiling price was the proper award, but rejected the Frankfurter reasoning. They stated that “whenever perishable property is taken for public use under controlled-market conditions, the constitutionally established maximum price is the only proper standard of just compensation.” This opinion would rule out replacement cost altogether because consequential damages are not allowed under government takings. It would not, however, exclude extra compensation under special circumstances such as the lack of an adequate market to determine the price. Justice Rutledge partially agreed with both groups. He agreed with Reed that the ceiling price was generally the proper compensation but would qualify that view “by some limitations which would make adjustments.


28 In re Atkins, 129 N.J.Eq. 186, 206, 18 A.2d 45, 56 (1941).

29 56 Stat. 23 (1942). Recovery was also allowed for interest.

beyond that price permissible when the circumstances of the taking are such that they would entail destruction of property values beyond those inherent merely in the property which the Government receives and uses." He agreed with Frankfurter to the extent that constitutional issues need not be reached in the determination of this case because "under circumstances like these, the legal market or ceiling price furnishes at least presumptively the measure of just compensation," and the owner must sustain the burden of proving further loss. Where, as here, there is a market value he would not allow replacement cost but would confine any extra recovery over ceiling to loss of good will when proved. Justices Jackson and Douglas dissented.

The Felin case has been cited infrequently. These citations have been primarily for its general result. The Court of Claims in International Rice Co. v. United States, for example, concluded that the Felin case refused to allow incidental or indirect losses as part of just compensation. The split has also been noted in some instances and little precedent value assigned to the case.

The Hague case involved a suit brought in a federal district court for an injunction against the enforcement of a Jersey City ordinance. The ordinance stated, inter alia, that "no public parades or public assembly in or upon the public streets, highways, public parks or public buildings of Jersey City shall take place or be conducted until a permit shall be obtained from the Director of Public Safety." The plaintiff had been refused a permit to distribute printed matter and to hold public meetings.

Justices Roberts and Black stated that the federal courts had original jurisdiction because this prohibition against the dissemination by citizens of information concerning the National Labor Relations Act involved a question of privileges and immunities under Section 1 of the Fourteenth Amendment of the Constitution, as made operative by Section 24(14) of the Judicial Code. On the merits, this opinion concluded that the ordinance on its face violated the privileges and immunities of the natural-citizen plaintiffs; that, although the use of

31 Ibid., at 647.
32 Ibid., at 647-48.
33 In United States v. Commodities Trading Corp., 339 U.S. 121 (1950), as a result of change in personnel of the Court, a majority opinion was rendered on the Felin issue. This opinion, by Justice Black, substantially expressed the Reed position in Felin. Any lack of subsequent usage by citing courts, of course, may be a result of the clarification of the Court's position in the Commodities case.
streets and parks may be regulated under the police power, such regulation must be "in the interest of all"; and that privileges and immunities "must not, in the guise of regulation," be abridged or denied. Justices Stone and Reed concurred in the result, but disagreed with the reasoning of Roberts with respect to both jurisdiction and the merits. They pointed out that while there had been no allegation of citizenship by plaintiffs, it was unnecessary since violations of freedom of speech and assembly fall within the Due Process clause of the Fourteenth Amendment, which protects all persons regardless of citizenship. They agreed that jurisdiction rested on Section 24(14) of the Judicial Code, but disagreed as to what constitutional grounds put it there, relying again on the application of due process "to all persons" rather than privileges and immunities "of all citizens." Chief Justice Hughes agreed with Roberts and Black on the merits, but with Stone and Reed on the jurisdiction question because he was "not satisfied that the record adequately supports the resting of jurisdiction" on the ground suggested by Roberts. Justices McReynolds and Butler dissented in separate opinions.

The Hague case has frequently been cited, principally for its general result. For example, Supreme Court justices have cited the factual result eleven times. In addition the Court has considered the relative merit of the two major views expressed in Hague. In 1940 the Court twice refuted arguments for extending the privileges and immunities clause as had been suggested in Hague by Roberts. Again, in 1947, the Court favorably cited the Stone opinion following the statement that "the responsibility of dealing with the privileges and immunities of their citizens except those inherent in national citizenship" should be left to the states. The next year in a footnote, however, the Court favorably cited Roberts' distinguishing of Davis v. Massachusetts and his argument for broadening the privileges and immunities clause. The Court noted: "Though the statement was that of only three Justices, it plainly indicated the route the majority followed who on the merits did not consider Davis . . . controlling."

28 Ibid., at 516.
29 Ibid., at 532.
33 167 U.S. 43 (1897), which, in Hague, had been distinguished by Roberts, ignored by Stone, and relied on by Butler in dissent.
In the same case, Justice Jackson in dissent indicated a view that the reasoning of a no-clear-majority case has no precedent value when he stated that "the case of Hague... cannot be properly quoted in [the free speech] connection, for no opinion therein was adhered to by a majority of the Court. The failure of six or seven Justices to subscribe to those views would seem to fatally impair the standing of the quotation as an authority."45

Cases which cite Hague's general result are also prevalent in the state and lower federal courts.46 However, in several instances, individual opinions were cited and labelled as such.47 In several others, the reasoning of the Roberts or


Stone opinions was used and reference made only to the case in general.\textsuperscript{48} A few cases have noted the Hague split. Some of these used the factual disposition as authority;\textsuperscript{49} others attempted to reach conclusions based on the several opinions.\textsuperscript{50}

The second subgroup of principal cases which are cited most frequently for their general result have, like the previous subgroup, at least two conflicting concurring opinions of approximately equal strength. The second subgroup differs, however, in that the number of justices concurring in each opinion is not equal. There is thus a plurality opinion and an equally strong, but conflicting, minority opinion.\textsuperscript{51} The equality of strength seems to indicate that these cases would be cited in the same manner as those in the first subgroup. Here, however, the numerical superiority of one opinion over the other may serve as justification for some courts to accord it greater weight, and thus cite the case for its plurality opinion. There are four cases in this second subgroup: National Mutual Insurance Co. v. Tidewater,\textsuperscript{52} Northwest Airlines Inc. v. Minnesota,\textsuperscript{53} Downes v. Bidwell\textsuperscript{54} and Terry v. Adams.\textsuperscript{55}

The Tidewater Court split 3-2-(2-2). The action was commenced in a Maryland federal district court by one corporation, of the District of Columbia,


\textsuperscript{49} Grand Rapids Furniture Co. v. Grand Rapids Furniture Co., 127 F.2d 245, 248, 249 (C.A. 7th, 1942) (All opinions agreed there was no jurisdiction under section 24(1)); George v. United States, 196 F.2d 445 (C.A. 9th, 1952) (All opinions agreed that the ordinance forbade free speech to everyone); Thomas v. Casey, 123 N.J.L. 447, 448, 9 A.2d 294, 294 (1939); People v. Freidman, 14 N.Y.S.2d 389, 394 (N.Y. City Ct., 1939); Fornili v. Local 297, 200 Wash. 283, 292, 93 P.2d 422, 426 (1939) (Both opinions held the ordinance void.).

\textsuperscript{50} City of Manchester v. Leiby, 117 F.2d 661, 664, 665 (C.A. 1st, 1941) (The several opinions leave doubt as to whether section 24(14) removes the $3000.00 + jurisdiction requirement); Robeson v. Fanelli, 94 F.Supp. 62, 67, 68 (S.D.N.Y., 1950) (Only three justices agreed that privileges and immunities are protected when no petition for redress is involved and therefore the question has not been authoritatively determined); State v. Fowler, 79 R.I. 16, 21, 83 A.2d 67, 69 (1951) (Roberts discussed privileges and immunities and possibly overruled Danks, but this is not decisive and the Supreme Court should speak again "so the courts would have no reason to be misled in the future.").

\textsuperscript{51} Consult discussion in note 16 supra. \textsuperscript{52} 322 U.S. 292 (1944).

\textsuperscript{53} 337 U.S. 582 (1949). \textsuperscript{54} 182 U.S. 244 (1901).

\textsuperscript{54} 345 U.S. 461 (1953), discussed in note 93 infra.
against another, of Virginia. Jurisdiction was based solely on diversity of citizenship. The lower courts had held unconstitutional the federal statute which conferred diversity jurisdiction on the federal district courts in civil actions involving District of Columbia citizens. The Supreme Court reversed.

Justices Jackson, Black and Burton upheld the constitutionality of the statute in question on the grounds that although the District of Columbia was not a "state" for diversity purposes under Article III, Congress under its Article I power to legislate for the District of Columbia could confer jurisdiction on Article III courts and that this was a constitutional exercise of its power to provide a forum for District citizens. Justices Rutledge and Murphy concurred in the judgment but voiced a strong protest against the reasoning used by Jackson. Instead, it was argued that the Court should declare the District of Columbia a "state" under Article III. This would make the District of Columbia a "state" for diversity purposes and would allow cases involving District of Columbia citizens to come into Article III courts on diversity grounds alone. Justices Vinson and Douglas dissented on the ground that Congress has no power under Article I to extend the jurisdiction of Article III courts (thus agreeing with Rutledge) and that the District of Columbia is not a state under the diversity clause of Article III (thus agreeing with Jackson). Consequently, they concluded that the statute was unconstitutional. Justices Frankfurter and Reed rendered a separate dissent arguing essentially the same points.

Thus, Rutledge, Murphy and the dissenters (a majority of the Court) agreed that Congress has no power under Article I to extend the jurisdiction of Article III courts. Similarly, a majority of the Court, the dissenters plus Jackson, Black, and Burton, agreed that the District of Columbia was not a state for diversity purposes.

Considering its importance, Tidewater has been cited infrequently. This paucity of citation may have resulted because the case was decided recently and the issue involved does not arise often, or it may have resulted from the great confusion created by the Jackson and Rutledge opinions as to the precedent value of the case. In spite of the paradoxical alignment of the justices only two cases have pointed out the disagreement on the Court. Siegmund v. General Commodities Corp., relied on Tidewater's general result in applying that case to a controversy involving citizens of territories. The Siegmund court held Tidewater

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57 Frankfurter aptly pointed this out in the conclusion of his dissent: "A substantial majority of the Court agrees that each of the two grounds urged in support of the attempt by Congress to extend diversity jurisdiction to cases involving citizens of the District of Columbia must be rejected—but not the same majority. And so, conflicting minorities in combination bring to pass a result—paradoxical as it may appear—which differing majorities of the Court find unsupportable." 337 U.S. 582, 655 (1949).

58 175 F.2d 952 (C.A. 9th, 1949).

59 The clearest use of the case is for its general result. Also consult Menashe v. Sutton, 90 F.Supp. 531 (S.D.N.Y., 1951).
controlling and stated that it "upheld the constitutionality of the Act . . . as applied to an action between a citizen of the District of Columbia and a citizen of a state."60

A more revealing decision is that of Green v. Teffteller61 where both plaintiff and defendant relied on Tidewater. The court noted that "the divergent reasoning employed by the justices in sustaining the constitutionality of the 1940 jurisdictional Act . . . provides support, apparently at least, for the divergent positions taken here."62 The court described the "divergent reasoning" of the two opinions, indicating very clearly that the case has precedent value only for its final result and not for the reasoning involved. "Each of the two groups of justices rejected the theory of the other, and the four dissenting justices rejected both theories, the result being that constitutionality of the 1940 Act was upheld without the support of any controlling reason. The conclusion to be drawn from that result is that precedent is established by the vote of the justices, not by the reason given for their votes." (Italics added.)63

Finally, two cases have cited Tidewater for a proposition—"this provision [the provision of the Constitution granting Congress legislative power over the District of Columbia] is to be harmonized with Article III, Section 2, Clause 1"64—which seems to be derived from Jackson's reasoning. Conversely, a general statement in O'Toole v. United States65 can be construed as an endorsement of the Rutledge reasoning. In attempting to determine whether a member of the National Guard of the District of Columbia is an employee of the United States for purposes of the Federal Tort Claims Act, the court stated: "If the District of Columbia is a separate political community, it may in a qualified sense be called a 'state,'" citing Tidewater.66

In Northwest Airlines, the question was whether or not Minnesota could impose a personal property tax on Airlines, a Minnesota corporation, based on the value of its entire fleet of airplanes, all of which were within the state for part of the year. The Court held five to four that the tax was constitutional and divided essentially 4-1-(4) on the grounds of the holding.

Justices Frankfurter, Douglas and Murphy thought that the tax was valid because Minnesota was the domiciliary state and the aircraft were periodically

60 Siegmund v. General Commodities Corp., 175 F.2d 932, 953 (CA. 9th, 1949). The court also quoted extensively from both opinions, possibly indicating that it felt that the general result alone was not sufficient to support its opinion. Or, since both opinions supported the court's decision, it may have been using them simply for rhetorical purposes.
62 Ibid., at 387.
63 Ibid., at 388.
66 Ibid.
within the state. They concluded that the fact that non-domiciliary states could also tax the airlines did not abridge Minnesota's taxing power. Justice Black concurred "substantially" with the Frankfurter opinion. Justice Jackson concurred in the judgment, contending, however, that the domicile was unimportant, that Minnesota offered no protection or services not rendered by other states, and further that any apportionment principle of taxation should not apply to airlines. He proposed a "home port" theory and would have made Minnesota's right of taxation an exclusive one. Justices Stone, Roberts and Rutledge dissented.

Northwest has caused a great deal of confusion for subsequent courts. In Chicago v. Willet Co., a majority of the Court utilized the separate rationales of the concurring justices in Northwest. It was noted that in Northwest, Minnesota was both the state of incorporation and the home port, and the same fact situation prevailed here with respect to a fleet of trucks. But Justices Reed and Vinson, concurring in the judgment, thought that "nothing in the conclusion and judgment of the Court in Northwest Airlines [made the above rule] applicable to this situation, even if the 'conclusion' were an opinion of this Court." The two justices thus explicitly noted the weakness of Northwest as a precedent. Justice Reed, in Braniff Airways Inc. v. Nebraska, attached greater weight to the Frankfurter opinion's apportionment point, stating that it "seems fair to say that without the position stated . . . [there] the result would have been the reverse." Reed then found it necessary to distinguish away the Frankfurter opinion despite the fact that at one point he recognized that there was no majority opinion in Northwest. Several other cases have cited Northwest for the Frankfurter view. For example, in Standard Oil Co. v. Peck, the Supreme Court, in a clear-majority opinion written by Justice Douglas and joined by Justice Jackson and five others, directly referred to Frankfurter's opinion.

67 334 U.S. 574 (1953).
68 "This tax, as it falls on respondent, an Illinois corporation having its place of business in Chicago, is clearly unassailable under the authority . . . we reaffirmed in Northwest Airlines. . . ." Ibid., at 577.
69 Ibid., at 581.
72 Ibid., at 602.
73 342 U.S. 382 (1952).
74 In Standard Oil Co. v. Glander, 155 Ohio St. 61, 71, 98 N.E.2d 8, 14 (1951), the Ohio Supreme Court also cited the Frankfurter opinion as the holding by stating that the Supreme Court in Northwest recognized the right of the domiciliary state to tax full ad valorem on personal property although the property passed through other states. In addition, the Supreme Court has cited specific opinions, labelling them as such. Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 94 (1948) (Stone opinion); Greenough v. Tax Assessors of Newport, 331 U.S. 486, 492 (1947) (Frankfurter opinion); International Harvester Co. v. Evatt, 329 U.S. 416, 423 (1947) (Stone opinion). In one instance the home port and state of incorporation theories were
by stating that *Northwest* "allowed the domiciliary state to tax the entire fleet ... operating interstate [because] it was not shown that 'a defined part of the domiciliary corpus' has acquired a taxable situs elsewhere."\(^{75}\)

Thus, while *Northwest Airlines* has been utilized for its general result,\(^{76}\) the Frankfurter view appears to have acquired some authority. Although not of appreciably greater strength than the Jackson opinion, the numerical superiority of the justices supporting the Frankfurter opinion appears to have given it greater weight.\(^{77}\)

In the *Downes* case, the Court in effect split as they had done in *Northwest*, 3-1-1-(3-1), with one of the minority opinions agreeing in substance with the plurality opinion. This was an action to recover import duties which had been paid under protest for the transfer of goods from Puerto Rico into New York. Shortly after the annexation of Puerto Rico, Congress passed the Foraker Act\(^ {78}\) to provide temporary revenue and government for Puerto Rico. It included the authority to collect duties on goods shipped from the island to the United States. The plaintiff in the case claimed that this duty violated Article I, Section 8, Clause 1 of the United States Constitution,\(^ {79}\) which requires uniformity throughout the United States with respect to duties, imports and excises.


