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The One and the Many: Adjudication in Collegial Courts

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This Article explores a problem that may occur in appellate cases in which two or more issues present themselves. In these problematic cases, the court may reach a decision as to outcome in one of two ways, either by summing the votes of individual judges as to the outcome of the case overall, or by summing the votes of individual judges on each of the issues and then combining the results. The two methods of decisionmaking can lead to different results. This "doctrinal paradox" is unfortunate because cases are supposed to be decided on their merits rather than by an unconsidered choice of voting protocol. Professors Kornhauser and Sager argue that neither of the decisional methods is always superior. Rather, appellate courts, as "collegial enterprises," should directly confront the doctrinal paradox when it arises and deliberately determine the method of case decision that will control. Professors Kornhauser and Sager suggest that the best method for choosing between decisional methods is a "metavote," with members of a court voting for a particular method after discussing such factors as whether the outcome or rationales for it are more important, whether the issues to be decided are independent, the seriousness of the consequences of the outcome, hierarchical management concerns, and internal management considerations.

INTRODUCTION

One of the most salient features of appellate courts is also one of the most ignored:¹ appellate judges, almost always sitting in panels of three

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1. We first began to consider the implications of multi-judge courts for theories of

or more, are expected to behave as colleagues. They are expected to adjust their formal and informal behavior as judges to the fact that they have power to adjudicate cases not individually, but only collectively as a court. Judges have been largely unreflective about the nature of their collegial relationships and responsibilities, even when they are called on to consider events that render these matters highly problematic. Theorists, for their part, while renouncing oversimplification of the model of adjudication in many other respects,² have rarely noted the collective nature of adjudication and the questions that flow from it.

Recent events in the Supreme Court remind us of how poorly we understand the collective nature of judging and of how troublesome that failure of understanding can be. In two cases, *Pennsylvania v. Union Gas Co.*³ and *Arizona v. Fulminante*,⁴ a single Justice, in deference to the views of his colleagues, chose to cast his vote against his own substantive view of the case. This deference on matters of substance carried a perverse procedural sting: in both cases none of the other eight Justices adopted a view of their own collegial responsibilities that entailed such deference, and indeed such deference is almost without precedent in Supreme Court practice. Moreover, these structurally aberrant votes were in each instance decisive. In effect, a single Justice in each of these cases, in the name of deference, thrust his own, apparently idiosyncratic, view of collegial protocol on his colleagues. Yet neither of the Justices in question felt the need to explain his unusual vote at any length, much less to justify it, and in neither case did any of the other Justices address the question of the appropriate collegial voting protocol.

The somewhat mysterious voting events in *Union Gas* and

adjudication in Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82 (1986). There we identified in passing the doctrinal paradox, our principal concern here, and urged that greater attention be paid to the collective features of adjudication generally. *Id.* at 115-16. Perhaps that call (and possibly others, see David P. Leonard, *The Correctness Function of Appellate Decision-Making: Judicial Obligation in an Era of Fragmentation*, 17 LOY. L.A. L. REV. 299 (1984)) was heard. More likely, the Supreme Court's recent and disturbing encounters with the doctrinal paradox have begun to excite attention. See, e.g., David Post & Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 GEO. L.J. 743, 745 (1992) (arguing for issue-by-issue voting); John M. Rogers, "I Vote This Way Because I'm Wrong": *The Supreme Court Justice as Epimenides*, 79 KY. L.J. 439 (1991) (arguing for case-by-case voting). While we disagree with both Rogers and Post and Salop at a number of points, the research in each was useful to us; the robust commitment in each to a position diametric to the other was grist for our own reflections.

In the interval between our first joint effort in this area and our completion of this Article, Lewis Kornhauser has pursued, in an analytically more formal environment, several themes connected to our work here. See Lewis A. Kornhauser, *Modeling Collegial Courts I: Path-Dependence*, 12 INT'L REV. L. & ECON. 169 (1992) [hereinafter Kornhauser, *Modeling Collegial Courts I*]; Lewis A. Kornhauser, *Modeling Collegial Courts II: Legal Doctrine*, 8 J.L. ECON. & ORG. 441 (1992) [hereinafter Kornhauser, *Modeling Collegial Courts II*].

2. As with Professor Hart's useful enrichment of John Austin's bare conception. H.L.A. HART, *THE CONCEPT OF LAW* 77-96 (1961).

3. 491 U.S. 1 (1989).

4. 111 S. Ct. 1246 (1991).

Fulminante are in fact instances of a largely unobserved paradox that can arise when doctrine directs a multi-judge court to resolve two or more issues en route to the decision of a case before it.⁵ This paradox, which we call the doctrinal paradox, is a prominent instance of the broader proposition that appellate adjudication is a collective endeavor that can only be fully understood once its collective features are considered.

In this Article, we hope to bring some order to this tangle, and to take something of use away from it. We begin with a general taxonomy of collective enterprises; we then make some preliminary attempts at locating appellate adjudication within that taxonomy, in the course of which we observe and address some of appellate adjudication's prominent collective features. Finally, and at some length, we introduce the doctrinal paradox and offer a solution to the puzzle that it poses for multi-judge courts.

I

COLLECTIVE ENTERPRISE

A. *The Nature of Collective Enterprise*

When some number of people join together in a coordinated effort to a common end, we can describe their effort abstractly as a collective enterprise. We may usefully distinguish four varieties of collective enterprise: distributed, team, redundant, and collegial.

Distributed and *team* enterprises are in significant part distinguished from one another by the fashion in which each achieves coordination. In *distributed* enterprises, though individuals act in isolation, the prior structuring of their tasks assures the necessary coordination of effort. In the simplest distributed enterprises, participants have identical tasks. Distributing the burden multiplies the performance, but the performance is essentially more of the same thing. Several persons painting a house together, or workers tending a field are instances of these simple distributive enterprises. Complex industrial processes illustrate distributed enterprises in which individuals are allotted different tasks. On an assembly line, each worker performs independently of the other workers.

Team enterprises, by contrast, require members to coordinate their actions during the performance. Each participant must consider (and respond to) others in the group as she herself performs. Team enterprises do not merely multiply product or amplify effort: they transform the performance into something that only a group could have produced.

5. We first observed the existence of this paradox in *Unpacking the Court*. Kornhauser & Sager, *supra* note 1, at 115. Kornhauser has since considered some formal properties of the paradox in Kornhauser, *Modeling Collegial Courts I*, *supra* note 1, and Kornhauser, *Modeling Collegial Courts II*, *supra* note 1. The second paper argues, among other points, that, despite superficial similarities, the doctrinal paradox at issue here is distinct from both the Condorcet and Ostrowski paradoxes which are widely discussed in the literature.

The density of group interaction is crucial to the transformation. Team enterprises involve a shift in the agency of attribution and evaluation away from the individual and towards the group. Orchestras and basketball teams are ready examples of team enterprise.

Distributed and team enterprises also have different aims. In distributed enterprises, the magnification or multiplication of performance is desired. In team enterprises, the performance itself is redefined in a way that values the interaction of the team members intrinsically, whether it is the harmony of choral voices, the rich complexity of an orchestral score, or the strategic interplay of the five members of a basketball team.

Redundant and *collegial* enterprises do not aim either to amplify performance as do distributed enterprises, or to reshape performance as do team enterprises. Instead, they aim to produce performances that could in principle represent the unenhanced effort of a single person, but to bring that performance closer to the ideal.

Redundant and collegial enterprises are in significant part distinguished from each other by the fashion in which each achieves coordination. *Redundant* enterprises rely on an external structure of multiple independent efforts. Quality control of an automated production process, for example, might involve two or three inspectors; the aggregation rule in the strictest form would cede to each inspector authority to reject the product being examined. The judging of an international athletic event like gymnastics is also a redundant enterprise. Each judge ranks the performance before her without consulting her peers, and the rankings are aggregated by rule: for example, the highest and lowest rankings may be discarded and the remaining rankings averaged.

Redundant enterprises are characterized by the independence of the actors who join in them. Mechanical process and rule, not collaboration, link the performances of the separate actors. Indeed, in many cases redundant enterprise may forbid consultation in the interest of an unfettered and unbiased second look. For example, gymnastic judges are forbidden from consulting each other prior to giving their marks. Furthermore, our quality control regime might well profit from an enforced insularity to ensure that defective products are rejected.

Collegial enterprises, in contrast, are like team enterprises in that each participant must consider and respond to her colleagues as she performs her tasks. Collaboration and deliberation are the trademarks of collegial enterprise, and the objective of collegial enterprise often reaches beyond accuracy to other measures of quality.⁶ While interaction and

6. In *Unpacking the Court* we identified five distinct measures of quality of adjudicative processes: accuracy, authenticity, fit, reliability, and appearance. Accuracy refers to the ability to get the right answer, however "right" is defined. Authenticity measures the quality of processes that aggregate preferences rather than judgments. An authentic process correctly reflects the preferences

exchange are irrelevant or even antithetical to redundant enterprises, they are crucial to collegial enterprises, and the product of a collegial enterprise often belongs to that enterprise in a uniquely collective way. Think, for example, of the collaboration of authors on a novel, scholars on an essay, or scientists on research. As in a team enterprise, collegial enterprise involves a shift in the agency of performance from the individual to the group.

Enterprises need not come in pure forms. A group of collaborating scientists, for example, may share work and insight in a fashion that exhibits the characteristics and realizes the benefits of both distributed and collegial enterprise. The jury in criminal trials is also a hybrid: the twelve-person jury with a requirement of a unanimous verdict has a structural capacity to deflect error towards acquitting the innocent and away from convicting the guilty,⁷ a capacity of precisely the sort we encounter in redundant enterprises. At the same time, the jury is a collegial body in which deliberation is of great importance.⁸

of the decisionmakers. Both fit and reliability are measures of performance in a representative decisionmaking process. Fit measures the tendency of those in the representative body to reach the results that the group they represent would have reached. Reliability measures the tendency of the process to avoid extreme outcomes. Appearance refers to the tendency of a decisionmaking process to inspire belief in its legitimacy. Kornhauser & Sager, *supra* note 1, at 91-92.

