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“Issue Voting” by Multimember Appellate Courts: A Response to Some Radical Proposals

John M. Rogers*

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I. INTRODUCTION

A judge on a multimember appellate court can vote against the result of his or her own reasoning by deferring to a majority on a subissue on which the judge differs. When Justice White did just this in *Pennsylvania v. Union Gas*,¹ soon followed by a similarly anomalous vote by Justice Kennedy in *Arizona v. Fulminante*,² I examined the pool of United States Supreme Court cases in which this kind of voting was possible.³ Out of more than one hundred fifty earlier cases where one or more of the justices might have voted in such a way,

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1. 491 U.S. 1, 56-57 (1989) (White, J., concurring in part).

2. 499 U.S. 279, 313-14 (1991) (Kennedy, J., concurring in the judgment).

3. See John M. Rogers, “I Vote This Way Because I’m Wrong”: *The Supreme Court Justice as Epimenides*, 79 Ky. L. J. 439 (1991).

only two justices in one 1971 case had cast such votes.⁴ The votes of Justice White in *Union Gas* and Justice Kennedy in *Fulminante* were troubling, however, not because of their almost totally unprecedented nature, but because they portended forfeiture of the Supreme Court's claim—implicit in the fact that the Court issues opinions—to be composed of reasoned, and not arbitrary, decision makers. There was no tenable justification given for the anomalous votes in each case, even though the votes finally decided the rights of the parties. Even the smallest first step toward such arbitrariness *as a basis for decision* should be more disturbing than any particular unfortunate decision of the Court.

To be frank, when preparing my Article I had a lurking concern that I was overreacting to some minor aberrations. Even the greatest legal giants may stumble once or twice.⁵ My own research showed that the overwhelming practice of the justices on the Court has been to vote for the consequence of the individual justice's own reasoning. Imagine my surprise when Professors David Post and Steven Salop argued in the *Georgetown Law Journal* that a judge should *always* vote against his or her own view if a majority of colleagues on the court disagrees with an essential step of the judge's analysis.⁶ And consider my further surprise when Professors Lewis Kornhauser and Lawrence Sager argued in the *California Law Review* that courts should regularly engage in "metavotes" to determine whether individual judges on a court should do what Post and Salop say they should always do.⁷

The policies used to support these radical suggestions do not stand up to practical scrutiny, and moreover, they raise tremendous difficulties. Although my arguments have been foreshadowed or as-

4. See *United States v. Vuitch*, 402 U.S. 62, 96 (1971) (Harlan, J., dissenting); *id.* at 97-98 (Blackmun, J., dissenting). See Rogers, 79 Ky. L. J. at 461-63 (cited in note 3). Five additional cases involved three-way choices for the Court, where at least one justice voted against his position so that the Court could reach a judgment. See *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 423 (1954) (plurality opinion); *Klapprott v. United States*, 335 U.S. 601, 619 (1949) (Rutledge, J., concurring); *Von Moltke v. Gillies*, 332 U.S. 708, 726-27 (1948) (plurality opinion); *Screws v. United States*, 325 U.S. 91, 134 (1945) (Rutledge, J., concurring); *Connecticut v. Johnson*, 460 U.S. 73, 89-90 (1983) (Stevens, J., concurring). The imperative that the Court reach some sort of judgment distinguishes these cases. See Rogers, 79 Ky. L. J. at 459-61 (cited in note 3). See also text accompanying notes 117-18.

5. Compare *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 618 n.12 (opinion of Rutledge, J.) (1949) (noting that John Marshall's "master touch was lacking").

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

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

serted before,⁸ the justification for the customary practice of outcome voting—as opposed to “issue voting”—may be more compelling if set forth in direct response to their contentions.

The question whether judges should vote by outcome or by issue can arise when two or more issues of law must be resolved by a multijudge court to reach judgment in a case, and there is a difference in the identity of the judges who agree on each issue. This situation generally exists in cases where there is a plurality decision and a concurrence.⁹ In such cases, issue voting rather than the customary practice could have led to a different result in well over one hundred cases, and it would certainly have led to different results in twenty or thirty supreme court cases. Professors Post, Salop, Kornhauser, and Sager are thus proposing an enormously significant change.¹⁰

Let us take an example to illustrate the problem. *National Mutual Insurance Co. v. Tidewater Transfer Co.*¹¹ is perhaps the most handy example, since it is not particularly complex, and both Post and Salop (who urge issue voting in all cases)¹² and Kornhauser and Sager

8. See Rogers, 79 Ky. L. J. at 463-75 (cited in note 3).

9. Id. at 443-45. See also Kornhauser and Sager, 81 Cal. L. Rev. at 29 (cited in note 7) (“Any plurality opinion case is a paradoxical case lurking in disguise”).

10. Professors Post and Salop state that “there is no hard-and-fast ‘voting rule’ to which the Supreme Court consistently adheres.” Post and Salop, 80 Georgetown L. J. at 755 (cited in note 6). In their footnote listing examples of both outcome and issue voting, they describe four cases as “outcome voting,” while hundreds of examples are available. They list five examples of “issue voting”: the three anomalous cases dealt with in my earlier article (*Union Gas*, *Fulminante*, and *Vuitch*), and two cases that instead are paradigm examples of outcome voting: *NLRB v. Wyman-Gordon*, 394 U.S. 759 (1969), and *James v. United States*, 366 U.S. 213 (1961). Post and Salop, 80 Georgetown L. J. at 748 n.19 (cited in note 6). See also id. at 750 n.30.

There are thus only three anomalous issue-voting instances in the U.S. Reports. Moreover, as Professors Kornhauser and Sager point out, the issue voting of Justice White in *Union Gas* and of Justice Kennedy in *Fulminante* can be contrasted with the outcome voting of the other justices in each of those very cases. Kornhauser and Sager, 82 Cal. L. Rev. at 18-19 (cited in note 7).

Professors Post and Salop also rely on some drafts leading up to the justices’ decision in *Bell v. Maryland*, 378 U.S. 226 (1964), as described in Bernard Schwartz, *Super Chief Earl Warren and his Supreme Court: A Judicial Biography* 508-25 (N.Y.U., 1983). One group of Justices, led by Justice Black, proposed a dissenting statement using the logic of issue voting, based [in Schwartz’s words] “on the proposition that when a majority wanted to reach the constitutional merits, the Court must do so.” Id. at 521. Justice Brennan and Chief Justice Warren found the implications of the proposed statement “absurd,” and it was promptly dropped by the proponents. Id. at 522. The final result was a majority opinion of the Court on one dispositive issue, contrary to the description by Post and Salop. See Post and Salop, 80 Georgetown L. J. at 755 (cited in note 6). The example at best shows a brief flirtation with an issue-voting notion by some justices during internal jockeying on a politically sensitive case.

11. 337 U.S. 582 (1949).

12. Post and Salop, 80 Georgetown L. J. at 750 (cited in note 6).

(who use *Tidewater* as a paradigm of when issue voting¹³ should be used) agree that the case should have been decided differently.¹⁴ In *Tidewater*, the Supreme Court had to decide the constitutionality of a statute granting diversity jurisdiction to federal district courts over cases between citizens of the District of Columbia and citizens of a state. A majority in two separate opinions held that Congress had the power to grant such jurisdiction to federal district courts.¹⁵ All justices presumably accepted that the statute would be upheld if Congress had the power to grant jurisdiction under either Article I or Article III of the Constitution, and that the statute should be struck down if neither article gave Congress such power. Three justices found that the statute was constitutional based on Article I, but not authorized by Article III,¹⁶ two justices found that the statute was constitutional based on Article III, but not on Article I.¹⁷ Since five justices found that the statute was supported by Article I or Article III, the statute was upheld and the party favoring federal jurisdiction prevailed.

What exactly is the harm here that demands a different result? It can be stated simply: a separate majority agreed with each step of a syllogism that leads to the opposite result. That is, six justices agreed that Article I did not support jurisdiction, seven justices agreed that Article III did not support jurisdiction, and all presumably agreed that if neither Article I nor Article III supported jurisdiction there was no jurisdiction. We can call this situation a "disgrace to the judicial process,"¹⁸ "fundamentally flawed,"¹⁹ "distinctly troublesome,"²⁰ an "affront to the model of reasoned justification,"²¹ or whatever epithet seems appropriate. But in reality what is so bad about it?

Professors Post, Salop, Kornhauser, and Sager make four criticisms of outcome voting:²² (1) less useful precedent is produced,²³ (2)

13. Professors Kornhauser and Sager use the term "issue-by-issue voting." Kornhauser and Sager, 81 Cal. L. Rev. at 11 (cited in note 7).

14. *Id.* at 27; Post and Salop, 80 Georgetown L. J. at 750 (cited in note 6).

15. *Tidewater*, 337 U.S. at 583-604 (opinion of Jackson, J.); *id.* at 604-27 (Rutledge, J., concurring).

16. *Id.* at 585-603 (opinion of Jackson, J.).

17. *Id.* at 604-26 (Rutledge, J., concurring).

18. *Lowry v. Baltimore & Ohio R.R. Co.*, 707 F.2d 721, 743 (3rd Cir. 1983) (en banc), quoted in Post and Salop, 80 Georgetown L. J. at 758 n.72 (cited in note 6).

19. Post and Salop, 80 Georgetown L. J. at 745 (cited in note 6).

20. Kornhauser and Sager, 81 Cal. L. Rev. at 12 (cited in note 7).

21. *Id.* at 27.

22. Kornhauser and Sager used the term "case-by-case voting." *Id.* at 11.

23. Post and Salop, 80 Georgetown L. J. at 759, 761-62 (cited in note 6); Kornhauser and Sager, 81 Cal. L. Rev. at 42-48 (cited in note 7).

lawyers are encouraged to make insubstantial arguments,²⁴ (3) subsequent cases in which only one of the issues is raised will be decided differently, leading to a type of objectionable inconsistency in the law,²⁵ and (4) outcome voting is "path dependent."²⁶ Before responding to these arguments, we should first examine the proposed alternative to outcome voting, since the cure to any problem should not be worse than the disease.²⁷

II. PROBLEMS WITH ISSUE VOTING

The alternative proposed by Professors Post and Salop is issue voting, defined by them as:

[H]av[ing] the court as a whole collectively assess each of the legal issues raised in the case and reach collective decisions on each of those issues, again by majority vote. The court's judgment then would be determined by the result it reached on each of the underlying issues.²⁸

Professors Post and Salop do not explain who will determine what the "underlying issues" are, however.²⁹ And while Professors Kornhauser and Sager argue that such issue voting is sometimes proper and sometimes not, they give no elaboration of how underlying issues will be ascertained in those cases where issue voting is proper.³⁰ The question presents no small problem.

24. Post and Salop, 80 Georgetown L. J. at 760 (cited in note 6).

25. Id. at 764-70; Kornhauser and Sager, 81 Cal. L. Rev. at 25, 27 (cited in note 7).

26. Post and Salop, 80 Georgetown L. J. at 762-64 (cited in note 6); Kornhauser and Sager, 81 Cal. L. Rev. at 36-39 (cited in note 7).

27. Or in public policy jargon, we should avoid the "nirvana fallacy" of comparing existing institutions with nirvana rather than with real alternatives. See Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 Yale L. J. 1219, 1230 n.33 (1994), borrowing the term from Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J. L. & Econ. 1 (1969).

28. Post and Salop, 80 Georgetown L. J. at 744 (cited in note 6).

29. They do "recognize that [what determines an issue] is a troublesome question," but they avoid it with an invitation to "further work to refine the analysis." Id. at 772. They wishfully suggest that "there will often be consensus," and suggest that subissues that "will never arise independently" should not be voted on separately. Id. at 772-73. They do not indicate what the procedure would be to make such a decision.

30. Like Post and Salop, Professors Kornhauser and Sager recognize the problem but suggest no solution beyond saying that "a decision that issue-by-issue adjudication is the appropriate procedure requires that the court also specify the issues and ensure that each judge faithfully reports her views on each relevant issue." Kornhauser and Sager, 81 Cal. L. Rev. at 49 (cited in note 7).

When voting by outcome, individual justices decide what issues they deem to be relevant or dispositive, but when all judges are to vote on the same underlying issues, who decides which issues get a vote? None of the four advocates of issue voting suggests how issues will be determined for the collective issue-vote. My attempt to parse all of the United States Supreme Court's plurality decisions³¹ made it very clear to me that in most of these cases there was more than one way to state the relevant subissues. There is also the problem of sub-subissues, and sub-sub-subissues. How deep should we go? How many votes should we have? And who is going to outline which issues underlie which other issues?

To show the seriousness of the problem, we need only look at *Tidewater* itself, a case in which all four proponents of change support issue voting. What follows is a list of most of the issues presented in *Tidewater*, followed by the number of votes for and against the issue.³² That the reader may find more, or fewer, or differently stated issues only strengthens my point.³³

Issues on which justices disagreed in *Tidewater*:

- A. Is a statute giving federal court jurisdiction over controversies between D.C. citizens and citizens of a state within the constitutional power of Congress? (5 yes, 4 no)
- B. Is a D.C. citizen a citizen of a "State" under Article III? (2 yes, 7 no)
- C. Can Congress confer the jurisdiction of federal courts under Article I beyond the limits of Article III? (3 yes, 6 no)
- D. Should the relevant provisions of the Constitution be given a strict (not broad) interpretation? (4 yes, 5 no)

31. See Rogers, 79 Ky. L. J. at 442-56 (cited in note 3).

32. Professors Post and Salop simply assert that the case "raised two issues." Post and Salop, 80 Georgetown L. J. at 748 (cited in note 6).

33. An outline of the issues as treated in the four opinions in *Tidewater* is attached as an Appendix. The outline is cross-referenced by letter to the list that follows in the text. I have listed the issues here based on the criteria (1) that the issue was, for at least some of the justices, part of the reasoning toward their decisions, and (2) that there was express or implicit disagreement on the issue among the justices.