\(^{75}\) 342 U.S. 382, 384 (1952).

\(^{76}\) Writing for the Court in Willet, Justice Frankfurter cited the decision for what might be called its general result. In a dissenting opinion in Braniff he again emphasized the inherent perplexities of aviation taxation and stated that "the most important thing that was ... decided [in Northwest] was the refusal of the court to apply to air transportation the doctrines that had been enunciated with regard to land and water transportation." 347 U.S. 590, 604 (1954). Frankfurter further indicated that he would limit the Northwest case to its own particular facts when he stated: "It was not too difficult in *Northwest Airlines* to allow Minnesota to levy a personal property tax on the entire fleet of airplanes owned by a corporation of its creation, the principal place of business of which was also in Minnesota." Ibid., at 607.

The problem which faced lower courts as a result of the Northwest decision is exemplified by Mid-Continent Airlines v. Nebraska, 157 Neb. 425, 59 N.W.2d 746 (1953). The conclusion of the court was that Northwest does "cast serious doubt on the right" of non-domiciliary states to further tax where the domiciliary state has taxed *ad valorem* on full value. The Nebraska court considers this problem "the cause of the major division of the Court." Ibid., at 430 and 748.

\(^{77}\) It should be noted that the structure of the opinions in Northwest and resultant citation, to a large extent, of its plurality opinion almost puts it into the "technical minority" subgroup of the "relative disparity" cases discussed in Section III B of this comment. However, it has been placed in the "coordinate opinion" group because its citation pattern was felt to be indeterminate and because its minority view (Jackson's) seemed closer to being "strong" than "technical." In any event, Northwest certainly is a borderline case in regard to the analysis used in this comment and illustrates the rather thin and arbitrary line dividing some categories. A similar case is Wheeler v. Sohmer, 233 U.S. 434 (1914), which is discussed in Section III B infra.

\(^{78}\) 31 Stat. 77, c. 191 (1900).

\(^{79}\) "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be Uniform throughout the United States."
Justice Brown announced the judgment of the Court and delivered a separate opinion in which he stated that Puerto Rico was not a part of the United States under the clause in question, basing his conclusion on the proposition that this section of the Constitution does not become operative on territories until Congress so decides. In a separate concurring opinion, Justices White, Shiras and McKenna agreed that the clause did not prohibit the duty. They based their conclusion on the ground that the Constitution becomes immediately operative in a territory when the United States acquires it, and that the question turned on whether the particular clause became applicable. Their decision rested on the thesis that the uniformity clause did not become operative until Congress incorporated the territory. Justice Gray, in a separate concurring opinion, agreed "in substance . . . with the opinion of Mr. Justice White," merely adding the argument that the government of territory acquired by war retains its former laws until Congress approves a complete government. He, too, accepted incorporation by Congress as the point at which the revenue clauses would become applicable. Justices Fuller, Harlan, Brewer and Peckham dissented. Thus, five justices concluded that the revenue clauses were not in force in Puerto Rico; four so concluding because the territory had not been incorporated, and one because Congress had not specifically stated that the clauses had become operative.

Although the Supreme Court has frequently cited the result of Downes, the citations have been usually qualified by a statement that the Downes Court offered no conclusive rationale. The precedent value of Downes has also been

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81 Dooley v. United States, 183 U.S. 151, 157, 164 (1901) ("[W]e held that Congress could lawfully impose a duty upon imports from Porto Rico" [stated by Brown, Gray, Shiras and McKenna] and "[the Court maintained . . . [the view that] Porto Rico . . . had not been so made a part of the United States as to cause Congress to be subject . . . to the uniformity provisions of the Constitution." [by White]); Fourteen Diamond Rings v. United States, 183 U.S. 176, 181 (1901) ("in Downes . . . the conclusion of a majority . . . was that . . . duties on goods imported from Porto Rico into New York . . . was valid" [opinion of the Court]); Kepner v. United States, 195 U.S. 100, 124 (1904) ("The power of Congress to make rules and regulations for the territory incorporated in or owned by the United States is settled . . .").
82 DeLima v. Bidwell, 182 U.S. 1, 201 (1901) (McKenna, Shiras and White complained in dissent that in the instant case the Downes dissenters agreed with the Brown-Downes rationale but had disagreed with it in the Downes case); Dooley v. United States, 183 U.S. 151, 158 (1901) (Brown, Gray, Shiras and McKenna noted that the Downes "conclusion was reached by a majority of the court by different processes of reasoning . . ." White did not expressly note the disagreement but in discussing the Downes case, on two occasions confined his conclusion to the resulting judgment); Fourteen Diamond Rings v. United States, 183 U.S. 176, 181 (1901) (A majority of the Court stated that, in Downes, "five concurred, although not on the same grounds . . ."); Dorr v. United States, 195 U.S. 138, 154 (1904) (Peckham, Fuller and Brewer stated: "I do not wish to be understood as assenting to the view that Downes . . . is to be regarded as authority. . . . The various reasons advanced by the judges . . . were not concurred in by a majority of the court [and] are plainly not binding."); Rasmussen v. United States, 197 U.S. 516, 531 (1905) (The Court, Brown and Harlan excepted, noted that the White and Gray Downes rationale concerning the incorporation test was accepted by a majority in a later case. Justice Brown discussed the two Downes majority views); Alaska v. Troy, 258 U.S. 101, 111 (1922) (The Court said that "in Downes . . . none of these opinions were accepted by a majority of the court and statements therein are not binding upon us.").
affected by the later decision of *Dorr v. United States*. There the Court split 5-3-(1), with a majority of Brown, White, McKenna, Holmes and Day basing its conclusion on what some later decisions have interpreted as an acceptance of the "incorporation" requirement of the White opinion in *Downes*. However, Justice Brown later contended that *Dorr* did not substantiate the "incorporation" rule, because the point was not necessary to the decision. In some later cases, members of the Court suggested that *Downes* itself went on the "incorporation" rule. This may have resulted from the *Downes* plurality in favor of the rule or from the influence the *Dorr* formulation had upon the doctrine.

The great bulk of lower federal court citations which are useful to this analysis have been confined to noting the result of *Downes*. A few cases have pointed out that the *Downes* Court was split. Those that did cited the resulting judgment as the holding, indicating that the later cases cleared up the ambiguity, or brushed the case aside as having no precedent value. Three cases intimate, however, that the White opinion was the holding. From all of these cases it

83 195 U.S. 138 (1904).
84 Rassmussen v. United States, 197 U.S. 516, 520 (1905) (The Court, Justices Brown and Harlan excepted, stated that the incorporation "reasoning [was] in effect adopted in the Dorr case as the basis of the ruling."); Balzac v. Porto Rico, 258 U.S. 298, 305 (1922) (The Court there said that "the Dorr case shows that the opinion of . . . White of the majority in Downes . . . has become the settled law of the court.").
85 Rassmussen v. United States, 197 U.S. 516, 531 (1905). Justice Brown contended that the Dorr case contained factors which came under both his and Justice White's Downes rationale and that the incorporation rule was not necessary to the Dorr decision.
86 In Hawaii v. Mankichi, 190 U.S. 197, 219 (1903), Justices White and McKenna stated that because Hawaii had not been incorporated during the period of time involved in the litigation "the case is controlled by Downes . . . ." The majority opinions in Public Utilities Commission v. Ynchausti & Co., 251 U.S. 401, 407 (1920), and Hoover & Allison Co. v. Evatt, 324 U.S. 652, 673 (1945), also make reference to Downes in terms of the incorporation rule.
89 Neuss Hesslein & Co. v. Edwards, 30 F.2d 620, 621 (C.A. 2d, 1929) ("The ambiguities . . . have since been cleared. . . ."); Pugh v. United States, 212 F.2d 761, 762 (C.A. 9th, 1954).
90 United States v. Sprague, 44 F.2d 967, 981 (D.N.J., 1930) ("[W]e think [the Downes case] rested upon the principles of political science.").
91 Alton v. Alton, 207 F.2d 667, 670 (C.A. 3d, 1953) ("[I]t seems to be settled that the entire Constitution does not extend of its own force to incorporated areas." The court also cited the Dorr case to this passage.); Porto Rico Brokerage Co. v. United States, 76 F.2d 605, 610 (Cust. & Pat. App., 1935); People of Porto Rico v. American R. Co. of Porto Rico, 254 Fed. 369, 371 (C.A. 1st, 1918) ("In Downes . . . the relationship of Porto Rico apparently is not recognized as that of a territory fully incorporated into the United States.").
may be concluded that the chief precedent value of Downes was in its factual result, except in connection with Dorr and the later cases which served to remove the ambiguity caused by the split.

In summary, the "coordinate opinion" cases have been cited predominately for their general results. As has been suggested, this is perhaps due to the presence of conflicting majority views of approximately equal strength and the consequent absence of a basis for choice between these views. Occasionally, however, the presence of unequal numerical alignments appears to have caused later courts to use the cited decision for the view stated in the plurality opinion. In this situation, there is of course some basis for choice.

Three state cases have cited Downes on its decisional point. One used it for its general result. People v. Bingham, 189 N. Y. 124, 129, 81 N.E. 773, 775 (1907). The second noted it had been expanded by Dorr to make the incorporation rule that of the Supreme Court. People v. Bingham, 117 App.Div. 411, 419, 102 N.Y.Supp. 878, 883 (1st Dept., 1907). The third is perhaps the most interesting of all Downes citations, Miller v. Bank of Washington, 176 N.C. 152, 161, 96 S.E. 977, 981 (1918). This case was not concerned with the issues in Downes but rather with the problem of how to dispose of a case in which the court has split in opinion. To this end, one member of the court included a synopsis of nineteenth and early twentieth century United States Supreme Court split decisions, primarily those with an equally divided court. It was stated that in "Downes... all nine of the justices expressed their views; the report of the case covered 154 pages. This was the case in which it was said that the court had 'filed nine dissenting opinions.'" Ibid., at 161 and 981. The judge, however, confined his conclusions to the equally-divided cases.

Terry v. Adams, 345 U.S. 461 (1953), presents an interesting variation on the "coordinate opinion" series. However, it is not significant for the purposes of this comment, due to the absence of citing cases.

It involved the legality of excluding Negro voters from elections held by the Jaybird Democratic Association, an organization consisting of all the qualified white voters in the county. The Association had held a primary prior to the regular state primary (at which Negroes were allowed to vote). The winners then filed individually for the state primary, were never opposed and almost invariably won.

Justices Black, Douglas and Burton held that the Jaybird's election violated the Fifteenth Amendment, it being precisely the kind of election the Fifteenth Amendment was designed to prevent. They argued that this Amendment is violated whenever a state permits a duplicate election which in effect produces the "equivalent of the prohibited election." Justices Clark, Vinson, Reed and Jackson concurred in result, although finding "state action" on a different ground. They considered the Jaybird Association to be a political party, operating as "part and parcel of the Democratic Party." And since the latter existed under the auspices of Texas law, the case was controlled by Smith v. Allwright, 321 U.S. 649 (1944), where the Court had held that rules of a political party subject to considerable statutory control excluding Negroes from voting in party primaries are a violation of the Fifteenth Amendment. Justice Frankfurter concurred singly, differing in reasoning from both the Black and Clark opinions. He found "state action" here insofar as county election officials clothed with the authority of the state "share[d] in the subversion." Justice Minton in a lone dissent found no "state action" and therefore no violation of the Fifteenth Amendment.

Thus, the Court split 4-3-1-(1), with the three different views being taken as to why the Fifteenth Amendment was violated in this case. And, since each of these views seems equally strong, Terry would appear to be what might be termed a triple "coordinate opinion" case. Terry is quite recent and has been cited only twice, both times for its general result. Howard v. Ladner, 116 F.Supp. 783, 787 (S.D. Miss., 1953); Ervin v. Richardson, 70 So.2d 585, 588 (Fla., 1954).
II

DUAL MAJORITY

A second group of no-clear-majority decisions, the “dual majority” cases, bears a superficial resemblance to the “coordinate opinion” cases containing a plurality and minority opinion. In substance, the “dual majority” cases involve a 4-1-(4) numerical alignment with the plurality stating a strong rule in conflict with the rationale set out by the minority. However, the minority seems to agree with the dissent on the rule of law applicable, although differing in its interpretation of the facts. There are thus two majorities—the plurality and minority as to the result, and the minority and dissent as to the reasoning.

As might be expected, the “dual majority” cases have not been used in a consistent manner by later courts. They are occasionally cited for their general result, for a particular opinion or as carrying little weight. Furthermore, some courts have used them for the proposition advocated by the minority plus the dissent. Five cases fall into the “dual majority” category: Interstate Pipeline v. Stone,94 Louisiana ex rel. Francis v. Resweber,95 United States v. PeeWee Coal Co.,96 Colegrove v. Green97 and Coleman v. Miller.98

The Interstate case,99 in which the Court split 4-1-(4), involved a pipeline located wholly in Mississippi which was used to pipe oil to the railroad, the railroad then shipping the oil out of the state. The state had imposed a tax on the pipeline measured by the gross receipts of the business it did within the state.

Justices Rutledge, Black, Douglas and Murphy upheld the tax, stating: “We do not pause to consider whether the business of operating the intrastate pipe lines is interstate commerce, for, even if we assume that it is, Mississippi has power to impose the tax involved in this case.”100 The tax was valid because it was imposed on that portion of the business which was wholly intrastate.101 Justice Burton concurred in the judgment solely on the ground that “the tax imposed by the State of Mississippi was a tax on the privilege of operating a pipe line for transporting oil . . . in intrastate commerce,”102 and that no issue

94 337 U.S. 662 (1948).
95 341 U.S. 114 (1951).
97 328 U.S. 549 (1946).
98 307 U.S. 433 (1939), discussed in note 140 infra.
99 A case closely related to Interstate is Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1948). Both involved the same basic problem of state taxation and interstate commerce; both were no-clear-majority decisions; both are usually cited together. Interstate, however, has been cited predominantly as a case with little authority, while Memphis has been cited most often for its plurality opinion. Memphis has therefore been treated as a principal case in a different group. Consult Part III A infra.
100 337 U.S. 662, 666 (1948).
101 Justice Rutledge added several criteria for determining the constitutionality of the statute: (1) tax does not discriminate against interstate commerce; (2) apportionment is unnecessary; (3) no attempt to tax interstate activity outside of the state and (4) no possibility of double taxation.
102 337 U.S. 662, 668 (1948).
as to the validity of a tax upon the privilege of transporting oil in interstate commerce was present. Justices Reed, Vinson, Frankfurter and Jackson dissented, pointing out that the majority had used two separate theories to uphold the tax. They construed the operations to be interstate transportation, and the tax to be one exacted by the state for carrying on interstate business, measured by a percentage of the gross income from that portion of the interstate commerce carried on wholly within the state. They concluded that such a tax was unconstitutional. Thus, four justices would uphold the tax even on interstate commerce. Burton concurred on the theory that only intrastate commerce was involved. By implication, he would not uphold a tax on interstate commerce. Burton thus differed from the dissent only in his interpretation of the facts and not as to the proper rule of law.