7. Some measure of the complex interaction between jury size and outcome and of the complexity of verifying empirically the impact of size and structure is provided by Richard O. Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 643 (1975).

8. We ignore many complexities of collective enterprise. Two complexities that arise from meditation on the requirement of a "common end," however, merit mention here. First, at a sufficient level of generality, one may conclude that even individuals engaged in an essentially conflictual activity share a common end. The "common end" of war, for example, might be said to be the resolution of the dispute between the parties. Any competition presents similar problems.

Exchange provides a more provocative and perplexing example. Suppose *X* has two oranges and *Y* two apples. The most preferred position of each is to possess all the fruit. Each also prefers holding one apple and one orange to holding two apples or two oranges. One might describe the trade of an apple for an orange as a collective enterprise with the common end of improving the welfare of both *X* and *Y*. Indeed, if we accept this characterization of "common end" the traders may qualify as a team, because each party must attend to the interests of the other. This usage, however, may stretch the meaning of "common end" too far.

The interest group theory of legislation provides a more compelling example of the problems posed by exchange. If two interest groups cooperate to enact a law, one might say that they shared a common end to enact that piece of legislation. Such a construction seems to stretch the concept of a common end. It is particularly difficult when one considers a third interest group that opposed the legislation. What common end does this third group share with the two groups that prevailed? Note that on a civic republican theory, legislation is collegial enterprise.

Second, one's conception of a common end may in part define the scope of the enterprise under consideration. Adjudication provides a clear example. We may consider a single, multi-judge court at a particular time, such as the Supreme Court of the United States in 1992, as the enterprise. Or we might consider the Supreme Court of the United States from its inception through today as the enterprise. This second entity has changing personnel, and analysis of this entity requires articulating not only the obligation of a sitting judge to other judges sitting at the same time but also to judges who sat before and who will sit in the future. A third enterprise might be the entire federal court system at a given time. A fourth might be the "law" or the "common law" as a whole. This

B. Appellate Adjudication as a Collective Enterprise

Appellate adjudication by multi-judge courts is a complex practice which has important ingredients of both redundant and collegial enterprise. In our own prior effort to explain multi-judge courts,⁹ we focused largely on structural features of the multi-judge court that contribute to its virtues and liabilities as a redundant enterprise. In brief, we argued that, given certain optimistic but far from heroic assumptions about the distribution among the population of judges of the propensity to do their job well, and given a voting protocol of simple majority rule, increasing the number of judges would indeed increase the likelihood of good adjudicative results.¹⁰

This argument does not depend on collective features of multi-judge adjudication other than redundant judgment and the linkage provided by the practice of simple majority rule. It would hold, for example, if each judge on a panel of judges heard the case separately, reflected on the case in isolation from her colleagues, consulted only her own past judgments, and rendered an opinion justifying her conclusion in terms that wholly ignored her colleagues' present or past determinations.¹¹

all-encompassing enterprise apparently has a somewhat different character than the single court to which we shall attend.

9. Kornhauser & Sager, *supra* note 1.

10. *Id.* at 97-100.

Picture a vast urn that contains balls of two colors; each color is associated with an outcome in the case to be decided. Imagine that we know only that the balls associated with the right outcome outnumber those associated with the wrong outcome. Imagine further that given the great size of the urn we cannot possibly empty it. Under these constraints, an obvious decision procedure would be to draw blindly from the urn and choose the outcome associated with the color that predominates (by majority rule, in effect) in our draw. The greater the number of draws, the greater will be our likelihood of reaching the right outcome. Enlarging the number of judges on a court is like increasing the number of draws from the urn.

11. The result depends in part on each judge's reaching a conclusion independently from other judges. Independence requires a deliberative process that improves rather than hinders a judge's independent exercise of judgment. Deliberation might improve the quality of a judge's consideration without lessening the independence of her judgment when, for example, it identifies facts or arguments that a judge had not noticed or ensures that she carefully test the logic of her argument. On the other hand, some deliberative processes might sway a judge even if they are unrelated to the truth of the claim asserted. Deliberative processes that encourage conformity of opinion, emphasize the authority of particular judges, or give sway to charismatic personalities might tend to undermine the virtues of redundancy.

The practice of stare decisis in its actual, collegial form does not undermine the independence necessary to drive the claim for the redundant virtues of multi-judge courts that we advanced in *Unpacking the Court*. The collegial form of stare decisis requires judges to attend not to their own past judgments, but rather to the past judgments of their court, including those with which they would have disagreed or actually did disagree. By hypothesis, a legal system which respects the practice of collegial stare decisis follows its own prior decisions. Judges who want to reach correct decisions in such a system exercise independent judgment about all pertinent aspects of the case before them, including the force of prior judgments of their court. See *id.* at 102-15.

Some collegial responsibilities, however, may well give judges reasons to decide cases differently than they would if they were deciding the case before them alone. For example, a judge may write a majority opinion differently because that opinion must speak for "the court." See *infra* text

Appellate adjudication, of course, does not proceed in this isolated manner, but rather has significant collegial features. Judges on appellate tribunals hear cases as a group. They deliberate at some length about both the appropriate outcome and its rationale. They join together in opinions. Perhaps most importantly, the historic and contemporary majority will of the court, not a judge's own past judgment, constrains each judge's present choice set. These features suggest that, in important respects, in appellate adjudication the agency of performance is the court, not the judge. The purpose, extent, and nature of these collegial features and the obligations they place on individual judges, however, are precisely the aspects of appellate adjudication that are least well understood.

Consider the Supreme Court. When the Justices take account of prior decisions as sources of authority, they reference the outcomes and rationales supported by majorities in the past. An opinion announcing the outcome and articulating a rationale that is joined by a majority of the Justices is styled and respected as "the opinion of the Court," carrying an authority distinct to such opinions. But the collegial aspects of this picture are somewhat blurred by other features of multi-judge adjudication. The Court is seldom unanimous as to outcome or rationale, and dissenting and concurring opinions regularly display the license of individual Justices or groups of Justices to separate themselves from "the Court's" adjudication of the case before them. In what meaningful sense is the resulting congeries of individual judgments a collegial endeavor, and what obligation does an individual judge hold to that endeavor?

It is useful to begin with the majority opinion. We understand that the author of the majority opinion writes, not for herself, but for the Court. While the author and other members of the majority clearly endorse both the outcome in the case and the rationale, the opinion does not necessarily correspond to the opinion she would write were she the sole member of a single-judge court. Put differently, the author of the majority states: "For the following reasons, we decide this case this way," rather than "I decide this case this way." As a consequence, the majority opinion does not necessarily state the author's view of what legal regime would be best, all things considered. The author of the majority opinion may hold personal views that differ in some respect from the views articulated in the majority opinion. For example, a Justice who believes that the death penalty, regardless of how administered, is unconstitutional, may appropriately base a majority opinion striking down a capital punishment statute on significantly more narrow grounds.¹²

accompanying note 12. Collegial responsibility of this sort can interfere or at least compete with the redundant features of multi-judge adjudication.

12. The exact limits of appropriate judicial behavior are difficult to articulate. Clearly, some

Even a Justice who dissents from the outcome or the rationale typically acknowledges her respect for the majority, who, by virtue of its preponderance of numbers, acts for the Court. Thus, a dissenting Justice often styles her disagreement in the case before her as a disagreement with the "Court," not with the "majority." The exceptions to this rhetorical practice may bespeak a special degree of disagreement, or signal a special disrespect.¹³

Can we offer an account of dissenting and concurring¹⁴ opinions that is consistent with the obligations of a participant in a collegial enterprise? At first glance, it might seem that a collegial structure of authority would require action by consensus or, barring consensus, issuance of a single opinion that suppressed any dissent. A somewhat less stringent view of collegial obligation would require a dissenting Justice to go along with the majority in most circumstances but permit deviation when she felt a fundamental error was being committed. In such a regime, concurring or dissenting opinions would be justifiable only under the same sort

distortions of a judge's views represent inappropriate judicial behavior. Equally clearly, to meet her judicial obligations, a judge may endorse some view other than the one that she thinks would yield the best legal regime. Perhaps a judge need only strive for the best that she thinks achievable on the given court. Cf. *infra* Sections V.D (discussion of problems of supervisory management), V.E.2 (discussion of strategic behavior).

13. We have not attempted anything approaching satisfactory documentation of our sense that this is true, but a brief electronic browse seems to support our hypothesis. We first looked at Volume 490 of the *United States Reports*. We chose that because of Justice Blackmun's especially bitter closing statement in his dissent in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989): "One wonders whether the majority still believes that race discrimination—or more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was." *Id.* at 662 (Blackmun, J., dissenting). With a Westlaw query—CI("490 U.S.") & SY(DISSENT!)—we determined that there were 25 cases in 490 U.S. in which dissenting opinions were written. Modifying that query to include "& majority," we reduced that number to 15 cases which we read. In 12 of those cases, just short of one half of the cases with dissents, dissenting Justices referred to "the majority," and in 10 of those 12 they did so consistently with what seemed to us to be a fairly high degree of hostility. We then looked at Volume 443 of the *United States Reports*, because that volume represents the Court's work a decade prior to Volume 490. Our expectation was that the Court would be more collegial and that this would be reflected in the rhetoric of dissent. Using the same Westlaw queries, we found 20 dissents, 4 cases where the dissent made reference to "the majority," and only 2 where this reference was consistent throughout the opinion. Many features of this abbreviated look rob it of empirical force, not the least of which is that the identity of the Justices who find themselves in dissent may skew the results.

