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I. INTRODUCTION

There is now a small but growing literature on the proper voting procedure for multijudge panels. Professor John Rogers began the most recent round of thinking about these vexing issues, arguing that a judge on a multimember panel should never "vote against the result of his or her own reasoning by deferring to a majority on a sub-issue on which the judge differs."[1] We responded, arguing in favor of just such action, which we labeled "issue voting."[2] We criticized Professor Rogers's preferred mode of multimember court adjudication, which we labeled "outcome voting," on the grounds that it provided limited guidance and inevitably produced path dependence and incoherence in the law. Professors Lewis Kornhauser and Lawrence Sager presented a third position that "no simple rule favoring one voting protocol in all paradoxical cases can produce universally

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

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

appealing results."[3] They set forth a mechanism, which they called the "metavote procedure," by which courts would resolve the question of which of these two voting rules to adopt in any particular case.[4] Professor Maxwell Stearns also has examined these issues in detail, from a social choice perspective.[5] Rogers now joins the fray once again, calling for blanket adoption of outcome voting for multimember courts, finding our arguments (and Kornhauser and Sager's) unpersuasive on a number of grounds.[6]

Professor Rogers's critique makes it clear that we did not deal with these questions definitively in our earlier paper. We are still unpersuaded, however, that his solution is the better one. In this brief Reply, we will sketch out a partial answer to Rogers's concerns.

II. THE GUIDANCE OBJECTION TO OUTCOME VOTING

In our view, the fundamental flaw of outcome voting is that it produces precedent that is both less useful and may be incapable of coherent application. Outcome voting provides substantially less guidance about the content of legal rules than an alternative, issue-voting system. We refer to this constellation of problems with outcome voting as the "Guidance Objection." Our point can be illustrated simply using Rogers's own example.[7] Three criminal defendants (Q, R, and S) are alleged to have committed identical crimes, and all three were convicted. In R's case, evidence from the police's use of a questionable search technique was introduced. At S's trial, the trial court allowed use of a questionable peremptory

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3. Lewis A. Kornhauser and Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 Cal. L. Rev. 1, 29 (1993).

4. Professors Kornhauser and Sager describe the metavote procedure as follows. In a "paradoxical" case, that is, one in which the outcome will differ depending upon whether outcome voting or issue voting is employed, a court ought to make the question of which procedure to adopt and its resolution an

> explicit, reflective, articulated, and formal part of its decision of the case. The judges should deliberate about the appropriate collegial action to take in the case before them, given their convictions about all those matters that they would be called on to determine were they deciding the case as individuals rather than as a group. They should vote on the question of collegial action as they would any other question, and they should proffer an opinion or several opinions justifying their metavote.

Id. at 30.

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

6. See generally John M. Regers, *"Issue Voting" by Multimember Appellate Courts: A Response to Some Radical Proposals*, 49 Vand. L. Rev. 997 , 1007-21 (1996).

7. See id. at 1012-13.

challenge. In Q's case, *both* the questionable search technique and the questionable peremptory challenge were employed.

Imagine a three-member appellate panel which has provisionally adopted Rogers's outcome-voting rule and which is reviewing Q's conviction.[8] The conversation at the judges' conference might proceed as follows.

> Judge ABC: "I vote to affirm. Neither the peremptory challenge nor the search technique is unconstitutional, standing alone, and I see no reason that their use in combination with one another is constitutionally flawed."
>
> Judge DEF: "I disagree. The peremptory challenge alone is clearly unconstitutional. In fact, I didn't even have to reach the question of the search technique in order to resolve the question presented here, namely whether this defendant was unconstitutionally convicted. I vote to reverse."
>
> Judge GHI: "I also disagree with Judge ABC. The search technique alone is clearly unconstitutional. In fact, I didn't even have to reach the question of the peremptory challenge in order to resolve the question presented here, namely whether this defendant was unconstitutionally convicted. I vote to reverse."

We can summarize the conference and the votes on Q's case in the following example.

Example 1.