E. Does a broad interpretation of the Constitution permit Congress to enact the statute in question? (5 implicitly yes, 4 no opinion)³⁴

F. Is it fair or unfair if the Constitution denies Congress the power to give federal courts jurisdiction over controversies between D.C. citizens and citizens of a state? (5 unfair, 2 fair)

G. Should the Constitution be interpreted to avoid unfair results? (5 implicitly yes, 4 no)

H. Is it consistent with Justice Marshall's opinion in *Hepburn* to find a statute constitutional that gives federal court jurisdiction over controversies between D.C. citizens and citizens of a state?³⁵ (3 yes, 2 [perhaps 6] no)

I. Should *Hepburn* be overruled? (2 yes, 7 implicitly no)

J. Should the Court defer to Congress regarding the meaning of the asserted limits in Article III? (3 yes, 2 no)

K. Can we ascertain the Framers' intent on whether "State" in Article III includes D.C.? (7 yes, 2 no)

L. Should words in the Constitution be construed to have consistent meanings? (5 yes, 2 no)

M. Do the justiciability limits on federal courts derive from Article III? (6 yes, 3 no)

N. Is the rationale for giving D.C. federal courts the power to carry out legislative and administrative acts limited to federal courts sitting in D.C.? (4 yes, 3 no)

34. Because four justices did not appear to reach this issue, it perhaps does not belong on the list under my criteria for inclusion. It is helpful for a later point that I make, however.

35. There is certainly no reason that the question of what an earlier case holds cannot be an issue in a subsequent case. See Michael C. Dorf, *Dicta and Article III*, 142 U. Pa. L. Rev. 1997, 2014 n.63 (1994).

O. Do United States District Courts exercise Article I or Article III power when they entertain suits against the United States? (3 Art. I, 6 Art. III)

P. Do United States District Courts exercise Article I or Article III power when they entertain bankruptcy trustee suits arising under state law? (3 Art. I, 4 Art. III)

Q. In order for a case to "arise under" federal law for constitutional purposes, must federal law be an element in the cause of action? (3 yes, 2 no)

Do Professors Post, Salop, Kornhauser, and Sager seriously suggest that there be votes on each of these issues? If so, who gets to decide the sequence of the votes? Indeed, how can the Court *a priori* ascertain which subissues and sub-subissues will have disagreement at all?

One possible answer is to say that the court should just go "one level down." If the Court engages in outcome voting, in effect it refuses to divide issues at all. The overall issue in *Tidewater*, for instance, is (A) whether a statute giving federal courts jurisdiction over controversies between D.C. citizens and citizens of a state is within the constitutional power of Congress? Going one level down in *Tidewater*, the justices would vote, for instance, only on two immediately underlying issues. For instance, the justices could vote on (B) whether a D.C. citizen is a citizen of a "State" under Article III, and (C) whether Congress, under Article I, can confer jurisdiction of federal courts beyond the limits of Article III? All Justices presumably agreed that a positive answer to either B or C would lead to upholding the statute in question, while answering both B and C in the negative would mean the statute was not constitutional.

Going one level down would mean not voting separately on the issues underlying issues B and C. For instance, no vote would occur on the following issues that underlie issue B: (K) whether we can ascertain the Framers' intent on whether "State" in Article III includes D.C., and (L) whether words in the Constitution should be construed to have consistent meanings. Nor would votes occur on the following issues that underlie issue C: (M) whether the justiciability limits on federal courts derive from Article III, and (P) whether United States District Courts exercise Article I or Article III power when they entertain bankruptcy trustee suits arising under state law. Going in turn even deeper, the issues underlying issue P might

include (Q) whether federal law must be an element in the cause of action in order for a case to “arise under” federal law for constitutional purposes.

There are two problems with going only one level down. First, all of the problems that the critics have with outcome voting apply just as strongly if outcome voting is pushed just one level down. To be consistent, the critics must urge issue voting “all the way down”—that is, on every issue where there might be disagreement. The agenda manipulation problems with such a proposal are enormous, however. Whoever gets to structure the sequence of votes would be able to preordain the desired answer.

Second, even if issue voting were to go only one level down to the major subissues, and not to all the possible issues that underlie issues that underlie issues, justices will not necessarily agree on what the major underlying issues are. In *Tidewater*, for instance, the critics assume that the two underlying issues are whether Congress had the power to enact the statute under Article III, and whether Congress had the power to enact the statute under Article I (that is, issues B and C above). All justices agreed that if Congress had the power under neither, then the statute was unconstitutional, and that power under either article would render the statute constitutional. But the overall issue, whether Congress had the power to pass the statute (issue A), could easily be considered to have different major subissues.

For instance, all the justices would presumably agree that if the constitutional limits on the judicial power are to be construed broadly and not strictly (issue D), and a broad construction permits Congress to pass this statute (issue E), then the statute is constitutional. Issue voting on these underlying issues would lead to the conclusion that the statute was constitutional, since there were five votes for D and E.

Similarly, the overall issue of whether the statute is constitutional would be completely controlled by the following two issues: whether Justice Marshall’s holding in *Hepburn* forbids the statute in question (issue H), and whether *Hepburn* should be overruled (issue I). Justice Rutledge’s concurring opinion, for instance, is organized this way.³⁶ His position is that *Hepburn* requires a finding that the statute is unconstitutional, and the two dissents of Justices

36. See Appendix.

Frankfurter and Vinson can be read to agree. His second point, that *Hepburn* should be overruled, appears to be opposed by all the other justices. Adding the issues in the manner that Professors Post and Salop propose, we get the result that the statute is *not* constitutional.

There is even another possibility. The following two-part syllogism leads to the conclusion that the statute is constitutional: invalidating the statute is unfair (issue F), and the Constitution should be interpreted to avoid unfair results (issue G). There are five votes for each part of this syllogism, and under issue voting the statute would be constitutional.

So under issue voting the result in *Tidewater* depends on which major underlying issues are subjected to votes. The statute is not constitutional if the relevant syllogism is: Article I does not allow jurisdiction (6 votes), and Article III does not allow jurisdiction (7 votes), therefore the statute is unconstitutional. The statute is also not constitutional if the relevant syllogism is: *Hepburn* requires finding the statute unconstitutional (6 votes), and *Hepburn* should not be overruled (7 votes), therefore the statute is not constitutional. But the statute *is* constitutional if the relevant syllogism is: the applicable constitutional provisions should be construed broadly (5 votes), and a broad interpretation permits this statute (presumably 5 votes), therefore the statute is constitutional. And the statute is also constitutional if the relevant syllogism is: the fair result is that the statute is constitutional (5 votes), and the constitution should be interpreted to reach the fair result (5 votes).

Who is to say which is the controlling way to break down the issues? Since the proponents of change have given us no clue, we should at the outset be dubious.³⁷ Let us now look at the bases of criticism of the almost universal practice of outcome voting.

37. In their reply to this Article, Professors Post and Salop put forth an attempt to answer the question. According to them, issues should be voted upon separately if they are "logically independent" and "potentially dispositive." David G. Post and Steven C. Salop, *Issues and Outcomes, Guidance, and Indeterminacy: A Reply to Professor John Rogers and Others*, 49 Vand. L. Rev. 1069, 1078 (1996). Even a cursory attempt to apply this standard to the issues identified in *Tidewater* shows the indeterminate nature of the test. *Tidewater* issues B and C are said to pass the test, while the remaining issues are said to fail. *Id.* at 1080 n.31. But D through Q are said to fail the test because they are not "capable, *standing alone*, of disposing of the overall question whether the statute before the Court is constitutional." *Id.* Of course, answering B or C in the negative will also not dispose of the overall question. But according to Professors Post and Salop, because answering yes to *either* questions B or C *will* resolve the case, this disjunctivity distinguishes B and C from issues D and E, which both must be answered to resolve the case. Similarly, F and G are said both to require answers to resolve the case. *Id.* But any syllogism that requires X and Y for result R can be restated as requiring the opposite result if there is either not-X or not-Y. Rogers, 79 Ky. L. J. at 444 (cite in note 3). In other words, if an appellate result requires both of two premises to be demonstrated, the

III. SUPPOSED PROBLEMS WITH OUTCOME VOTING

A. Usable Precedent

Professors Post and Salop argue that outcome voting often results in plurality opinions, which “lack[] the full force of law”³⁸ and lead to a “reduction in usable output” by courts.³⁹ Professors Kornhauser and Sager make the analogous argument that cases like *Tidewater* hurt “the orderly development of legal doctrine.”⁴⁰ Actually, plurality opinions, plus the concurrences needed to reach a majority, together have the full force of law.⁴¹ Lawyers and judges applying the plurality plus the concurrence must examine how the authors of each opinion would resolve the case, thus multiplying the number of opinions that must be analyzed to determine the effect of the precedent, but in no way making it more difficult to examine the effect of each particular opinion. For instance, in a case arising after *Tidewater*, perhaps involving a statute that makes a territory other than the District of Columbia a state for diversity jurisdiction purposes, the lower court would have to examine each of the four opinions to see how the justices would vote in the new case. For any one of the four opinions, the endeavor would be no more difficult than if that opinion had been the unanimous opinion in *Tidewater*. (It might be four times the work to do this, of course.) Once the four

opposite result is required by the rejection, of either premise, *id.* at 444, and either issue is then “capable, *standing alone*, of disposing of the overall question,” Post and Salop, 49 Vand. L. Rev. at 1080 n.31.

For his part, Professor Stearns in his reply simply denies that D, E, F, G, K, and L are “really issues.” See Maxwell L. Stearns, *How Outcome Voting Promotes Principled Issue Identification: A Reply to Professor John Rogers and Others*, 49 Vand. L. Rev. 1045, 1065 (1996). A look at my Appendix will show that many of the justices in *Tidewater* must have disagreed with him, since they resolved the questions as integral parts of their analyses, and it is sufficient for my purposes to demonstrate that reasonable people will disagree on what are relevant issues.

38. Post and Salop, 80 Georgetown L. J. at 759 (cited in note 6).

39. *Id.* See also *id.* at 761-62.

40. Kornhauser and Sager, 81 Cal. L. Rev. at 25 (cited in note 7). In their view, outcome voting in *Tidewater* could wreak havoc. *Id.* at 31, 35. Since there was outcome voting in *Tidewater*, one wonders what havoc has been wreaked. See note 42 and accompanying text.

41. See also Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 Tex. L. Rev. 1, 46 (1994) (“[W]hen the Court produces a fragmented-majority dispositional rule, meaning a majority of the Court has embraced the same rule but in separate opinions, the rule has essentially the same predictive value as would a unified-majority dispositional rule”).

outcomes are determined, the result has just as much force of law as any precedent.

Professors Post and Salop in fact identify two court of appeals decisions in which just this kind of analysis was made.⁴² In *Siegmund v. General Commodities Corp.*, the Ninth Circuit separately applied Justice Jackson's and Justice Rutledge's opinions in *Tidewater* to conclude that a statutory extension of diversity jurisdiction to citizens of the Territory of Hawaii was constitutional. The court applied the first two *Tidewater* opinions to the case before it, and the opinion displayed not the slightest sign of the "court's discomfort in trying to wrest workable precedent from *Tidewater*" that Post and Salop say is "apparent to any reader."⁴³ Post and Salop call the opinion "an exercise of somewhat tortured logic,"⁴⁴ and "a curious head-counting exercise,"⁴⁵ but these are just epithets.⁴⁶ The result may not fit coherently with other decisions in which only one of the subissues in *Tidewater* is raised, but that is a problem of coherence in the law, not with the usability of precedents.⁴⁷

Professors Post, Salop, Kornhauser, and Sager also seek to mystify what a lower court is supposed to do on remand from a decision like *Tidewater*. Of course in *Tidewater* the lower court can simply find jurisdiction and try the case. Professors Post and Salop posit a case in which a court majority finds an agency regulation invalid on one or the other of two possible grounds, neither of which alone commands a majority. One ground is a challenged agency statistical technique; the other is the agency's failure to use notice

42. Post and Salop, 80 Georgetown L. J. at 767-69 & n.95 (cited in note 6) (citing *Siegmund v. General Commodities Corp.*, 175 F.2d 952 (9th Cir. 1949), and *Detres v. Lions Building Corp.*, 234 F.2d 596 (7th Cir. 1956)).

43. Post and Salop, 80 Georgetown L. J. at 767 (cited in note 6).

44. Id. Professors Post and Salop do challenge the logic of the *Siegmund* court's application of Justice Rutledge's opinion in *Tidewater*, id. at 768 n.94, but this is the type of criticism that would be just as applicable if Justice Rutledge's opinion had been the majority opinion of the Supreme Court. In other words, the "logical fallacy" that Post and Salop find in the Ninth Circuit's application of Justice Rutledge's opinion had nothing at all to do with the outcome voting in *Tidewater*.

45. Id. at 769.

46. The Seventh Circuit in *Detres* found the *Siegmund* reasoning equally applicable in the case of Puerto Rican citizens. 234 F.2d at 603. Other examples of lower court application of "incoherent" supreme court holdings include: *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875 (2d Cir. 1981) (applying *First National City Bank v. Banco Nacional de Cuba (Citibank I)*, 406 U.S. 759 (1972)); *Greene v. Tefeteller*, 90 F. Supp. 387 (E.D. Tenn. 1950) (applying *Tidewater*); *Service Oil, Inc. v. North Dakota*, 479 N.W.2d 815 (N.D. 1992) (applying *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167 (1990)).

47. Nor is there any reason that this method "can work only in those cases where the Court has settled into a pattern of nested disagreement." Kornhauser and Sager, 81 Cal. L. Rev. at 48 (cited in note 7). In other types of cases also, each opinion can be separately analyzed and fairly applied as if it were the majority opinion of the court.

and comment rule-making procedures.⁴⁸ Post and Salop then ask what the poor agency is to do.⁴⁹ “Should the challenged statistical technique [one ground] be abandoned? Should a notice and comment procedure [the other ground] be provided? Should both be done? The outcome-voting procedure obviously results in a decision that provides no guidance to the agency.”⁵⁰ On the contrary, it is obvious that the guidance is clear. The agency must do one or the other (or both).⁵¹ One can say that no individual judge would make such a decision, but that is very different from saying there is no guidance from the court’s decision.⁵²

Moreover, there *would* be a problem with the usability of precedents if a scheme of issue voting were adopted.⁵³ Let us say that

48. Post and Salop, 80 Georgetown L. J. at 746-47 (cited in note 6).

49. *Id.* at 765.