14. "True" concurring opinions, for these purposes, are not measurably less problematic than dissents, since they are dissents from the rationale adopted by the majority. "True" concurrences announce and defend the author's unwillingness to subscribe to the majority's rationale for an outcome that the author supports. By contrast, in "two-cents" concurrences, the author is willing to join in both the outcome and rationale sponsored by the majority, but wishes to add her own, presumably consistent, thoughts on the matter. In Supreme Court practice, "true" concurrences are introduced with the phrase, "Justice X, concurring in the judgment," while "two-cents" concurrences are introduced with the phrase, "Justice X, concurring." In recent years, it has been increasingly common for Justices who join in the majority outcome to write separately to explain their agreement with discrete portions of the majority rationale and their disagreement with others. Opinions of this sort are now introduced with the phrase, "Justice X, concurring in part and concurring in the judgment."

of circumstances that justify chronic dissents from settled doctrine in present Supreme Court practice.

In fact, concurring and dissenting opinions serve functions quite consistent with a collegial understanding of the Court. Internally—within the Court itself—dissent promotes and improves deliberation and judgment. Arguments on either side of a disagreement test the strength of their rivals and demand attention and response. The opportunity for challenge and response afforded by the publication of dissenting and concurring opinions is a close and sympathetic neighbor of the obligation of reasoned justification.

Externally—for lower courts, the parties, and interested bystanders—concurring and dissenting opinions are important guides to the dynamic “meaning” of a decision by the Court.¹⁵ From a collegial perspective, dissenting and concurring opinions offer grounds for understanding how individual Justices, entirely faithful to their Court’s product, will interpret that product. The meaning each Justice brings to the product of her Court will inevitably be shaped by elements of value and judgment she brings to the interpretive endeavor;¹⁶ her dissent from the Court’s conclusions in the case in question is likely to be dense with insight into these aspects of her judicial persona.

The functions that concurring and dissenting opinions do *not* perform also reveal much about their compatibility with a collegial view of the Supreme Court. Most significantly, these opinions are not formally operational with respect to the mandates of the Court or their accompanying rationales. When six of the nine Justices vote for outcome *R* as opposed to outcome *S*, outcome *R*, rather than some proportional weighting of *R* and *S*, results; a criminal defendant whose conviction is affirmed by a divided vote does not serve an appropriate fraction of her sentence, but all of it. A Justice has an unencumbered license to dissent in a case of first impression,¹⁷ but her dissent does not deflect either the outcome chosen by the majority or the rationale that it advances in defense of that outcome.

Dissenting and concurring opinions take account of and respect the link between majority judgment and collective court authority. They implicitly read in the subjunctive tense: “Were I/we deciding this case alone, I/we would reach this outcome for these reasons.”¹⁸ Imagine that

15. This function may be understood in either noncollegial or collegial terms. A noncollegial perspective sees these guides as grounds for predicting how faithful individual Justices, and hence in aggregate the Court, will be to the course charted in the instant opinion and judgment.

16. See RONALD DWORKIN, *LAW'S EMPIRE* 44-65 (1986).

17. This lack of restraint applies only to cases of first impression. In subsequent cases that raise similar questions, dissent is heavily encumbered by the contrary obligations of precedent.

18. The phrasing here conceals some difficulties. Arguably, on a collegial court, the dissent should ask: “Were I/we writing the majority opinion, the court would reach this outcome for these reasons.” But a dissenter seems to have more license to state her own views and less pressure to

the Supreme Court followed each of its nonunanimous votes on a case with a metavote, where the proposition at issue would assume this general form: "We have voted, 6-3, to reverse the conviction below for the reasons stated in Justice *X*'s opinion, in which five other Justices join. Should we now adopt this outcome as the judgment of the Court, and Justice *X*'s opinion as the opinion of the Court, yea or nay?" There is little doubt that in all but the most exceptional cases¹⁹ the Justices would be unanimous in affirming this proposition, given the expressed judgments of their colleagues. In practice, the Supreme Court simply acts on the assumed affirmance of this proposition; we might say that settled unquestioned practice constitutes a tacit adoption of the proposition.

Thus far, we have merely tried to lift up the cover of conventional practice a little, in order to consider some of the questions of collegial obligation that practice conceals. We now turn to a problem that has thrown conventional practice into disarray, and which will draw us somewhat deeper and more urgently into a consideration of the collegial aspects of multi-judge adjudication.

II

THE DOCTRINAL PARADOX

A. *The Doctrinal Paradox Characterized*

When a single judge, Liza, decides a case with more than one pertinent issue, her view of the general structure of legal doctrine in the area will provide an unproblematic protocol for connecting her judgment on each issue with the appropriate disposition of the case as a whole. Suppose *P* sues *D* for damages flowing from a breach of contract. *D*, in defense, asserts both that no binding contract existed and that, in any event, he fully performed what he promised to do. Liza, if she has an orthodox view of the law of contract, will see the case as presenting two issues, on both of which *P* must prevail if he is to be awarded damages. (We could call a case with this simple two-issue structure a "*D*-favoring" case, since *D* wins if he prevails on either issue.)

announce a rationale satisfactory to her colleagues. It is not clear whether a dissenter has as much license to compromise her views as does the Justice writing for the majority. Complicating the question in both directions is the fact that the authors of dissenting opinions are often writing not just for themselves but for some number of colleagues.

If anything, concurring opinions create more tangled issues. Certainly, a Justice who concurs in the judgment has an obligation, when deciding whether to join a majority opinion, to consider some compromise of her individual views. Once this obligation is discharged, however, and she decides to write a separate concurrence, an additional question arises: does the concurring Justice have the same freedom as the dissenter to state her own views or does she face more pressure to announce a "majority" rationale?

19. We have in mind cases involving the voting paradox to which we have not yet introduced our readers, which could be understood to invite exceptions to this general rule. Indeed, *Union Gas* and *Fulminante* are remarkable, for better or worse, precisely because they are exceptions. See *infra* text accompanying notes 26-36.

But appellate decisionmaking in the United States, as we have been at pains to observe, is rarely the province of a single judge. Appellate tribunals are almost always staffed by three or more judges, and when multi-judge tribunals confront cases with multiple issues the protocol for deciding cases can become quite problematic. Suppose the simple contract case that Liza adjudicated at trial is being reviewed by a three-judge appeals court, and that the judges' views of the merits are as follows:

A SIMPLE PARADOXICAL CASE

Judge	Contract	Breach	Liability (Outcome)
<i>A</i>	Y	N	N
<i>B</i>	N	Y	N
<i>C</i>	Y	Y	Y

Two voting protocols are available to the appeals court,²⁰ and the choice between them will determine the outcome of the case. The court could simply tally votes on the outcome of the case, on the bottom-line question of whether or not *P* is entitled to damages. If the court proceeds in this way, *D* will win, since both Judge *A* and Judge *B* would not award damages. We can call this procedure "case-by-case" voting, since it reflects the view of each judge on the outcome of the case as a whole.

Alternatively, the court could tally the votes on each pertinent issue, and then combine these results as dictated by the general structure of contract law. If the court proceeds in this way, *P* will win: on the issue of whether a valid contract was formed the votes of Judges *A* and *C* will comprise an affirmative majority; on the issue of whether *D* has breached the contract the votes of Judges *B* and *C* will do so; and contract law will assemble these conclusions to direct an award of damages against *D*. We can call this procedure "issue-by-issue" voting since it reflects the view of each judge on the constitutive issues.

The fact that a court in a rather simple case of this sort could face a choice between two voting protocols, each of which seems quite reasonable, indeed natural, to follow and yet discover that the outcome of the case will turn on the choice between them, is the product of a structural paradox latent in appellate adjudication.²¹ We can call this the doctrinal

20. In fact, the court might choose to vote in other ways as well. To see this, note that there are four possible resolutions of the two issues—(Y,Y), (Y,N), (N,Y), and (N,N). The court might act as a committee governed by Robert's Rules of Order: a judge would make a motion that might then be amended, and so on.

21. In simple disputes that present only one cause of action (or ground for recovery), the doctrinal paradox will arise if two conditions are met: (1) a majority of judges would each rule against the plaintiff on at least one issue, and (2) there is no one issue on which a majority of judges would join in ruling against the plaintiff. Condition (1) ensures that, in case-by-case adjudication,

paradox. While bearing a familial resemblance to other paradoxes more familiar in the literature of social choice, the doctrinal paradox is distinct,²² and distinctly troublesome in the multi-judge court environment.

We have no clear understanding of how a court should proceed in cases where the doctrinal paradox arises. Worse, we have no systematic account of the collective nature of appellate adjudication to turn to in the effort to generate such an understanding. Worse still, judges who have encountered the doctrinal paradox in the course of their collective adjudicative efforts have barely paused to reflect on their quandary. The embarrassment of all this to an orderly sense of appellate adjudication is amply demonstrated by the Supreme Court experience.

B. Supreme Court Encounters with the Doctrinal Paradox

In the House of Lords (and other English "superior" courts), the historic tradition, still honored at least formally, is that each judge gives a "speech," offering both a personal ruling on the outcome of the case and reasons to support that ruling;²³ these are the outward trappings of a

the court finds *against* the plaintiff. Condition (2) ensures that, in issue-by-issue adjudication, the court finds *for* the plaintiff.

Kornhauser, *Modeling Collegial Courts II*, *supra* note 1, at 447, discusses a more complex situation in which the plaintiff asserts multiple grounds for recovery, each of which presents many issues. In this instance, the plaintiff need only prevail in one cause of action (though in that cause of action she must prevail on every issue) to prevail in the case.

Unfortunately, we cannot at this point state necessary and sufficient conditions for the doctrinal paradox generally.

22. Almost every discussion of voting mentions, alludes to, or focuses on the Condorcet paradox. On the Condorcet paradox (or the paradox of voting), see KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 93 (2d ed. 1963). In the Condorcet paradox, at least two voters make pairwise choices (by majority rule) among at least three alternatives. For some pattern of preferences among the voters, these pairwise comparisons lead to a cyclic rule of social choice. The standard example assumes three voters *A*, *B*, and *C* with preferences over three alternatives *x*, *y*, and *z* as follows:

$$\begin{aligned} A: & x > y > z \\ B: & y > z > x \\ C: & z > x > y \end{aligned}$$

In pairwise majority votes *x* beats *y*, *y* beats *z*, and *z* beats *x*.