Judge	Search Technique	Peremptory Challenge	Result of Individual Judge's Reasoning
ABC	Constitutional	Constitutional	Affirm
DEF	----	Unconstitutional	Reverse
GHI	Unconstitutional	----	Reverse
Majority	--- (1-1)	--- (1-1)	Reverse (2-1)

Under an outcome-voting procedure, the court issues its judgment, overturning the conviction by a two-to-one majority vote. Because there is only one question of law on which the judges vote, that is, whether a conviction obtained by means involving *both* the

8. We have reduced Rogers's nine-person court to a three-person court, just for expositional simplicity. Inasmuch as Rogers's hypothetical collection of judges consisted of three identically acting trios—judges A, B, and C forming one trio; judges D, E, and F the second; and judges G, H, and I the third—we can collapse this collection into three judges (whom we will call ABC, DEF, and GHI) without any loss of information.

questionable search technique and the questionable peremptory challenge is invalid, only one rule—that these means in combination are invalid—emerges from the court's deliberations.[9] Because outcome voting allows Judges DEF and GHI to ignore issues that are unnecessary to their individual reasoning about the case, the court does not indicate whether the search technique would be constitutional if it were employed without its fortuitous association with the peremptory challenge, or whether the peremptory challenge would be constitutional without its fortuitous association with the search technique. On each of these issues, the court apparently is equally divided, one-to-one. Thus, the panel provides no guidance for R's and S's cases.

In our earlier paper, we focused on what Professor Kornhauser and Sager call the "paradoxical" result that may occur under an outcome-voting regime.[10] The paradox occurs if, but only if, the judges reveal their views on each of the underlying issues presented by the case and their views take a particular form, as illustrated by the following example.

Example 1A.

Judge	Search Technique	Peremptory Challenge	Result of Individual Judge's Reasoning
ABC	Constitutional	Constitutional	Affirm
DEF	Constitutional	Unconstitutional	Reverse
GHI	Unconstitutional	Constitutional	Reverse
Majority	Constitutional (2-1)	Constitutional (2-1)	Reverse (2-1)

In this situation, one majority of this court believes that the search technique is constitutional, and a different majority believes that the use of the peremptory challenge is constitutional. Nonetheless, under outcome voting, the conviction of defendant Q will be reversed, while the convictions of R and S will stand.

In Example 1, the paradox is not revealed. Because the judges need only declare their views on the issues that are dispositive for their own individual reasoning about the sole question on which they have to vote, the public will not know (nor will the judges themselves know) whether or not the paradoxical situation pertains. This absence of revelation, we would suggest, is why the paradox appears so infrequently in the law. Appellate judges can so easily avoid

9. See Rogers, 49 Vand. L. Rev. at 1013 (cited in note 6).
10. See note 4.

revealing the paradoxical result, and can so easily avoid even finding out whether the paradox exists in any given case, by declining to reach issues unnecessary to their individual reasoning process.

But the revelation of the paradoxical result is not essential to our analysis. The Guidance Objection flows directly from concerns involving application of the principle of stare decisis. Suppose that the court in Example 1 agreed to follow the principle of stare decisis in its deliberations. Inasmuch as it has taken a position only on the outcome of the case, a future court, to be faithful to the principle of stare decisis, need only ensure that the same outcome obtains if and when a case raising this particular combination of search technique and peremptory challenge comes before the tribunal again. The principle of stare decisis can only mean that the conviction of another defendant subject to both of these constitutional shortcomings must be overturned. Because the court in Example 1 is silent about the consequences of employing this search technique against a defendant who has not had the peremptory challenge used against him as well, stare decisis will not be implicated when such a defendant comes before the tribunal. There will be no precedent to apply in such a case, for nothing has been decided on that question of law. In other words, an outcome-voting regime can easily accommodate only one form of stare decisis, what Hardisty calls "result stare decisis." "Under result stare decisis, a court adheres to an otherwise binding precedent . . . as long as similarity in results follows similarity in facts and a difference in results reflects a difference in facts."[11]

How would the court in Example 1 articulate its reasoning in its opinions to guide the public about the governing rules in this jurisdiction? The court has issued a single rule of law in this case: the conviction of a defendant subject to both the search and the peremptory challenge must be overturned. But no opinion can be written articulating that rule without also articulating a rule the court is not prepared to issue (in other words, that the presence of any one of the challenged techniques is unconstitutional). That is, there can be no statement from the court explaining why a conviction depending on both of these challenged techniques should be overturned while a conviction depending on only one of them should not. This is because there is no judge who has reached that particular conclusion. As a result, there is both (a) no guidance at all with

11. James Hardisty, *Reflections on Stare Decisis*, 55 Ind. L. J. 41, 56 (1979).

respect to the subsidiary questions, such as the constitutionality of the peremptory challenge standing alone or when paired with a different question of law, or the constitutionality of the search technique standing alone or when paired with a different question of law, and (b) virtually no guidance concerning even the single rule that the case ostensibly establishes.[12]