50. *Id.*

51. Professors Kornhauser and Sager raise the identical problem using a criminal procedure example. What if one judge on a three-judge panel says that piece of evidence f could not be admitted under the Fourth Amendment, and a second judge says that piece of evidence g could not be admitted under the Fifth Amendment? Kornhauser and Sager, 81 Cal. L. Rev. at 42-44 (cited in note 7). This is said to present the lower court with a “jumbled mandate[],” *id.* at 43, and a “messy . . . situation,” *id.* at 44. Once again, however, the law is pretty clear: the lower court must exclude one piece of evidence, the other, or both. And again, while this may not be a desirable state of the law in terms of coherence, there is nothing unclear about the mandate.

52. Professors Kornhauser and Sager come up with a hypothetical that is supposed to be even more difficult. In a civil case on appeal before a three-member panel, suppose the trial court admitted pieces of evidence j and k over the plaintiff’s objection. The plaintiff loses, and on appeal (only) one judge says piece of evidence j should be excluded, (only) one judge says piece of evidence k should be excluded, and the remaining judge says both j and k should be admitted. *Id.* at 44. On remand, the trial judge is simply precluded from admitting both j and k. But what if each of the judges who says that certain evidence need not be excluded also believes that such evidence *must* be admitted if proffered? In that circumstance the lower court is in a quandary: rejecting j or k on remand will now also result in reversal. According to Kornhauser and Sager, such a situation will result in “an endless loop of reversals.” *Id.* The absence of citation to any instance of such an endless loop should make us wonder, however, whether this is really a problem.

In this example, the appellate court is deciding two issues with respect to each piece of evidence: whether the evidence may, and whether it must, be admitted. This binary nature of the underlying issues leads to an unusual three-way choice of outcome on appeal. That is, the appeals court as a whole is not deciding simply to affirm or reverse, but whether to affirm, or to reverse with instructions to admit j but not k, or to reverse with instructions to admit k but not j. Unlike in most appeals, this appeal has three possible outcomes. As I explained in my earlier piece, when an appellate court must choose among three or more outcomes, none of which has a majority of the court, the higher rule that the court must decide the case requires some judges to vote against their own position. Rogers, 79 Ky. L. J. at 459-61 (cited in note 3). This has been the practice for that precise reason. See text accompanying notes 117-18. It makes no sense to apply the practice mandated by unusual three-possible-outcome appeals to typical two-possible-outcome appeals.

53. Professors Kornhauser and Sager assume to the contrary that if the *Tidewater* court had engaged in issue voting, “the Court would have offered lower courts and its own successors

in *Tidewater* the justices somehow agreed as a preliminary matter to engage in issue voting, despite the possibility that a decision would issue inconsistent with the independent legal analysis of a majority of the justices. They next would have to identify the major subissues. There could be disagreement on the question of what the major subissues are. Justices might try to determine neutral principles for making that determination, but differ as to what the relevant factors might be. Or they might disagree as to the application of the relevant factors. There would then be the necessity of establishing a voting protocol for determining what the subissues are. Should issue voting or outcome voting apply to voting on what the subissues are? Once the subissues are established, should each subissue be voted on as a whole, or should there be votes on sub-subissues? There might be disagreement on that issue. Once again justices may try to determine neutral principles for making this determination, yet differ as to what the relevant factors might be. Or they might disagree on the application of those agreed-upon factors for determining whether there should be votes on sub-subissues. Once again a voting protocol would have to be established, and the judges would have to determine whether to use issue voting or outcome voting when voting on whether to have issue or outcome voting on subissues. While the justices might not address all of these issues expressly, there is no doubt that they would have to be resolved before judgment could be reached.

Now, "following high court precedent" can be thought of as a shorthand way of saying "predicting what the higher court would do."⁵⁴ If the Supreme Court engages in outcome voting, as it now does almost universally, then a lower court has to engage in counting the

the stable extension of well-settled principles." Kornhauser and Sager, 81 Cal. L. Rev. at 27 (cited in note 7).

54. For citations of statements to this effect by Oliver Wendell Holmes, Jr., Karl Llewellyn, Richard Posner, and others, see Caminker, 73 Tex. L. Rev. at 29 n.110 (cited in note 41). Caminker contrasts the prediction model with a "precedent" model (which I read to be one in which higher court opinions are akin to legislation). Caminker elaborately defends the prediction model, but curiously would not carry it to the logical (and eminently supportable) conclusion that lower courts should predict high court overruling of high court precedent. *Id.* at 70-72. Compare John Regers, *Lower Court Application of the "Overruling Law" of Higher Courts*, 1 Legal Theory 179, 179-91 (1995). Professor Caminker, it should be noted, finds the prediction model to be especially appropriate where cases like *Tidewater* are concerned. Caminker, 73 Tex. L. Rev. at 67-69 (cited in note 41). For criticism of the prediction model, see Michael C. Dorf, *Prediction and the Rule of Law*, 42 U.C.L.A. L. Rev. 651 (1995). As Caminker notes, even under the precedent model of adjudication, cases like *Tidewater* can be applied as precedent. Caminker, 73 Tex. L. Rev. at 64 n.221 (cited in note 41). And if somehow Professor Dorf's position is inconsistent with the existence of incoherent holdings, then every such holding is a rejection of Dorf's position!

votes of individual justices in order to apply the precedent to a new factual situation. But if the Supreme Court engages in issue voting, the lower court now has the following very difficult problem: in all cases that have more than one controversial legal issue, the lower court must somehow figure out how the Supreme Court would resolve all of the issue division and voting issues described in the previous paragraph. The court will either be unguided or have an inscrutably difficult multilevel task of anticipation to undertake. So if you want to talk about really worthless precedents, issue voting will certainly create them.⁵⁵

B. Encouraging Lawyers to Make Insubstantial Arguments

Professors Post and Salop argue that outcome voting encourages lawyers to raise “[a]ny issue . . . if even a single Justice might find it a plausible ground on which to base his or her judgment.”⁵⁶ The result is an asserted “incentive to engage in ‘kitchen sink’ advocacy.”⁵⁷ The reader who has engaged in much advocacy before appellate panels may well ask how often the advocate actually reasons, “No majority will buy this, but I may pick up a vote, so I will include this issue.” The negative effect of presenting an argument that is so weak that it is obviously unacceptable to the majority will usually outweigh the slim possibility that one will pick up a needed vote from a quirky judge.⁵⁸ (This is not to say that insubstantial arguments are not made, but only that, when made, the advocate generally has at least some hope that a majority will buy the argument.) I do not have empirical evidence for this assumption, but then Professors Post and Salop present none for their opposite assumption.

What is very likely, however, is that a system of issue voting will lead lawyers to make strained and very abstract arguments. What able lawyer cannot take a relatively clear-cut issue, divide it up into subissues, and then demand resolution of each subissue in an

55. This argument is related to my criticism of Justice White’s vote in *Union Gas* as rendering uncertain the precedential effect of the decision. See Rogers, 79 Ky. L. J. at 471-72 (cited in note 3). Recently, the Supreme Court has explicitly recognized the uncertainty of the precedential effect of *Union Gas* because of Justice White’s vote. See *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1127-28 (1996).

56. Post and Salop, 80 Georgetown L. J. at 760 (cited in note 6).

57. *Id.* at 760.

58. This is particularly so in cases before federal courts of appeals where an advocate does not learn the composition of the panel until after briefing.

effort to corner a judge into the decision the lawyer wants? Lawyers on the other side will demand that the issues be divided differently in order to drive the court in different directions. Lawyers on either side can then argue over what factors should govern the division of the issues.⁵⁹ While some such issues are argued on appeal even under outcome voting, lawyers would pay much more attention to making such arguments if the judges are required to vote on such issues as part of the judgment process. Under issue voting, the potential to engage in pettifoggery seems enormous.

C. *Legal Incoherence*

A much stronger argument against outcome voting is the possibility of incoherent results. Although incoherence sounds bad, it is not as bad as inconsistency, as I tried to explain once before.⁶⁰ In each case like *Tidewater*, it is possible to hypothesize three cases: one case in which two issues (whether-X and whether-Y) are raised as in *Tidewater* itself, and two subsequent cases in each of which only one of the issues is presented (whether-X in one, whether-Y in the other). In the first case the holding will be "we can't say both X and Y." In the second case the holding will be "we say X," and in the third case the holding will be "we say Y." A reasonable individual reasoner would not come to all three conclusions.

Let us look at an example. The example I gave of such a set of three cases was based on *Wyman-Gordon*.⁶¹ The example given by Professors Post and Salop involved a different administrative law hypothetical of their own making.⁶² An example could be constructed using *Tidewater*, but I will use a simpler example. Three criminals commit identical crimes. The police use a questionable search technique to get evidence against Q, and the trial court allows a questionable peremptory challenge. In the trial of defendant R, only the questionable search technique is involved, while in the trial of S, only the questionable peremptory challenge is involved. Otherwise the cases are legally identical. Assume six justices (A,B,C,D,E,F) think the search technique is constitutional, while three justices (G,H,I) do not. Assume however that A,B,C and G,H,I (six justices) think the peremptory challenge is constitutional, but D,E,F (three justices) do

59. All of this follows resolution of the issue on which Professors Kornhauser and Sager advocate a metavote, whether there should be issue or outcome voting in the first place.

60. See Rogers, 79 Ky. L. J. at 465-74 (cited in note 3).

61. *Id.* at 465-66.

62. See Post and Salop, 80 Georgetown L. J. at 745-46, 766 (cited in note 6).

not. In cases of first impression, the convictions of R and S would stand, while that of Q would be reversed. This is incoherent because no justice took the following position, which would be the law: a conviction involving both the questionable search technique and the questionable peremptory challenge is invalid, but an otherwise proper conviction involving only one but not the other is valid. Since there is no logical relation between the search technique and the peremptory challenge, this seems an irrational rule.

Although not rational in the sense that an individual reasoner could logically reach the rule, the rule can certainly be applied consistently.⁶³ The lower court on remand in the case of Q need only avoid one or the other problem. Subsequent lower courts can easily apply the rule, and there is no basis for Professors Post and Salop's statement that "eventually the two lines of precedent must collide."⁶⁴ It may be that one group of justices will ultimately change its mind, but there is no more reason for it to do so than with any other position taken by a justice that determines a case.

Of course it may be embarrassing to the law that we have a rule that no individual reasoner could arrive at. We could eliminate the problem quickly and easily by mandating that all appellate courts consist of one judge only. We do not do so because the system finds better judgment—accuracy, consistency, fairness, political responsibility—in multiple member appellate courts.⁶⁵ The occasional anomaly

63. Professors Post and Salop thus are incorrect when they suggest that the example involves inconsistency, that this is a situation of two precedents where "one holds that the law is A and the other holds that the law is not-A." *Id.* at 765. Post and Salop subsequently appear to recognize that the problem is instead one of coherence. See *id.* at 766-67 (describing the risks of incoherence). Professors Kornhauser and Sager also occasionally refer to the problem as one of inconsistency. See Kornhauser and Sager, 81 Cal. L. Rev. at 27 (cited in note 7). This is particularly confusing coming from the two authors who themselves most clearly drew the distinction between inconsistency and incoherence. See Lewis A. Kornhauser and Lawrence G. Sager, *Unpacking the Court*, 96 Yale L. J. 82, 102-09 (1986) ("explor[ing] consistency and coherence in the context of multi-member courts"). Writing separately, Professor Kornhauser has also recognized that "[i]n result-bound adjudication, like cases will be treated alike, though which way they are treated may depend on the order in which they are decided." Lewis A. Kornhauser, *Modeling Collegial Courts. II. Legal Doctrine*, 8 J. Law, Econ. & Organization 441, 445 (1992).

64. Post and Salop, 80 Georgetown L. J. at 766 (cited in note 6).

65. See Kornhauser and Sager, 96 Yale L. J. at 97-100 (cited in note 63); Kornhauser and Sager, 81 Cal. L. Rev. at 6 n.10 (cited in note 7); *id.* at 6 n.10; Caminker, 73 Tex. L. Rev. at 42 & n.155 (cited in note 41). See also William G. Fuqua, *From Judge to Justice*, 6 Ky. Bar News, No. 4, p. 2 (1995) (reporting observations of a trial court judge elevated to the Kentucky Supreme Court that "there was a great deal of comfort in knowing that any decision that was made carried with it the concurrence of at least three other jurists. This was a luxury that I had not enjoyed as a trial judge").

is not so harmful as to warrant the drastic solution of reducing all appellate courts to one member. The same could be said regarding issue voting. The occasional anomaly is not so harmful as to warrant the drastic solution of issue voting.

Issue voting is a bad solution because it would be so much more indeterminate than the outcome-voting system. Results will not depend on counting logical independent votes but on anticipating how issues will be divided, and then on counting votes on the various issues. There is no developed body of law on how issues must be divided for separate voting. In order to approach consistency in the law, there would have to be a whole body of law developed on the question of dividing issues on appeal. One can foresee whole law courses on "Division of Issues." The artificiality of the endeavor would become an embarrassment to the law, even apart from the difficulty of explaining to the public that the court has reached a result that a majority of justices oppose.

D. Path Dependence

The problem of incoherence is closely related to the problem of path dependence. The concern is that outcome voting permits the sequence of appellate cases to determine the outcome.⁶⁶ Such path dependence is assumed to be bad.

To see just how bad this situation is, let us take a worst-case example: the criminal procedure example above. If the cases are decided in the sequence Q,R,S (or Q,S,R), then the law will be that a combination of the questionable search and the questionable peremptory challenge will be unconstitutional, but that neither the questionable search nor the questionable challenge without the other will invalidate a conviction. But, if the cases are decided in any sequence where Q is not the first of the three cases, then the result in Q will be different. This is because one of the issues, having been applied to determine a previous case by a majority vote, will be binding as a matter of stare decisis. For instance, if R's case came up first, six justices (A,B,C,D,E,F) would uphold the conviction on the ground that the search was constitutional. When Q's case later came up, all nine justices would be bound by stare decisis to hold the search constitutional, and six justices would find the peremptory challenge constitutional (A,B,C,G,H,I), so the high court would affirm the conviction. In contrast, if the Q case arose first, the rule that combined error re-

66. See Post and Salop, 80 Georgetown L. J. at 762-64 (cited in note 6).

quires reversal would apply in Q and subsequent combined-error cases.

The R and S cases will be decided the same under any sequence, but the Q case will have different results depending upon whether it reaches the appellate court before or after either the R or S case. Thus the result in Q is path dependent. Three points will show that this epithet should not concern us. First, the evil of path dependence is no greater than the evil of stare decisis, without which outcome voting would not be path dependent in the first place. Second, the path dependence problem is inherently limited because the sequence is not randomly determined. Third, there are in any event much less drastic ways of dealing with the problem.

