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Appellate Court Voting Rules

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COLLOQUIUM

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INTRODUCTION

During the 1996 term, the United States Supreme Court made a candid confession about its voting practices. In *Seminole Tribe of Florida v. Florida*,[1] the Court overruled *Pennsylvania v. Union Gas Co.*[2] and recognized that when a justice defers to the majority against his or her own reasoning inconclusive precedent results.[3] *Union Gas* was particularly unusual because Justice White switched his vote to assure a result in a three-remedy case where none of the three remedies had the support of a majority.[4] In *Seminole Tribe*, the Court admitted *Union Gas* "has, since its issuance, been of questionable precedential value, largely because a majority of the Court expressly disagreed with the rationale of the plurality."[5] Accordingly, the Court recognized the problems created when a justice votes against his or her own reasoning to ensure a result.

While scholars frequently have analyzed the strategic voting practices of legislators,[6] similar analysis of voting on judicial panels is relatively new. Frank Easterbrook was the first scholar to apply Arrow's Theorem systematically to the Supreme Court's voting practice,[7] and several scholars followed his lead.[8] After Justice

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1. 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996).
2. 491 U.S. 1 (1989).
3. *Seminole Tribe*, 116 S. Ct. at 1127-28.
4. *Union Gas*, 491 U.S. at 56-57 (White, J., concurring in part) (deferring to the majority on whether Congress expressly abrogated the states' eleventh amendment immunity under CERCLA and thus concurring in a judgment contrary to his own analysis). See also *Arizona v. Fulminante*, 499 U.S. 279, 313-14 (1991) (Kennedy, J., concurring in the judgment).
5 *Seminole Tribe*, 116 S. Ct. at 1128.
6. See, for example, Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 Va. L. Rev. 971 (1989); *Symposium on the Theory of Public Choice*, 74 Va. L. Rev. 167, 167-518 (1988); Daniel A. Farber and Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 Tex. L. Rev. 873 (1987).
7. Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 Harv. L. Rev. 802, 819-20 (1982).

practice,[7] and several scholars followed his lead.[8] After Justice White's vote in *Union Gas*, Professor John Rogers warned the Court against abdicating its role as a reasoned decision maker. He concluded, however, that the contradictory vote in *Union Gas* was aberrational.[9]

More recently, Professors David Post and Steven Salop published an article encouraging multimember courts to abandon their traditional practice of outcome voting and instead to adopt a system of issue voting.[10] Shortly thereafter, Professors Lewis Kornhauser and Lawrence Sager urged appellate courts to adopt neither outcome voting nor issue voting as a rule. Rather, they suggested appellate courts should take a metavote on whether outcome or issue voting should control each case.[11] Professor Maxwell Stearns advanced the debate over appellate court voting in a trilogy of articles published over the past two years. These articles apply social choice theory to the Supreme Court, providing an evolutionary analysis of outcome voting, stare decisis, and standing.[12]

The investigation of appellate court voting rules has become all the more intriguing following *Seminole Tribe*. Recognizing the important insights to be gained from an intense investigation of appellate court voting rules, the *Vanderbilt Law Review* has organized the following Colloquium to discuss whether appellate courts should continue using the traditional practice of outcome voting or whether such courts should adopt a system of issue voting. Professor John Rogers's article, *"Issue Voting" by Multimember Appellate Courts: A Response to Some Radical Proposals*,[13] serves as the impetus for this discussion.

In his provocative article, Professor Rogers responds to the issue voting proposals of Professors Post, Salop, Kornhauser, and Sager by describing some unforeseen problems issue voting would

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7. Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 Harv. L. Rev. 802, 819-20 (1982).

8. See, for example, Lewis A. Kornbauser and Lawrence G. Sager, *Unpacking the Court*, 96 Yale L. J. 82 (1986).

9. See generally John M. Regers, *"I Vote This Way Because I'm Wrong": The Supreme Court Justice as Epimenides*, 79 Ky. L. J. 439 (1991).

10. See generally David Post and Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 Georgetown L. J. 743 (1992).

11. See generally Lewis A. Kornhauser and Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 Cal. L. Rev. 1 (1993).

12. See generally Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 Yale L. J. 1219 (1994); *Standing Back from the Forest: Justiciability and Social Choice*, 83 Cal. L. Rev. 1309 (1995); *Standing and Social Choice: Historical Evidence*, 144 U. Pa. L. Rev. 309 (1995).

13. 49 Vand. L. Rev. 997 (1996).

create. Rogers observes that none of the scholars who support issue voting suggests how issues should be determined for the collective issue vote. Indeed, Rogers shows how relatively simple constitutional cases involve issues that can be divided into any number of subissues and sub-subissues, which in turn can be manipulated by an agenda setter to produce a desired result. After describing the impracticality of issue voting, Rogers defends outcome voting against the claims that it is a non-Condorcet-producing rule. Rogers further defends outcome voting against the claims of Professors Post and Salop, Kornhauser and Sager, and Stearns that it produces path dependent legal doctrine. In essence, Rogers argues the problems created by issue voting would far outweigh the occasional incoherence caused by the traditional voting practice of appellate courts.

Professor Maxwell Stearns's reply, *How Outcome Voting Promotes Principled Issue Identification*,[14] provides a social choice evaluation of the issue voting versus outcome voting debate. Stearns first takes issue with Rogers's understanding of several social choice concepts, focusing on Rogers's discussion of Condorcet winners and Condorcet-producing rules. He contends that although outcome voting is a non-Condorcet-producing rule, it remains a better alternative than issue voting. While Stearns agrees the number of issues in each case can be divided into several subissues, he argues the number of issues in a given case is fairly stable and small within an outcome-voting regime. Finally, Stearns suggests that outcome voting avoids strategic issue identification by encouraging judges to identify the genuine legal issues in each case.

Professors David Post and Steven Salop provide the final reply, *Issues and Outcomes, Guidance, and Indeterminacy*,[15] which responds to some of Rogers's concerns and further elaborates the authors' support for issue voting. Post and Salop argue outcome voting produces precedent that provides uncertain guidance to lower courts. In response to Rogers's contention that issues can be divided any number of ways, Post and Salop propose a procedural rule to control the number of issues in a given case. These authors conclude the discussion by admonishing the Court to adopt issue voting explicitly as a solution to the problems associated with current appellate practice.

The *Vanderbilt Law Review* expresses its gratitude to these scholars for taking this opportunity to discuss the anomalies created

14. 49 Vand. L. Rev. 1045 (1996).
15. 49 Vand. L. Rev. 1069 (1996).

by appellate review. Hopefully this Colloquium will spark further debate on this subject as judges, scholars, and practitioners begin to understand the nuances of appellate court voting and its impact on the path of the law.

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