III. THE INDETERMINACY OBJECTION TO ISSUE VOTING

Professor Rogers seems to agree with much of our diagnosis of the flaws of outcome voting. For example, he agrees that outcome voting can lead to "incoherence" in the law.[13] He similarly agrees that outcome voting may lead to path dependence, inasmuch as Q's case will be decided differently if it comes before or after the court has decided R and S.[14] He claims, however, that the issue-voting cure is worse than the outcome-voting disease.[15] There are, he suggests, "overwhelming reasons for not turning to a system of issue voting."[16] These most notably include what Rogers regards as a fundamental problem inherent in any issue-voting system. According to Rogers, the definition of the issues on which appellate courts should be voting is "radically indeterminate."[17] "Issue voting is a bad solution," he argues, "because it would be so much more indeterminate than the outcome-voting system. . . . There is no developed body of law on how issues must be divided for separate voting. In order to approach

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12. The Guidance Objection is closely related to similar objections lodged against strict application of result stare decisis. See, for example, Richard A. Posner, *The Federal Courts: Crisis and Reform* 253 (Harv. U., 1985) ("[I]f one . . . insists that a judicial opinion is authoritative only with respect te the exact constellation of facts that was before the judges who decided the case, the decision will have no utility as a precedent, because no two cases have exactly the same facts. . . . [T]his is one reason why judicial opinions contain analysis and not just a statement of facts followed by announcement of the result; the analysis shows which facts are essential to the decision").

13. Rogers refers to the paradoxical result as an "incoherent result [in] that both errors combined result[] in reversal, even though it had previously been held that neither of the errors alone would invalidate the conviction." Rogers, 49 Vand. L. Rov. at 1016 (cited in note 6). See also id. at 1017 (referring again to this as an "incoherent result").

14. See id. at 1015 (stating that Q's 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").

15. See id. at 1001.

16. Id. at 1025.

17. See id. at 1021 (noting the "potential for radical indeterminacy" in an issue voting system); id. at 1038 ("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"); id. at 1002-04 (discussing the various ways that one can "state the relevant subissues" in *Tidewater*).

consistency in the law, there would have to be a whole body of law developed on the question of dividing issues on appeal."[18]

We refer to Rogers's position as the "Indeterminacy Objection." The Indeterminacy Objection is a serious one, and we concede that it is both more complex and more interesting than we indicated in our earlier paper. Rogers's critique makes it clear that we focused exclusively on the costs of outcome voting, and gave scant attention to the possibility that issue voting entails costs of its own or to the possibility that these costs may exceed the costs of outcome voting. At the same time, although we agree with Rogers that there are costs entailed by adopting issue voting, we are not persuaded that those costs are as substantial or as unavoidable as Rogers assumes.

To see this more clearly, the Indeterminacy Objection can be restated. If courts are to vote on issues, there must be some mechanism whereby those issues can be identified prior to the vote. As Rogers points out, specification of issues is neither preordained nor obvious. Presented with the specification of the two issues in Example 1, a court could go "one level down" and decompose[19] either one or both of the issues into subissues. For example, the defendant may be claiming that the search was unconstitutional because he was unlawfully detained without probable cause and that any purported consent to the search was not voluntarily given.[20] And each of those subissues may, in turn, be further decomposed, apparently *ad infinitum.*

Rogers suggests that there is no principle that can guide this issue decomposition process. Were that the case, issue voting would indeed be deeply and perhaps fatally flawed because any outcome could be achieved under issue voting by manipulating the degree of issue decomposition. This openendedness, in turn, would allow great scope to a form of agenda control that we term "issue decomposition manipulation." Judges could attempt to obtain their preferred outcome by manipulating the level of issue decomposition.[21]

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18. Id. at 1014.

19. We prefer to speak of "decomposing" rather than "dividing" issues when discussing the separation of an individual issue into constituent subissues in order to emphasize that we are moving, at least metaphorically, "down" an issue hierarchy in a vertical manner. As discussed below, see notes 35-36 and accompanying text, different considerations may come into play when moving "horizontally" across different issue formulations.

20. See, for example, *United States v. Mendenhall,* 446 U.S. 544, 547-50 (1980).

21. And, needless to say, the attorneys arguing the case could try to manipulate the formulation of the issues as a way of influencing the judges to adopt their preferred issue formulation.

For example, suppose that a panel votes on the search issue and the votes of the three judges are arrayed below in Example 2A.

Example 2A.