In our context, each alternative *x* (or *y* or *z*) is complex. It is the complete resolution of the case and every issue within it. One may apply the structure of social choice theory to our context by assuming that each judge has a complete, transitive "preference" over all possible complete resolutions of a given case.

In this framework, the doctrinal paradox is distinct from the Condorcet paradox. To show this one need only show that, for at least one "preference" profile, the doctrinal paradox may arise when no Condorcet paradox exists and that, for at least one preference profile, the doctrinal paradox does not exist when the Condorcet paradox exists. See Kornhauser, *Modeling Collegial Courts II*, *supra* note 1, at 453. The appendix to that paper also shows that the doctrinal paradox differs from the logrolling, sequential, and Ostrogorski "paradoxes," all of which are related to the Condorcet paradox.

23. Modern practice in the House of Lords apparently has more collegial overtones than this description suggests. See ALAN PATERSON, *THE LAW LORDS* 89-119 (1982). The American collegial model may have in fact been inspired by the practices developed in the King's Bench in the

redundant enterprise. American practice, almost from the outset,²⁴ has been different. Supreme Court opinions are more collegial, with groups of Justices joining in one or more opinions, supporting or dissenting from the outcome sponsored by a majority of their number. Early in the Court's experience unanimity was more the rule than the exception,²⁵ and throughout its history a small handful of opinions have sufficed in all but a few cases.

The move from the original English practice to the American practice entails more than the mechanical fact of an economy in the number of opinions and the sharing of the work of writing them. It involves a commitment to, and a demand for, collegial deliberation, and supports an ideal of a multi-judge court acting as an entity, not merely an aggregation of individual judges. Even in the present, rather fractious moment, the Supreme Court norm remains that of a collegial court striving towards the collective expression of shared judgments; in other courts in the United States the norm of collegial adjudication is typically far better realized in practice.

One important structural feature of the English practice has survived the American transformation of collective adjudication. With few exceptions, each Justice on the Supreme Court has taken herself to be individually sovereign not only over the choice among rationales, but also over the choice among outcomes in each case. American practice has mirrored early English practice in this strong sense: deliberative persuasion and consensus notwithstanding, at the end of the day each Justice aligns herself with the outcome she would have chosen were she deciding the case alone. Consequently, once the convictions of American judges have been infected by their collegial environment, the outcome in

period between 1756 and 1788 when Lord Mansfield presided. During his tenure, Mansfield forged a tradition in which concurring or dissenting opinions were extremely rare. See CECIL H.S. FIFOOT, *LORD MANSFIELD* 46-47 (1977).

24. A sample of state court decisions in the last quarter of the 18th century indicates that even by this early point *seriatim* delivery of decisions was the exception rather than the rule, and that the norm was unanimous decisions by the court as a whole. See Michael Polonsky, *The Opinion of the Court* 4-8 (May 29, 1992) (unpublished manuscript prepared for a seminar in American Legal History taught by Aviam Soifer at Boston University, on file with authors). The great respect enjoyed by Lord Mansfield in the former colonies may account for this early development, at least in part. See A.J. Levin, *Mr. Justice William Johnson, Creative Dissenter*, 43 MICH. L. REV. 497, 514 (1944) (quoting a letter from Thomas Jefferson in which he unsympathetically attributes this practice in Virginia to the adoration of Mansfield by Judge Pendleton); *supra* note 23. John Marshall is credited with forging this tradition in the Supreme Court. See 3 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 16 (1919); HERBERT A. JOHNSON, *Introduction: The Business of the Court*, in *FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15*, at 373, 380-81 (The Oliver Wendell Holmes Devise History of the Supreme Court of the United States, vol. 2, Paul A. Freund ed., 1981); Robert G. Seddig, *John Marshall and the Origins of Supreme Court Leadership*, 36 U. PITT. L. REV. 785, 796-97 (1975).

25. Polonsky, *supra* note 24, at 1.

each case has been the outcome that would have been reached had the traditional English protocol been in place.

Two recent votes by Justices White and Kennedy respectively seem inconsistent with this view of collegial adjudication on the Supreme Court. The first, by Justice White, determined the outcome of *Pennsylvania v. Union Gas Co.*²⁶ That case presented the Court with two principal questions: First, can Congress, acting under the authority of the Commerce Clause, make the states vulnerable to private suits in federal court, despite the Eleventh Amendment? And second, assuming Congress can do so, is the Superfund Amendment and Reauthorization Act of 1986 (SARA)²⁷ appropriately construed to be an exercise of this power? Justice White was persuaded that Congress had the power in question but had not exercised it in SARA.²⁸ Had he been deciding the case alone, accordingly, he would have ruled that the State of Pennsylvania was immune from suit in federal court by the Union Gas Company;²⁹ he voted, however, in support of the view that the Company's suit could go forward, and his was the fifth vote necessary to secure that outcome.³⁰

Justice Kennedy's similarly aberrant vote was in *Arizona v. Fulminante*.³¹ In the course of deciding *Fulminante*, the Court addressed three questions: First, was the confession of the defendant—admitted into evidence at his trial—coerced?³² Second, where coerced confessions are erroneously admitted into evidence in criminal trials, does the harmless error doctrine apply?³³ And third, assuming that questions one and two are answered affirmatively, was the admission of the confession in the defendant's trial harmless error?³⁴ In Justice Kennedy's eyes, the confession was voluntary, the harmless error doctrine should apply to coerced confession cases, and the admission of the defendant's confession would not have been harmless, had it been error.³⁵ Given his view that the confession was voluntary and obtained under entirely constitutional circumstances, as a single judge, Kennedy would have affirmed the defendant's conviction. He voted, however, to invalidate the conviction. As with Justice White in the *Union Gas* case, his vote may very well have

26. 491 U.S. 1 (1989).

27. Pub. L. No. 99-499, 100 Stat. 1613 (amending the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), 42 USC §§ 9601-9675 (1988 & Supp. II 1990)).

28. *Union Gas*, 491 U.S. at 55-57.

29. *See id.*

30. *Id.* at 45.

31. 111 S. Ct. 1246 (1991).

32. *Id.* at 1251-53.

33. *Id.* at 1263-66.

34. *Id.* at 1257-61.

35. *Id.* at 1266-67 (Kennedy, J., concurring in the judgment).

been the necessary vote to secure that outcome.³⁶

While at least superficially irregular, these votes by Justices White and Kennedy are not mysterious. *Union Gas* and *Fulminante* are both cases in which the doctrinal paradox arises. White and Kennedy, though almost certainly not conceiving of the question in these terms, each chose to adopt the issue-by-issue voting protocol rather than the case-by-case protocol. This becomes clearer if we take a moment to discuss the distinction between case-by-case voting and issue-by-issue voting in the context of individual votes by particular Justices on the Supreme Court.

Imagine a case in which the Court is reviewing the conviction of a federal criminal defendant who raises two constitutional objections to her trial: that the Fifth Amendment was violated by the admission into evidence of her involuntary confession, and that the Fourth Amendment was violated by the admission into evidence of certain materials obtained in the course of an unlawful search of her automobile. She seeks a new trial. The government seeks to have her conviction affirmed. Now suppose the Justices of the Court have the following views of the case (note, that, like our earlier contract example, the structure of legal doctrine is such that this is a "defendant-favoring" case):

A PARADOXICAL SUPREME COURT CASE
(CENTRALIZED VOTING PROTOCOL)

Justice	Fourth Amendment Violated	Fifth Amendment Violated	New Trial (Outcome)
1	N	N	N
2	N	N	N
3	N	N	N
4	N	N	N
5	Y	Y	Y
6	Y	Y	Y
7	Y	Y	Y
8	N	Y	Y
9	Y	N	Y

The Court could simply tally the votes of the Justices on the outcome of the case; the defendant would then prevail by the margin of a 5-4 vote. This would be an instance of case-by-case adjudication by the Supreme Court.

36. One has to speak in this speculative voice because Justice Souter, curiously, cast an incomplete roster of votes. He supported the view that the confession was voluntary, and joined in the conclusion that the harmless error doctrine applied to the admission of coerced confessions, but he did not take a position on the question of whether the error in *Fulminante* would have been harmless and did not vote on the outcome of the case.

Alternatively, the Court could tally the votes of the Justices on each of the defendant's constitutional complaints, and then reach the outcome by combining these results in the manner dictated by the Court's general doctrinal understanding of constitutional claims of this sort—namely, that the defendant is entitled to a new trial if, but only if, she prevails on either of her constitutional claims. Under this voting procedure the defendant would lose, since by a vote of 5-4, each one of her constitutional objections would be rejected by the Court. This, of course, would be issue-by-issue adjudication.

It is natural, perhaps, to think of these two voting protocols as part of the voting machinery of the Court itself. In case-by-case adjudication, we picture the Court as expecting each Justice to express a final view on the outcome of the case, and as then simply counting noses. In issue-by-issue adjudication, in contrast, we picture the Court as expecting an expression of views on each issue, and as discouraging or at least ignoring any references made by the Justices to their personal view of the outcome, since the outcome will be a matter of simple doctrinal arithmetic.