The path dependence problem is directly caused by the way in which judges on one court apply the doctrine of stare decisis to precedents of the same court.⁶⁷ Stare decisis requires judges to apply the law as formerly applied by the same court, even if the judge would come to a different conclusion in the absence of that precedent. The doctrine only makes a difference if the judge, apart from the precedent, would have voted differently. So even if the judge believes that the issue was wrongly decided before, the judge must now continue to apply the "wrongly decided" law.⁶⁸

The path dependence problem identified by Professors Post, Salop, Kornhauser, and Sager assumes that appellate judges will be bound by, and apply, holdings that they voted against.⁶⁹ Of course there are times when judges find an exception to stare decisis and vote to overrule. In addition, there are some issues over which a judge feels so strongly that he or she will continue to vote independently no matter how often or how clearly the law is rejected by majority holdings. But in either of those situations, under a regime of outcome voting, the path dependence problem does not arise. In our criminal procedure example, should D,E,F and G,H,I stick to their guns even after being outvoted in the R and S cases, the later case of Q will be decided just as if it had arisen before R or S.

67. This is sometimes called "horizontal stare decisis." "Vertical stare decisis," in contrast, refers to the obligation of courts to follow precedents of higher courts. See, for example, C. Steven Bradford, *Following Dead Precedent: The Supreme Court's Rejection of Anticipatory Overruling*, 59 *Fordham L. Rev.* 39, 68-69 (1990).

68. See Larry Alexander, *Constrained by Precedent*, 63 *S. Cal. L. Rev.* 1, 8 (1989); Frederick Schauer, *Precedent*, 39 *Stan. L. Rev.* 571, 588 (1987); Theodore M. Benditt, *The Rule of Precedent*, in Laurence Goldstein, ed., *Precedent in Law* 91 (Clarendon, 1987).

69. See Kornhauser and Sager, 81 *Cal. L. Rev.* at 6 n.11 (cited in note 7).

That is, the incoherent result that both errors combined results in reversal, even though it had previously been held that neither of the errors alone would invalidate the conviction, would apply regardless of the sequence of the three cases. So in order to consider the path dependence problem, we must assume that appellate judges will vote for holdings that they previously voted against (or would have voted against).

Note that regardless of the sequence of the Q, R, and S cases, the R and S cases will be decided the same way. That is, regardless of the order in which the cases arise, under outcome voting there is no path dependence with regard to the single issue cases. In both the R and S cases in our example, the conviction will be upheld whether or not the combined-error Q case has already been decided by the court.⁷⁰ Only the Q case result will depend upon whether R or S has already reached the court.⁷¹

70. Professors Post and Salop unpersuasively suggest that this might not be so. They suggest that when a combined-issue and one single-issue case have already been decided, the second single-issue case may be decided in a way different than if it had arisen first:

To reach this result, the court would reason that the precedents established in the two previous cases necessarily determine the outcome in the third case. That is, in order to harmonize the three cases, the lower court must hold "Yes" in the third case [that is, the position of a minority on the Supreme Court on the single issue] in order to satisfy the two precedents. The lower court will be in conflict with the votes of the Supreme Court on this issue in the [two-issue case] but it will be consistent with the outcomes of the two cases reviewed by the Court. If the Supreme Court affirms this outcome, then precedential inconsistency will be avoided.

Post and Salop, 80 Georgetown L. J. at 767 (cited in note 6). It does not make sense for lower courts to reason this way, and Professors Post and Salop later give a clear example of one that did not. *Id.* at 769-70 n.96 (citing *Marathon Pipeline Co. v. Northern Pipeline Constr. Co.*, 12 B.R. 946 (D. Minn. 1981), affirmed 458 U.S. 50 (1981)). If a lower court actually ruled against the Supreme Court's majority position in the single-issue case and the Supreme Court were to affirm, a confused body of law would indeed result. But there is no reason for the Supreme Court to affirm. There is no majority *holding* that requires it to do so under *stare decisis*. Certainly the earlier combined-issue case would not require the result, since by definition the result in that case depended on the presence of both issues in the same case.

Professors Kornhauser and Sager make a suggestion similar to Post and Salop's. One alternative in a single-issue case following *Tidewater* (that is, one raising only the Article I issue) would be to "affirm *Tidewater* and reverse the previous majority" on the Article I issue. Kornhauser and Sager, 81 Cal. L. Rev. at 26 (cited in note 7). The Court could only do this by rejecting the application of *stare decisis* in the single-issue case.

71. Professor Stearns makes an argument that might suggest that path dependence will control the outcomes of the R and S cases as well. He posits a case in which Justices A,B,C,D,E,F would hold that Washington State statute X violates the 14th Amendment (while G,H,I hold that X comports with the 14th Amendment), and Justices A,B,C,G,H,I would hold that California statute Y comports with the 14th Amendment (while D,E,F would hold that Y violates the 14th Amendment). Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 Cal. L. Rev. 1309, 1353-55 (1995). See also Maxwell L. Stearns, *Standing and Social Choice: Historic Evidence*, 144 U. Pa. L. Rev. 309, 323-27 (1995). Professor Stearns deduces from this that Justices D,E,F,G,H,I form a majority for the proposition that the Washington and California statutes should be decided "in the same manner." Stearns, 83 Cal. L. Rev. at 1355. See also Stearns, 144 U. Pa. L. Rev. at 324. This is true

If we assume that there is one “right” and one “wrong” decision in the Q case, then if the Q,R,S cases come up in one sequence, the court system provides the right answer; and if the Q,R,S cases come up in another sequence, the court system provides the wrong answer.⁷² But that is true in general if the doctrine of stare decisis is applied. In other words, the evil of path dependence that results from outcome voting is the very “evil” of stare decisis itself—we are stuck with an earlier decision that may be wrong. The path dependence criticism of outcome voting thus boils down to a criticism of the horizontal principle of stare decisis. While stare decisis is amenable to criticism, there are strong arguments to support it.⁷³ The system will sometimes end up with the wrong law, but considerations of consistency and other values justify the possibility. The same can be said for the path dependence criticism of outcome voting. The system will sometimes end up with the wrong resolution of the law (that is, the rule in the combined-issue case when the sequence of cases happens to be one way rather than the other), but considerations of consistency and other values justify the possibility. Other than that, what is the harm?

Critics may be uncomfortable with this answer to the path dependence argument because the incoherent result (when the combined-issue case arises first) appears so clearly wrong to them.⁷⁴ If we assume in contrast that the incoherent result *might* be the right one, then we merely have the systemic chance that we may possibly be

only in the sense that D,E,F would hold that both X and Y violate the 14th Amendment, and G,H,I would hold that both X and Y comport with the 14th Amendment. But this is simply not to say—as Stearns does—that if the Washington (X) case came first then Justices G,H,I, who would have dissented in the Washington case, would feel bound in the California (Y) case. Stearns, 144 U. Pa. L. Rev. at 1355. In the example, G,H,I thought that X and Y should both be upheld; it does not follow that if X is struck down, Justices G,H,I would be unable to distinguish the case that they disagreed with. In other words, preferring that two cases be decided one way is hardly the same thing as saying they are indistinguishable when one of them has been decided the opposite way.

72. By “right” I mean whatever answer the court would arrive at if properly applying the correct law, entirely without regard to the reader’s view as to what the proper criteria are. No matter what a judge’s position is on positivism, natural law, realism, formalism, interpretivism, originalism, etc., the very idea of law contemplates at least that some precepts are law and some are not. Although we often do not agree what is the law and what is not, we generally agree that a particular precept must either be the law or not be the law. See John M. Rogers and Robert Molzon, *Some Lessons about the Law from Self-Referential Problems in Mathematics*, 90 Mich. L. Rev. 992, 999-1002 (1992).

73. Rogers, 79 Ky. L. J. at 463-65 (cited in note 3).

74. See, for example, Kornhauser and Sager, 81 Cal. L. Rev. at 58 (cited in note 7) (stating that outcome voting where issues are independent “produces outcomes that are patently arbitrary and hence wrong”).

stuck with a wrong decision—the same risk that stare decisis presents. The path dependence argument thus comes down to whether an incoherent result is inherently wrong as a matter of public policy. I have dealt with that issue in the previous Section and elsewhere.⁷⁵

The problem of path dependence is not only no worse than the downside of the stare decisis doctrine from which it results, but the problem is inherently limited because the path is not arbitrary or random. This can be demonstrated by observing that pairs of issues, each of which draws a different majority in one case, have varying degrees of likelihood of arising in the same case. We can call this characteristic of two issues their “co-occurrence likelihood.”⁷⁶ The following issues, for example, would have a high co-occurrence likelihood: (a) whether a certain state employment practice violates 42 U.S.C. § 1983, and (b) whether the same practice violates Title VII of the Civil Rights Act; or (a) whether an agency regulation exceeds the agency’s regulatory power, and (b) whether the same regulation violates the United States Constitution.

Of course if issues are related in the sense that resolution of one affects the resolution of the other, it is particularly likely that the issues will arise in the same case. But co-occurrence could also be likely where the issues are entirely independent. In the second example above, for instance, the statutory challenge to the regulation may be based purely on the meaning of a jurisdictional word in the statute, while the constitutional challenge could be based on a conceptually unrelated provision in the Bill of Rights, such as the Free Exercise Clause of the First Amendment.

If the co-occurrence likelihood of two issues is high, then the problem of path dependence for those two issues is small because the sequence of cases in which both issues are raised (like Q), and cases in which only one issue is raised (like R or S), will not be random. Instead, because the presence of one issue makes the presence of the other issue likely, the combined-issue case (like Q) will most likely arise before any case in which only one issue arises. Thus, for pairs of issues where the co-occurrence likelihood is high, the law will naturally tend to the path where the judges’ votes on the combination of issues will form the law.

In contrast, if the co-occurrence likelihood of two issues is low, the single-issue case (like R or S) will most likely occur first, and only coincidentally will the combined-issue case occur first. Thus, for pairs

75. Rogers, 79 Ky. L. J. at 465-74 (cited in note 3).

76. Now that I’m getting into it, I guess making up jargon can be sort of fun.

of issues where the co-occurrence likelihood is low, the law will naturally tend to the path where the judges' votes on the individual issues will form the law.

Some examples illustrate this phenomenon clearly. In their effort to show the arbitrariness of the path dependence incurred by outcome voting, Professors Post and Salop use a three-case example—a combined-issue case plus two single-issue cases—based on *Tidewater*.⁷⁷ Professors Kornhauser and Sager use a similar example.⁷⁸ The result is path dependent in *Tidewater*, the argument runs, because the result depends upon whether the Supreme Court considers *Tidewater* before or after a case in which only one of the two issues of *Tidewater* is presented.⁷⁹ But the Post and Salop hypothetical single-issue cases (that is, in which only one of the issues is presented) sound artificial⁸⁰ because it is very difficult to

77. Post and Salop, 80 Georgetown L. J. at 764 (cited in note 6). Post and Salop also use an administrative law hypothetical. *Id.* at 763-64.

78. Kornhauser and Sager, 81 Cal. L. Rev. at 26-27 (cited in note 7). They also use an example based on *Union Gas* to make the same point, hypothesizing a case previous to *Union Gas* in which Justices White, Brennan, Marshall, Blackmun, and Stevens had been able to decide that the Constitution permits Congress to create a cause of action against a state when legislating pursuant to the Commerce Clause, but in which the question of whether the language of CERCLA permits a suit against a state in federal court was not raised. *Id.* at 14, 39.

Professors Kornhauser and Sager also use a pollution example where different majorities find (a) strict liability and (b) a particular waiver is unenforceable, but the two minorities constitute an overall majority that rejects either a or b, so that under outcome voting there is no liability. *Id.* at 36-38. In such a situation, "case-by-case voting has the consequence of giving a dissenting vote on a constituent question decisive force in the outcome of the case since the identity of one or more judges who hold dissenting views are crucial to that outcome." *Id.* at 38. To the extent that their words "dissenting vote" mean a vote against the outcome of the appeal, then Kornhauser and Sager misuse the term. If the words mean instead disagreement with a majority on an underlying issue, then the observation is a mere restatement of the voting problem we are debating rather than an explanation of how outcome voting leads to path dependence.

79. Post and Salop, 80 Georgetown L. J. at 764 (cited in note 6); Kornhauser and Sager, 81 Cal. L. Rev. at 27 (cited in note 7). The assumption of course is that the Article I versus Article III basis for the statute is the proper way to divide the issues. Compare text accompanying notes 33-37.

80. Professors Post and Salop ask us to "assume that, prior to the passage of the statute at issue in *Tidewater*, a resident of the District of Columbia brought a diversity suit in federal court, claiming that jurisdiction was proper because the District is a state for diversity purposes." Post and Salop, 80 Georgetown L. J. at 764 (cited in note 6). Allowing such a suit would have required an overruling of the statutory holding of *Hepburn & Dundas v. Ellzey*, 6 U.S. (2 Cranch) 445, 453 (1805), that the general diversity statute did not include D.C. citizens. This was not at issue in *Tidewater* and accordingly no justice urged a change in the statutory holding. Some justices advocated overruling the alleged constitutional holding of *Hepburn* that D.C. is not a "State" under Article III—a different issue. Indeed, if the issues were the same, then *Hepburn* itself would be the hypothesized single-issue case that occurred before *Tidewater*.

hypothesize a real case in which only one of the issues is presented. In order to present the Article III issue, the case would have to involve a statute granting diversity jurisdiction to federal courts over disputes between citizens of a state and citizens of an entity that may or may not be included within the Article III meaning of "State." It is hard to think of such an entity other than the District of Columbia or a territory of the United States. In either of those situations, though, the Article I issue is also presented: Congress has the power to legislate for both D.C. and for territories. Only a strained and artificial hypothetical could present one issue without the other. One would have to come up with a case where, for instance, Congress extends diversity jurisdiction to citizens of a non-state entity over which Congress has no legislative power. For the *Tidewater* pair of issues, then, the overwhelming likelihood is that the combined issue case will arise first. The path dependence problem is thus alleviated, if not totally eliminated, by the fact that the nature of the issues determines the order in which the three hypothetical cases arise.