Judge	Search Technique
X	Unconstitutional
Y	Constitutional
Z	Unconstitutional
Majority	Unconstitutional (2-1)

On this formulation of the issue, by a two-to-one majority the court apparently favors a holding that the search is unconstitutional. If, however, the search issue is decomposed into two subissues, the judges' preferences may lead to a different result, as summarized in Example 2B.

Example 2B.

Judge	Voluntariness	Lawfulness of Initial Stop	Result of Individual Judge's Reasoning (see Ex. 2A)
X	Unconstitutional	Constitutional	Unconstitutional
Y	Constitutional	Constitutional	Constitutional
Z	Constitutional	Unconstitutional	Unconstitutional
Majority	Constitutional	Constitutional	Unconstitutional

Thus, by decomposing the search issue into its component subissues and voting on these subissues, the holding has been transformed into a holding that the search technique is constitutional.[22]

Rogers would solve the Indeterminacy Objection by forbidding any decomposition of issues whatsoever. To Rogers, the only relevant question of law presented by any case is the one at the *highest* level of the issue hierarchy, which is obtained by combining all possible subissues into a single vote on the outcome itself. That is, just as it appears to be always possible to decompose issues into subissues, one

22. See Maxwell L. Stearns, *How Outcome Voting Promotes Principled Issue Identification: A Reply to Professor John Rogers and Others*, 49 Vand. L. Rev. 1045, 1063 (1996) (noting that under issue voting "the determination of issues and issue levels would determine the outcome of the case. As a result, to avoid the outcome on a given issue, subissues, or subsubissues, and so on, justices will have a strong incentive to continue going down levels until a path emerges [] that gets to where they want to go . . .").

can also move in the opposite direction, to go "one level up" from any specification of issues. The two subissues in Example 2B can be combined into the single issue set forth in Example 2A.

The two issues that we began with in Example 1—the constitutionality of the search technique and the constitutionality of the peremptory challenge—can likewise be combined into a single issue: whether the *combination* of the search and the peremptory challenge is constitutional. At this highest level of the issue hierarchy, the single issue presented is what we have referred to as the *outcome*.[23] Thus, it becomes clear that outcome voting can be viewed as simply a special case of issue voting in which a particular issue decomposition rule is employed. Under outcome voting, courts are directed to vote only on the single issue presented by the case as a whole, that is, the issue at the highest level of the issue hierarchy.[24]

IV. RESOLVING THE INDETERMINACY OBJECTION TO ISSUE VOTING

The outcome-voting solution to the Indeterminacy Objection, requiring adoption of a particular issue decomposition rule, has an obvious virtue: it provides a unique issue formulation in every case, thereby avoiding issue manipulation problems. The Guidance Objection, however, remains. If outcome voting is the only way to meet the Indeterminacy Objection, some courts might agree with Rogers that the need for determinacy dominates the need for guidance. We think, however, that there may be other issue formulation rules that are capable of determining a unique set of relevant issues, so that the agenda manipulation costs of issue voting can be

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23. Rogers's listing of the "issues" on which the justices disagreed in *Tidewater* includes as issue A the "outcome" in that case: "Is a statute giving federal court jurisdiction over controversies between D.C. citizens and citizens of a state within the constitutional power of Congress?" Rogers, 49 Vand. L. Rev. at 1002 (cited in note 6). Rogers himself calls this the "overall issue" that emerges if the court "in effect . . . refuses to divide issues at all." Id. at 1004. See also Stearns, 49 Vand. L. Rov. at 1058-59 (cited in note 22) (noting that Rogers "mix[es] issue and outcome voting . . . in his analysis of *Tidewater* . . . [by presenting] two alternatives, issue A, which is a direct vote on the outcome, or issues B plus C, which together create an opposite outcome").

24. The paradoxical result under outcome voting, see text accompanying note 10, is thus just a special case of the more general phenomenon discussed in the text. Just as voting on the single "issue" at the highest level of the issue hierarchy—that is, outcome voting—can yield a different result if one breaks that issue inte its component subissues and votes separately on each of those, so too can the result of the vote on any subissue change if one takes votes on each of its components, and so on further down the issue hierarchy.

minimized even while providing the superior guidance of an issue-voting regime.

To meet the Indeterminacy Objection we propose the following issue decomposition rule:

> A *primary* issue on which multimember courts should vote is a question of law presented by a case that (a) is logically independent of any other questions presented by the case, in the sense that the question can be resolved as a logical matter without reference to any other accompanying questions, (b) is potentially dispositive of the outcome of the case, in the sense that resolution of the question can uniquely determine the outcome of the case, and (c) cannot be further decomposed into separate subquestions that fulfill criteria (a) and (b).