Several subsequent cases have explicitly noticed the disagreement in Interstate. In Spector Motor Co. v. McLaughlin, a state tax on an interstate motor truck freight carrier attached as a tax on the privilege of doing solely interstate business. The district court frankly evaluated the trend of the Supreme Court decisions. The Interstate case, as the latest expression of the Court, was interpreted to indicate that a majority of the Court—the four dissenters and Burton—would hold a tax levied on the privilege of doing business solely interstate in character to be a violation of the Commerce clause.

The court of appeals, however, failed to agree with the lower court's use of Interstate. The higher court stated: "So we shall set forth our analysis of the legal situation and our reasoned conclusion as to the controlling law without attempting to guess which justices or how many, if any, may agree with us. . . . In view of the divisions within the Court, there is [no] majority opinion which can be relied upon as giving the rationale of the Court's decision." It was concluded that Interstate had precedent value only insofar as the state tax was sustained. Rather, the criteria laid down by Rutledge in Interstate were applied, not because they represented the holding of the Supreme Court, but rather because the court of appeals agreed with Rutledge's reasoning.

The tax in the Spector case was not upheld by the Supreme Court. Justice Burton, speaking for a clear majority of the Court (Vinson, Reed, Frankfurter, Jackson and Minton), distinguished Interstate by stating that the tax in Spector "is not collected in lieu of an ad valorem property tax." Such a construction of the facts in Interstate is not consistent with either the Reed or Rutledge opinion and would seem to indicate that Burton was citing his own construction of the Interstate facts. Justice Burton also cited the Interstate dissent for the general proposition that exclusively interstate businesses are constitutionally immune from a state privilege tax. In a parenthesis following the citation, how-

104 Ibid., at 154–55.
ever, he indicated that the *Interstate* dissent had discussed the issue "on the assumption that the activities were in interstate commerce."\(^{107}\) This quote merely corroborated the fact that, in *Interstate*, Burton agreed with the dissenters on the law but disagreed with their construction of the facts.\(^{108}\) It appears then that in the *Spector* cases, no single judge or justice cited the *Interstate* case for a clear holding.\(^{109}\)

Other cases have also indicated an awareness of the disagreement in *Interstate*. In *Martin Ship Service v. Los Angeles*,\(^{110}\) each of the *Interstate* opinions was carefully analyzed. The California court concluded: "Even if the proposition stated by the dissenting justices . . . still has any vitality, it is not controlling here."\(^{111}\) Though the disagreement was recognized, the Rutledge opinion appears to have been accepted as controlling. Other courts\(^{112}\) have similarly cited the Rutledge opinion as the holding in *Interstate* while still others\(^{113}\) seem to have construed the case through the eyes of Burton. Thus, *Interstate* may be said to be "most confusing" for subsequent courts. The different usages of the case indicates the confusing nature of a decision where a "majority" of the Court actually are on the "losing" side.

The *Louisiana ex rel. Francis v. Resweber* Court also split 4-1-(4). The case involved an abortive attempt to electrocute a convicted murderer which had failed because of faulty equipment. The governor of Louisiana subsequently issued a second death warrant fixing a new date for the execution. Petitioner claimed the protection of the Due Process clause of the Fourteenth Amendment, stating that a second attempt at execution would be a denial of due process because of the double jeopardy provision of the Fifth Amendment and the cruel and unusual punishment provision of the Eighth Amendment.\(^{114}\)

\(^{107}\) Ibid., at 609.

\(^{108}\) Burton cited Interstate for a statement which seems to be a further elaboration of his holding in that case: "Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and . . . may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate." Ibid., at 609–10.

\(^{109}\) Even the dissenters, Clark, Black and Douglas, cited Interstate by the reference: "See opinion of Justice Rutledge in *Interstate* . . ." Ibid., at 615.

\(^{110}\) 34 Cal.2d 793, 803, 215 P.2d 24, 31 (1950).


\(^{113}\) Coleman v. Trunkline Gas Co., 218 Miss. 285, 295, 63 So.2d 73, 76 (1953); Coleman v. Trunkline Gas Co., 61 So. 2d 276, 284 (Miss., 1952) (dissent).

\(^{114}\) Petitioner also claimed that he was denied equal protection of the laws and that he was inadequately represented by counsel in the original trial. Both contentions were rejected summarily in the Reed opinion.
Justices Reed, Vinson, Black and Jackson assumed, without deciding, that a violation by a state of the principals of these Fifth and Eighth Amendment guarantees would constitute a violation of the Due Process clause of the Fourteenth Amendment but concluded that no constitutional provisions had been violated on the facts of this case. Justice Frankfurter concurred but specifically rejected the idea that the Fourteenth Amendment limits the states in the manner in which the federal government is limited by the first eight amendments. He thus would not rule on the claim based on the Fifth and Eighth Amendments but rather favored a "case by case" interpretation of the Fourteenth Amendment. He concluded that since the second execution would not be "repugnant to the conscience of mankind" there was no violation of the Constitution. Justices Burton, Douglas, Murphy and Rutledge dissented. They seemed to agree with Frankfurter's interpretation of the Fourteenth Amendment, stating that "[i]n determining whether a case of cruel and unusual punishment constitutes a violation of due process of law, each case must turn upon its particular facts." Because this case involved capital punishment and contained controverted facts as to whether or not the petitioner had received some electrical current in the first attempt, they would remand the case to the Supreme Court of Louisiana to examine the facts and dispose of the case in a manner that would not violate the Constitution. They intimated that if the facts proved that a current had passed through the petitioner's body, then a second attempt at execution would violate the due process of the Fourteenth Amendment.

Thus one majority agreed that the Due Process clause of the Fourteenth Amendment was not coincident with the first eight amendments but disagreed as to the possibility that there had been a deprivation of constitutional rights on the facts of this case. Another majority agreed that there was no such deprivation but differed as to assumptions regarding the proper application of the Fifth and Eighth Amendment guarantees through the Due Process clause of the Fourteenth Amendment. The only clearly authoritative point upon which a majority agreed was that no constitutional right had been violated upon the particular facts of the *Francis* case.

*Francis* has been cited in eleven federal cases. It has never been used where its rationale was decisive and thus has been accorded little weight in the federal courts. The strongest, and perhaps the strangest, citation of the case appears in

116 Ibid., at 477.
Application of Middlebrooks," where it was stated that the Frankfurter opinion coupled with the Burton dissent "substantially holds that cruel and unusual punishment inflicted by a State is a deprivation of due process, contrary to the Fourteenth Amendment." Perhaps "substantially holds" is indication enough that the court was aware that Francis was not decided on the cited point.

Only two state courts have used Francis in any significant manner. The Supreme Court of West Virginia cited it for a proposition which it later clarified to mean that rights proscribed to the federal government by the first eight amendments "by virtue of the Fourteenth Amendment, but not because of the individual amendments . . . may not be denied or abridged by any State." The California Supreme Court agreed when it stated that "infliction of barbarous punishment [by a state] would not violate the Eighth Amendment; it might violate the Fourteenth." These results were reached apparently by coupling the Burton dissent with the Frankfurter concurring opinion. Such a use is similar to that made of Interstate by the lower court in Spector, but varies from the general use of the Interstate type of case. The few other citations of Francis seem to lean toward citation of its general result. The case, however, has been cited infrequently and is relatively weak in authority.

In United States v. PeeWee Coal Co. the owner of a mine, which the government had seized in order to avert a strike, sued to recover operating losses for the period of governmental control, alleging the seizure to be a violation of the Fifth Amendment. The Court of Claims rendered judgment for the losses attributable to government operation of the mine. Upon the government's appeal the Court split in a 4-1-(4) alignment.

Justices Black, Frankfurter, Douglas and Jackson would have affirmed the lower court decision because there was a "taking" of private property within the Fifth Amendment requiring the government to pay "just compensation." "Just compensation" in this case would not be the reasonable value of the property's use, since PeeWee did not claim this, but rather the total operating loss which the government assumed by taking over the property. Reed, concurring, agreed that there was a temporary "taking" under the Fifth Amendment requiring the government to pay "just compensation," but would not require the government to pay for operating losses generally. Rather, where the owner suffered a loss which would have occurred without the taking, he has suffered no loss for which he should be compensated. But Reed agreed with the Black disposition of the case, since the loss here suffered was attributable to the government's operation. Justices Burton, Vinson, Clarke and Minton, dis-

119 Ibid., at 951.
121 In re Wells, 35 Cal. 2d 889, 895 n. 1, 221 P.2d 947, 951 n.1 (1950).
122 They had given a wage increase in compliance with a War Labor Board directive which Reed construed as having no legal sanction.
senting, agreed that there was a "taking" but would not attribute any of the loss to the government and therefore would not permit PeeWee to recover.

Thus, a majority of the Court (the Black group and Reed) agreed that there was a "taking" in this case which entitled PeeWee to recover compensation. Reed, in effect, agreed with the dissent as to the test for compensation but disagreed on the facts. The Black group was then in the minority on its test—that the government must bear all operating losses of a business which it "takes."

PeeWee has been cited clearly only three times—each time for its general result rather than for any specific opinion. For example, in Sawyer v. United States Steel Co. the lower court stated: "Only last year the Supreme Court held that the 'United States became liable under the Constitution to pay just compensation' for a taking under circumstances closely parallel to those of the present case," citing PeeWee. Similarly, Justice Douglas concurring, and Chief Justice Vinson dissenting, in the same case in the Supreme Court, cited the case for its general result.

Colegrove v. Green involved an action for a declaratory judgment that the Illinois Apportioning Act of 1901 was unconstitutional. The plaintiffs claimed that the population distribution for a pending election of representatives to Congress was so disproportionate that the results of the election should be declared invalid. The Supreme Court rejected this position, dividing 3-1-3.

Justices Frankfurter, Reed and Burton considered these claims as presenting a political question and refused jurisdiction, stating that this was a problem for Congress and not the judiciary. Justice Rutledge concurred in the result but disagreed with the political-question analysis. He concluded that, although this was a case in which the Court had jurisdiction, it was also an action in equity. He would have denied equity jurisdiction in this case—exercising the discretion of an equity court—because of the imminence of the contested election. Justices Black, Douglas and Murphy dissented, agreeing with Rutledge that the Court had jurisdiction, and would have accepted jurisdiction. They stated that this was a justiciable controversy, that injury to plaintiffs had been shown and that under the Equal Protection clause of the Fourteenth Amendment the application of the Illinois statute should be declared unconstitutional. Thus, in summary, three justices thought that there was no justiciable controversy while a four-justice majority—the dissent plus Rutledge—thought that a jus-

125 Ibid., at 584.
ticiable controversy was present. Yet a different majority, the plurality and Rutledge, refused to grant the relief requested.

The Supreme Court, in a series of decisions involving issues similar to those in Colegrove, has had occasion to refer to it. In the first, a per curiam decision, the Court refused to grant an injunction which would have prohibited use of the Georgia county system of selecting candidates for public office. The action had arisen on a claim, under the Equal Protection clause of the Fourteenth Amendment, that the system resulted in disproportionate representation. Only Justice Rutledge disagreed with the decision of the Court. In a separate opinion he noted that this case was very close to Colegrove but that in his opinion it was not necessarily determined by that decision and that "the issues whether of jurisdiction, of discretion in exercising it, or of substantive right . . . have not been conclusively adjudicated by prior decisions of this court." He advocated "a full hearing and consideration after argument here." It would appear that the remainder of the Court was not willing at this time to attempt a clarification of the Colegrove decision with an opinion in which a majority agreed. The Reports are silent as to which justices sat at the argument for this per curiam decision. However, if only the same seven justices were present, there was the possibility of producing a clear majority if the factor of an imminent election would not require Justice Rutledge to exercise his interpretation of the equity court's discretionary power. Rutledge's opinion does not illuminate this point.

Two years later a full Court considered a similar question in MacDougall v. Green. The Illinois statute here in dispute required a new political party to obtain twenty-five thousand valid signatures on a petition, of which at least two hundred names were required from each of fifty counties. In a per curiam opinion, five justices, Vinson, Reed, Frankfurter, Jackson and Burton, deciding on the merits, refused to enjoin enforcement of the statute. Three of these justices had refused jurisdiction in Colegrove on political-question grounds. The other two—Vinson and Jackson—were not on the Colegrove Court. What distinguished the Colegrove statute from the one in this case was left unanswered. Instead, Colegrove was cited for the proposition that "[t]he Constitution—a practical instrument of government—makes no such [as asked for here] demands on the States." However, this quote does not represent the rationale of any of the three Colegrove opinions. Indeed, Justices Frankfurter, Burton and Reed had said in Colegrove that whatever demands the Constitution did make in this area was for the legislature to decide and that the judiciary had no jurisdiction

129 Ibid., at 825. On the same day the Court also denied a rehearing on Colegrove itself. Justice Rutledge advocated the reargument of Colegrove for the same reasons he gave in Cook.
130 335 U.S. 281 (1948).
132 MacDougall v. Green, 335 U.S. 281, 284 (1948).
over the constitutional question. It is unlikely that the Rutledge or Black opinions in *Colegrove* could also be construed to support the quoted material since the Black opinion came to the opposite conclusion and Rutledge had refused to entertain jurisdiction at all.  

The remaining four justices in *MacDougall* specifically pointed out that this case was similar to *Colegrove*, and all four maintained their previous positions. Justice Rutledge would have again refused equity jurisdiction because of the imminence of an election. Justices Black, Douglas and Murphy would have granted the injunction because of a violation of the Fourteenth Amendment. Both groups cited only their own *Colegrove* opinions. Neither group suggested that *Colegrove* could be authority either for or against their points of view.

The following year in *South v. Peters*, another case attacking the Georgia county unit election system, *Colegrove* was cited as a case in which the Court had refused to exercise its equity power because political issues—arising from a state's geographical distribution of electoral strength—had been posed. This new interpretation, adopted by seven justices, combined part of Frankfurter's *Colegrove* opinion with part of Rutledge's, but was not an accurate picture of the two opinions. Frankfurter, in *Colegrove*, had recognized no equity power. He had seen the problem as being one for the legislature and beyond the power of the judiciary. And, of course, Rutledge had seen no political question in *Colegrove*.

Thus a majority of the Supreme Court had again interpreted *Colegrove* differently. Justices Douglas and Black, in dissent, again pointed out that only a minority of three justices had stated that *Colegrove* involved a political question. They argued that the only reservation by Justice Rutledge against granting jurisdiction in *Colegrove*, the imminence of an election, was lacking in this case. Consequently, they contended that jurisdiction should be granted since a majority in *Colegrove* so held. Thus, in effect, they were citing the minority and dissenting views in *Colegrove*.

Similarly, the use of *Colegrove* as precedent by lower courts does not present a uniform pattern. It has been cited for its general result: "Whether it be that the subject matter [the Georgia county unit system] is not of equitable cognizance, or merely that equity should withhold its hand, we think the decision in *Colegrove* ... requires us to deny equitable relief." Other courts have spe-

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133 Why they chose to make it appear that their new position was consistent with *Colegrove* is not clear. It would have been possible to state that *Colegrove* presented no bar to redetermining the issue because there had been no clear majority there.