Similarly, in trying to explain how cases like *Tidewater* are incoherent, I used three hypothetical cases based on *Wyman-Gordon*.⁸¹ In that case the two issues were: (1) whether the NLRB violated the A.P.A. by not engaging in rule making on a particular issue, and (2) if the NLRB violated the A.P.A. by not engaging in rule making, whether reversal of the NLRB was required. Different majorities answered each question yes, but no majority accepted both 1 and 2. The result was affirmance of the NLRB. I hypothesized two later cases, one in which only issue 1 was presented, and one in which only issue 2 was presented. But I did so abstractly because it is very hard to think of a real case in which only one of these issues is presented. Of course it is not impossible; one of the issues, for instance, could be conceded by the parties. But if the issues are likely to co-occur, the sequence of the three possible cases will likely see the combined-issue case arising first.

In contrast, the best example of a pair of issues where the single-issue case may plausibly come before the combined-issue case is one like my Q,R,S example above where the two issues have very

"For expositional purposes," Professors Kornhauser and Sager ask us to "assume that the Court considers an extension of jurisdiction to a district court in the Territory of Guam and that there is no plausible argument that the Territory of Guam is a state within the meaning of Article III." Kornhauser and Sager, 81 Cal. L. Rev. at 26 (cited in note 7). But in the actual post-*Tidewater* cases involving territories, there was not only a plausible argument to that effect, but the argument was made to find that Justice Rutledge would hold the statute constitutional on that ground. See text accompanying note 42.

81. See Rogers, 79 Ky. L. J. at 465-66 (cited in note 3).

little in common. The only characteristic of the search issue that makes it likely to arise in the preemptory challenge case is the fact that it arises in a criminal case. It is only happenstance that the issues are presented in the same case. Most pairs of issues with this low likelihood of co-occurrence will see one of the single-issue cases arise first. Of course it is possible that totally unrelated issues will occur in the same case before either one is presented separately, but the system will naturally tend toward the other sequence.

Thus the system is naturally stable. While the resolution of the combined-issue case is path dependent, the path is not random and arbitrary. Rather, the path is largely determined by the relative likelihood that the two issues will occur in the same case. The more closely the issues are related, the more likely they will co-occur, and the more likely there will be a special rule for when they co-occur. The less closely the issues are related, the less likely they will co-occur, and the less likely there will be a special rule of law for when they do co-occur. This is not an embarrassment to the law. Instead, it is merely a necessary concomitance of consistent decision making by multimember appellate courts. The alternative is either a system of single-judge courts, with the loss of wisdom that this entails, or a system of issue voting, with its potential for radical indeterminacy.

There is, finally, a far less drastic way to lessen the path dependence that does exist, at least for courts with discretionary review power. If the Supreme Court, for instance, would refrain from granting certiorari in the same case on totally unrelated issues, then truly anomalous situations like the criminal procedure example above—where the co-occurrence of issues is pure happenstance—would be avoided. One might ask if the problem is big enough to warrant even this suggestion. At the least, those who are concerned with the problem should be satisfied with advocating such an easy cure rather than a radical and destabilizing change in how judges vote.

IV. THE INSTABILITY OF ISSUE VOTING

The basic criticisms of outcome voting therefore do not withstand analysis, at least when contrasted with any alternative. In my critique of the votes of Justices White and Kennedy in *Union Gas* and *Fulminante*, respectively, I argued that there was no reasoned basis for voting against one's position in some cases (because outvoted on a

subissue) but not in other cases. There lay the indeterminacy.⁸² Professors Post and Salop try to avoid this problem by advocating issue voting in all cases. There are several unanswered problems with this solution. First there is the practical problem of getting all members of the Court to accept the new voting protocol. Perhaps a constitutional amendment would be necessary to get everyone on board. While advocates of issue voting may say their idea is good, even if not accepted, there would be enormous indeterminacy in partial acceptance.

Second, for Professors Post and Salop to advocate issue voting in all cases, they must accept some results that will deeply embarrass the judicial system. If, for instance, there are three constitutional challenges to a criminal defendant's capital conviction and different groups of only three justices agree with each challenge, the criminal could be executed although all justices independently find the conviction unconstitutional. Post and Salop basically say, why not?⁸³ One answer is that the polity that ultimately must accept judicial decisions will have a hard time accepting such a result. The only way to defend headlines like "JONES EXECUTED; ALL JUSTICES AGREE CONVICTION UNCONSTITUTIONAL" would be to explain that the justices voted issue-by-issue on what the law is, and the application of this law requires execution. But who made the decision? Who did the applying?⁸⁴ Each justice can say that if the court had agreed with him or her, the defendant would not have been executed. But this is not how the public thinks judges should act. Judges should not be voting on the law like legislators but should be applying the law and bearing responsibility for the proper application of the law. It would fundamentally undermine the responsibility of the judiciary to permit, or require, judges to vote for results that they oppose.⁸⁵

82. Professors Post and Salop recognize a related problem: the "absence of a firm voting rule raises the uncomfortable possibility of strategic voting by the Justices." Post and Salop, 80 *Georgetown L. J.* at 745 (cited in note 6). See also *id.* at 755-57. The seriousness of the strategic voting problem is demonstrated by Professors Kornhauser and Sager, though it obviously does not lead them to reject issue voting. See Kornhauser and Sager, 81 *Cal. L. Rev.* at 51-56 (cited in note 7).

83. Post and Salop, 80 *Georgetown L. J.* at 760 (cited in note 6) ("[W]hy indeed should the defendant be spared?").

84. Professors Post and Salop assert, "Under true issue-voting, the Justices would not be compelled to vote on the outcome of the cases at all, since the judgment of the court would be *automatically* determined by the Justices' views on each of the issues." *Id.* at 752. Professors Kornhauser and Sager characterize the outcome under issue voting as "a matter of simple doctrinal arithmetic." Kornhauser and Sager, 81 *Cal. L. Rev.* at 16 (cited in note 7).

85. Professors Kornhauser and Sager suggest that a decision like the one described is troubling because the result is criminal conviction, and they propose that a special rule require

Third, the proposal that judges always engage in issue voting only addresses the indeterminacy involved in deciding whether to engage in issue voting as opposed to outcome voting. There is also the indeterminacy inherent in figuring out how issues should be divided. As explained above,⁸⁶ there is often more than one answer to the question, and the difference in the answers will be outcome determinative.

Professors Kornhauser and Sager, on the other hand, seek to avoid the possibility of obviously indefensible results by proposing that issue voting sometimes be used and sometimes not.⁸⁷ They propose a "metavote" by the Court on whether to engage in issue voting or outcome voting.⁸⁸ Their answer to the indeterminacy critique is to provide a list of factors for determining on a case-by-case basis whether or not all the members of the Court should engage in issue voting.⁸⁹ Once again there are several unanswered problems with this solution.

issue voting when outcome voting would lead to upholding conviction for a serious crime. *Id.* at 40-41 & nn.66-67. As Professors Post and Salop easily demonstrate, outcome voting could lead to conviction and issue voting could lead to acquittal in a case where the theories for upholding convictions are inconsistent. Post and Salop, 80 *Georgetown L. J.* at 761 (cited in note 6). I would argue that the public would be similarly outraged by the headline, "CONVICT SET FREE, ALL JUSTICES AGREE CONVICTION PROPER." There is, after all, a public interest in convicting criminals. In this regard, it has been observed that the California voters ousted California Chief Justice Rose Bird for following a hidden agenda inconsistent with the law in a way that was advantageous to criminal defendants:

Her opposition to the death penalty was not in doubt, but unlike Justices Brennan and Marshall, she did not preface her every voto with a candid statement of that position.

Rather, she managed in every death case that came before her to find some more particular defect . . . [T]he result was unconvincing, and in the end I suspect far more provocative than frank and consistent opposition.

Charles Fried, *Impudence*, 1992 *S. Ct. Rev.* 155, 167.

86. See text accompanying notes 36-37.

87. They also want to avoid situations where issue voting might lead to a result that is substantively not "appealing." Kornhauser and Sager, 81 *Cal. L. Rev.* at 29 (cited in note 7). It would be "intolerable," for instance, "that the inability of the Justices to agree on the detail of doctrine should be allowed to suppress the Court's exploration of gender justice." *Id.* Compare the apparent rationale of Justice Kennedy in *Fulminante* that issue voting may be warranted in the special case where outcome voting would lead to capital punishment. 499 *U.S.* 279, 313 (Kennedy, J., concurring).

It would be particularly anomalous to have voting protocol determinations based on the merits of the case. Professors Kornhauser and Sager assert that the choice of voting protocol should not be determined by a judge's views on the merits, Kornhauser and Sager, 81 *Cal. L. Rev.* at 31 (cited in note 7), but later hedge this position by saying that a judge's vote on voting protocol might "legitimately be inflected" by views on the merits, *id.* at 32.

88. *Id.* at 30. Such a vote would presumably be required whenever there is no majority opinion, regardless of when during deliberation it becomes apparent that there will be no such opinion. *Id.* at 31-32.

89. *Id.* at 33-48.

First, we still have the practical problem of putting the system in place. How can some justices, even on a case-by-case basis, force others to defer to their voting on issues? Is a constitutional amendment required? Once again, if some justices reject the new system, no amount of consistency in the application of the Kornhauser and Sager factors by those who accept them will render the results consistent.

Second, the factors proposed by Kornhauser and Sager to decide whether to use issue voting at best mitigate the total lack of guiding principles found in the votes of Justices White and Kennedy in *Union Gas* and *Fulminante*. Though camouflaged somewhat, some of the factors are closely related to views of justices on the merits of the particular case.⁹⁰ The other factors consist of case-specific weighing of the various purported bad effects of outcome voting that I have dealt with above.⁹¹ Assuming that these factors were somehow legally accepted or imposed, there is still a lot of room for interpretation and manipulation in their application. Judges may legitimately disagree on how to apply them in particular cases, especially when such votes are still a novelty.⁹² The metaquestion will

90. Professors Kornhauser and Sager's first factor is the "durability" of commitment of the justices to the relevant subissues of law. *Id.* at 33-36. The judge should consider whether she is more committed in the long run to doctrinal specifics than to the overall development of constitutional doctrine. *Id.* Presumably a judge should vote for issue voting if she is strongly committed to one side of a subissue, but for outcome voting if she is not so strongly committed on the subissues. But what of the levels of commitment on the part of other justices? Must justices now argue their positions in conference and in interchamber memos not only on the law, but also on how strongly they believe it is the law?

Professors Kornhauser and Sager's third factor is even more closely related to the merits. They suggest that where serious criminal convictions are involved, since they "alter the status quo in such a drastic way," the government must win on both issue-voting and outcome-voting protocols in order for the conviction to be upheld. *Id.* at 39-41. Such a "tilt" in the criminal justice system against conviction is wholly unwarranted and is expressly based on the authors' weighing of criminal law considerations. Others might argue that the crime problem in the United States requires convictions to be upheld more rather than less than they now are. The problem is one of judicial responsibility. My example of a criminal executed when eight out of nine justices find the defendant unconstitutionally convicted is no more shocking than the reverse possibility of issue voting, where a criminal is set free when eight out of nine justices find the defendant to be legally convicted, unless one assumes that nonconviction is better as a matter of public policy than conviction. Victims might not think so. Of course public policy requires the state to be extra sure that the defendant is guilty, and the elements of criminal law and procedure, such as the jury requirement, the presumption of innocence, etc., should be designed to do that. But these mechanisms are appropriately designed to preserve society's interest in enforcing the criminal laws. It makes no sense to put a thumb on the balance in deciding how a high appellate court will vote. See also note 85.

91. Professors Kornhauser and Sager suggest consideration of the relative seriousness of the ill-effects of outcome voting in a particular case, especially path dependence and inadequate guidance to lower courts. Kornhauser and Sager, 81 Cal. L. Rev. at 36-39, 42-48 (cited in note 7). I have already explained why these are not substantial ill-effects in the first place.

92. Professors Kornhauser and Sager say the justices should conduct the metavote "as they would any other question." *Id.* at 30.

soon arise: How should the metavote be taken if there are different majorities on determinative issues in the metavote? Should there be issue voting or outcome voting on the metavote? Neither answer is fully satisfactory. Outcome voting on the metavote could lead to the very sort of path dependence that Kornhauser and Sager are trying to address. But deciding whether to have issue voting might require a meta-metavote. Nightmares of infinite regression are conceivable.

Let us assume, however, that the metavote is taken and that Kornhauser and Sager's factors provide enough guidance so the decision whether to have issue voting or outcome voting in a particular case is reasonably determinate. In those cases where issue voting is the answer—Kornhauser and Sager give *Tidewater* as a paradigm example⁹³—we *still* have the indeterminacy inherent in deciding how the issues will be divided. On this question, as under Professors Post and Salop's proposal, we are given no guidance. All of the indeterminacies of a universal issue-voting system come into play once the determination is made to have issue voting in a particular case.⁹⁴

In sum, although the laws are applied consistently, occasionally judge-made laws will be incoherent due to the combination of the following factors: (1) multimember appellate courts, (2) appellate cases with multiple issues, and (3) outcome voting. The third factor should not be tampered with any more than the first two. First, there are strong reasons for not turning to single-member appellate courts. Second, while it is impossible to reduce to one the number of dispositive issues in a case when the issues are interrelated, courts with discretionary review power could refrain from reviewing in one appeal more than one of several issues co-occurring purely by happenstance. Third, as demonstrated, there are overwhelming reasons for not turning to a system of issue voting.

V. A DEFENSE OF OUTCOME VOTING AGAINST THE CLAIM THAT IT DOES NOT PRODUCE THE "CONDORCET WINNER"

While not in favor of any system of issue voting, Maxwell Stearns has treated the incoherence problem in ways that suggest outcome voting is bad. In a series of articles, Professor Stearns has demonstrated that the problem of cycling is not as troubling a charac-

93. *Id.* at 27.

94. See text accompanying notes 36-37.

teristic of our legal system as some might argue.⁹⁵ Cycling refers to the inability of a multimember decision maker to arrive at a decision because of the members' differing orders of preferences. For instance, if three legislators rank their outcome preferences A, B, and C as follows—Person 1: A,B,C; Person 2: B,C,A; Person 3: C,A,B—then in a pairwise vote between A and B the winner will be A, in a pairwise vote between B and C the winner will be B, and in a pairwise vote between C and A the winner will be C. In a series of pairwise votes where the winner of each pairing is paired against the other remaining possibility, the outcomes will cycle because the winner of one pairing will never defeat the third choice in a subsequent pairing.⁹⁶ That is, the winner between A and B will lose to C, the winner between A and C will lose to B, and the winner between B and C will lose to A. The cycle will continue as long as the votes are pairwise if there is no outwardly imposed cutoff on the number of pairwise votes, and certain other assumptions are made (such as the absence of strategic voting against one's preference).