This rule is derived by a kind of backward induction from the principle of stare decisis itself, precisely because our goal is to maximize the amount of future guidance that courts can provide in any given case through the application of stare decisis. The stare decisis we have in mind, however, is "rule stare decisis," not the "result stare decisis" that is applied under outcome voting:

> Jurists commonly embrace "rule stare decisis" by explicitly or implicitly assuming that "decisis" denotes judicial decisions to adopt certain rules.
>
> . . .
>
> [A]ppellate courts commonly apply rules to facts to justify their judgments. Under rule stare decisis, a court follows stare decisis when it adheres to these rules of law expressly stated in "binding" precedents.
>
> . . .
>
> Appellate courts articulate rules of law for the same reasons they follow the principle of stare decisis. The reasons of guidance, predictability, efficiency, uniformity and impersonality, which explain why courts articulate rules of law in the first place, also explain why courts adhere to those rules in later cases. . . . The courts, having articulated the rules in order to increase efficiency, uniformity and impersonality, must generally follow the rules in order to achieve these values. Moreover they must appear to follow the rules in order to appear to achieve these values. Thus, the same factors that explain why a court applies rules to facts to justify its judgment also partially explain why precedential justifying rules are among the referents of decisis in stare decisis.[25]

Under rule stare decisis, the output of courts is composed primarily of "precedential rules of law labeled 'holdings' (or '*rationes decidendi*')."[26] These are rules of law that are applied to the particular constellation of facts in a case and necessary to the outcome that the

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25. Hardisty, 55 Ind. L. J. at 53-55 (cited in note 11) (footnotes omitted).
26. Id. at 57-58.

court reached. These rules can be extracted and applied in later cases that present different aggregate constellations of facts and legal questions. The first two components of our issue decomposition rule assure that a "primary issue" will be a question of law on which the court can issue such a "holding." The requirement that a primary issue must be logically independent of all other questions with which it is associated ensures that the court's resolution of the primary issue can be applied in future situations where those associated questions do not appear. The requirement that a primary issue must be potentially dispositive assures that it is "necessary" that the court resolves the issue one way or another. In other words, the outcome in the case would be different if the primary issue were resolved differently.

For example, the two issues in Example 1—the constitutionality of the search and the constitutionality of the peremptory challenge—satisfy these first two criteria. Either of these issues is, as a matter of substantive constitutional law, capable of disposing of the case. In addition, each can be disposed of without reference to the other.[27]

Each of these issues, however, may be further decomposable. The third criterion of our issue decomposition rule provides a "stopping rule" for this process that should produce a unique statement of the issues in a given case by directing courts to continue the issue decomposition process only as long as the subissues identified are (a) logically independent of one another, and (b) potentially dispositive of the case. To illustrate, the issue of the constitutionality of the search technique identified in Example 2A is not a "primary issue" within our definition because it can be decomposed into independent questions of law that fulfill the first two criteria, as shown in Example 2B.[28]

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27. See Rogers, 49 Vand. L. Rev. at 1013 (cited in note 6), where Regers points out that there is "no logical relation" between these two questions. Similarly, most if not all ordinary civil cases, such as a suit for breach of contract, will present at least three issues that are logically independent and capable of disposing of the case at hand: (1) whether the court can exercise subject matter jurisdiction generally over breach of contract actions, (2) whether the court can exercise personal jurisdiction over the defendant, and (3) whether the plaintiff has carried his burden of proof on the merits.

28. See *Mendenhall*, 446 U.S. at 557 (dividing the case into the questions of whether the "search of [the defendant's] person was . . . preceded by an impermissible seizure" and whether the defendant's consent to the search was "for any other reason invalid"). Similarly, the single question at the highest level of the issue hierarchy in *Tidewater* (what Rogers lists as issue A in his list of "Issues on which justices disagreed in *Tidewater*," see Rogers, 49 Vand. L. Rov. at 1002 (cited in noto 6)) can be divided into two issues fulfilling the first two criteria of our issue