136 *Turman v. Duckworth*, 68 F.Supp. 744, 747–78 (N.D. Ga., 1946). Other lower federal court cases have cited *Colegrove* as denoting a reluctance to entertain jurisdiction when the issues are of a "controversial nature," without explicitly stating a specific *Colegrove* rationale on which to base this theory. *Caven v. Clark*, 78 F.Supp. 295, 298 (W.D. Ark., 1948) (poll tax lists—political issue, and also question as to jurisdiction under Federal Declaratory Judg-
cifically stated that *Colegrove* had been decided on the political question point. In these cases reference was made to the Frankfurter opinion as the opinion of the "Supreme Court." Another view of *Colegrove* is illustrated by a court which stated that it was a "most confusing" case. Similarly, it has been concluded that "no law results from [*Colegrove*] ... and it presents" the novelty of sawing a justice in half and having him walk away whole. This view would appear to be an apt summary, and perhaps an explanation of the use of *Colegrove* as precedent.

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17 Watts v. O'Connell, 247 S.W.2d 531, 532 (Ky., 1952); State v. Zimmerman, 261 Wis. 398, 412, 52 N.W.2d 903, 910 (1952). The former stated that Frankfurter was "speaking for the court." The latter used the phrase "the United States Supreme Court in its opinion declared ... ," citing the Frankfurter opinion. It is also interesting to note that a dissenting opinion in the Zimmerman case vigorously opposed the "political question" conclusion, yet did not cite Colegrove, much less attack the majority's interpretation of it.


14 Coleman v. Miller, 307 U.S. 433 (1939), a case similar to Colegrove in terms of issues and structure of opinions, involved a refusal by the Kansas Legislature to ratify the proposed Child Labor Amendment to the federal Constitution. A second vote taken twelve years later resulted in a tie which was broken in favor of ratification by the vote of the Lieutenant Governor. This action was brought by the state senators who had voted against ratification to prevent the issuance of official notice that the state had approved the amendment. Their complaint stated, inter alia, that the Constitution did not allow a state to pass an amendment after once rejecting it.

Justices Hughes, Stone and Reed held that the Court had jurisdiction because the case involved a Constitutional question affecting the amending powers under Article V, but decided to dismiss the action on political-question grounds. Justices Black, Roberts, Frankfurter and Douglas agreed with this result but reasoned that the Court should not grant jurisdiction on the grounds that there should be no judicial review with respect to the amending powers in Article V. Two justices in dissent agreed with the conclusion reached in the Hughes opinion that the Court had jurisdiction but disagreed with its application to the particular facts since they did not believe a political question was involved. They would have decided on the merits in favor of the mandamus on the grounds that a reasonable time had elapsed for the state to adopt the amendment and that it had therefore expired. Thus one majority—the dissenters and the Hughes group—agreed that the Court had jurisdiction but disagreed on the political-question issue, while a different majority of the Court combined to reach the final result.

Courts at all levels have made little use of this case except as general reference, particularly to the point of refusal of the judiciary to entertain political questions. Only one attempt has been made to interpret Coleman and this proved to be a failure. The citing judge miscounted and stated that the Supreme Court "was equally divided upon the question of whether a justiciable issue or a question political in its nature, and hence not justiciable, was presented." The judge concluded that "[i]t is difficult to ascertain in ... Coleman ... what really did happen for the Court had jurisdiction... ." Latting v. Cordell, 197 Okla. 369, 383, 172 P.2d 397, 410 (1946) (dissent). Finally, it has been noted that the Court has shown considerable fineness in maintaining its jurisdiction for future purposes. 122 A.L.R. 695, 727 (1939).
In summary, the "dual majority" cases have not been cited in a consistent pattern by later courts. Although it can be argued that it would be reasonable to use them for the view stated in their minority and dissenting opinions, this has been done in relatively few instances. Instead, they are sometimes used for their general result, occasionally for their plurality opinion and many times as having no authority. Finally, note the close relation the "dual majority" cases bear to the "coordinate opinion" cases containing plurality and minority opinion. They are analytically identical, except insofar as the minority in the former are supported in their rationale by the dissent.

III

RELATIVE DISPARITY

The accepted theory as to the precedent value of no-clear-majority decisions—that they stand only for their general result—is substantiated only to a limited extent by the cases thus far considered. Those to be discussed in the remainder of this comment, the "relative disparity" cases, have been cited primarily for their plurality opinions and not for their general results.

Broadly speaking, the "relative disparity" cases are characterized by an inequality of scope between concurrences. Furthermore, the prevailing justices have split into unequal numerical alignments. These cases may be divided into five main subgroups, each containing plurality opinions: (1) minority concurrence without opinion; (2) technical minority opinion; (3) narrow minority opinion; (4) broad minority opinion; and (5) second choice minority opinion. As will be seen, this classification is dictated by the nature of the minority concurrence and its relation to the plurality opinion.

A. Silent Concurrence

The first subgroup of cases cited primarily for their plurality opinions are those in which the minority concurs without opinion. It will be convenient to divide these cases further into two types, depending on the presence or absence of a dissenting opinion.

There are two decisions of the first type—Hubbert v. Cambellsille Lumber Co.\textsuperscript{141} and Jacob v. New York City.\textsuperscript{142} In each the Court split 4-2-(3), with only the plurality delivering an opinion. In these circumstances, citation of the plurality opinion as the holding of the case may perhaps be expected, due to the close resemblance it bears to an "opinion of the Court" and the absence of a conflicting rationale.

The Hubbert case involved the issuance of county bonds under one or both of two statutes. One of the statutes provided special remedies upon default if certain special terms were marked on the face of the bonds. An attempt was

\textsuperscript{141} "Inequality of scope" is used to denote differences between concurrences which, for the purposes of this comment, are deemed significant. In general, these differences will depend on whether or not the minority concurrence is "silent" (Section III A), "technical" (Section III B), "narrow" (Section III C), "broad" (Section III D) or "second choice" (Section III E).

\textsuperscript{142} 315 U.S. 752 (1942).
made to resort to a special remedy with bonds which did not contain the marking on the ground that the marking requirement was merely directory and not mandatory. Justices Brewer, Fuller, Holmes and Day asserted that since the proposed remedies were extraordinary, a reasonable presumption existed that the marking requirement was mandatory. Justices White and McKenna concurred without opinion. Justices Harlan, Brown and Peckham dissented without opinion.

*Hubbert*, despite its antiquity, has been cited only five times. All of these citations were to the plurality opinion, and the split was not mentioned. Nor was it noted that the plurality opinion represented only a minority of four justices.

The *Jacob* case involved an action under the Jones Act brought by an employee for personal injury damages resulting from the use of a faulty wrench aboard the employer-defendant’s ship. The lower court had directed a verdict for defendant. Justices Murphy, Black, Douglas and Byrnes reversed, stating that the plaintiff had a right to a jury trial because he had introduced sufficient evidence to bring the question of the employer’s negligence to the jury. It is further stated that the defense of contributory negligence and assumption of risk are not available in actions under the Jones Act. Also, the opinion “suggests” that the simple tool doctrine is not applicable under the Jones Act but determined that “even assuming its applicability, the doctrine does not justify removing this case from the jury” since the plaintiff here had inspected the tool in question, reported defects, and the question still remained whether or not the employer was negligent in failing to replace it. Justices Frankfurter and Jackson concurred in the result without opinion. Justices Stone, Roberts and Reed dissented without opinion.

*Jacob* has been cited frequently, but on no occasion has the citing court expressly recognized the split. Some appear to have viewed the Murphy opinion as the holding of the Court. Others have used the Murphy reasoning without stating it to be the holding. A few have cited the general result.

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Subsequent courts, when considering decisions like *Hubbert* and *Jacob*, have only one opinion from which to derive a holding. This opinion may often appear, at least superficially, to be that of a majority of the Court. Under these circumstances, a case can only be cited for its general result or for the reasoning in the sole opinion. It is not surprising then that the one written opinion obtains the force of a holding. The silent concurrences and dissents seem to be disregarded by subsequent courts.

The second type of "silent concurrence" decision is that in which the dissent renders an opinion. Thus, there are two opinions—the plurality and the dissent—and a minority concurrence without opinion. And, since the plurality looks very much like an "opinion of the Court," or perhaps because there is no competing concurrence, decisions of this type are normally cited for their plurality opinion when used as precedent. There are six such cases, all except one involving 4-1-(4) splits: *Muhlker v. New York and Harlem Railroad Co.*, *McDonald v. Commissioner of Internal Revenue*, *Gaves v. New York*, *Cox v. United States*, *Trono v. United States* and *Memphis Natural Gas Co. v. Stone*.

The *Muhlker* case involved an injunction to prevent the defendant railroad from building an elevated railroad over the street adjacent to plaintiff's property unless compensation was given for loss of light and air. Plaintiff's predecessors had deeded to the city the land under the street for street purposes only. After plaintiff had purchased his property, the state courts had changed their interpretation of the law with respect to the property rights of land adjacent to streets. It was claimed that this change impaired the plaintiff's contract with the government and that it cancelled his property rights without due process of law.

Justices McKenna, Harlan, Brewer and Day concluded that the plaintiff was entitled to compensation for the lost light and air, stating that "[the Contract clause] is the ground of our decision. We are not called upon to discuss the limitations upon the power of the courts of New York to declare rules of property or changes or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States." Justice Brown concurred in the result but stated no opinion. Justices Holmes, Fuller, White and Peckham dissented, stating that the Constitution was not violated by the facts of this case. Rather, the resolution of the property law therein involved was properly a function of the state courts.

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150 The Court has cited Jacob six times, all in general language. Five of the citations were made by Justice Black, who concurred in the Murphy opinion, and the sixth was made by Justice Murphy himself.

151 197 U.S. 544 (1905).
152 323 U.S. 57 (1944).
155 199 U.S. 521 (1905).
156 335 U.S. 80 (1947).
Muhlker has been cited a great deal. Only one case, however, has specifically acknowledged the presence of a silent concurrence. Rather, almost half the cases using Muhlker as precedent expressly indicate that the plurality opinion was the holding of the Court and do not recognize that it did not represent the views of a clear majority of justices sitting. The rest use Muhlker for its result, without elaborating as to the rationale.


This fact is particularly interesting because the McKenna opinion used a constitutional rationale. This means that, although five sitting justices did not record agreement with the McKenna analysis of the Contract and Due Process clauses, this fact went essentially unexplored for over fifty years. During this time eighteen cases, including one by the Supreme Court (Sauer v. New York, 206 U.S. 536 [1907] [which distinguished Muhlker]), have been directly affected by the Muhlker-minority analysis. This result seems difficult to defend unless there is some basis for linking a concurrence without opinion with a four-justice "opinion of the Court."
McDonald v. Commissioner of Internal Revenue was concerned with whether campaign expenses of a political candidate, and assessments upon candidates exacted by their political party, were permissible deductions for income tax purposes. The relevant sections of the Internal Revenue Code of 1939 were Section 23(a)(1)(A) ("business or trade expenses"); Section 23(e)(2) ("transactions entered into for profit"); and Section 121 ("expenses for production of income"). Justices Frankfurter, Stone, Roberts and Jackson concluded that these statutory provisions did not allow campaign expense deductions, and, even if the statutes were less clear, "we should not be inclined to displace the views of the Tax Court with our own."<sup>1</sup> Justice Rutledge concurred in the result without opinion. Justices Black, Reed, Douglas and Murphy dissented. They felt that, at least in part, campaign expenses should be included under Section 121 as expenses "for the production of income." And, since the Tax Court had made no findings of fact but had instead categorically denied campaign expenses, they would remand to the Tax Court to pass on the particular facts at hand.

Thus, four justices would have denied all income tax deductions for campaign expenses, and four would have determined on the facts of the particular case whether such expenses were for "the production of income." One justice agreed with the refusal of the deduction in this case but expressed no opinion on the statutory interpretation.

No case citing McDonald has specifically noted the absence of a clear-majority opinion. In most instances, reference is made directly or indirectly only to the Frankfurter opinion. Some refer to this opinion as the holding.<sup>2</sup> The case has been cited in general terms<sup>3</sup> and for secondary points.<sup>4</sup> The silent single-justice minority apparently did not detract from the weight of the plurality, despite the presence of a four-justice dissent.<sup>5</sup>

In Gayes v. New York, a defendant in a burglary prosecution was convicted without counsel, and was later convicted of another crime. His second sentence was increased because of the first conviction. Justices Frankfurter, Vinson, Reed and Jackson held that in a third proceeding the second sentence could not be challenged for lack of counsel at the first trial, "so far as the United States Constitution is concerned." Instead, the proper remedy would have been to

<sup>1</sup> McDonald v. Commissioner of Internal Revenue, 323 U.S. 57, 64 (1944).

<sup>2</sup> E.g., in Mays v. Bowers, 201 F.2d 401, 402 (C.A. 4th, 1953), the court said that in McDonald "the Supreme Court has expressly decided that campaign expenses are not deductible from income."


<sup>4</sup> In Commissioner v. George Jones Co., 152 F.2d 358, 361 (C.A. 6th, 1945), the case was used to support the rationale of restricting Supreme Court review of tax cases to results which have no "warrant in the record and ... [no] reasonable basis in the law" (taken from Frankfurter opinion). Accord: Lincoln Electric Co. v. Commissioner, 162 F.2d 379 (C.A. 6th, 1947).

<sup>5</sup> Subsequent courts may have been influenced in accepting the Frankfurter opinion and ignoring Rutledge's silence by the fact that the Frankfurter opinion seems to be in accord with prior law. Cf., Higgins v. Commissioner of Internal Revenue, 312 U.S. 212 (1941).
attack the first conviction during the second sentencing. Justice Burton
merely concurred in the result and expressed no opinion. Justices Rutledge,
Black, Douglas and Murphy dissented, stating that the constitutional violation
was clear and, furthermore, that under New York law "the so called 'flank'
attack is apparently the only one now open to petitioner." It was further
stated that it was up to the state to determine which method may be utilized
later to attack criminal proceedings.

Gayes has been cited rather frequently. In several instances, the split on the
Court has been noted, although the predominant use has been that of citing
the plurality opinion as the holding. Analyses of Gayes worthy of note have
appeared in decisions rendered by the Bronx County Court and the Wyoming
County Court, both in New York. The Wyoming County case involved a
fourth offender, one of whose convictions had been in a foreign jurisdiction
where the New York criminal standards were held not to be in effect. His con-
viction as a fourth offender was therefore found invalid. In distinguishing Gayes,
the court noted that the Frankfurter opinion and the dissent each received the
votes of four justices and that Burton concurred only in the result. Thus, "[t]here
is nothing to indicate that . . . Burton disagreed with the law as heretofore
announced by the New York courts." Consequently, the Wyoming court did
not follow the Gayes decision.

The Bronx County Court criticized Gayes as "creating doubt as to what due
process is today . . . [and is of] grave consequence if controlling and appli-
cable." Because Justice Burton concurred in result only, the court refused to
give Gayes any consideration. It thus allowed a convicted fourth offender to

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167 Gayes v. New York, 332 U.S. 145, 154 (1947). In a footnote Justice Rutledge stated
that, under the New York case law, it would be necessary for petitioner to vacate the first
sentence before he could attack the second. Ibid., at 152 n. 11.

168 The Supreme Court has cited Gayes only three times, never authoritatively. United
States v. Morgan, 346 U.S. 502, 511 (1954); Quicksall v. Michigan, 339 U.S. 660, 661 (1950);

169 People v. McAllister, 194 Misc. 674, 679, 87 N.Y.S.2d 643, 647 (Bronx County Ct.,
1949); People ex rel. Marlowe v. Martin, 192 Misc. 192, 196, 83 N.Y.S.2d 201, 205 (Wyoming
County Ct., 1948); People v. Gayes, 190 Misc. 865, 77 N.Y.S.2d 20 (Schenectady County Ct.,
1948) (on remand from Supreme Court).