Professor Stearns has argued persuasively that the problem of cycling in legislatures is alleviated by the interplay of Congress and the courts.⁹⁷ He has also argued that path dependence in court decision making is alleviated by the application of properly understood standing doctrine.⁹⁸ Unfortunately, in making his points

95. Stearns, 103 Yale L. J. at 1219 (cited in note 27); 83 Cal. L. Rev. at 1309 (cited in note 71); 144 U. Pa. L. Rev. at 309 (cited in note 71).

96. See Stearns, 144 U. Pa. L. Rev. at 314-15 (cited in note 71); Lewis A. Kornhauser, *Modeling Collegial Courts I: Path-Dependence*, 12 Intl. Rev. L. & Econ. 169, 182 (1992) (discussing cycling and leading a decision maker back to previously rejected alternatives).

97. Stearns, 103 Yale L. J. at 1291 (cited in note 27). Professor Stearns does not make a normative assessment of competing voting regimes for appellate courts, but rather he discusses such regimes as a part of a larger inquiry into whether proposals to expand judicial review based upon social choice are sound. In a positive analysis of the institutional structures and decisional rules in both the Supreme Court and Congress, he employed as a benchmark the five fairness conditions that Arrow's Theorem proved could not all be simultaneously met in one rational institution. Since any collective decision making will come up short in some respect, identification of a flaw in a given institution's voting rules cannot serve as a basis for reassigning decisional authority unless the alternative decision or rule is superior. Stearns's point is that notwithstanding some defects, the voting rules in the Supreme Court have evolved to outcome voting. His argument is that outcome voting, even though it is a non-Condorcet-producing rule, is superior to issue voting if we assume that the Supreme Court is institutionally obligated to resolve cases before it. Stearns goes on to argue that given the difficulty with appellate court decisional rules, proposals to expand judicial review are likely to be unsound based on social choice theory. I have dealt with Arrow's Theorem before. See Regers, 79 Ky. L. J. at 467-70 (cited in note 3). My problem with Professor Stearns's argument is not with his conclusion but rather with his ultimately undemonstrated characterization of outcome voting as "non-Condorcet producing."

98. Stearns, 83 Cal. L. Rev. at 1309-10 (cited in note 71); Stearns, 144 U. Pa. L. Rev. at 459-62 (cited in note 71). I agree with Stearns's ultimate point in his pieces on standing: "standing . . . limit[s] the extent to which litigants can benefit by opportunistically manipulating

Stearns treats the incoherence problem addressed by Professors Post, Salop, Kornhauser, and Sager as if it were a cycling problem. Although perhaps related, the problems are different. In a statement that he no longer embraces,⁹⁹ Stearns once called the result of issue voting the Condorcet winner, thereby strongly suggesting that outcome voting does not lead to the best result as a matter of public policy.¹⁰⁰

A Condorcet winner is a choice that defeats all other available choices in an unlimited series of pairwise elections using majority rule.¹⁰¹ For instance, in the above example, if the scheme of preferences were—Person 1: A, B, C; Person 2: B, C, A; Person 3: C, B, A (where Person 3's preferences have been changed)—then in a series of pairwise votes, where the winner is put up against the remaining possibility, the process will settle on B as the winner. In this situation, B is the Condorcet winner.¹⁰²

To apply this type of analysis to a *Tidewater*-type case, Professor Stearns conflated legal reasons with legal results. He used *Kassel v. Consolidated Freightways*¹⁰³ as his example of a *Tidewater*-type case.¹⁰⁴ I characterized *Kassel* as a case in which one of the two issues was not reached by some of the justices.¹⁰⁵ To avoid unneces-

the order in which issues are presented to federal circuit courts and, ultimately, to the Supreme Court for consideration." Stearns, 83 Cal. L. Rev. at 1351 (cited in note 71).

99. See Stearns, 144 U. Pa. L. Rev. at 321 n.49 (cited in note 71).

100. See note 106. See also Stearns, 83 Cal. L. Rev. at 42 (cited in note 71) (stating that "case-by-case voting can lead to outcomes favored by only a minority of the Court"); Stearns, 144 U. Pa. L. Rev. at 325 (cited in note 71) (showing how a Court opinion would "inevitably thwart the will of a majority of [its] members").

101. See Dennis G. Mueller, *Public Choice II* at 112-14 (Cambridge U., 1989). Sometimes the pattern of preferences for multiple choices will lead to cycling rather than to a Condorcet winner. This is the Condorcet paradox. See Kornhauser and Sager, 81 Cal. L. Rev. at 12 n.22 (cited in note 7); Post and Salop, 80 Georgetown L. J. at 747 nn.16-17 (cited in note 6); Stearns, 83 Cal. L. Rev. at 1329-31 (cited in note 71).

102. See Stearns, 83 Cal. L. Rev. at 1332 (cited in note 71).

103. 450 U.S. 662 (1981).

104. To make the identical point in his standing article, Stearns uses an elaborate standing hypothetical. Stearns, 83 Cal. L. Rev. at 1336-38 (cited in note 71). The identical criticism applies.

105. Regers, 79 Ky. L. J. at 449 n.27 (cited in note 3). *Kassel* involved a dormant commerce clause challenge to Iowa's truck-length limit. 450 U.S. at 664. In my earlier attempt to parse all of the Supreme Court plurality opinion cases, I identified the relevant two subissues in *Kassel* as (X) whether the Court should avoid second-guessing the balancing done by the state legislature, and (Y) whether the Court should avoid looking at the state legislature's purpose in determining the constitutionality of the state's regulation of commerce. All justices presumably agreed that if both X and Y were the law, then the statute should be upheld (R). Justice Powell and three others disagreed with X, Justice Brennan, writing for two justices, disagreed with Y, so a majority of six struck the statute (not-R). 450 U.S. at 678-79, 687. Justice Rehnquist, writing for three justices, agreed with both X and Y and therefore voted in dissent to uphold the

sary complication, let us examine Stearns's analysis using the *Tidewater* example we have already looked at here.

Professor Stearns referred to the dissent's result in *Kassel* or *Tidewater* as the "Condorcet winner."¹⁰⁶ The idea seemed to be that when each judge is presented with only the yes-or-no choice of how one issue is decided (pairwise choices), the conclusion is that of the dissent.¹⁰⁷ For instance, in the *Tidewater* context, if all justices are given only the pairwise choice that Article I does or does not authorize the statute, a majority will prefer that Article I does not authorize the statute. If all justices are given only the pairwise choice that Article III does or does not authorize the statute, a majority will prefer that Article III does not. So the Condorcet winner is that neither Article I nor Article III authorizes the statute, since that is the preference of a majority of decision makers when the choices are given pairwise.¹⁰⁸

statute (R). 450 U.S. at 687 (Rehnquist, J., dissenting). Because Justice Brennan purported not to reach X, I identified this case as one in which one of the issues was not reached by one set of justices. Rogers, 79 Ky. L. J. at 449 n.27 (cited in note 3).

Stoarns identifies the relevant issues in *Kassel* slightly differently: (X) whether a rational basis test applies, and (Y) whether the court can look at trial evidence. Stearns, 103 Yale L. J. at 1256-57 (cited in note 27); Stearns, 144 U. Pa. L. Rev. at 320-21 (cited in note 71). As under my characterization of the issues in *Kassel*, all justices presumably agreed that if both X and Y were the law, then the statute should be upheld (R). Justice Powell and three others disagreed with X, Justice Brennan, writing for two justices, disagreed with Y, so a majority of six voted to strike the statute (not-R). Justice Rohnquist, writing for three justices, agreed with both X and Y and therefore voted in dissent to uphold the statute (R). So far this is the same result as under my characterization of *Kassel*. But Stearns reads Justice Brennan's concurrence as accepting X (a rational basis test applies) rather than not deciding X. Stearns, 144 U. Pa. L. Rev. at 321 (cited in note 71). The difference does not affect either Stearns's point or my critique. It does serve as an example, however, of the differences that will have to be resolved in any system that contemplates issue voting.

Under Stearns's characterization of *Kassel*, it is exactly parallel to *Tidewater*. (Under *Tidewater*—(X) Article I does not support the statute, (Y) Article III does not support the statute, and (R) strike the statute—all justices agreed that X and Y implied R. But only a minority, the dissent, accepted both X and Y, so R was rejected, and the statute was upheld. See text accompanying notes 12-16.

106. In discussing *Kassel*, Stearns asserted that "[t]o see the Condorcet winner" we should count the votes on each constituent issue and conclude that the position taken by the dissent "would have prevailed" by doing so. Stearns, 103 Yale L. J. at 1257 (cited in note 27). "Thus Supreme Court voting procedures did not identify the Condorcet winner in this case." *Id.* Outcome voting "will sometimes, as in *Kassel*, miss a Condorcet winner." *Id.* at 1266-67. Stearns now agrees that the dissent in *Kassel* was not a Condorcet winner. Stearns, 144 U. Pa. L. Rev. at 321 n.49 (cited in note 71). But see Stearns, 83 Cal. L. Rev. at 1335 (cited in note 71) (stating that decisional processes of appellate courts "fail[] to ensure that available Condorcet winners prevail"); *id.* at 1338 ("Supreme Court decisionmaking . . . is not structured to ensure that available Condorcet winners prevail"); *id.* at 1342-43 (arguing a voting procedure that ensures a decision is "arbitrary and irrational" because "a present majority will prefer an available alternative, thus rendering the outcome inconsistent with the notion of majority rule").

107. Stearns, 103 Yale L. J. at 1257 (cited in note 27).

108. I have used *Tidewater* to keep the number of different examples in this piece from unnecessarily proliferating. In this context *Kassel* as characterized by Stearns is indistinguish-

This of course does not follow. The problem is that what is chosen encompasses two different things: the legal reasoning and the outcome. Judges can agree on the outcome and disagree on the legal reasoning. In appellate cases the outcomes are typically presented pairwise in the sense that the choice of outcome is limited to "affirm" or "reverse." But the choice of legal reasoning for the outcome is not restrained in the same sense and certainly not on a pairwise basis. The outcome in *Tidewater*, for instance, was either "the statute is constitutional and the district court has jurisdiction" or "the statute is not constitutional and the district court has no jurisdiction." The legal reasoning, on the other hand, that leads to one or the other conclusion, could consist of a broad number of possible combinations of the issues listed above.¹⁰⁹

Even if we limit the issues to those suggested (Article I does or does not authorize the statute, Article III does or does not authorize the statute), the conclusion that the dissent's outcome is the Condorcet winner could not follow. The first set of choices consists of the following: (a) Article I does not authorize the statute, or (b) Article I does authorize the statute. The second set of choices does not include either one of the first two, but instead consists of two entirely different choices: (c) Article III does not authorize the statute, or (d) Article III does authorize the statute.

Now if six justices prefer a to b in pairwise contests, and six justices prefer c to d in pairwise contests, how can it be said that either a or c is the Condorcet winner? Even to ask the question would require that either a or c be one of the choices in *both* of the pairwise contests. That is not true of either a or c. Stearns seemed to suggest that the Condorcet winner is (e) neither Article I nor Article III authorizes the statute. But e is not the equivalent of any one of a, b, c, or d. Indeed, in a pairwise contest between e and (f) Article I or Article III authorizes the statute, it is clear that f is selected by a majority of justices.¹¹⁰

able from *Tidewater*. See note 105. Using the *Kassel* example, the argument would be as follows: if all justices are given only the pairwise choice that the rational basis test should or should not be used, a majority will prefer that the rational basis test should be used. If all justices are given only the pairwise choice that trial evidence can or cannot be used, a majority will prefer that trial evidence can be considered. So the Condorcet winner is that the rational basis test should be used and trial evidence can be considered, since that is the preference of a majority of decision makers when the choices are given pairwise.

109. See text accompanying notes 34-35.

110. If we use Professor Stearns's *Kassel* example, the analysis would look like this. Even if we limit the issues to those suggested (the rational basis test is or is not applicable, trial evi-

Such an analysis is confusing because it assumes that a Condorcet winner is the *outcome* preference (or result preference or remedy preference) after pairwise votes on *issue* preferences. This mixes apples with oranges.¹¹¹ Of course if there are pairwise votes on *outcomes*, the majority result wins, and the dissent's position can hardly be called the Condorcet winner. And there really is no way to talk meaningfully about pairwise voting on issues decided by a court. The yes-or-no preference with regard to one issue is simply not one of the preferences with regard to a different issue.

More recently Stearns has argued not that outcome voting misses a Condorcet winner in cases like *Tidewater* and *Kassel*, but that because there is no Condorcet winner in such cases, the Court must engage in outcome voting to avoid the endless cycling that would result from issue voting.¹¹² Here is how this argument goes, again using the *Tidewater* rather than the *Kassel* example. In a first pairwise vote, a majority votes that Article I does not authorize the statute. That is, of the following two, a wins: (a) Article I does not authorize the statute, or (b) Article I does authorize the statute. In a second pairwise vote, a majority votes that Article III does not authorize the statute. That is, of the following two, c wins: (c) Article III does not authorize the statute, or (d) Article III does authorize the statute. Finally, in a third pairwise vote, a majority votes that the statute is constitutional. That is, a majority prefers f over e: (e) the Constitution does not authorize the statute, or (f) the Constitution authorizes the statute. Given these three majorities, "if the Court employed a Condorcet-producing voting rule, for example, an

dence should or should not be considered), the conclusion that the dissent's outcome is the Condorcet winner could not follow. The first set of two choices consists of the following: (a) the rational basis test is applicable, or (b) the rational basis test is not applicable. The second set of choices does not include either one of the first two, but instead includes two entirely different choices: (c) trial evidence should be considered, or (d) trial evidence should not be considered. Now if six justices prefer a to b in pairwise contests, and six justices prefer c to d in pairwise contests, how can it be said that either a or c is the Condorcet winner? Even to ask the question would require that either a or c be one of the choices in *both* of the pairwise contests. That is not true of either a or c. Stearns seemed to suggest that the Condorcet winner is (e) the rational basis test is applicable and trial evidence should be considered. But e is not the equivalent of any one of a, b, c, or d. Indeed, in a pairwise contest between e and (f) the rational basis test is not applicable or trial evidence should not be considered, it is clear that f is selected by a majority of justices.