Continuing the decomposition process is unlikely to yield additional primary issues, however. The question, for example, of whether the defendant's consent to the search was voluntary requires consideration of a number of different factors: whether the police officer informed the defendant that he had the opportunity to withhold his consent, whether or not there was a show of force, the conversation that transpired immediately prior to the demonstration of consent, the defendant's mental state and capacity, etc. But, as a matter of substantive law, none of these factors can be *dispositive* of the question of voluntariness of consent, because that question turns on the reviewing court's evaluation of the "totality of the circumstances" surrounding the consent.[29] By definition, there can be no dispositive subsidiary question of the form "whether the police officer's failure to inform the defendant of the opportunity to withhold consent renders consent involuntarily obtained" because that would necessarily mean that only one "circumstance"—the presence or absence of that failure on the officer's part—need be considered in determining voluntariness. This is logically inconsistent with the rule that the totality of *all* of the circumstances must be considered.[30] Accordingly, the issue decomposition process stops at this third level of the issue hierarchy.[31]

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decomposition rule: (1) whether a citizen of the District of Columbia is a citizen of an Article III "State" (issue B), and (2) whether Congress can constitutionally confer jurisdiction of federal courts under Article I beyond the limits of Article III (issue C).

29. See *Mendenhall*, 446 U.S. at 544 (stating whether consent to search is "the product of duress or coercion . . . is to be determined by the totality of all the circumstances"); id. (concluding that seizure within the meaning of the Fourth Amendment has occurred only if, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free te leave").

30. In other words, a rule that courts must consider the "totality of the circumstances" in determining whether the consent was voluntary necessarily implies that no dispositive rule of the form "If X, then the consent was/was not voluntary" can exist at subsidiary levels of the issue hierarchy. The idea that there can be no dispositive subissues in a totality of the circumstances inquiry is widely recognized. See, for example, *Allen v. City of Portland*, 73 F.3d 232, 233 (9th Cir. 1995) (determining whether confinement was coercive is a "totality of the circumstances" inquiry in which "[n]o one factor is dispositive"); *United States v. Milbrand*, 58 F.3d 841, 846 (2d Cir. 1995) (detormining whether forfeiture can be sustained against an eighth amendment challenge is a "totality of the circumstances" inquiry in which "[n]o one . . . factor[] is dispositive").

31. It similarly appears that the decomposition process in *Tidewater* can stop after the second level of the issue hierarchy. Except for what Rogers labels issue A (the highest-level specification and what we call the outcome) and issues B and C (the first-order decomposition), none of the separate questions set forth in Rogers's list of "Issues on which justices disagreed in *Tidewater*" appear to be capable, *standing alone*, of disposing of the overall question whether the statute before the Court is constitutional. For example, whatever a justice's view of whether the Constitution should be given a strict or broad interpretation (issue D), disposition of the case also requires determination of whether a broad (or strict) interpretation permits Congress to enact the statute in question (issue E). Similarly, whatever a justice's view of whether the

The relationship between this rule directing courts to vote only on logically independent issues and our overall goal of maximizing guidance can also be illustrated with reference to what Rogers calls the "co-occurrence likelihood"[32] of issues. As Rogers notes, "if issues are related in the sense that resolution of one affects the resolution of the other"—in other words, if they are logically dependent—"it is particularly likely that the issues will arise in the same case."[33] The converse is likely true as well: logically independent issues are likely to be statistically independent as well, and will co-occur no more frequently than one would expect at random. Our issue decomposition rule is consistent with Rogers's observation that "[i]f the co-occurrence likelihood of two issues is high, then the problem of path dependence for those two issues is small."[34] To put the matter in our terms, to the extent that two issues are logically (and thus statistically) dependent, we would not expect incoherence to develop. There is therefore no need to require courts to vote separately on logically dependent issues in order to avoid incoherence, since incoherence will not develop in any event.[35]

Constitution should be interpreted to avoid unfair results (issue G), disposition of the case also requires determination of whether it is fair or unfair to deny Congress the power to give federal courts jurisdiction over controversies between D.C. citizens and citizens of another stato (issue F). See Stearns, 49 Vand. L. Rev. at 1065 (cited in note 22) (noting that "many if not most of the issues set out in [Rogers's] list [of *Tidewater* issues] are interesting questions for pedagogic inquiry, but they are not 'issues' as lawyers and judges understand that term").