But the choice between protocols need not be made in this way. The Court could proceed in the fashion common to English and American courts, and have the Justices report their views as to the appropriate dispositions of the cases before them, yet still elect between the two voting protocols. The choice would not be reflected in the formal machinery of the Court, but in the view taken by each Justice of her individual obligation to the views of her colleagues when casting her vote on the outcome of a case. An individual Justice could take herself to be bound to vote her own personal view of the correct outcome of the case, as driven by her own views of the constituent issues (an individual case-by-case protocol). Alternatively, she could take herself to be bound to vote for the outcome that accords with the will of the majority of the Court on the constituent issues (an individual issue-by-issue protocol). Though expressed in either case as individual votes on outcome, the consistent acceptance of either of these understandings by the Justices would of course produce the same outcomes as their court-centered equivalents:

INDIVIDUAL VOTING PROTOCOLS IN A PARADOXICAL CASE

Justice	Fourth Amendment Violated	Fifth Amendment Violated	New Trial (Case-by- Case Vote)	New Trial (Issue-by- Issue Vote)
1	N	N	N	N
2	N	N	N	N
3	N	N	N	N
4	N	N	N	N
5	Y	Y	Y	N
6	Y	Y	Y	N
7	Y	Y	Y	N
8	N	Y	Y	N
9	Y	N	Y	N

The singular votes of Justices White and Kennedy are simply instances of issue-by-issue voting on the individual rather than the centralized court level. In *Union Gas*, Justice White was outvoted, 5-4, by a majority of his colleagues who believed that Congress had evidenced a clear intent to make the states vulnerable to suit in federal court under SARA, and he voted to permit the suit against the State of Pennsylvania to go forward on the strength of their determination of the intent issue.³⁷ Similarly, in *Fulminante*, Justice Kennedy was outvoted, 5-4, by a majority of his colleagues who felt that the confession was involuntary and therefore voted to reverse the conviction of the defendant and remand the case for a new trial.³⁸ Each in effect treated the majority view on each discrete issue in the case before him as the Court's view, binding on him.

We have perhaps made these events seem a little less unruly, a little more understandable, by this characterization: the votes of Justices White and Kennedy must be seen in context of the doctrinal paradox as options for one of two entirely plausible voting protocols. But much more has to be said if we are to gain a useful understanding of the circumstances under which such votes can be justified.

37. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 56-57 (1989) (White, J., concurring in the judgment in part and dissenting in part).

38. 111 S. Ct. at 1267 (Kennedy, J., concurring in the judgment).

III

THE EMBARRASSED STATE OF CURRENT PRACTICE

A. *Current Practice Is Chaotic*

A prominent and arresting feature of the choice of voting protocol by White and Kennedy is its eccentricity. Consider a little more closely, for example, the voting pattern of the Court in *Union Gas* itself:

PENNSYLVANIA V. UNION GAS CO.

Justice	Power to Abrogate	Exercised in This Statute	Can Pennsylvania Be Sued Here? (Outcome)
Blackmun	Y	Y	Y
Brennan	Y	Y	Y
Marshall	Y	Y	Y
Stevens	Y	Y	Y
White	Y	N	Y
Kennedy	N	N	N
O'Connor	N	N	N
Rehnquist	N	N	N
Scalia	N	Y	N
	Y (5-4)	Y (5-4)	Y (5-4)

The most vivid contrast, of course, is between Justices Scalia and White. Their situations are at least roughly symmetrical: each believes that only one of the two elements necessary to make Pennsylvania vulnerable to suit in federal court under SARA is satisfied. But while White allows the issue-by-issue tally of his colleagues' views on the missing element to supervene, Scalia does not. He clearly follows the case-by-case protocol. We can sharpen this disparity by noting that while Justice White defers to Justice Scalia's judgment by allowing himself to be ruled by the slender majority that believes SARA to be an abrogation of Pennsylvania's Eleventh Amendment immunity if Congress had the power to effectuate such an abrogation, Justice Scalia does not return the favor; his vote on the outcome of the case is unaffected by Justice White and those of his colleagues who believe that Congress has this power, despite the slender majority they comprise.

Actually, Justice White's voting rule is rejected by each of the Justices in *Union Gas* for whom the question of case-by-case versus issue-by-issue voting arises. The question arises for each of the five Justices (White, Kennedy, O'Connor, Rehnquist, and Scalia) who is outvoted on either of the two salient issues, and all but Justice White vote case-by-case. The only difference between White and Scalia on the one hand and

Kennedy, O'Connor, and Rehnquist on the other is that White and Scalia agree with the majority on one issue, while Kennedy, O'Connor, and Rehnquist are outvoted on both issues. In principle, it is hard to see why this should be important if issue-by-issue voting is, as a general matter, the appropriate individual protocol.

Similarly, Justice Kennedy's embrace of the issue-by-issue protocol in *Arizona v. Fulminante* not only reverses his own choice of voting protocol two years earlier in *Union Gas*, it is unique among his colleagues in *Fulminante*:

ARIZONA V. FULMINANTE

Justice	Coerced Confession	Harmless Error Applies	Error Was Harmless	New Trial (Outcome)
Blackmun	Y	N	N	Y
Marshall	Y	N	N	Y
Stevens	Y	N	N	Y
White	Y	N	N	Y
Scalia	Y	Y	Y	N
<i>Kennedy</i>	N	Y	N	Y
O'Connor	N	Y	Y	N
Rehnquist	N	Y	Y	N
Souter	N	Y	?	?
	Y(5-4)	Y(5-4)	N(5-3-?)	Y(5-3-?)

Kennedy is the only Justice among those who vote for a new trial as the outcome of the case who is confronted with a choice between issue-by-issue and case-by-case voting: the issue-by-issue protocol would unseat Blackmun, Marshall, Stevens, and White on the applicability of the harmless error test, but this would not affect their votes on the case because Justice Kennedy joins them in the conclusion that the error in this case was not harmless. However, all four of the Justices who ultimately vote or would vote against the majority outcome (Scalia, O'Connor, Rehnquist, and probably Souter) do so in defiance of the individual issue-by-issue protocol: given the majority view that *Fulminante's* confession was coerced and that its admission at his trial was not harmless error, every Justice on the Court would be obliged by the issue-by-issue protocol to vote for a new trial.

This discussion of *Union Gas* and *Fulminante* may overstate our ability to capture a single attitude towards the choice of voting protocols held by the Justices other than White and Kennedy. While apparently accepting case-by-case voting as the bottom line, the Justices in both of these cases exhibit conduct that, at the very least, invites an issue-by-

issue focus. In *Union Gas*, Justices Kennedy, O'Connor, Rehnquist, and Scalia believe that Congress lacks the authority to abrogate immunity in Commerce Clause cases, yet they take formal positions on the question of whether Congress expressed its intent to do so clearly enough. Indeed, as we have observed, it is Justice Scalia's vote that creates the bare majority on the question to which Justice White defers. Similarly, in *Fulminante*, Justices Blackmun, Marshall, Stevens, and White, all of whom strenuously resist the application of the harmless error doctrine in coerced confession cases, each register a formal position on the question of whether the admission of the contested confession was harmless error. Indeed, in recent years Justices commonly have separated their opinions into numbered parts by issue, inviting the other Justices to shop among the parts, creating an environment of issue-by-issue deliberation.

Still, Justices White and Kennedy are alone among their colleagues in either *Union Gas* or *Fulminante* in choosing to cast their bottom line votes in accord with the issue-by-issue protocol. Indeed, it appears that case-by-case voting historically has been the tacit—quite possibly unreflective—but encompassing norm of the Court.³⁹ Some measure of the Court's reflexive commitment to the case-by-case protocol is offered by *National Mutual Insurance v. Tidewater Transfer Co.*⁴⁰

In *Tidewater*, the Court approved the extension of diversity jurisdiction to the citizens of the District of Columbia, despite the fact that both of the rationales for that result were emphatically rejected by substantial majorities of the Justices. Three Justices were drawn to the view—then and now an apostasy of federal jurisdiction faith—that under certain circumstances Congress may give an otherwise well-formed Article III court some modicum of jurisdiction outside the bounds of Article III.⁴¹ Two other Justices were persuaded—despite the contrary teaching of an unbroken line of precedent extending back to John Marshall—that the word "State" in Article III could be read to encompass the District of Columbia.⁴² Hence the improbable and unsettling⁴³ vote of the Court, 5-4 in favor of upholding the extension of jurisdiction:

39. See Rogers, *supra* note 1, at 442-63.

40. 337 U.S. 582 (1949) (plurality opinion).

41. *Id.* at 583-604.

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

43. See *infra* text accompanying notes 49-51, where we consider how disruptive to the coherent development of legal norms a decision like *Tidewater* could easily be.

NATIONAL MUTUAL INSURANCE V. TIDEWATER TRANSFER CO.

Justice	Jurisdiction Beyond Article III Is OK	"State" Includes D.C.	Statute Valid (Outcome)
Black	Y	N	Y
Burton	Y	N	Y
Jackson	Y	N	Y
Murphy	N	Y	Y
Rutledge	N	Y	Y
Douglas	N	N	N
Frankfurter	N	N	N
Reed	N	N	N
Vinson	N	N	N
	N(6-3)	N(7-2)	Y(5-4)

No Justice in *Tidewater* appears to have thought that the issue-by-issue voting was the appropriate response to the embarrassment of the moment. Even Justice Frankfurter, who dissented from both of the disfavored rationales and hence from the outcome, and plainly thought the voting pattern in the case reflected badly on the Court, stopped short of recommending this change in protocol.

B. Current Practice Is Unconsidered

Against this backdrop, the votes of Justices White and Kennedy that have attracted our attention are problematic in at least two respects. First, there is the manner in which the issue-by-issue voting protocol was chosen. Second, there is the overarching question posed whenever the doctrinal paradox asserts itself: which protocol ought to govern judicial decisionmaking? We will discuss these in turn.

White and Kennedy seem to have regarded their choice of voting protocol as unfettered by convention or collegial practice, and as requiring little or no analytical justification. Ironically, in the course of yielding to their colleagues on the substance of particular issues in the cases before them, White and Kennedy ignored an encompassing tradition of case-by-case voting on the Court and the nearly unanimous practice of their colleagues. Their colleagues, in turn, seem to have regarded this as benign and appropriate, if worthy of comment at all. Chaotic voting behavior of this sort is not the inevitable product of the individual choice of protocol. Nor is it required by the Anglo-American practice that invests each Justice with ultimate sovereignty over his or her vote on the case. On other matters, judges are sovereign in this ultimate sense, but

we regard them, and they regard themselves, as bound in the main to follow collegial precedent.