111. This confusion is particularly obvious in Stearns's standing example, where reasons are mixed with results with abandon. See Stearns, 83 Cal. L. Rev. at 1339 & n.102, 1341-42 (cited in note 71).

112. Stearns, 144 U. Pa. L. Rev. at 322 (cited in note 71). See also *id.* at 361 n.161 ("[I]f the Court as a whole lacks a Condorcet-winning preference, it will be forced to issue an opinion that a present majority of its members may disfavor relative to an available alternative").

unlimited motion-and-amendment procedure, it would cycle.”¹¹³
Stearns goes on:

To avoid this problem and to ensure that it can resolve all cases properly before it, the Supreme Court, along with virtually all appellate courts, employs case-by-case decisionmaking [in other words, outcome voting], even though that rule, as in *Kassel*, sometimes thwarts the preferences of a majority of the Court’s members on an issue-by-issue basis.¹¹⁴

This argument is more sophisticated, and on its face *supports* outcome voting, yet it is similarly flawed. The example used is not one in which issue voting is used, but one in which the Court goes back and forth between issue voting and outcome voting. The first two votes in the example are issue votes, and the third vote is an outcome vote. Of course you will get different results if you switch voting protocols in mid-stream!

On the contrary, the possibility of cycling is not affected by whether a system of issue voting or outcome voting is used. Under outcome voting the majority of outcome votes determines the case. And under issue voting, if we accept the assumptions of issue voting advocates (that issues can be agreeably identified and voted upon separately as they arise), then there is no reason to expect cycling with respect to how issues are decided. Nor is there any greater likelihood of cycling with respect to outcomes under issue voting: in cases like *Tidewater* and *Kassel*, the dissent’s preferred outcome will simply prevail.

Also, if we distinguish carefully between reason and result, it makes no sense in such cases to say that there is no Condorcet winner. There is no way to know how a series of pairwise votes on the same set of issue-choices would turn out, since that is not what we are presented with in *Tidewater* or *Kassel*. Instead we have a series of pairwise votes on separate issues. So if we are talking issues, we

113. *Id.* at 323. Here is how this argument goes in Stearns’s terms, using his *Kassel* example. In a first pairwise vote, a majority votes that the rational basis test is applicable. That is, of the following two, a wins: (a) the rational basis test is applicable, or (b) the rational basis test is not applicable. In a second pairwise vote, a majority votes that Article III does not authorize the statute. That is, of the following two, c wins: (c) trial evidence should be considered, or (d) trial evidence should not be considered. Finally, in a third pairwise vote, a majority votes that the statute is not constitutional. That is, a majority prefers f over e: (e) the state statute does not violate the Dormant Commerce Clause, or (f) the state statute does violate the Dormant Commerce Clause. Given precisely these three majorities, Stearns argues that “if the Court employed a Condorcet-producing voting rule, for example, an unlimited motion-and-amendment procedure, it would cycle.” *Id.*

114. *Id.*

cannot tell whether there is a Condorcet winner or not. It is as if in our abstract examples we were told only—Person 1: A,B; Person 2: C,D; Person 3: E,F. This is not enough information to know which preference is the Condorcet winner, or indeed whether there is one. In contrast, if we focus on outcomes, then as demonstrated above, under outcome voting even in cases like *Tidewater* and *Kassel* the clear Condorcet winner was the side that actually won, since a majority of justices supported that outcome over its (one) alternative.

In other words, if we focus on outcomes, then neither issue voting nor outcome voting is more likely to miss Condorcet (outcome) winners. Moreover, outcomes will not cycle under either voting rule. And if we focus on issues, then neither issue voting nor outcome voting is more likely to miss Condorcet (issue) winners. Similarly, issue resolutions are no more likely to cycle under either voting rule. It is only by mixing issues and outcomes in one example that a contrary conclusion can be reached.

The mixing of reason and result in the Condorcet analysis of cases like *Tidewater* permits misunderstanding of some points I have made. For instance, Stearns has referred to cases like *Tidewater* and *Kassel* as three-remedy cases.¹¹⁵ By three-remedy cases I meant a different category of cases—those with three possible outcomes on appeal.¹¹⁶ This does not occur often, since usually an appellate court has the two choices of affirm or reverse. But on occasion the reasoning of each of three groups of justices may lead to three different outcomes, such as affirm, remand, or reverse. In this situation we may have a true possibility of cycling or inability of the multimember institution to reach a result. This possibility does derive from the system of pure outcome voting, coupled with majority voting by a multimember court. In this situation justices have on occasion departed from pure outcome voting because of the overriding requirement for the Supreme Court to make a decision. In 1991, I could find only five cases like this;¹¹⁷ there has since been another.¹¹⁸ Each time a justice whose reasoning led to one of the polar positions voted instead for the middle position, that is, for instance, to remand rather than to affirm or reverse. This is the same result that would

115. See, for example, Stearns, 103 Yale L. J. at 1266 n.176 (cited in note 27) (referring to my discussion of *Union Gas* and *Fulminante*, which are indistinguishable in this context from *Tidewater* and *Kassel*, in connection with his curious characterization of such cases as three-remedy cases).

116. Rogers, 79 Ky. L. J. at 459-61 (cited in note 3).

117. See note 4.

118. See *Turner Broadcasting System v. Federal Communications Commission*, 114 S. Ct. 2445, 2475 (1994) (Stevens, J., concurring).

occur if each of the justices were presented separately with the choice of affirm or remand and the choice of reverse or remand. So we can say that remand was the Condorcet winner in such cases.¹¹⁹ Thus in the situation where there are more than two outcomes, the system already now reaches the Condorcet winner.

This is simply not the problem in *Tidewater*, *Kassel* (Stearns's example), *Wyman-Gordon* (my earlier example), my criminal procedure example, or any incoherent-rule case resulting from differently constituted majorities on subissues. In *Tidewater* the choices were to uphold or invalidate the jurisdictional statute. In *Kassel* the choices were to uphold or invalidate Iowa's truck-size statute. In *Wyman-Gordon* the choices were to uphold or reverse the NLRB decision to require addresses. In the criminal procedure case the choices were to uphold the conviction or to require a retrial. In none of these situations was there a third choice advocated by any justice. These are simply not three-remedy cases. There is no way the dissent's preferred outcome in these cases can be characterized as the Condorcet winner. The dissenting positions in each of these cases is a winner only if one assumes issue voting. The dissenting position in these cases may be called the issue-voting winner, but that obviously adds nothing to the argument that issue voting is appropriate. Nor can it be said that there is no Condorcet winner. All that can be said is that the outcome winner is determined by whether issue voting or outcome voting is used.

At one point Stearns approaches yet another way to apply Condorcet analysis to cases like *Tidewater*: to view the preferences not as issues of law, nor as outcomes, but as legal regimes that include more than one outcome.¹²⁰ For instance, Stearns hypothesizes a case in which three justices support each of the following three constitutional sets (really pairs) of principles:¹²¹

119. This conclusion is based on the highly likely, but admittedly not certain, assumption that a justice whose first choice is affirmance will prefer remand to reversal, and that a justice whose first choice is reversal will prefer remand to affirmance.

120. My distinctions among reason, result (outcome), and regime (set of outcomes) corresponds to Professor Kornhauser's carefully defined distinction among reason, result, and rule. See Kornhauser, 12 *Intl. Rev. Law & Econ.* at 174-75 (cited in note 96). Writing separately at that point, Kornhauser noted that "[w]hile choices among results are 'naturally' binary, the choice among rules is not." *Id.* at 177.

121. Stearns, 83 *Cal. L. Rev.* at 1345-46 (cited in note 71).

(A) (not-*Flast*¹²²) there is no taxpayer standing to challenge governmental benefits to religion in the form of monetary grants, and (*Valley Forge*) there is no taxpayer standing to challenge governmental benefits to religion in the form of property grants;

(B) (*Flast*) there is taxpayer standing to challenge governmental benefits to religion in the form of money grants, and (not-*Valley Forge*) there is taxpayer standing to challenge governmental benefits to religion in the form of property grants; or

(C) (*Flast*) there is taxpayer standing to challenge governmental benefits to religion in the form of money grants, and (*Valley Forge*) there is no taxpayer standing to challenge governmental benefits to religion in the form of property grants.

To avoid stare decisis considerations, Stearns hypothesizes that neither type of grant has reached the Supreme Court before, and that taxpayer standing cases of each type (property and monetary) are decided by the Court simultaneously. If we think in terms of outcomes, then for each case there are only two choices: standing exists or not. There will be standing for the money challenge and not for the property challenge, and there is no Condorcet problem regarding the outcome in either the monetary or the property case.

However, if we view the above three possible legal regimes, or pairs of outcomes, as preferences, we can hypothesize their rank ordering for various justices in a way that would raise the Condorcet paradox. If *Flast* versus not-*Flast* and *Valley Forge* versus not-*Valley Forge* are voted upon in two separate cases without regard to stare decisis, the winning legal regime is clearly C.¹²³ It is perhaps likely

122. The names *Flast* and *Valley Forge* reflect that these positions may roughly reflect the holdings of *Flast v. Cohen*, 392 U.S. 83 (1968), and *Valley Forge College v. Americans United*, 454 U.S. 464 (1982).

123. Professor Stearns confuses the matter somewhat by treating a fourth proposition—(X) taxpayer standing to challenge governmental benefits to religion should be present or not regardless of whether the government grants money or property—as if it were another outcome to be voted upon. Stearns, 83 Cal. L. Rev. at 1346 (cited in note 71). This is not really an outcome of the same order as *Flast* versus not-*Flast* or *Valley Forge* versus not-*Valley Forge*, since it will not decide a taxpayer standing case without either of those outcomes having already been determined. Another way of stating choice X is: (X) either (*Flast*) there is taxpayer standing to challenge monetary grants, and (not-*Valley Forge*) there is taxpayer standing to challenge property grants; or (not *Flast*) there is no taxpayer standing to challenge monetary grants and (*Valley Forge*) there is no taxpayer standing to challenge property grants. So stated, X clearly does not by itself answer whether there is standing in the case of a particular governmental benefit to religion. Thus, X is not an outcome but ultimately just an issue. Thus

that C will be the legal regime that will be the Condorcet-winning legal regime, since in all probability C is preferable to the *remaining* regime choice for each of the justices preferring A or B. It is only in the unlikely event that some justices who prefer A would, given the choice of B or C, prefer B (or instead that some justices who prefer B would, given the choice of A or C, prefer A) that we can say in some sense there is no Condorcet winner.¹²⁴ But as I now demonstrate, all of this is true regardless of whether we use issue voting or outcome voting.¹²⁵ To demonstrate this, we must examine which regime results under issue voting and outcome voting.

First, let us take issue voting. We can arrive at the regime preferences hypothesized above by assuming that the two relevant subissues are:

(Y) taxpayer standing is based on the Establishment Clause of the First Amendment (assume 3 justices say yes, 6 say no); or

(Z) taxpayer standing is based on the Taxing and Spending Clause of Article I (assume 3 justices say yes, 6 say no).

Assume for simplicity purposes that taxpayers challenging monetary grants to religion might rely for standing on the Establishment Clause or the Taxing and Spending Clause, but that taxpayers challenging property grants to religion could only rely on the Establishment Clause. Assume that only three justices agree with Y and only three justices agree with Z,¹²⁶ and all justices agree that without holding Y or Z there can be no taxpayer standing. In such a situation there will be six votes for standing when there is a governmental grant of money to religion (those who prefer regime B or C above), but only three votes for standing when there is a governmental grant of property to religion (those who prefer regime B above). In other words, my assumed allocation of issue preferences would lead to the regime preferences hypothesized by Stearns.

when Stearns intersperses votes on *Flast* versus not-*Flast*, *Valley Forge* versus not-*Valley Forge*, and X versus not-X, he is again mixing votes on outcomes with votes on issues.

124. See note 130.

125. Indeed, outcome voting, as we shall see, is somewhat more likely to lead to C.

126. These assumptions are entirely hypothetical, and not based even loosely on the actual positions of justices in cases like *Flast* and *Valley Forge*. See note 122.

Now there are two possible actual cases: grant of money (two issues, because there are two possible constitutional bases for standing), and grant of property (single issue, because there is only one possible constitutional basis for standing).¹²⁷ Under issue voting, there would be no standing in either of these cases because (6-3) the Establishment Clause does not support standing and (6-3) the Taxing and Spending Clause does not support standing. Thus the regime under issue voting would be A.

Under outcome voting, if the property-only, or single-issue, case arose first, even assuming *stare decisis*, the regime selected by the Court as a whole would be A. That is, the Court would vote 6-3 against standing because the Establishment Clause would, without considering the Taxing and Spending Clause, only get three votes for standing. In the subsequent money-grant, double-issue case the dissenting votes in the previous case will then be bound by *stare decisis* to vote without relying on the Establishment Clause, and will thus vote against standing. But if the double-issue money-grant case arose first, the ultimate regime will be C, since in the money-grant case there will be standing (plurality on the Establishment Clause plus concurrence on the Taxing and Spending Clause); but in the subsequent single-issue property-grant case there will be only three votes for standing (the three who rely on the Establishment Clause).¹²⁸

The bottom line is that under issue voting the regime is A, which is the first choice of only a minority; and under outcome voting the regime is either C or A, depending on the sequence of cases presented.¹²⁹ But neither C nor A is the majority's first preference for a legal regime. We can only say that regime C or regime A is the Condorcet choice if regime C or regime A would prevail over the other regime choices in pairwise contests. But there is no way to ascertain whether issue voting or outcome voting is more likely to reach a Condorcet-winning regime because there is no way to rank the justices' preferences among regimes A, B, and C. This is true because justices do not tell us which regime they prefer. Instead, justices tell us how they vote on outcomes and how they resolve some issues. Indeed, justices rarely describe how they would vote on another case if

127. To make the parallel with *Tidewater* and *Kassel* complete, we would have to hypothesize another single-issue case: a taxpayer challenge to governmental spending not based on the Establishment Clause. Since such a case would not govern one of the outcomes paired by *Stearns*, I leave this possibility aside.