32. See Regers, 49 Vand. L. Rev. at 1018 (cited in note 6).

33. Id.

34. Id.

35. We disagree with Regers's suggestion, however, that incoherence will also disappear if issues are logically independent. See id. at 1018-19. Even if the likelihood of co-occurrence is quite low for any particular pair of issues, the incidence of incoherence can be significant in the aggregate, given the large number of possible issue pairs. A simple model may help illustrato this point. Assume we are trying to estimate the frequency with which path dependence might manifest itself in a legal system. Suppose that:

1. There are 1000 separato legal issues that can arise in any individual case, and all issues are equiprobable and mutually independent. As a result, each issue will arise with a probability of one in a thousand and the likelihood that a two-issue case will consist of any two particular issues (for example, issue #41 and issue #738) is simply the product of their individual probabilities, or one in a million (.001 x .001 = .000001).
2. All cases involve resolution of two separate issues.
3. All issues can be resolved in binary, yes-or-no, fashion. Each issue is equally likely to be decided "yes" as it is "no" by any one judge.
4. In all cases, one side (whom we will call the plaintiff) wins only if a "yes" is returned on both issues.
5. All cases are heard by three-member panels.

We can represent the results of all two-issue cases by means of a six-cell matrix (similar to the matrix presented in Example 1 in the text).

Judge	Issue 1	Issue 2
A	Y or N	Y or N
B	Y or N	Y or N
C	Y or N	Y or N

There are $2^6 = 64$ different matrices that can describe the results of the court's deliberations in all cases. The paradoxical result will be produced in six of those.

Case 1.

Judge	Issue 1	Issue 2
A	Y	Y
B	Y	N
C	N	Y

Case 2.

Judge	Issue 1	Issue 2
A	Y	Y
B	N	Y
C	Y	N

Case 3.

Judge	Issue 1	Issue 2
A	Y	N
B	N	Y
C	Y	Y

Case 4.

Judge	Issue 1	Issue 2
A	N	Y
B	Y	N
C	Y	Y

Case 5.

Judge	Issue 1	Issue 2
A	N	Y
B	Y	Y
C	Y	N

Case 6.

Judge	Issue 1	Issue 2
A	Y	N
B	Y	Y
C	N	Y

In each of these cases, the court sides with the plaintiff under issue voting (since a "yes" is returned on each of the two issues) but with the defendant under outcome voting (because 2 of the three judges believe that defendant should prevail). Thus, in any given case, there are 64 possible (and equiprobable) voting distributions, six of which (approximately 9%) yield the paradoxical result. We can therefore predict that, of our 1000 issues, 90 issues (9% of the total) will first arise in the "paradoxical" case.

This model hardly captures the complexity of the real world. We put it forward simply to demonstrate that even in situations where all pairwise combinations of issues have a low

Our issue decomposition rule does not solve every aspect of issue formulation. This issue decomposition rule will produce a unique set of primary issues defined vertically. That is, it provides a manageable "stopping rule" for the vertical issue decomposition process. However, cases may present alternative primary issues at any level of decomposition defined horizontally. For example, a judge presented with the case in Example 1 may believe that the case should be disposed of on grounds entirely unrelated to the constitutional questions on which we (and Rogers) have focused. This judge may believe that this case raises questions about two other issues—say, jury bias and whether the defendant's trial counsel afforded constitutionally adequate representation.

In a case where the judges disagree about the primary issues defined horizontally, our decomposition rule will not be effective. In these cases, it may be necessary to use a metavote procedure analogous to the one recommended by Kornhauser and Sager to solve the incoherence that this horizontal indeterminacy can produce.[36] This would entail a vote by the court on the particular issue formulation the court should use in issue voting. This metavote procedure may itself present a number of difficulties, the most serious of which is that it may not yield *any* issues for the court to resolve. For example, suppose that the three judges offer distinct and mutually exclusive sets of primary issues (which we label X, Y, and Z). Suppose they first consider whether issue set X describes the primary issues in the case. This proposal will be defeated by a two-to-one majority. Similarly, a two-to-one majority will defeat the proposal that the court consider issue set Y, or issue set Z, as the primary issues presented.[37] Thus, there is potential incoherence in an issue voting system as well.

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likelihood of co-occurrence (.0000001), path dependence and incoherence do not vanish. A non-trivial proportion of cases (9%) will arise in the paradoxical context.

36. See Kornhauser and Sager, 81 Cal. L. Rev. at 30 (cited in note 3). Kornhauser and Sager recommend the use of a metavote to resolve the question of whether to use outcome voting or issue voting.

37. Alternatively, if the court chooses between issue statements using pairwise voting, the Condorcet paradox may arise, along with the potential for agenda manipulation. For example, suppose the three judges rank the appropriateness of the three sets of potential primary issues as follows:

Judge	Ranking
ABC	X>Y>Z
DEF	Y>Z>X
GHI	Z>X>Y

Of course, in this circumstance the outcome-voting solution is also problematic. If the judges disagree among themselves about the issues that need to be addressed in order to resolve the case, they can, to be sure, reach a collective outcome, each judge on his or her own terms. But the resulting opinions will have no precedential value at all. Moreover, as we pointed out in our earlier article, outcome voting suffers from incoherence, path dependence, and its own brand of agenda manipulation.