We can think of the practices of a body like the Supreme Court as ranging along a spectrum. At one end are those matters that are collegially or centrally determined in a deep, structural sense. The rule of four, pursuant to which the vote of four Justices to hear a matter brought to the Court on certiorari is decisive, is an instance of such structural centralization.⁴⁴ In the middle are those matters—comprising most of the Court's business—that are not structurally centralized but over which collegial consensus exerts at least a substantial, “gravitational”⁴⁵ pull. Ordinary matters of legal doctrine are an obvious example of this, with judges in the Anglo-American tradition on the one hand being sovereign over the expression of outcome and rationale, and yet on the other hand taking themselves to be restricted in the sound exercise of that sovereignty by precedent.

At the far end of this spectrum are matters over which the sovereignty of individual judgment is absolute. It is not entirely clear that any of a multi-judge court's business ought to be this starkly noncollegial, or even that any is in modern practice. For the Supreme Court, the decision of a Justice to support or oppose the granting of certiorari review may be one of this independent sort, leaving certiorari practice collective only in the redundant sense; despite the presence of formal guidelines for certiorari,⁴⁶ the largely invisible process of choice supports this view of certiorari as an independent decision.

The choice between case-by-case voting and issue-by-issue voting, as a mechanical matter, could be structurally centralized. It could be the stable understanding and practice of a court that each judge casts a vote in favor of the outcome of the case as she would have independently decided it, and that the court then acts on the simple majority tally that results (case-by-case adjudication). Throughout most of the Supreme Court's history, in fact, this seems to have been the Court's practice. Alternatively, it could be the stable understanding and practice of a court that each judge casts a vote in favor of the correct resolution of each issue in the case, that each issue is then decided by a simple majority tally of these votes, and that the case itself is decided by assembling the decided issues in the manner dictated by accepted doctrine (issue-by-issue adjudication).

The choice of voting protocols might be decentralized as are other, more substantive matters of the Court. As with matters of doctrine and

44. On the rule of four, see Richard L. Revesz & Pamela S. Karian, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1068-109 (1988).

45. Ronald Dworkin uses the term in this sense. RONALD DWORIN, *Hard Cases, in TAKING RIGHTS SERIOUSLY* 81, 111-13 (1977).

46. SUP. CT. R. 10 (1992).

application, the Justices could be sovereign in the strong sense that they ultimately cast votes on the outcome of the case, yet still properly regard themselves as bound by the Court's prior, collective decision as to the correct voting protocol. For example, suppose the Court had firmly decided that in all or some multi-issue cases, issue-by-issue voting was the appropriate protocol. Justices, like White in *Union Gas* and Kennedy in *Fulminante*, who found themselves outvoted on issues which in their eyes forced a decision on the case would then support outcomes with which they disagreed. They would express their substantive disagreement with the Court, and, if they harbored a further disagreement with the Court's choice of the issue-by-issue protocol, they might choose to express that disagreement as well. Still, in the end, each Justice would take himself to be bound by the protocol.

Or the choice of voting protocols might be decentralized more radically, with the Justices free to adopt their own voting protocol without regard to the past practice of the Court as a whole. This seems to be the way in which the Justices of the Court, encountering the problem casually in *Union Gas* and *Fulminante*, have so far treated the issue.

There are good reasons for thinking that the method of aggregating the views of the Justices (or the judges on other multi-judge courts) ought to be part of the machinery of the Court, or at least firmly settled practice among the Justices. Consider *Union Gas* once again, with just this revision: suppose the Justices acted uniformly with regard to the appropriate voting protocol. The outcome would depend on whether the chosen protocol was case-by-case or issue-by-issue.⁴⁷

UNION GAS WITH UNIFORM INDIVIDUAL PROTOCOLS

JUSTICE	POWER TO ABROGATE	EXERCISED IN THIS STATUTE	SUIT OK (CASE OUTCOME)	SUIT OK (ISSUE OUTCOME)
BLACKMUN	Y	Y	Y	Y
BRENNAN	Y	Y	Y	Y
MARSHALL	Y	Y	Y	Y
STEVENS	Y	Y	Y	Y
WHITE	Y	N	N	Y
KENNEDY	N	N	N	Y
O'CONNOR	N	N	N	Y
REHNQUIST	N	N	N	Y
SCALIA	N	Y	N	Y
	Y (5-4)	Y (5-4)	N (5-4)	Y (9-0)

47. Here, as elsewhere, we have assumed that judicial preferences are separable in that the order in which the issues arise does not alter a judge's view of the correct outcome on an issue.

The choice between these protocols, effectively the choice of the outcome in the case, ought to be a matter of articulate and reflective practice, not the private impulse of each Justice. In *Union Gas* and *Fulminante*, Justices White and Kennedy in effect inflict issue-by-issue voting on their colleagues, who may upon reflection unanimously oppose it.⁴⁸ In both cases every other Justice who was required to choose opted for case-by-case voting. If we were inclined to guess, in light of the Court's encompassing case-by-case practice, we would have to suppose that most, if not all, of the remaining Justices would also opt for case-by-case voting. Surely this is not how the choice of voting protocol—the choice of outcome—ought to be made.

IV

JUDICIAL OBLIGATION ON A COLLEGIAL COURT

A. *A Point of Departure*

Consider, counterfactually, an appellate structure in which a single judge, Liza, hears all cases. When Liza decides a case, she issues an opinion. A judicial opinion is a complex document, signifying the complexity of the event it reports and justifies. In Liza's opinion, she: (1) characterizes the facts of the case, (2) renders final judgment (in the sense that she decides for plaintiff or against plaintiff), (3) reaches various intermediate conclusions on the appropriate resolution of particular issues and causes of action, (4) pronounces (at least sometimes) on the appropriate structure of doctrine, and (5) offers justifications for the final judgment, the intermediate conclusions, and the pronouncements on doctrinal structure.

The most precise and perhaps most durable consequences of Liza's

48. Because the choice between issue-by-issue and case-by-case voting will have practical consequence only when the Court is closely divided on issues important to the outcome of the case, the decision of a single Justice on the Court to vote issue-by-issue will often impose an issue-by-issue outcome on the Court. *Tidewater*, which we discussed earlier, provides a good example. If a single Justice who ultimately concluded that the statute in question was constitutional had chosen to vote issue-by-issue, the outcome in *Tidewater* would have been reversed, just as it was in *Union Gas* and *Fulminante*.

For completeness, we present the following pattern of votes to illustrate an instance in which a single judge's use of issue-by-issue voting does not impose that outcome on the court:

Judge	Contract	Breach	Liability (outcome)
<i>A</i>	Y	N	N
<i>B</i>	Y	N	N
<i>C</i>	N	Y	N
<i>Court</i>	Y	Y	N

In this instance, the views of *A* and *B* determine the outcome in the case. If Judge *C* sees herself as bound by the issue-by-issue vote on the contract issue, her decision on the case should be to find liability. If she believes that she is bound on the breach issue as well, she finds no liability.

action are associated with the judgment she renders. The various sorts of reasons she offers for that judgment, however, have important consequences as well. A lower court will take instruction from this part of the opinion, in both the case at hand and in future cases. Liza and her successors will have an obligation to govern, at least to some extent, their subsequent decisions in accord with the reasons she has given for her judgment as well as with her judgment itself.

To be sure, in the eyes of a lower court, a successor to Liza, or even, on subsequent reflection, Liza herself, the judgment in this case and the reasons Liza gives in support of it may seem to be at cross-purposes. At the moment Liza decides the case and issues her opinion, however, they are, to her eyes, linked parts of a consistent and coherent view of the legal problem posed by the case. That fact itself must have significance for any other judge who understands Liza's decision to have authority over his subsequent judicial behavior. Certainly such a subsequent judge has no intrinsic difficulty in identifying what part of Liza's decision is sponsored by the court which Liza embodies.

Multi-judge courts render even this modest degree of clarity problematic. In particular, in cases where the doctrinal paradox arises, judgment and reason are immediately and inexorably pulled apart, to the potential detriment of the orderly development of legal doctrine. Consider *Tidewater*, where substantial majorities of the Justices rejected both the proposition that the District of Columbia was a "State" within the meaning of Article III, and the proposition that Congress had the power to extend the jurisdiction of Article III courts. The two minorities, however, held differently, and, in case-by-case voting the conjoined minorities dictated the outcome of the case. Obviously, the Court as an entity articulated *no* justification for its outcome. Each justification offered was in fact rejected by a substantial majority of the Court. This conflict between justifying reasons and case judgment is the most objectionable and perplexing feature of the case.

Majorities of the Justices in *Tidewater* agreed on three legal propositions: (1) that the extension of diversity jurisdiction to the District of Columbia was constitutional (proposition T); (2) that the District of Columbia was not a "State" within the meaning of Article III (proposition S); and (3) that Congress' Article III court-shaping authority does not include giving Article III courts a little extra non-Article III business (proposition P). Proposition T was intrinsic to the Court's judgment, and perhaps enjoys a certain pride of place by virtue of that circumstance. Propositions S and P, however, in addition to having commanded more substantial majorities than T, have fairly deep roots in federal court doctrine. Proposition P in particular is a structural proposition of broad applicability, contradiction of which would unsettle many legal understandings in related areas.