128. Also, if we assume no *stare decisis*, the regime selected by the Court as a whole will be C, regardless of the sequence of the cases.

129. In neither case would there be cycling. See Kornhauser, 12 *Intl. Rev. L. & Econ.* at 179 (cited in note 96) ("[R]ule-bound adjudication does not lead to cycling on majority courts").

their own position in the instant case were rejected. Without this description, however, we have no way of knowing whether C or A is a Condorcet-winning regime.¹³⁰ It follows that issue voting is no more productive of Condorcet-winning regimes than outcome voting.¹³¹

130. Hazarding a guess, however, I think that C (a possibility under outcome voting) would more likely be the Condorcet winner than A (the only possibility under issue voting), since C is the regime that in some sense is in the "middle" position. This guess is based on the reasonable, but not certain, assumptions that a justice whose first choice is standing in neither situation will prefer standing in one situation to standing in both, and that a justice whose first choice is standing in both situations will prefer standing in one to standing in neither. For an analysis of how a judge might make such a decision, see *id.* at 176.

131. In his reply to this piece, Professor Stearns states repeatedly that I misunderstand the terms Condorcet winner and Condorcet-producing rule. In fact he nowhere shows that I have used either term differently from the meaning that he ascribes to those terms: a Condorcet winner is an alternative that defeats all available alternatives in unlimited pairwise contests. Instead he assumes that I have misunderstood the terms because he cannot accept the criticism that by mixing issues and outcomes he has confused the pool of preference choices to which the Condorcet criterion may usefully be applied.

To find a cycle in outcome voting, and thereby to say that outcome voting is not a Condorcet-producing rule, Stearns treats the outcome vote as just another issue vote. To do this he treats the overall issue in *Tidewater* (my "issue" A: whether the statute is constitutional) as one of three preferences, and he then treats my subissues B and C as the other two. According to Stearns, since votes on these three issues will cycle, outcome-voting is non-Condorcet producing. See Stearns, 49 *Vand. L. Rev.* at 1053-54 (cited in note 37).

This is a double non sequitur. First, with respect to his treatment of the outcome determination as just another issue, his point is purely semantic. Sure, in every case we can state the issue at a sufficient level of generality as to render the answer equal to the outcome. (An extreme example of such a legal "issue" that is present in every case is "should a plaintiff recover on the facts of this case?"). Voting on such an issue is identical to outcome voting. The difference between Professors Post, Salop, Kornhauser, and Sager and me is whether the vote should be on that highly general, single issue or on subissues. So we could say my dispute with Post, Salop, Kornhauser, and Sager is really between "global issue voting" and "subissue voting." I think it is clearer to use the terms "outcome voting" and "issue voting," but it really does not matter. All of my arguments apply regardless of which terminology we use. If I say Stearns is mixing outcomes with issues in comparing the effects of outcome and issue voting, it is no answer to say that he is really only mixing global issues with subissues. It is still mixing the types of voting that we are all comparing. Second, treating the outcome as an issue only shows that issue voting cycles, not that outcome voting cycles.

Stearns's reply is really just an over-formalization of a simple point: outcome voting can lead to a different result than issue voting. If "should the plaintiff win?" is an issue that can be voted upon under issue voting, then issue voting would certainly be indeterminate, but voting on *that* issue is what Post, Salop, Kornhauser, and Sager are arguing *against*. Post and Salop argue that the vote should always be on subissues, and Kornhauser and Sager argue that it should sometimes be. If the voting can go back and forth, then of course the voted-upon answers will be different, and one could call that cycling. But no one advocates going back and forth in that fashion.

In short, Stearns has nowhere demonstrated that outcome voting is not a Condorcet-producing rule, despite his repeated assertions to that effect. The fact that in the end he supports outcome voting does not mean that his negative characterization of outcome voting (as a non-Condorcet-producing rule) is valid.

At one point Stearns says that I might make some arguments that I do not make (for example, "[issue] voting can only take place at one level," "in a given vertical path, we must stay at a single level!"), and then essentially uses *my* arguments to refute them! Compare Stearns,

VI. CONCLUSION

With remarkable continuity, justices of the Supreme Court of the United States have voted on the basis of their own individual analysis of the law. While such individual analyses may have properly included deference to previous decisions with which they may have disagreed (*stare decisis*), justices have not voted against the result of their own current analysis because a majority of colleagues disagrees on a subissue. A logical exception to this practice is compelled by the necessity that the Court make a decision in cases where there are more than two possible outcomes on appeal. The three other known times¹³² when supreme court justices have deviated from the otherwise universal practice must be considered anomalies. To urge that this anomalous practice be accepted wholesale is to wish upon the law a radically indeterminate basis for deciding cases. Advocates of issue voting may assume agreement on how issues should be divided, but the assumption is completely unwarranted. Issues in cases can be divided in different ways to achieve different results. Even if there were general agreement on how issues should be divided, issue voting would lead to majorities of judges in real cases having opposed the judgment of their own court. Who will be responsible for such judgments?

The occasional incoherence in the law that results when multi-member courts engage in outcome voting is not a problem that warrants such a remarkable cure. Outcome voting, even when it occasionally leads to incoherence, never requires inconsistency. Outcome voting is also fully consistent with *stare decisis*. Moreover, incoherent results will naturally be uncommon. On one hand, where subissues are related, or at least likely to arise in the same case, the incoherent result is intuitively unobjectionable.¹³³ On the other hand, where subissues are unlikely to occur in the same case, the possibility of an

49 Vand. L. Rev. at 1061 (cited in note 37), with text preceding note 36. Also, Stearns says that I provide "not a single example" of his mixing issues with outcomes "with abandon." One need only look to the pages of his article that I cited in note 111 for that statement. For instance, Stearns describes the following series of hypothetical votes: Scalia moves an issue, Blackmun moves an issue, Blackmun moves an outcome, O'Connor moves an issue with an outcome, Blackmun moves two issues plus an outcome. Stearns, 83 Cal. L. Rev. at 1339 (cited in note 72).

Finally, the four (presumably worst) examples given by Stearns to demonstrate that I have "substantially misrepresented" his work do not, upon any fair reading, support his charge. See Stearns, 49 Vand. L. Rev. at 1056 n.45 (cited in note 37).

132. See notes 1, 2, and 4.

133. For instance, in *Tidewater* the majority believed—albeit on different grounds—that the Constitution permitted Congress to grant federal courts the jurisdiction in question, and that was the result.

incoherent rule becoming the law is small and can be reduced by an enlightened policy of discretionary review. For instance, the Supreme Court could easily grant certiorari on only one of the two independent issues should both of them arise for the first time in the same case.

Finally, it is misleading and incorrect to say that issue voting is any more likely than outcome voting to lead to a Condorcet winner. Indeed, outcome voting is just as likely as issue voting to produce a Condorcet winner, regardless of whether the pool of preferences we are talking about is preferred issue resolutions, outcomes, or legal regimes.

APPENDIX

Outline of the Justices' Opinions in *National Mut. Ins. Co. v. Tidewater Transfer Co.*

(Parenthetical numbers indicate page numbers in 337 U.S. (1949).)
 (Bold letters indicate issues listed in text accompanying notes 33-35.)

Jackson (with Black and Burton, 3 votes)

- I. A statute giving federal court jurisdiction over controversies between D.C. citizens and citizens of a state is within the constitutional power of Congress. (600, 604) (A)
 - A. The relevant constitutional provisions should not be given a strict interpretation. (585-86) (D)
 1. Fundamental rights are not involved. (585)
 - B. A D.C. citizen is not a citizen of a "State" under Article III. (588) (B)
 1. Dictum of Marshall in *Hepburn* should be deferred to. (586-87, 582)
 2. It is unlikely the Framers intended "State" to have different meanings in the Constitution. (587-88) (K, L)
 - C. The statute can be based on Congress's power to legislate for D.C. (589, 600) (C)
 1. This conclusion is consistent with *Hepburn*. (588-89) (H)
 2. The justiciability limits on federal courts do not derive from Article III. (590-91) (M)
 3. Some Article III courts exert non-Article III power. (591-92) (C)
 - a. D.C. federal courts have the power to carry out legislative and administrative acts and this is not limited to D.C. (590, 592) (N)
 - b. District courts exercise Article I power when they entertain suits against the U.S. (592-94) (O)
 - c. District courts exercise Article I power when they hear bankruptcy trustee suits arising under state law. (594-96, 599) (P)
 - i. In order for a case to arise under federal law for constitutional purposes, federal law must be an element in the cause of action. (596-99) (Q)

- D. The result is fair (“less harsh”; contrary holding has “no justification”). (602-03) (F)
 - 1. The result is only formally different from a D.C. federal court exercising nationwide process. (601-03)
- E. There is no express prohibition of this type grant of jurisdiction. (603)
- F. Deference to Congress is appropriate. (603) (J)

Rutledge (with Murphy, 2 votes)

- I. A statute giving federal court jurisdiction over controversies between D.C. citizens and citizens of a state is within the constitutional power of Congress. (A)
 - A. *Hepburn* requires a different answer. (604-08) (H)
 - 1. Article III is a limit on the power of Congress to confer jurisdiction on federal courts. (607) (C)
 - a. If Congress can override the limits of Article III, then Article III illogically limits nothing. (605, 607)
 - b. The rationale for giving D.C. federal courts the power to carry out legislative and administrative acts is limited to federal courts sitting in D.C. (608-09) (N)
 - c. District courts exercise Article III federal question power when they entertain suits against the U.S. (609-10) (O)
 - d. District courts exercise Article I power when they hear bankruptcy cases arising under state law. (611) (P)
 - i. Such cases are part of a congeries of cases, other ones of which are clearly federal question cases. (611)
 - ii. In order for a case to arise under federal law for constitutional purposes, federal law need not necessarily be an element in the cause of action. (613-15) (Q)
 - e. The justiciability limit on federal courts derives from Article III. (616) (M)
 - B. *Hepburn* should be overruled. (618, 624-26) (I)
 - 1. Stare decisis is not as weighty in constitutional cases. (617 n.11)
 - 2. A D.C. citizen can be considered a citizen of a “State” under Article III. (619-25) (B)

- a. A broad (not "narrow and literal") interpretation of the Constitution's words is appropriate. (620) (D)
 - i. Key words in different parts of the Constitution have been interpreted differently. (620-21) (L)
 - ii. This case involves civil and not political rights. (623)
 - b. The Framers did not consider the issue. (621-22) (K)
 - c. The purpose of diversity jurisdiction in Article III does not support *Hepburn*. (622-23)
 - d. The distinction in *Hepburn* is unfair ("highly unjust discrimination"; "purposeless and indefensible"). (624-25) (F)
3. The plurality's reasoning is inconsistent with *Hepburn*. (626) (H)

Vinson (with Douglas, 2 votes)

- I. A statute giving federal court jurisdiction over controversies between D.C. citizens and citizens of a state is outside the constitutional power of Congress. (A)
 - A. Article III sets a limit on the power of Article III courts outside D.C. (627-45) (C)
 1. The justiciability limit on federal courts derives from Article III. (628-29) (M)
 2. Legislative history supports that Article III is a limit. (629, 631-36) (K)
 3. Cases support that Article III is a limit. (629-30, 637-38)
 4. The rationale for giving D.C. federal courts the power to carry out legislative and administrative acts is limited to federal courts sitting in D.C. (638-40) (N)
 5. District courts exercise Article III federal question power when they entertain suits against the U.S. (640 n.20, 641 n.21) (O)
 6. The Supreme Court's appellate power to review legislative courts is consistent with a holding that Article III sets a limit. (642-43).
 - a. Legislative courts can hear cases of the same nature as Article III cases. (641)
 - b. This does not lead to the incongruous result that Article I courts are more powerful than Article III courts. (644)
 - i. Legislative courts are limited to Article I subjects over which Congress can legislate. (644)

- ii. Perhaps some Article III cases cannot be taken by legislative courts in the states. (644).
- iii. Legislative courts may be limited to cases where a court is not constitutionally necessary. (644)
- 7. Considerations of fairness (“expediency”) should not supersede the intent of the Framers. (644-45) (G)
- B. A D.C. citizen cannot be considered a citizen of a “State” under Article III. (645-46) (B)
 - 1. Article III contains an express limit and no express exception. (645) (K?)
 - 2. *Hepburn* held that a D.C. citizen is not a citizen of a “State” under Article III. (645) (H?)
 - 3. A strict interpretation is appropriate. (645-46) (D)
 - a. The case is one regarding the mechanics of government, and not one where experience can give content to constitutional words. (645)

Frankfurter (with Reed, 2 votes)

- I. A statute giving federal court jurisdiction over controversies between D.C. citizens and citizens of a state is outside the constitutional power of Congress. (A)
 - A. Article III sets a limit on the power of Article III courts outside D.C. (648-52) (C)
 - 1. A strict interpretation is warranted. (647) (D)
 - a. The provisions are specific, precise, and technical—as opposed to grand concepts. (646)
 - b. Fairness does not require a different result (“no great public interest or libertarian principle is at stake”). (651) (F)
 - 2. Article III limits were a needed safeguard to carry out a policy of distrust of federal courts. (647) (K)
 - 3. The justiciability limit on federal courts derives from Article III. (648) (M)
 - 4. Such limits apply regardless of currently perceived public policy. (648-49) (G)
 - 5. District courts exercise Article III federal question power when they entertain suits against the U.S. (649) (O)
 - 6. Cases support that Article III is a limit. (652)

7. District courts exercise Article III power when they hear bankruptcy trustee suits arising under state law. (652 n.3) (P)
 - a. Such cases are part of a congeries of cases, other ones of which are clearly federal question cases. (652 n.3)
- B. A D.C. citizen cannot be considered a citizen of a "State" under Article III. (652-55) (B)
 1. The limits in Article III are express. (653)
 2. The Constitution does not refer to D.C. as a "State." (653)
 - a. We should defer to the contemporary interpretation of Justice Marshall. (653) (H?)
 - b. The Framers were able to express themselves precisely. (653-54) (K)
 3. Other constitutional provisions containing the word "State" that have been held to apply to D.C. "do not depend on a legal right relating solely to states." (654) (L)
 4. No great deference is owed to Congress regarding the meaning of the limits in Article III of the Constitution. (655) (D)