170 United States ex rel. Turpin v. Snyder, 183 F.2d 742, 743 (C.A. 2d, 1950); United States
v. Rockower, 171 F.2d 423, 425 (C.A. 2d, 1948); United States v. Kline, 98 F.Supp. 325,
328 (E.D.N.Y., 1951); State ex rel. Watkins v. Murray, 228 Ind. 277, 91 N.E.2d 845 (1950);
United States v. Moore, 166 F.2d 102, 105 (C.A. 7th, 1948).

171 People v. McAllister, 194 Misc. 674, 87 N.Y.S.2d 643 (Bronx County Ct., 1949).

172 People ex rel. Marlow v. Martin, 192 Misc. 192, 83 N.Y.S.2d 201 (Wyoming County Ct.,
1948).

173 Ibid., at 196 and 206.

174 People v. McAllister, 194 Misc. 674, 679, 87 N.Y.S.2d 643, 647 (Bronx County Ct.,
1949).
attack his third conviction on a claim of deprivation of counsel.\textsuperscript{175} Other cases in New York, however, have cited the Frankfurter opinion as the Gayes holding.\textsuperscript{176}

Cox \textit{v. United States} involved a review of defendants' convictions for being AWOL from a conscientious objector's camp. The defense was that the defendants should be exempt from such service because they were ministers as defined by the Selective Service Act.\textsuperscript{177} They previously had exhausted their administrative remedies in an attempt to obtain this exemption.

Justices Reed, Vinson, Jackson and Burton stated that the defendants had a right to raise the issue of their classification in these proceedings. However, they would limit the appeal to the question of whether there was any "basis in fact" for the Selective Service Board's decision. They decided that under the facts of this case the decision of the board, which refused to classify defendants as ministers, should stand. They noticed particularly that defendants had been engaged in secular employment as well as performing religious duties, and emphasized the relatively small number of hours spent in the service of the religious organization. Justice Frankfurter concurred in this result but stated no opinion. Justices Douglas and Black, dissenting, agreed with the Reed opinion that the scope of review was limited to the "basis of fact" point but disagreed on the interpretation of the instant facts. They rejected the part of the Reed analysis which had discussed the number of hours defendants acted as "ministers" and also that part which would give weight to the evidence that defendants had secular employment concurrently with their "ministerial" duties. They would disregard such criteria. In a separate dissent, Justices Murphy and Rutledge objected to the application of the "basis in fact" rule. They noted that the defendants were raising the issue in a criminal action where the "stakes are too high... to permit an inappreciable amount of supporting evidence to sanction a draft board classification."\textsuperscript{178} Instead, they would expand the scope of judicial review. "[O]nly evidence of a substantial nature warrants approval of the draft board classification."\textsuperscript{179} They agreed with the Douglas

\textsuperscript{175}The only other reference to the disagreement in Gayes was in a dissent which maintained that the state had relied on Gayes as holding (as the Frankfurter opinion had stated) that the Sixth Amendment did not apply to the states. The dissent maintained that "it is important to note that the opinion in the Gayes case was actually the opinion of but four of the majority..." Bojinoff \textit{v. State}, 274 App.Div. 838, 839, 80 N.Y.S.2d 513, 515 (4th Dep't, 1948). This is an interesting example of the use of the lack of a clear majority to weaken the precedent value of the case. The same proposition—that the Sixth Amendment does not apply to the states—was decided by a clear majority in Foster \textit{v. Illinois}, 332 U.S. 502 (1946), which was handed down on the same day as Gayes.


\textsuperscript{179}Ibid., at 458.
opinion that the fact that the defendants did not spend full time as ministers and that they also engaged in secular employment afforded "no reasonable basis for implying a non-ministerial status." 180

Thus, six justices agreed that the "basis in fact" rule should be applied, but only four agreed that working part time as a minister, coupled with a non-ministerial secular job, was a sufficient basis in fact to support the denial of ministerial classification by a Selective Service Board. An equally strong minority of four justices rejected these factors as a reasonable basis in fact, two of these refusing to accept the "basis in fact" rule at all. Frankfurter expressed no opinion.

Few citations to Cox have recognized its no-clear-majority aspect. Instead, most later cases refer only to the six-justice agreement on the "basis in fact" rule. 181 Nevertheless, several cases have cited the Reed opinion as to whether or not the facts in Cox presented a sufficient basis to justify reversal. 182 Thus, citation of the plurality opinion appears again to be the general rule. 183

In Trono v. U.S., the defendants had been indicted for murder and convicted of assault, a lesser crime. They then appealed to the Supreme Court of the Philippine Islands which reversed the assault conviction, found them guilty of the higher crime of homicide and sentenced them accordingly. The appeal to the Supreme Court of the United States was based on the claim that this action constituted double jeopardy under an act of Congress 184 applicable to the Philippine Islands which contained language substantially identical to the Bill of Rights of the Constitution of the United States.

Justices Peckham, Brewer, Brown and Day asserted that, because the original appeal was by the defendants, it resulted in a waiver of the entire original judgment and a conviction of a higher crime upon the appeal was not double jeopardy. Justice Holmes concurred in the result without opinion. Justice Harlan dissented on the ground that the Philippine Islands are within the jurisdiction of the Constitution and that, since there had been no jury or grand jury, the prosecution of the case was unconstitutional. Justices McKenna and White dissented on the ground that, even though the defendants had appealed, the reversal by the Philippine Supreme Court on these facts constituted double jeopardy and was therefore a violation of the statute. Chief Justice Fuller dissented without opinion.

180 Ibid., at 459.
181 The case has been cited thirty-six times for this rule. Since a majority agreed on this point these cases are not enumerated herein.
183 The Reed plurality opinion may have been more easily accepted by subsequent courts as that of the Court because of the split among the dissenters, even though they were in agreement on the question of secular employment and number of hours spent in the ministry.
In general, the *Trono* plurality opinion has been cited as the holding of the Court without mention of the silent concurrence. The Mississippi Court, although perhaps more forcefully than most courts, typifies this in its statement that: "In the case of *Trono* . . . we find the rule clearly and forcibly stated through Justice Peckham . . . from the highest judicial authority of the country and as such is entitled to great respect." Other courts refer only to the result in *Trono*, without reference to its rationale.

In *Memphis Natural Gas Co. v. Stone*, the Court upheld, in a 3-1-1-(4) split, a Mississippi "doing business" tax on "capital used, invested or employed within the state" as applied to local portions of an interstate pipeline. The company engaged in no intrastate commerce in Mississippi.

Justices Reed, Douglas and Murphy concluded that the tax was valid since it was based on the local activity of maintenance of the pipeline—protected by the state "apart from the flow of commerce." They noted that the tax was not an apportioned tax on gross receipts from interstate commerce itself. The fact


1817 Calicoat v. State, 131 Miss. 169, 197-200, 95 So. 318, 325-26 (1922).

that interstate commerce could not be conducted without these local activities did not make the tax one on the privilege of doing interstate business. Justice Rutledge concurred in a separate opinion. He disagreed with the Reed opinion, stating that "the local activities . . . [are not] separate from the interstate business . . . either by reason of the apportionment or otherwise."

Rather, in certain instances, as here, the local portions of interstate commerce can be taxed by a state. Justice Black concurred without opinion. Justices Frankfurter, Vinson, Jackson and Burton dissented, stating that the Memphis Co. received no protection from the state and that the tax was not on any "local incidents" which have not already been fully taxed. They concluded that the tax was one on the privilege of doing interstate business within the state, could not be justified as an additional ad valorem tax, and was therefore invalid.

It should be noted that the structure of the opinions in Memphis differs from that of the typical "silent concurrence" case. Instead of only one written concurring opinion, Memphis has two. Nevertheless, the silent concurrence is determinative of the result, since less than a clear majority of justices support the written concurrences. A further question is presented by the relationship of the two concurring opinions. It may be argued that since Rutledge saw no difficulty in taxing the concomitants of interstate commerce, he certainly would find no problem with respect to local incidents apart from such commerce. Thus, Rutledge would appear to agree with the Reed opinion, except insofar as he was willing to go even further. Under this analysis, four justices would accept the plurality view (with one going even further). In this sense Memphis closely approaches the typical "silent concurrence" case.

Memphis has been used as precedent almost exclusively for the view taken by its plurality (Reed) opinion, although the Rutledge opinion has been cited. This pattern has developed notwithstanding the fact that Justice Reed, speak-

189 Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 98 (1947).

190 This phenomenon is characteristic of the "broad minority" cases discussed in Part III D infra. Several other cases involved in this comment also present an overlapping between the distinctive factors of different "relative disparity" subgroups. Consult Burns v. Wilson, 346 U.S. 137 (1953), discussed in note 239 infra and Klapprott v. United States, 335 U.S. 601 (1949), discussed in Part III E infra. In these circumstances, classification depends on which element is deemed analytically dispositive of the particular case.


ing for four justices in the Interstate case and unopposed on this question by the
remaining five, stated that Memphis was "indecisive." Similarly, the only
other citing Court taking this view of Memphis concluded that "[I]n view of the
divisions within the [Memphis] Court, there is [no] majority opinion which
can be relied upon as giving the rationale of the Court's decision." In
summary, the "silent concurrence" decisions do not appear to substantiate
the theory that no-clear-majority decisions have precedent value only for their
general result. Instead, they have to a large degree presented a pattern of cita-
tion for their plurality opinions. This is clearly true in the absence of a dissent-
ing opinion, and almost as certain where one is present. The resemblance borne
by the typical four-justice plurality opinion and the absence of competing con-
curring opinions afford a possible basis for the explanation of this citation
pattern.

B. Technical Minority

The presence of a silent concurrence is not the determinative factor in all
no-clear-majority decisions where the plurality opinion is given stare decisis
value. Another subgroup of cases, containing written minority concurrences, is
similarly (although to a lesser extent) cited for its plurality opinions. In these
cases the minority opinion is usually supported by only one justice and is con-
 fined to a somewhat technical ground, with the stronger rule or problem dis-
cussed by the plurality being specifically rejected or not considered.

These "technical minority" cases are distinguishable from the "coordinate
opinion" cases discussed above. There, the minority not only expressed refusal
to join the rationale of the plurality, but also proposed an equally strong and
distinct rule. Here, no strong second rule is present, except perhaps in the dis-
sent. Three cases will be discussed in this subgroup: United States v. Williams, Texas and Pacific Ry. Co. v. Leatherwood and Wheeler v. Sohmer.

The Williams case involved several persons who, it was alleged, acting under
the color of state law had conspired to obtain forced confessions in violation of
a federal statute. All but one of the defendants had previously been acquitted
of the substantive offense under a related statute before the conspiracy in-

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105 341 U.S. 70 (1951).
107 233 U.S. 434 (1914).
108 62 Stat. 696 (1948), 18 U.S.C.A. §241 (1951). "If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States," they shall be in violation of the statute.
dictments were returned. The Supreme Court sustained a reversal by a 4-1-(4) split.

Justices Frankfurter, Vinson, Jackson and Minton concluded that the conspiracy statute in question "applies only to the interference with rights which arise from the relation of the victim and the Federal Government, and not to interference by State officers with rights which the Federal Government merely guarantees from abridgment by the States." Justice Black concurred in the result on the limited ground that the instant prosecution was barred by the principle of res judicata. He reasoned that since all but one of the defendants had been declared innocent of the substantive offense, and since no other evidence of the unlawful agreement had been presented, the prior acquittals operated to bar this action because one person cannot conspire with himself. Justices Douglas, Reed, Burton and Clark dissented, rejecting the reasoning of both concurring opinions.

The Williams case has not been cited frequently. When used, the approach has been to cite the Frankfurter opinion as the "opinion of the Court," disregarding the fact that a majority did not agree with its rationale. As an extreme example, one court has stated, with reference to Williams, that "[u]pon appeal the Supreme Court by a divided court affirmed the dismissal upon the first ground assigned by the Court of Appeals"—that the conspiracy statute was not intended to apply to rights set out in the Fourteenth Amendment. And, although the court noted that Justice Black had rendered a concurring opinion, reference was made to the Frankfurter opinion as the "majority opinion" and as "[what] the Supreme Court . . . held." Leatherwood presents a similar problem of statutory construction. The question was whether the Carmack Amendment, which regulated shipments by rail through connecting carriers, bound the shipper and all subsequent carriers to the terms of the original bill of lading. The original bill of lading had contained a clause barring any action for damages beyond six months after the loss occurred. The connecting carriers had insisted that the shipper sign new bills covering shipment over their lines which did not contain the six month limita-

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203 Ibid. The only specific notation of the split is in Rosenberg v. United States, 346 U.S. 273, 307 (1953), where Justice Frankfurter cited Williams rhetorically while stating that "[t]he Reports of this Court are replete with instances of marked division of opinion in construing criminal statutes." Scarlette v. State, 201 Md. 319, 93 A.2d 757 (1953), cited the res judicata opinion of Justice Black but emphasized that it was voiced only in a separate concurring opinion. Several cases have cited Williams generally, but the citations are of no use to this analysis.
204 34 Stat. 584, 585 (1906).
tion. The shipper complied. More than six months after the occurrence of loss, the shipper sued the original carrier and the connecting carriers, repudiating all bills and claiming upon an implied obligation created by the original carrier when the goods were accepted for through interstate carriage. The connecting carriers claimed that the subsequent bills had no legal effect and that the terms of the original bill were binding on all parties.

Justices Brandeis, Holmes, Day and White concurred, holding that under the Carmack Amendment, "the bill of lading given by the initial carrier embodies the contract for transportation from point of origin to destination; and its terms in respect to conditions of liability are binding upon the shipper and all connecting carriers...[and] has in effect the force of a statute, of which all affected must take notice."

In a separate concurring opinion, Justices McReynolds and Van Devanter stated that this "broad declaration" was beyond the requirements needed for the decision, and that they were "not prepared to assent to it as a proposition of law." Instead, they would deny the action for damages on the limited factual ground that the shipper had repudiated the subsequent bills. It was intimated that had he relied on them, "the question presented would have been a very different one."

Justices McKenna, Pitney and Clarke dissented without opinion.

The Court was thus split 4-2-(3), with four justices contending that any waiver of the terms of the original bill of lading was prohibited, two relying strictly on the facts of the case and specifically objecting to the broad doctrine of prohibition of waiver, and three disagreeing with these positions but not stating their reasons.

Over three-fourths of the many cases using Leatherwood as precedent state that its plurality opinion was the holding. Several are quite emphatic. None

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206 Ibid., at 482.
207 Ibid.