Suppose that after *Tidewater* the Court is called upon to determine the constitutionality of a grant of jurisdiction to which only one of the repudiated grounds (S or P) is applicable. For expositional purposes, 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.⁴⁹ The Court faces three alternatives: (1) the Court could overrule *Tidewater* and affirm proposition P that Congress has no power to extend the jurisdiction of Article III courts beyond Article III jurisdiction; (2) the court could affirm *Tidewater* and reverse the previous majority that held for P; or (3) the Court could affirm both the judgment in *Tidewater*, on some ground not articulated in that opinion, and its conclusion P that Congress had no power to extend Article III jurisdiction.⁵⁰

The third option resolves the paradox of *Tidewater*, and, arguably, such a route is open to a subsequent Court. The doctrine of protective jurisdiction, for example, may offer a suitable ground on which to reconcile the apparently contradictory positions of *Tidewater*. The Court, however, has been loath to pursue this rationale.⁵¹ In the absence of an alternative ground—the presence of which, it must be emphasized, would be purely fortuitous—the Court must choose between options (1) and (2). Stare decisis, in some form, supports both these options. In option (1),

49. Stated differently, the analogue of proposition S is taken as clearly true.

50. Each of the three propositions in *Tidewater* can be affirmed (+) or rejected (-). We may initially produce the following chart (where T, S, and P are defined as in the text):

Pattern	T	S	P
1	+	+	+
2	+	+	-
3	+	-	+
4	+	-	-
5	-	+	+
6	-	+	-
7	-	-	+
8	-	-	-

The structure of doctrine and the rules of logic impose some restrictions on permissible patterns. Doctrine requires that (1) the negation of S implies T (if the District of Columbia is within the definition of "State," then the extension of jurisdiction is constitutional), and (2) the negation of P implies T (if Congress can extend the scope of Article III courts, then the extension is constitutional). Thus, patterns 6, 7, and 8 are logically impossible.

Unfortunately, unless the Court finds some third ground, distinct from S and P, on which to affirm T, pattern 1, the apparent outcome in *Tidewater*, is also a logical impossibility because doctrine requires (in the absence of a third ground) that (3) S and P implies the negation of T. In a subsequent case, then, the Court must either abandon one of the three propositions T, S, and P affirmed in *Tidewater* or find an alternative ground on which to affirm T.

In the text, we assume for convenience that, in the ensuing case, the Court cannot abandon proposition S.

51. See, e.g., *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983) (holding that Congress had authority under Article III to enact a statute allowing foreign plaintiffs to sue foreign defendants in American federal courts). For a skeletal version of the protective jurisdiction claim, see *infra* note 59.

the Court affirms the *result* in *Tidewater* but calls into question the results in many other prior cases. Option (2), in contrast, rejects the result in *Tidewater* but maintains the integrity of the line of cases concerning congressional power under Article III.

The obligation of a court to repair inconsistencies that have emerged in the course of adjudicatory events, and to do so at the cost of treating some of those events as error, is not exceptional. There are, however, features of the *Tidewater* story that are both exceptional and unfortunate. Problems would arise even if the Guam case came along immediately after *Tidewater*. And had the Guam case arisen before *Tidewater*, in all probability *Tidewater* itself would have come out differently. *Tidewater* is remarkable in that it installs or ratifies two important propositions of law that starkly contradict its own result. It is an affront to the model of reasoned justification that drives adjudication.

The *Tidewater* story would have had a happier ending if the Court had pursued the issue-by-issue protocol. The Court would have concluded, consistent with its two rather firmly held interpretations of Article III, that the extension of diversity jurisdiction to the District of Columbia was unconstitutional. In addition to its judgment, the Court would have offered lower courts and its own successors the stable extension of well-settled principles. There would have been both a collegial outcome and a collegial rationale, and they would have matched.

Consider *Fulminante*, where Justice Kennedy's vote produced the issue-by-issue outcome. A future Court faces no obstacle to constructing a set of reasons or justifications to attribute to the Court as a whole and to respect as legal authority. The future Court will need only to adopt the issue-by-issue justifications that commanded majority allegiance: Chief Justice Rehnquist's view that the harmless error rule of *Chapman* applied to coerced confessions and Justice White's view that, in the given case, the confession was coerced and its admission influenced jury deliberation.

Before we rush to issue-by-issue voting as the means by which reasons and judgment can be pulled back together in paradoxical cases, however, we should consider the problems that the issue-by-issue protocol can bring in other types of cases. In *Apodaca v. Oregon*,⁵² a tangled point in a tangled line of cases, the Court considered whether a criminal defendant in state court who was constitutionally entitled to a jury trial was also constitutionally entitled to a unanimous verdict as a precondition of conviction. Three questions were addressed by each of the Justices: First, is the unanimous jury required in federal criminal trials? Second, is the question of federal jury unanimity associated with constitutional premises that apply with equal force to state criminal trials?

52. 406 U.S. 404 (1972) (plurality opinion).

Third, is a unanimous jury constitutionally required in state criminal trials in any event? The Justices arranged themselves with regard to these questions as follows:

APODACA V. OREGON

Justice	Required in Federal Trials	Grounded in Applicable Constitutional Premise	Required in State Trials (Outcome)
Brennan	Y	Y	Y
Douglas	Y	Y	Y
Marshall	Y	Y	Y
Stewart	Y	Y	Y
Blackmun	N	Y	N
Burger	N	Y	N
Rehnquist	N	Y	N
White	N	Y	N
<i>Powell</i>	Y	N	N
	Y(5-4)	Y(8-1)	N(5-4)

In *Apodaca*, issue-by-issue voting leads to structural incoherence. Eight of the nine Justices believe that the federal and state rules should be identical although they split evenly on whether that single rule requires unanimity or not. Justice Powell breaks the tie one way for state juries and the other way for federal juries. He offers the only justification for the outcome in *Apodaca* that might be plausibly attributed to the Court as an entity, but his reasoning is rejected by every other Justice.

As another example, consider a slight alteration of the circumstances surrounding *Reed v. Reed*.⁵³ *Reed*, the first modern gender discrimination case, struck down an Idaho law favoring men over women in a contested assignment of the executorship of a decedent's estate. The year is 1970, and the Court is just beginning to think about gender discrimination in the civil rights era. Suppose that the Justices divide into four camps and press their respective views with considerable passion, as follows:

Camp 1 (3 Justices): The Idaho law favoring men over women as executors of estates given equal degrees of consanguinity ought to be measured by the dilute version of the rational basis test prevalent since 1937, and upheld as a rational generalization of business experience and education.

53. 404 U.S. 71 (1971).

Camp 2 (2 Justices): The law ought to be measured by the rational basis test, but in subtly energized form, and invalidated under the Equal Protection Clause. Quite possibly, this camp speaks only indirectly or even remains silent on the issue of gender discrimination as a special case.

Camp 3 (2 Justices): *Camp 2*'s use of the rational basis test is dubious at best, and *Camp 1*'s result is obviously intolerable. Heightened scrutiny (quite possibly the compelling state interest test) is demanded by equal protection under these gender discrimination circumstances, and the law is invalid under that scrutiny.

Camp 4 (2 Justices): The law is invalid not as a special case under the Equal Protection Clause but as an irrebuttable presumption violative of procedural due process. Again, we can assume that the role that gender plays in this group's conclusion is murky at best from the face of their supporting opinion.

So reshaped, *Reed* is simply a rather elaborate and fractured instance of a plurality decision, where there is no rationale embraced by a majority, and therefore, no rationale belonging to the Court. Any plurality opinion case is a paradoxical case lurking in disguise. Consider the structure of a plurality opinion (j here signifies the number of judges on the court in question): (1) There are at least two reasons, $R1$ and $R2$, for a particular outcome, O ; (2) the number of judges who support at least one R is more than $j/2$; and (3) every R is supported by $j/2$ or fewer judges. If every R is considered an "issue," then the preconditions of the aggregation paradox are present.

Issue-by-issue voting would produce an unhappy result in our modified *Reed*. Although the Court would agree, 6-3, that the law is invalid, no majority would join in support of any rationale. On an issue-by-issue basis, the challenge to Idaho's law would fail. The consequences of this improbable conclusion would be the inverse of *Tidewater*, but worse. It is intolerable 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.

So, we are left at this point with two negative propositions. First, the presently unconsidered, ad hoc approach of the Justices to cases that present the doctrinal paradox leaves much room for improvement. Second, however desirable a considered and settled approach to such cases may be, no simple rule favoring one voting protocol in all paradoxical cases can produce universally appealing results.

It may seem that we have worked rather hard only to arrive at a

point of departure.⁵⁴ We now have at hand, however, the material from which to draw an approach to paradoxical cases. That the blanket adoption of neither protocol is acceptable tells us a good deal about the mechanism by which a multi-judge court confronting a paradoxical case should select its protocol. Moreover, the very cases that disfavor a blanket rule are suggestive of the sorts of circumstances that favor one protocol over the other.

B. *The Metavote*

We can think about the decisions of multi-judge courts as involving a question that does not arise in single-judge courts: how ought the court as a collective entity decide the case, in light of the distribution of convictions among the members of the court as to the complex of matters bearing on the decision of the case? That question, of collegial agency, is posed at a different level and at a different time than the other questions before the court. It is a question that affects the court's decisions on all other questions, and it arises only after the judges on the court have arrived at their conclusions with regard to the other questions.

In the ordinary case, the answer to this metaquestion is so clear that the question itself is effaced. As we observed earlier, when the Supreme Court hears a case and, for example, six Justices agree as to both outcome and rationale, while one Justice concurs and two others dissent, the question of collegial agency is firmly settled. Were the Justices to vote on whether the judgment of the Court should be that sponsored by the majority, and the rationale of the Court that proffered by the majority, we would expect the Justices to be untroubled and unanimous in their affirmation of each of these propositions.

In a paradoxical case, however, the question of collegial agency is open and problematic. In such a case, a multi-judge court ought to make that question 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.