V. CONCLUSION

There thus appears to be no perfect solution to the problems identified by Professor Rogers. Both issue voting and outcome voting have potential flaws. Overall, we retain a preference for the greater guidance provided by issue voting. After all, appellate courts have expertise in formulating issues, and, we believe, providing guidance and usable precedent is their primary responsibility. But a comprehensive justification for issue voting would require examination of normative considerations other than those we have been discussing here.[38]

Our belief that the Guidance Objection to outcome voting is the more serious problem intensified when the Supreme Court decided the case of *Seminole Tribe of Florida v. Florida*[39] during the preparation of this Reply. In *Seminole Tribe,* the Court overruled the holding in *Pennsylvania v. Union Gas Co.*[40] that the Commerce Clause grants Congress the power to abrogate the states' sovereign immunity. *Union Gas* itself well illustrates, as Kornhauser and Sager put it, the "embarrassed state of current practice."[41] In *Union Gas,* the Court was caught between the dominant outcome-voting paradigm and the paradoxical result. A majority of justices believed that Congress possesses the power to override the State of Pennsylvania's sovereign immunity, and a majority believed that Congress did so in the superfund statute; a majority of the Court,

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Pairwise votes on the better formulation of the primary issues will yield the Condorcet paradox, and will "cycle" endlessly, because X defeats Y (2-1), Y defeats Z (2-1), and Z defeats X (2-1).

38. See Kornhauser and Sager, 81 Cal. L. Rev. at 3-10 (cited in note 3), for an extensive discussion of the view that judicial decision making is a "collegial" enterprise and the significance of that view for the issue-voting/outcome-voting debate.

39. 116 S. Ct. 114 (1996).

40. 491 U.S. 1, 19 (1989).

41. Kornhauser and Sager, 81 Cal. L. Rev. at 18 (cited in note 3).

however, also favored the outcome that the State of Pennsylvania could *not* be sued under the superfund statute.[42]

The issue-voting solution to this paradox would have been straightforward: Pennsylvania loses (and two clear precedents are established). But in *Union Gas,* while the Court indeed reached this outcome (that is, Pennsylvania lost), the precedents were not at all clear because the Court reached this outcome only by the expedient of Justice White's "switching" his vote away from his preferred outcome.[43] Not surprisingly, from out of this somewhat chaotic situation and the absence of any agreement about what the Court was actually doing in *Union Gas,* incoherence quickly resulted. As the Court noted in *Seminole Tribe*:

> The Court in *Union Gas* reached a result without an expressed rationale agreed upon by a majority of the Court. . . .
>
> . . .
>
> In the five years since it was decided, *Union Gas* has proven to be a solitary departure from established law. See *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 US 139, 113 S. Ct. 684, 121 L. Ed. 2d 605 (1993). . . . The decision has, since its issuance, been of questionable precedential value, largely because a majority of the Court expressly disagreed with the rationale of the plurality. See *Nichols v. United States*, 511 US 114 S. Ct. 1921, 1927, 128 L. Ed. 2d 745 (1994) (the "degree of confusion following a splintered decision . . . is itself a reason for reexamining that decision").[44]

Union Gas has indeed proven deficient in the guidance it provided, precisely because the Court inadequately addressed these voting protocol questions. We believe that the better solution would have been for the Court to bite the bullet and explicitly adopt the issue-voting procedure.

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42. See Post and Salop, 80 Georgetown L. J. at 751-52 (cited in note 2); Kornhauser and Sager, 81 Cal. L. Rev. at 18-20 (cited in note 3).

43. See Post and Salop, 80 Georgetown L. J. at 752 (cited in note 2) ("[B]y voting to affirm the court of appeals, Justice White allowed the Court to preserve the outward appearance of outcome-voting," while "[u]nder true issue-voting . . . no individual Justice would be compelled, as Justice White was, to switch his vote to take his colleagues' view on the constituent issues into account"); Kornhauser and Sager, 81 Cal. L. Rev. at 18-20 (cited in note 3) (noting that in *Union Gas* Justice White appears to accept the principle of issue voting while none of his colleagues did so).

44. *Seminole Tribe*, 116 S. Ct. at 1127-28.