208 Of sixty-one cases citing Leatherwood, fourteen were discarded for this analysis because of the general nature of the citation. Of the remaining forty-seven, the following thirty-five cited the plurality opinion as the holding. Notation has been made where the opinion commented on the cited case. Galveston Wharf v. Galveston, H. & S.A.Ry. Co., 285 U.S. 127, 135 (1932); Burns v. Chicago M.St.P. & P.R. Co., 192 F.2d 472, 477 (C.A. 8th, 1951); Pennsylvania R. Co. v. Miller, 124 F.2d 160, 163 (C.A. 5th, 1942) (dissent) ("the vigorously established rule"); American Ry. Express Co. v. The Fashion Shop, 10 F.2d 909 (App. D.C.,1926) ("In Leatherwood...the Court said..."); New York Central R. Co. v. Gardner, 294 Fed. 89, 90 (C.A. 7th, 1923); McGinn v. Oregon-Washington Ry. & Navigation Co., 265 Fed. 81, 84 (C.A. 9th, 1920) ("Such is, in effect the holding of the Supreme Court in...Leatherwood..."); Burns v. Chicago M.St.P. & P.R. Co., 100 F.Supp. 405, 409 (W.D. Mo., 1951); Norton v. Shotmeyer, 72 F.Supp. 188, 192 (D.N.J., 1947) ("The Supreme Court in Leatherwood...has specifically stated..."); Inland Waterways Corp. v. Sloss Sheffield Steel & Iron Co., 223 Ala. 397, 399, 136 So. 849, 851 (1931); Louisville & N.R. Co. v. Strickland, 219 Ala. 581, 584, 122 So. 693, 698 (1929); Southern Ry. Co. v. Northwestern Fruit Exch., 210 Ala. 519, 520, 98 So. 382, 384 (1923); Pennsylvania R. Co. v. Midsate Horticultural Co., 21 Cal.2d 243, 252, 131 F.2d 544, 549 (1942) ("It has been decided...." citing "see...Leatherwood"); Cassone v. New York, N.H. & H.R. Co., 100 Conn. 262, 268, 123 Atl. 280, 283 (1924); Ameri-
recognize that they are relying on a view which did not have clear-majority support. Most of the remaining cases cite *Leatherwood* for its general result, also without acknowledging the lack of a clear majority. In fact, only two cases have noted the *Leatherwood* split. Thus, *Leatherwood* has been cited predominantly for its plurality opinion. The presence of the two-justice minority, as

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210 Jones & Co. v. Davis, 65 Cal.App. 164, 223 Pac. 560 (1924); Jenckes Spinning Co. v. New York, N.H. & H.R. Co., 47 R.I. 72, 129 Atl. 815 (1925). The latter case applied the broad rule stated by the Leatherwood plurality opinion and which only three years previously had been accepted unanimously in Georgia R. Co. v. Blish, 241 U.S. 190 (1916). The Jenckes court explained the change in the attitude of the Court in Leatherwood (as opposed to Blish) on the ground of factual differences. Although not articulated in Jenckes, this difference seems to be primarily that in Leatherwood, unlike Jenckes or Blish, the plaintiff shipper based his claim on a theory of implied contract with all of the defendant carriers and claimed that all of the bills of lading were invalid. The two concurring minority justices, and possibly the three who dissented without opinion, considered that this case could therefore have been decided against the plaintiff without resort to the broad rule concerning the binding nature of the initial bill of lading. This would appear to be a sensible disposition of Leatherwood, particularly if the Jenckes court felt confined by the accepted, but not often followed, notion that all no-clear-majority cases have no precedent value.
contrasted with the single-justice minority in *Williams*, is perhaps offset by the absence of a dissenting opinion.

*Wheeler v. Sohmer* concerned the right of a state to impose a transfer tax on promissory notes located within the taxing state at the date of the nonresident owner’s death, when the death occurred in another state. The Supreme Court held 4-2-(3) that the tax was not unconstitutional under the Due Process clause of the Fourteenth Amendment. The split in opinion revolved primarily around the interpretation of *Buck v. Beach*, where the Court had held that Indiana could not impose a property tax on notes which had been temporarily placed within the state in order to avoid a similar Ohio property tax, when the situs of the debt and domicile of the owner was not in Indiana.

Justices Holmes, Day, Lurton, and Hughes favored a rule which would uphold the power of a state to tax notes solely on the basis of their presence in the taxing jurisdiction. They stated that *Buck* had seemingly been decided on the grounds of temporary situs and had also been limited to property taxes. And, if not, then it must “yield to the current of authorities”—those which had upheld the taxing of notes based on their presence within the jurisdiction. Justices McKenna and Pitney concurred in result but disagreed with the “situs” rule. Instead, they based their decision on the ground that ancillary letters of administration for the notes had been probated in the taxing jurisdiction and that the right to impose a transfer tax was therefore present. They stated that *Buck* did not revolve on the point of temporary transfer but was applicable only to property taxes and did not extend to inheritance taxes. Justices Lamar, White and Van Devanter dissented. They agreed with the minority on its interpretation of the “situs” rule and that *Buck* did not go on the point of temporary transfer. However, they felt that the *Buck* doctrine should apply to transfer taxes as well as to property taxes, and would thus not allow the tax in this case.

The Supreme Court has had occasion to refer to *Wheeler* several times. Three cases have cited it as authority for the right of the situs state to tax. However the discussion in all three was confined to general terminology and two qualified it by such comments as “notes ... may acquire a situs at a place other than the domicile of the owner,” or “we held that the state might tax such notes as property having a local situs.” (Italics added.) Such qualifications suggest that these are citations of the general result rather than of the plurality opinion.

The plurality opinion would appear to have gained some currency as the holding in *Wheeler*. Thus, the Court has ruled that double taxation is illegal per se, without answering Justice Stone, who in arguing that the Court had previ-

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211 206 U.S. 392 (1907).
212 223 U.S. 434, 440 (1914).
ously been unconcerned with subjecting property to double taxation, stated that its ruling might be "far reaching enough to overturn ... Wheeler...." The reference to Wheeler is significant only if Stone was recognizing the plurality opinion as the holding, since double taxation is a product of the rule—in Wheeler espoused only by the plurality opinion—that the state of situs may tax property solely because of its physical presence therein. Shortly thereafter, the double-taxation rule was applied to a case similar to Wheeler and the Court held that the situs state could not constitutionally impose an inheritance tax on bank deposits when the state of residence had also imposed a similar tax on the same deposits of the deceased. The majority did not mention Wheeler even though, in dissent, Justices Holmes, Stone and Brandeis stated that "the tax (by the state of physical situs) was warranted by decisions of this court," citing Wheeler. Here, too, the dissenters were correct only if the plurality opinion is considered as the holding. Similarly, lower federal courts have several times described Wheeler as laying down the "situs" rule.

Most of the other citations of Wheeler have been for a view obtained by combining its plurality and minority opinions. This apparent lack of predominant citation for plurality opinion is perhaps explained by the fact that the result in Wheeler was essentially reversed by the later "double taxation" cases. As a result, subsequent use of the case has been more or less confined to the points upon which the two victorious opinions agreed.

In summary, it must be borne in mind that the "technical minority" cases differ only in degree from the "coordinate opinion" cases discussed above. Accepting the strong technical distinction, one might expect that cases involving technical minorities would be cited, if at all, for their plurality opinions. In this sense the "technical minority" cases closely approach the "silent concurrence" cases. As has been seen, this expectation accords in most instances with actual citation practice.

219 Ibid., at 596.
223 The recent case of United States v. Five Gambling Devices, 346 U.S. 441 (1953), illustrates the converse of the "technical minority" cases. It arose on an appeal by the govern-
C. Narrow Minority

The "narrow minority" subgroup of cases is characterized by the presence of a minority concurring opinion which is analytically not in conflict with the plurality opinion, except insofar as the plurality is broader than the minority. In other words, the minority opinion is literally "telescoped" within the plurality opinion. These cases may be distinguished from the "technical minority" cases, depending on whether or not the minority is found to agree, at least in part, with the reasoning of the plurality.

It will be noted that the "narrow minority" cases closely resemble clear-majority decisions, at least insofar as there is "telescoped" agreement between the concurring opinions. This agreement is of course represented only by the minority. It is thus significant that these cases are cited approximately one-fourth of the time for their plurality opinions, although no clear majority has accepted all of the views therein expressed. There are three cases in this subgroup: *Northern Securities Co. v. United States*,223 *Haley v. Ohio*224 and *Burns v. Wilson*.225

In *Northern Securities Co. v. United States*, the government brought suit under the Sherman Act against the Northern Securities Company, a holding company, its subsidiaries, two competing and substantially parallel railroad lines, and certain shareholders. A decree granting the relief requested was affirmed by the Supreme Court in a 4-1-(4) split.

Justices Jackson, Frankfurter and Minton held that a literal reading of the statute required that the devices be involved in interstate commerce. Thus, in the absence of such an allegation, dismissal was proper. Justices Black and Douglas concurred. They asserted that the statute did not require interstate movement but decided that it denied due process because of vagueness. In dissent, Justices Clark, Warren, Reed and Burton agreed with Black and Douglas that the act was not limited to interstate sales, but did not agree that the act was unconstitutionally vague. They further asserted that it was a valid exercise of congressional power under the Commerce and Necessary and Proper clauses.

Thus Five Gambling Devices might be termed a "technical plurality" decision. The plurality opinion was based on a narrow construction of the statute while a broad principle of constitutional law provided the basis for the concurring minority opinion.

Only once has Five Gambling Devices been cited for more than its general result. In *Jenkins v. Durkin*, 208 F.2d 941 (C.A. 5th, 1954), clear reference was made to the plurality opinion in the following manner: "We are particularly of the view that when the question of the exertion of congressional power over activities occurring wholly within a state is concerned, courts ought not to, indeed they may not, ... extend the congressional enactment beyond its reasonable confines, cf. United States v. Five Gambling Devices." Ibid., at 945. The remaining cases, typically per curiam opinion, cite Five Gambling Devices for its general result: *United States v. J. & W. Music Co.*, 212 F.2d 958 (C.A. 5th, 1954); *United States v. Loyal Order of Moose*, 211 F.2d 406 (C.A. 5th, 1954); *United States v. American Legion Post*, 209 F.2d 511 (C.A. 5th, 1954).

223 193 U.S. 197 (1904).
224 332 U.S. 596 (1946).
Justices Harlan, Brown, McKenna and Day stated that the combination was in restraint of trade within the meaning of the Act. It was their position that the Sherman Act declared illegal every contract, combination, or conspiracy which directly or necessarily operated in restraint of trade among the several states or with foreign nations and was not limited to restraints which are unreasonable in nature. Also, the application of the Act in this case was not an unauthorized interference with the internal commerce of the states creating the corporations involved. Justice Brewer concurred, but would limit the broad language of the Harlan opinion. It was his view that the Sherman Act only included within its scope contracts which were unreasonable restraints of interstate trade, and that the control of both railroads through the Northern Securities Company constituted such an unreasonable restraint of trade. In two separate dissents, Justices White, Holmes, Fuller and Peckham argued that the ownership of stock in the railroads was not commerce at all and therefore Congress was without power to regulate it. And, even if Congress had such power, it had not exercised it.

It seems clear that if the plurality was willing to strike down contracts of the type herein involved without regard to their reasonableness, they would certainly agree with the minority in striking unreasonable contracts. Thus a clear majority of the Court may be interpreted as agreeing with the minority opinion, although four of the justices would have gone even further.

The most prevalent use of Northern Securities as precedent has been for its general result. However, a great number of subsequent courts have cited it


227 "I am happy to know that only a minority of my brethren adopt an interpretation of the law which in my opinion would make eternal the bellum omnium contra omnes and disintegrate society so far as it could into individual atoms." Mr. Justice Holmes dissenting in Northern Securities Co. v. United States, 193 U.S. 197, 411 (1904).

for the view expressed by its plurality opinion. Still another court stated: "The opinion of Mr. Justice Harlan to the extent of Mr. Justice Brewer's concurrence correctly stated the principles governing the construction of the Act then under consideration." A final few have explicitly recognized the lack of


express clear-majority agreement as to the reasons supporting the judgment and have thus given Northern Securities little weight as precedent.231

In Haley v. Ohio, a fifteen year old defendant had been convicted in a state court of murder. He appealed to the Supreme Court, claiming a violation of due process under the Fourteenth Amendment. Following his arrest, the defendant had been questioned by the police from midnight until 5:00 A.M., after which he had signed an alleged confession containing a formal indication that the defendant had been advised of his constitutional rights prior to signing. There was controverted evidence of his having been beaten during this questioning period. After this episode, the defendant was held incommunicado for three days even though his mother and a lawyer attempted to see him. Over objection, the confession was introduced at the trial. This was held erroneous by the Supreme Court, in a 4-1-(4) split.

Justices Douglas, Black, Murphy and Rutledge stated that the introduction of the confession as evidence was a violation of due process under the Fourteenth Amendment. They stated that "[t]he age of petitioner, the hours when he was grilled, the duration of his quizzing, the fact that he had no friend or counsel to advise him, the callous attitude of the police towards his rights"232 combined to prove coercion in obtaining the confession. The opinion rejected the argument that the defendant had been apprised of his constitutional rights compare the analysis of the court in Monongahela River Consolidated Coal & Coke Co. v. Jutte, 210 Pa. 288, 59 Atl. 1088 (1904), where the court cited the Harlan view authoritatively, though it recognized the lack of a clear majority. It justified its use of Northern Securities on the ground that Justice Brewer did agree that the contract in the case operated as a direct restraint on interstate commerce.


231 Standard Oil v. United States, 221 U.S. 1, 95, 96 (1911) (by implication); American Federation of Tobacco Growers v. Neal, 89 F.Supp. 12, 14, 15 (W.D. Va., 1950); United States v. Winslow, 195 Fed. 578, 587 (D. Mass., 1912); Henry L. Doherty & Co. v. Rice, 186 Fed. 204, 211 (M.D. Ala., 1910); State v. Coyle, 7 Okla.Cr. 50, 83, 122 Pac. 243, 258 (1912); Pulpwood Co. v. Green Bay Paper & Fiber Co., 157 Wis. 604, 619, 147 N.W. 1058, 1064 (1914) (by implication). Analysis of the use of Northern Securities as a precedent by subsequent courts must of course take account of subsequent Supreme Court cases which may have clarified the dispute in the primary case. For example, in Standard Oil v. United States, 221 U.S. 1 (1911), the Court, by a clear majority, seems to have adopted a position similar to that advocated by Justice Brewer in Northern Securities. Although such subsequent clarification may indicate why the primary case has not been cited frequently or authoritatively, it does not in any way justify improper use of the primary case as a precedent.

before he signed and stated that "a boy of fifteen, without aid of counsel, [would not] have a full appreciation of that advice and that on the facts of this record he [did not have] ... a freedom of choice."233 Justice Frankfurter concurred in a separate opinion. The basic difference in his rationale arose from "doubts and difficulties" which he entertained because of the "delicate exercise of power" in reversing a state court's conviction for want of due process. He stated that the question of coercion, when the defendant was only fifteen years old, was not "a matter of mathematical determination," but rather it invited psychological judgment. From this he concluded that a fifteen year old defendant is not always incapable of exercising free choice of action and that he would not "dispose of this case by finding in the Due Process Clause Constitutional outlawry of all private statements made by an accused to a police officer."234 The thrust of his separate opinion apparently is that he would be more inclined to adopt a case by case approach in interpreting the Due Process clause and that he felt that the Douglas opinion was too general in its rejection of confessions of fifteen-year-old boys elicited without presence of counsel. Justices Burton, Vinson, Reed and Jackson dissented. They concluded that a finding of a violation of due process in this case would be based on pure conjecture, that the question rested upon controverted evidence and that the state courts were the appropriate tribunals to determine the outcome in such a situation. An independent review should rarely overturn the result obtained by the state court when "credibility plays as large a part in the record as it does in this case."235

The great majority of citations to Haley have been references to its general result, largely contained in discussions concluding that coerced confessions are inadmissible.236 Some cases go so far as to recognize the lack of an express clear

233 Ibid., at 601.
234 Ibid., at 603.
235 Ibid., at 623.

majority and then cite *Haley* for the points of agreement between the plurality and minority opinion.\(^{237}\) However, several courts have stated that *Haley* held all confessions obtained while the confessor is unlawfully detained are inadmissible\(^{238}\)—a view which can be derived only from the plurality opinion, and which was specifically rejected by the minority.\(^{239}\) In summary, the "narrow minority" cases differ from the "technical minority" cases insofar as the latter contain no logical connection between plurality and minority opinion, while in the former the minority lays down a rule which is telescoped by the plurality. Despite this area of agreement between the two opinions in the "narrow minority" cases, it is believed that they are properly classified as no-clear-majority cases, since their majorities do not agree on the rule supporting the result. Finally, although the "narrow minority" cases approach clear-majority decisions insofar as the minority reasoning is accepted (so far as it goes) by the

\(^{237}\) Garner v. United States, 174 F.2d 499, 504 (App. D.C., 1949) (dissent); Linkins v. State, 202 Md. 212, 218, 96 A.2d 246, 249 (1953) (The court apparently transposed the Frankfurter and Douglas views but would have arrived at the same conclusion anyway.).


\(^{239}\) Another decision which may be classified in the "narrow minority" subgroup is Burns v. Wilson, 346 U.S. 137 (1953). It affirmed dismissal of an application for habeas corpus sought on grounds of denial of due process. The petitioner had been convicted by court-martial of murder and rape and sentenced to death. Justices Vinson, Reed, Burton and Clark rendered an opinion indicating that the elements of due process applied to military courts as well as civil courts. However, the scope of review in the former was more restricted than that of the latter, being limited to a determination of whether the military courts had dealt fully and fairly with each claim, i.e., whether due process had been denied. Justice Minton, concurring, would have limited the scope of review of military proceedings by federal courts under writs of habeas corpus to a determination of whether the military court had jurisdiction, without permitting the federal courts to determine questions of due process. Justice Jackson concurred without opinion. Justices Douglas and Black dissented. They would allow review of the facts when, though having considered the issues, the military court had not correctly applied standards of due process. It is interesting to note that this opinion refers to that of the plurality as "the opinion of the Court." Justice Frankfurter neither concurred nor dissented. He indicated some disagreement with all the opinions, and wanted the case set down for reargument. There is thus a 4-1-1-[1]-[2] split. The "narrow minority" telescoping effect involves the plurality and Minton, who appears to agree except insofar as the plurality justices were willing to go even further. Note in this regard that the silent concurrence aspect of Burns is not dispositive, and is therefore not significant for the purposes of this comment. Consult note 190 supra.

Burns is recent and has not been cited often. Several cases cite the rationale of the plurality as that of the Court. Suttles v. Davis, 215 F.2d 760 (C.A. 10th, 1954); Easley v. Hunter, 209 F.2d 483 (C.A. 10th, 1953); White v. Humphrey, 212 F.2d 503 (C.A. 3d, 1954) (The Suttles case first cited Burns for a proposition on which Vinson and Minton could agree but then proceeded to cite the Vinson rationale as that of the Court.). Only one case cited what might be the Minton view as the holding of the case.
plurality, they have nonetheless been cited to some extent for the view stated by the plurality. The “narrow minority” cases also present the further problem of distinguishing the degree of difference between the plurality and minority rationales. If this difference is deemed minor, the case is of course a clear-majority decision. Thus, only cases containing reasonably distinct rules have been considered here.

D. Broad Minority

Cases in the “broad minority” subgroup present the converse of the situation found in the “narrow minority” cases. Here, there is a narrow plurality and a broad minority, with the latter telescoping the former. To the extent that the minority view does encompass that of the plurality the latter, in effect, expresses a clear-majority position. As might be expected, these cases are cited almost exclusively for the position taken by their plurality opinions. Four cases have been included in this subgroup: Kovacs v. Cooper,240 Watts v. Indiana,241 Harris v. South Carolina242 and Turner v. Pennsylvania.243

In Kovacs a city ordinance making unlawful the operation, on the public streets, alleys and thoroughfares, of a sound truck which emitted loud and raucous noises was upheld against a claim that it was a violation of Section 1 of the Fourteenth Amendment because it contravened rights of freedom of speech, freedom of assemblage and freedom to communicate information and opinions to others.

Justices Reed, Vinson and Burton upheld the ordinance as a valid instance of municipal regulation, interpreting the state court’s opinion as holding that the ordinance was limited to the barring of loud and raucous noises. Justices Frankfurter and Jackson each wrote concurring opinions arguing that all mechanical sound amplifying devices were subject to regulation or prohibition by state or municipal authorities. Dissenting, Justices Black, Douglas and Rutledge concluded from the record and opinion of the state court that the conviction was not for emitting “raucous” noises, so that the issue was whether or not an absolute prohibition of amplifying devices could be upheld. They argued that such an absolute prohibition infringed on the constitutionally protected area of free speech.244 Justice Murphy dissented without opinion.


244 Rutledge wrote a separate dissenting opinion in which he pointed out that a majority of the Court (Frankfurter, Jackson, Black, Douglas and Rutledge) agreed that the issue was whether or not all sound trucks could be prohibited without reference to whether “loud and raucous noises” were emitted or not, while only a minority (Reed, Vinson and Burton) thought that the issue was limited to “loud and raucous noises.” He further pointed out that this minority, coupled with Frankfurter and Jackson, comprised a majority which sustained the ordinance and its application. As to the precedent value of the decision Rutledge commented: “What the effect of this decision may be I cannot foretell, except that Kovacs will stand convicted and the division among the majority voting to affirm leaves open for future determination whether absolute and total state prohibition of sound trucks in public places can stand consistently with the First Amendment.” 336 U.S. 77, 105 (1949).
Thus the Court apparently split 3-2-(3-1). The fact that the plurality position was telescoped by the broad minority opinion is reflected in the citation pattern of *Kovacs*: The case has been cited only as upholding the prohibition of "loud and raucous" noises.\(^{245}\) Even though it has been said that its limits are "not clear,"\(^{246}\) *Kovacs* has not been used to justify a general prohibition of all sound trucks.

*Watts*, *Harris* and *Turner* all present similar facts and were decided in a consistent manner on the same day. Each case involved the illegal detention of a murder suspect for a period of days without aid of counsel, friends or advice as to constitutional rights, who, after prolonged questioning had rendered a confession. Upon conviction for murder, it was asserted that the admission into evidence of a confession procured by such means was a denial of due process under the Fourteenth Amendment. All convictions were reversed.

Justices Frankfurter, Murphy and Rutledge concurred in each of the principal cases, holding the admission of the confessions to be a violation of due process. It was their position that any confession by an individual who had been overborne and subjected to physical or mental torture is not voluntary and is therefore inadmissible. Justice Black concurred in each case, adopting a position substantially identical to that of the Frankfurter plurality. Justice Douglas also concurred in each case. He would go even further than the Frankfurter view, and outlaw any confession, voluntary or not, which is obtained during unlawful detention. Justice Jackson was the only justice who did not decide all these cases in a similar manner—concurring in *Watts*, and dissenting in *Harris* and *Turner*. He also accepted the Frankfurter position, with the qualification that involuntary confessions should nevertheless be admissible if verified or corroborated in such a manner as to leave no doubt that they were genuine and truthful.

Analytically, only *Turner* and *Harris* are true "broad minority" cases. In each, the minority (Douglas) accepts the views expressed by the plurality (Frankfurter-Black), and differs only insofar as the plurality does not, as a practical matter, go far enough. In *Watts*, the Jackson minority must also be

\(^{245}\) Public Utilities Comm'n v. Pollock, 343 U.S. 451, 464 (1952) (Justice Burton stated for the Court that "[l]egislation prohibiting the making of loud and raucous noises has been upheld."); F.&A. Ice Cream Co. v. Arden Farms Co., 98 F.Supp, 180, 185 (S.D. Cal., 1951) (*Kovacs* cited as upholding statute prohibiting "loud and raucous" noises); Haggerty v. Fresno County, 267 P.2d 370, 373 (Cal., 1954); Haggerty v. Kings County, 117 Cal.App.2d. 470, 481, 256 P.2d 393, 400 (1953); People v. Kunz, 300 N.Y. 273, 278, 90 N.E.2d 455, 457 (1949) (All three of these cases discussed *Kovacs* in terms of "loud and raucous," and the latter case cited *Kovacs* for the proposition that "a community can bar from its streets all raucously noisy advertising devices."). Justice Vinson intimated that the plurality opinion was the holding when he said in American Communications Association v. Douds, 339 U.S. 382, 398 (1950), that "[w]e have noted that the blaring sound truck invades the privacy of the home and may drown out others who may wish to be heard." Differing from the above cases, Dayton v. Zoller, 96 Ohio App. 424, 427, 122 N.E.2d, 28, 29 (1954), recognized the split. Nevertheless that case referred to the Reed opinion as the "majority" opinion and used it as authority.

\(^{246}\) Niemotko v. Maryland, 340 U.S. 268, 280 (1951) (Frankfurter).
considered. It would appear to differ on the point of allowing verification, and is thus the narrowest opinion. Watts therefore is both a “narrow” and “broad” minority case, but will be considered in the latter category because of its similarity to Turner and Harris and because the Jackson concurrence therein is not necessarily dispositive. In terms of clear majorities—six justices would agree at least on the “qualified voluntariness” test, five on the “unqualified voluntariness” test, and one on the “unlawful detention” test.

Most later courts have cited these cases for the Frankfurter-Black rationale excluding involuntary confessions. They have also been cited for their general result. No citations have been found for the Jackson qualification or broad

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In addition, six state citations seem to cite the Watts group for the Frankfurter view, although they may also be construed to stand merely for the general result: Barnes v. State, 217 Ark. 244, 250, 229 S.W.2d 484, 487 (1950); Driver v. State, 201 Md. 25, 29, 92 A.2d 570, 572 (1952); State v. Pierce, 4 N.J. 252, 259, 72 A.2d 305, 309 (1950); People v. Perez, 300 N.Y. 208, 217, 90 N.E.2d 40, 45 (1950); Commonwealth v. Turner, 371 Pa. 417, 423, 88 A.2d 915, 918 (1952); Commonwealth v. Bryant 367 Pa. 135, 148, 79 A.2d 193, 199 (1951).

Douglas view. In summary, the "broad minority" cases are cited predominantly for their plurality opinions. This involves using the primary decision for a proposition which was not explicitly agreed upon by a majority of the justices sitting. How-

In State v. Gardner, 119 Utah 579, 589, 230 P.2d 559, 564 (1951), counsel urged that a confession obtained while defendant was wrongfully held in confinement was inadmissible, citing Watts, Harris and Turner. The court properly rejected this view, pointing out that the only member of the Court to whom it could be attributed was Douglas. Grear v. State, 194 Md. 335, 349, 71 A.2d 24, 31 (1950), flirted with the marginal justice analyses when it spoke of the Frankfurter opinion as "the only one (except for the statement of three dissenting justices) which spoke for more than one justice and which expressed the marginal view of three justices necessary for the decision."

A possible second explanation, explicitly stated by no citing case, of the Watts cases and their subsequent citation is that the three dissenters did not explicitly reject the Frankfurter or Black position but rather affirmed because of their view of the facts and the state courts' consideration of them. Thus, if the dissenters merely disagreed on the facts but agreed as to which rule should be applied, a majority of the Court could be cited for that rule.

The well-known decision of Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123 (1951), combines factors characteristic of the "technical," "narrow" and "broad" minority series. It is unique in that a total of five majority concurring opinions were rendered, each of which—save one—representing the views of but one justice. The Attorney General, claiming authority under an Executive Order, and without hearing, had designated the plaintiff organizations as Communist and furnished their names to the Loyalty Review Board of the United States Civil Service Commission. The district court dismissed their complaint seeking an injunction and declaratory relief.

Justice Burton joined by Justice Douglas delivered an opinion ordering reversal because the Attorney General, by acting arbitrarily, had acted outside the scope of the authority granted to him under the Executive Order. It was further concluded that the plaintiffs in this case had standing to sue since "the touchstone to justiciability is injury to a legally protected right." Justice Black rendered an opinion indicating agreement with Burton that the Attorney General had exceeded his authority under the Executive Order, but further stating that the Due Process clause of the Fifth Amendment would bar such a listing without notice and a fair hearing. This opinion finally denounced the listing with or without a hearing as a violation of the constitutional prohibition against bills of attainder. Justice Frankfurter, rejecting the narrow limitations of the Burton opinion, concluded that the plaintiffs had standing to sue and had a cause of action because the listing without a hearing deprived them of due process.

Justice Douglas, in a separate opinion, agreed that due process had been violated but indicated that even if hearings had been provided, he would regard the "dragnet system of loyalty trials which has been entrusted to the administrative agencies of government" as unconstitutional. His interpretation of the rationale of the decision is worth noting: "While I join in the opinion of Mr. Justice Burton, which would dispose of the case on procedural grounds, the Court has decided them on the Constitution." (Italics added.) Justice Jackson, recognizing the disagreement among the members of the Court, indicated that no view had "attracted sufficient adherents for a Court." His own views were that the organization could not sue on their own behalf but could vindicate the unconstitutional deprivation of their members' rights, and here the members had been deprived of their constitutional rights of due process because of the lack of a hearing at any stage. The dissenters, Justices Reed, Vinson and Minton, agreed that Burton's decision went beyond the pleadings and went on to question whether the First Amendment or due process had been violated.

On the merits, the "technical" aspect of Joint is represented by those justices deciding on statutory construction grounds of the Attorney General's exceeding his authority (Burton, Black and Douglas). The "narrow" position is violation of due process because of lack of notice and hearing (Black, Frankfurter, Douglas and Jackson). The "broad" ground is the view of unconstitutionality even if there had been a hearing (Black and Douglas). Other issues, such as
ever, analytically this may perhaps be justified by inferring support from the broad minority concurring opinion. Insofar as this is done, the "broad minority" cases may be considered as clear-majority decisions—at least for the view stated in their narrow plurality opinions. Whether this analysis is followed by citing courts is an open question.

E. Second Choice Minority

In the final subgroup of "relative disparity" cases, the preferred views of the minority would produce a disposition different from that of the plurality or that of the dissent. The minority nevertheless concur with the plurality's disposition because it more closely expresses the minority's preferred views than does the result favored by the dissent. In this sense, majority agreement is produced by express compromise and represents in part the literal second choice of the minority justices.

These "second choice minority" cases are cited predominantly for the views expressed in their plurality opinion. There are two cases in this subgroup: Screws v. United States and Klapprott v. United States.

Screws involved a police officer who had beaten a Negro while arresting him, the prisoner dying as a result. The officer was prosecuted under a federal statute which prohibited officials from subjecting any person to a deprivation of rights, privileges or immunities protected by the Constitution and laws of the United

standing and justiciability, are not susceptible of analysis for they are discussed in only some and not all of the majority concurring opinions.

Several citing cases have pieced together the five separate concurring opinions and concluded that Joint holds that the action there by the Attorney General was a violation of due process. National Lawyers Guild v. Brownell, 215 F.2d 485, 487 (App. D.C., 1954) (In the dissent it was stated: "Lack of due process so fatal in Joint ... has been ostensibly made up for in the contemplated proceedings."); Green Spring Dairy v. Commissioner, 208 F.2d 471, 475 (C.A. 4th, 1953) ("In many decisions it has been held that the right to due notice ... and an opportunity to be heard in a fair and open hearing are assured to every litigant by the Federal Constitution," citing Joint.) Accord: Parker v. Lester, 98 F.Supp. 300, 306 (N.D. Cal., 1951); United States ex rel. Bittelman v. District Director of Immigration & Naturalization, 99 F.Supp. 306, 308 (S.D.N.Y., 1951).


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251 It will be noted that in most instances even what is typically a general-result citation will be in effect a citation to the plurality opinion, since the actual result reached is favored as a first choice only by the plurality.

252 325 U.S. 91 (1945).

States by reason of his color. Following conviction the officer appealed on the grounds that the statute was unconstitutional because of vagueness. The Supreme Court remanded for a new trial on a 4-1-1-(3) split.

Justices Douglas, Stone, Black and Reed upheld the constitutionality of the statute on the condition that it be narrowly construed. They would require that "willfully" be defined to mean a specific intent to violate the statute and further that specific federal rights, as announced in the Constitution or federal court decisions, must be violated in order to invoke the statute. They held that the jury had not been properly instructed and therefore remanded for a new trial. Justice Rutledge agreed that the statute was not too vague. Since he could see no possibility of confusion in the jury's instructions he would have affirmed the conviction. In order to create a majority, however, he acquiesced in the granting of a new trial. Justice Murphy also saw nothing vague or uncertain "about taking life without due process." He thus agreed with Rutledge and would have affirmed the conviction on the ground that the failure below to charge "willfulness" was inconsequential. In dissent, Justices Roberts, Frankfurter and Jackson argued that the statute was unconstitutional because of vagueness. They also pointed out that this defendant could be punished under state homicide statutes. They stated that Congress did not intend that the federal government prosecute so long as the violation in question was also a violation of a state law. Their opinion was that the act in question was intended to operate against a usurping state law and not a usurping state official.

Screws represents a decision wherein the result is determined by the express compromise of a minority justice. Although Rutledge wanted to affirm, he nonetheless agreed with the plurality to remand for a new trial instead of accepting the alternative of reversal urged by the dissent. Thus, Rutledge's concurrence was literally his second choice. Furthermore, note that Screws is an almost clear-majority decision. The difference between views of Rutledge and those of the plurality is not one of basic disagreement.

Screws, has been cited extensively. A large majority of these citations are general or cover secondary points. In addition, a considerable number of cases have used Screws authoritatively. Such use has been almost unanimously a citation of the plurality opinion as the holding, the one exception being a

254 "Whoever, under color of any law . . . wilfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges or immunities protected by the Constitution and laws of the United States . . . by reason of his color . . . [may be] fined less than $1000, imprisoned less than one year or both. . . ." 62 Stat. 696 (1948), 18 U.S.C.A. §242 (1950).

255 One-hundred-twenty-eight citations were examined.

256 United States v. Williams, 341 U.S. 70, 81, 87 (1951) (opinion of Justice Douglas, Reed, Burton and Clark. No Supreme Court majority opinion has cited the plurality opinion as the holding.); United States v. Hunter, 214 F.2d 356, 358 (C.A. 5th, 1954); Clark v. United States, 193 F.2d 294, 295 (C.A. 5th, 1951); Koehler v. United States, 189 F.2d 711, 713 (C.A. 5th, 1951); Fullens v. United States, 164 F.2d 756, 759, 760 (C.A. 5th, 1947); Hemans v. United
citation of the general result which did not specifically confine its interpretation of Screws to that rationale.257

Klapprott involved an action to set aside a default judgment which had been rendered in denaturalization proceedings. In those proceedings, the defendant had been served with notice but had failed to reply within the required sixty day period. Prior to the end of the period he had been arrested on federal criminal charges and confined in jail. Without hearings or the reception of evidence a default judgment had been entered depriving him of citizenship and cancelling his certificate of naturalization. More than four years later, while still a government prisoner and awaiting deportation, he petitioned to have the default order set aside.

Justices Black and Douglas stated that under Rule 60(b) of the Federal Rules of Civil Procedure the default judgment could be set aside even after the applicable one year limitation period if it was void or fell within the “any other reason” provision of the Rule. They concluded that a denaturalization judgment should not be issued where the defendant has not appeared, without first requiring the government to prove its case. They would thus set aside the default judgment here and allow the petitioner an opportunity to defend on the merits. Justices Rutledge and Murphy concurred and agreed in substance with the Black opinion. They, however, would have gone further, equating denaturalization proceedings with criminal prosecutions and concluding therefore that the rules of civil procedure which permit judgment by default should not apply. Their preferred disposition of the case would be to reverse the judgment and dismiss, but they agreed to the disposition favored by the Black opinion, in order to create a majority. Justice Burton agreed with the dissenters “that a judgment of denaturalization may be entered by default without a further showing than was made in this case” but concurred with the majority solely because of “the special circumstances here shown on behalf of this petitioner.” Justices Reed, Vinson and Jackson dissented on the grounds that the petitioner failed to meet the requirements of Rule 60(b); that the protections of the criminal law do not apply in such a civil proceeding; and that there is no reason

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257 Williams v. United States, 341 U.S. 97, 99 (1951). This view was joined by Justices Douglas, Vinson, Burton, Clark and Reed. Note, however, that all of them except Vinson had cited the plurality opinion as a holding in United States v. Williams, 341 U.S. 70, 81, 87 (1951).
for the government to present evidence in a default proceeding. Justice Frankfurter, in a separate opinion, argued that a default judgment can be enforced in a denaturalization proceeding but agreed with Justices Black and Douglas that Rule 60(b) may be applicable here. He, however, would first require the petitioner to establish that he was not guilty of negligence in failing to defend at the original denaturalization proceedings. He would thus remand to hear the merits of petitioner's claim.  

Klapprott is, in summary, a 2-2-1-(3-1) decision. Analytically, the rationales of the concurring majority opinion present the "broad/narrow" telescoping effect discussed above. Beginning with the "narrowest," these opinions may be lined up: Burton, then Black, and then Rutledge, with each differing only insofar as the next is willing to go even further. There is thus clear-majority agreement as to the Burton view, agreement of four justices as to the Black position, and two-justice agreement on the Rutledge view. Also present is the express compromise of the Rutledge opinion to reach the disposition favored by Black, Douglas and Burton. In this sense, the three justices last named create a plurality in terms of the actual disposition, and the Rutledge opinion is a "second choice minority" which is decisive as to the result.

Exposition of the manner in which Klapprott has been cited by later courts is difficult because of its complexity. Citation of either the Burton or Black rationale would appear to be what has previously been denoted citation of the plurality opinion, because these views together are a plurality in terms of result. Such citation is universally the practice in the many later cases referring to Klapprott, the plurality of which refer to what is in effect the Burton position and the rest to the Black view. Only one case has noted the lack of a clear majority.

The decision in Klapprott was subsequently modified in accord with the views expressed by Justice Frankfurter in the original decision. 336 U.S. 942 (1949). The case was remanded with directions to receive evidence on the truth or falsity of the allegations contained in the petition to vacate the original judgment. Justices Black, Douglas, Rutledge and Murphy dissented from the modified order. Although the case on rehearing became a clear-majority decision, the original case is significant for this analysis since later courts typically cite it without reference to the absence of a clear majority or to the subsequent modification.


United States v. Karahalias, 205 F.2d 331, 332, 334 (C.A. 2d, 1953) (Statement that the Supreme Court "held" that, under the facts, Rule 60(b) applied. Only Black had been explicit on this point. Note though, that this was the only subsequent case which specifically comment-
IV

CONCLUSION

The analytical categorization of no-clear-majority decisions set out in this comment reveals that similar types of decisions have been cited in a similar manner by later courts. It thus affords a possible basis for understanding actual citation practices in regard to no-clear-majority decisions. It at least makes

ed that the Klapprott Court was divided.); United States v. Backofen, 176 F.2d 263, 264 (C.A. 3d, 1949) (Reference to the Black rationale on Rule 60(b) as follows: "The Supreme Court held that Rule 60(b) should be applied."); United States v. Zurim, 93 F.Supp. 1, 3 (D. Neb., 1950) (Described the Black view that even in default cases the government must meet the usual burden of proving its case beyond a reasonable doubt as "the doctrine set forth by the United States Supreme Court," and applied this test to the facts of the case.); Sanders v. Clark, 85 F.Supp. 253, 256 (E.D. Pa., 1949) (Same interpretation as the Zurim case supra).

See also Ackerman v. United States, 178 F.2d 983, 984 (C.A. 5th, 1949) (Black opinion referred to as the "majority opinion."); Latta v. Western Inv. Co., 173 F.2d 99, 102 (C.A. 9th, 1949) (Discussion of Klapprott on Rule 60(b) in the following terms: "The court... through Mr. Justice Black stated... "); Klein v. Rappaport, 90 A.2d 834, 835 (Mun. App. D.C., 1952) (reference to the argument that even where there is default the government must still prove its case).


Two no-clear-majority decisions involve a "second choice" by the plurality. The first, Von Moltke v. Gillies, 332 U.S. 708 (1948), will not be discussed herein because its split was based entirely on differences in interpretation of the facts and it has thus presented little difficulty for later citing courts. It is, however, significant that only one out of fifty-two cases have noted the lack of a clear majority in Von Moltke. Von Moltke v. United States, 189 F.2d 56 (C.A. 6th, 1951) (the same case on remand).

The second is Maryland Casualty Co. v. Cushing, 347 U.S. 409 (1954). There, the owner of a ship, which had collided with a pier and capsized, filed in a federal district court to limit his liability under the Federal Limited Liability Act, 49 Stat. 1479 (1936), 46 U.S.C.A. §183 (Supp., 1955); Rev. Stat. §4826 (1873), 46 U.S.C.A. §186 (1928). Later, an action by representatives of five seamen who had drowned was filed in the same district court against the owner's insurance company. The plaintiffs in the latter action relied on the Louisiana direct action statute, La. Ins. Code (1950) §55, which authorized a direct suit against the insurer "within the terms of the policy." The district court dismissed this action. The court of appeals reversed. The Supreme Court split 4-1-(4) and remanded for a continuance.

Justices Frankfurter, Reed, Jackson and Burton argued that the Louisiana statute conflicted with the federal limited liability statute because it did not bring all the claims into court at once as did the federal statute and, further, it permitted direct actions against insurers of shipowners, which would result in increased premiums for the shipowners. It was contended that the latter would conflict with the federal policy of limited liability for shipowners. The insurance benefits of the shipowners might be exhausted by it in the direct action suit and yet the owners would still be liable in the limitation proceeding for any additional claims to the extent of the value of the ship. Thus their insurance coverage would avail them nothing. These four justices would have dismissed the complaints, but in order to get a majority to agree on a disposition they followed the plan advocated by Justice Clark. Clark, concurring singly, concluded that a conflict between the Louisiana and the federal statutes could be avoided. He did not agree that the federal policy which would make the limitation proceeding the exclusive forum was strong enough to invalidate a state law. Rather, he would uphold the state statute by instructing the district court to conclude the limitation proceeding, after which the direct action against the insurers could be brought. Justices Black, Warren, Douglas and Minton dissented. They argued that the Louisiana statute did not conflict with the federal law. It was their view that even if there should be recoveries from the limitation fund the shipowners would not be deprived of any right given by the federal act. They would not destroy the clear
clear that these practices do not accord with the theory put forth in the texts. It further demonstrates that in many instances, no-clear-majority decisions are cited for views which are not agreed to by a majority of the justices participating in the decision of the cited case. Also of significance is the fact that so few citing courts expressly note the lack of a clear majority in the no-clear-majority decisions being cited.

Whether the manner in which no-clear-majority cases have been used as precedent has resulted from conscious choice, faulty reading or pure disregard is an open question. It is interesting to note, with reference to these alternatives, that the analysis and categorization of this comment suggest different assumptions for the explanation of each group of no-clear-majority decisions. Thus, in Part I, cases presenting conflicting and equally strong majority views are cited mainly for their general results, making plausible the assumption of conscious choice. In Part II, cases presenting two majorities, one as to result and the other as to rationale, are cited in a haphazard fashion, thus pointing to the assumption of faulty reading. And in Part III, cases with an inequality of scope are cited primarily for their plurality opinions, thus suggesting the assumption of pure disregard (at least in the "silent concurrence," "technical" and "narrow" minority subgroups).

It is, nevertheless, more reasonable to assume that later courts approached each group of no-clear-majority decisions with the same general state of mind. The significance of the suggestion that different assumptions as to approach are dictated by different groups of decisions, would appear to be only that it indicates a general confusion as to such matters and that later courts have used no one all-pervading approach.

Other possible explanations for the citation patterns found to exist may be suggested. First, later courts have used the view stated in the opinion which appears first in the Reports. Second, later courts have cited the opinion which is supported by the greatest number of justices. Both these explanations rest on empirical facts, and are accurate more often than not. The final explanation is that the particular factors influencing a court's citation of a no-clear-majority policy of the Louisiana direct action statute which was also felt to be in harmony with the policy of maritime law.

Maryland Casualty quite clearly illustrates a second choice by the plurality. However, note that the dissenters could have compromised as easily. The disposition favored by the minority, i.e., a postponement of the direct action against the insurer, was closer to the reasoning of the dissenters, who say no conflict of state and federal statutes exists at all, than to the plurality favoring outright dismissal.

Since Maryland Casualty is a recent case, few citations are available. Although no significant trend can be seen, the minority opinion may perhaps be pivotal for future decisions since only this opinion favored the resultant disposition. See Lovless v. Employers' Liability Assurance Corp., 218 F.2d 714, 715 (C.A. 5th, 1955); Williams v. Steamship Mutual Underwriting Ass'n, 45 Wash.2d 209, 230, 273 F.2d 803, 815 (1954) (noting the Supreme Court split). This trend may be emphasized by the close agreement between the minority and dissent, so close in fact as almost to put Maryland Casualty into the "dual majority" category discussed in Part II of this comment.
decision are so numerous and varied as to be impossible to calculate and reduce to any general rule.

The discussion in this comment has not considered the manner in which no-clear-majority decisions should be cited. At best, it would appear that they should be used as precedent only after a careful analysis and evaluation which recognizes the absence of clear-majority agreement. This is sometimes done, but more often apparently disregarded. The difficulties inherent in the former inquiry and the dangers incident to the latter practice raise the further question of the propriety of handing down no-clear-majority decisions at all. Alternatively, it may be suggested that much can be done by the Court to indicate the points of agreement and disagreement in such cases. It is hoped that it will no longer be necessary to label them no-clear-majority decisions, but rather clear, no-majority decisions.

TAXATION OF MULTIPLE TRUSTS

The five-year throwback provision of the 1954 Internal Revenue Code has re-focused attention on an old problem—use of a number of accumulating trusts which, as a result of the progressive rate structure, are each taxed at a lower rate than would be applicable if only a single trust were used. Although avoidance of the additional surtax in this manner was possible long before the 1954 Code, prior to 1954 it was possible to use a single accumulating trust, give

1 Interest in the multiple trust problem reached a peak in the late 1930's as a result of a Congressional investigation. Consult Hearings before the Joint Committee on Tax Evasion and Avoidance, 75th Cong., 1st Sess. (1937). For discussion of the complexion of the problem at that time, consult Multiple Trusts and the Minimization of Federal Taxes, 40 Col. L. Rev. 309 (1940), and Paul, The Background of the Revenue Act of 1937, 5 U. of Chi. L. Rev. 41, 71-75 (1937).

2 Although statistical evidence of the use of multiple trusts is understandably unavailable, the attention the device has received suggests that it is highly popular among tax-planners. For example, the Wall Street Journal began a recent feature article on the effect of taxation on business and property planning with the following: "Sylvanus G. Felix is building a $3.5 million, 17-story office building in Oklahoma City. He's not alone in this venture. Far from it. His co-entrepreneurs: 27 trusts (for the benefit of his children) and eight corporations (he's president of each one). Mr. Felix could eliminate a lot of bookkeeping by handling the project alone. But he'd rather not. By splitting the building's income among 36 taxpayers, he figures he'll cut total income taxes 'by more than 50%.' " The Wall Street Journal, p. 1, col. 6 (Midwest ed., Jan. 5, 1956).

3 A single taxpayer with no dependents receiving $100,000 per year from personal services and $100,000 ordinary income from investments pays approximately $156,000 in taxes at present rates. If all the investment property were transferred and taxed to a single trust, the saving would be approximately $22,000 per year. Use of ten trusts would save an additional $41,000 per year. The saving exists not only because the marginal tax rate is lower, but also because each trust receives a deduction for personal exemption. Int. Rev. Code §642(b), 26 U.S.C.A. §642(b) (1954).