Tidewater is once again a useful example. At some point in their deliberative process, the Justices became aware of the unfortunate distribution of convictions among them as to whether "State" included the District of Columbia, whether Article III named firm boundaries on the

54. "Until yesterday I had no idea that there were any families or persons whose origin was a Terminus." OSCAR WILDE, *THE IMPORTANCE OF BEING EARNEST*, act III, reprinted in *THE BEST KNOWN WORKS OF OSCAR WILDE* 429, 464 (1927) (Lady Bracknell speaking to Jack Worthing).

jurisdiction of an Article III court, and whether, in consequence, Congress could expand diversity jurisdiction to include citizens of the District of Columbia. At that point, the issue of collegial action should have been put on the table; the bottom-line question would have been whether to derive the judgment case-by-case or issue-by-issue. Ultimately, the Court should have decided that question by majority vote and undertaken to justify its decision.

Although it is premature to consider what reasons would justify an individual's decision to resolve the question of collegial action one way or the other,⁵⁵ it is important to note what kinds of reasons are involved. The question for a Justice considering the appropriate collegial disposition of *Tidewater* is neither how she would decide the case were she deciding it alone nor what collective result most closely serves her individual view of the case, but rather how she believes the Court should decide the case in light of the distribution of convictions about the case among all the Justices on the Court. In both principle and practice, she could find reasons for collegial choice that point decisively away from the outcome that she would have favored had she been deciding the case alone.

Consider again the ordinary, nonparadoxical Supreme Court case with a voting distribution of 6-1-2 where, despite the foregone conclusion, the Court addressed the question of collegial action. Presumably each of the three Justices who disagreed with the six-Justice majority would recognize powerful, governing reasons for agreeing that the majority outcome and rationale should be treated as the action of the Court. This would not be a concession that the majority was right on the merits, but rather an assent to simple majority rule as the mechanism for assigning behavior to the agency of the Court.

In *Tidewater* as well, the five Justices who believed that diversity jurisdiction could extend to the District of Columbia should be able to identify reasons for adopting the issue-by-issue protocol there, even though the consequence would be an outcome that diverged from their individual judgment on the merits. We have already seen enough of the havoc *Tidewater* could wreak to anticipate the drift of such reasons. Conversely, the remaining four Justices might well identify reasons for the actual outcome in *Tidewater*; after all, the case-by-case protocol has been the encompassing norm of the Court throughout its existence. Both groups of Justices should see and react to the question of collegial action as distinct from their individual views of the case, in terms largely, if not completely, accessible to each other.

Paradoxical cases may nonetheless generate controversy at the collegial action stage, especially because of the paucity of judicial experience

55. We take this question up in general *infra* Part V.

in addressing the questions that attach to the issue of collegial action. Moreover, even judges who act in the best of faith and cleave to the job of keeping the question of how they would adjudicate the merits separate from what result and rationale should be assigned to the court will in some cases encounter connections between the two questions. These connections will direct controversy about the first into deliberations about the second. A judge who thought that the outcome in a paradoxical case should reflect that part of majority consensus that was in some sense the deepest or most firmly held by the court as a whole would have to determine which among the diverse convictions of her colleagues enjoyed this priority. She would be giving an account of their collective commitments that would quite legitimately be inflected by her own judgments.⁵⁶ This might be true, for example, of a Justice in our modified *Reed* at the collegial action stage. Her own judgments might well influence her decision whether to give priority to the Court's consensus over the infirmity of the gender preference at issue there, or to the absence among the Court of a shared understanding of doctrine to support that consensus.

The separate resolution of the question of collegial action in paradoxical cases, which we have dubbed the metavote, has several advantages. It makes possible the development of a systematic, reflective jurisprudence of collective judicial action. It preserves the firmly entrenched practice of each judge casting her sovereign vote over the disposition of the case, while detaching that practice from an unconsidered commitment to case-by-case adjudication, and opening the door to issue-by-issue adjudication in appropriate cases. Most importantly, it offers a procedure for choosing between the protocols that does not insist on a blanket choice or a litmus test, but instead provides for nuance and particularity. *Tidewater* may instruct that case-by-case adjudication is not inevitably the best course, but *Apodaca* and our modified *Reed* examples counsel against the thought that issue-by-issue adjudication is inevitably superior, or that simple formulas can effectuate a sound choice between the protocols. We can better see why this is so if we begin to explore possible grounds of choice in the collegial action phase of paradoxical cases. That exploration is our one remaining enterprise.

Before we take up this question of the grounds of choice in paradoxical cases, we must note a matter of terminology. As a shorthand, we have referred to the choice facing a multi-judge court in paradoxical cases as the choice between voting protocols, and we will continue to do so. In an important sense, though, the grounds of choice that we will canvass do not offer reasons to prefer one voting protocol over the other, but rather reasons to prefer the outcome dictated by one protocol over

56. Ronald Dworkin offers such a theory of interpretation. RONALD DWORBIN, *How Law Is like Literature*, in *A MATTER OF PRINCIPLE* 146 (1985).

the outcome dictated by the other. The preferred outcome is not preferred because it is sponsored by one of the protocols, but rather because of the connection between that outcome on the one hand and, on the other hand, the distribution, depth, and durability of convictions among the members of the court, as well as certain extrinsic considerations. The court is thus actually choosing between outcomes, not protocols.

V

GROUNDS OF CHOICE IN PARADOXICAL CASES

Collegial courts have various reasons for opting between case-by-case voting and issue-by-issue voting in paradoxical cases. These reasons do not map tidily onto the kinds of cases in which the doctrinal paradox can arise; in some instances they overlap, and in some instances they conflict. The choice between protocols, like other judicial choices, will sometimes involve close and contestable judgment. What follows, accordingly, is not a simple guide but rather a discussion of some of the reasons that should drive the judicial choice among protocols. Like other matters broached in this essay, this inquiry takes place in largely uncharted territory, and is exploratory rather than complete or definitive.

A. Collegial Reflective Equilibrium

While the doctrinal paradox is a creature of multiperson decision-making, the divergence of reason and outcome that is its essence is replicated in solitary experience.⁵⁷ Our personal normative commitments implicate both reasons and outcomes, and the two can conflict. Indeed, normative reflection and argument are often animated by the observation of such conflict. If you have come to hold that all lies are bad, but encounter a case where a lie seems not to be bad, then you have a potent incentive to change either your general view about lies or your judgment about the troubling case. Which you hold onto—your more general or your more particular view—will be a function of the comparative force of your competing commitments.⁵⁸

No single judge on a multi-judge court has quite the same incentive to repair the crack that opens between reason and outcome in a paradoxical case. In the individual case of conflicting judgments, one's own reflective integrity is at stake, and the root impulse to arrive at a correct outcome insists on a resolution of the conflict. In the multi-judge, paradoxical case, no single judge need feel this same urgent tug towards resolution. Each judge has satisfied herself, we assume, that her reasons are sound and that the outcome she has chosen is demanded by those rea-

57. See, e.g., S.L. HURLEY, *NATURAL REASONS: PERSONALITY AND POLITY* 136-70 (1989) (arguing for modeling individual rationality according to models of collective decisionmaking).

58. See JOHN RAWLS, *A THEORY OF JUSTICE* 48-49 (1971).

sons. The embarrassment is entirely the court's: the divergence between reasons and outcome does not impugn the soundness of any specific judge's decision.

Nevertheless, there is a useful analogy between the individual and collective cases. An important part of what makes the use of the case-by-case protocol so potentially troublesome in *Tidewater* is that the Court is left with an outcome which it is obliged to assimilate into the corpus of results that bind future cases. That outcome, however, is associated only negatively with relevant propositions of law to which a majority of the Court is more durably committed.

Suppose the Justices in *Tidewater* were put to a choice between the following: (1) uphold the extension of diversity jurisdiction to the District of Columbia, but in so doing, accept as feasible and binding a collective obligation to work in future cases towards a shared view of Congress' jurisdiction-granting authority that justifies that result; or (2) invalidate the extension of diversity jurisdiction and ratify the extant legal propositions that the District of Columbia is not a state within the meaning of Article III and that Article III marks the boundaries of Congress' jurisdiction-granting authority. Suppose further that we make these assumptions about the convictions of the Justices on the *Tidewater* Court:

- (1) Most or all of the nine Justices agree that the extension of diversity to citizens of the District of Columbia is constitutionally valid only if "State" can be read in Article III as inclusive of the District or if otherwise well-composed Article III courts can be given modest amounts of judicial business that fall outside the subject matter competence delineated in Article III.
- (2) The shared negative view of these two propositions—every Justice has a negative view of at least one of these propositions, and four of the Justices have negative views of both—is secure in the following sense: most or all of the Justices who believe that the legislation is valid on one of these grounds would decline to endorse the alternative ground, even if they believed that such an endorsement was necessary to uphold the legislation. In addition, most or all of the Justices who believe that the legislation is invalid would decline to embrace either of the two propositions in some other case where the outcome was more alluring. (The latter of these is almost certainly true, in fact; the former probably is.)
- (3) Most or all of the Justices know or would guess that the prior two stipulations are true.

In the face of these assumptions—which are entirely plausible in the

circumstances of *Tidewater*⁵⁹—each Justice should opt for invalidating the extension of diversity jurisdiction in lieu of a collective obligation to account for the extension in a future case, since the convictions of the Justices are such that a future account of this sort is neither feasible nor desirable. And that, of course, is exactly what makes the case-by-case protocol adopted by the Court in *Tidewater* so troubling. The tenacity and centrality of the Justices' negative convictions on each of the two available rationales will wreak havoc in future cases where the fact of the *Tidewater* outcome must somehow be reconciled with these abiding convictions. In *Tidewater*, issue-by-issue voting would have been the equivalent of opting away from a future obligation to provide an account of the law that is effectively ruled out by distribution of substantive convictions among the Justices; the Court would have espoused rationales it durably supported and an outcome that was consistent with those rationales.

Compare our somewhat altered version of *Reed*. Suppose that members of the Court were put to a choice comparable to that which we hypothesized putting to the members of the *Tidewater* Court: (1) strike down the Idaho law favoring males in disputed executorships, but in so doing accept as feasible and binding the collective obligation to work in future cases towards a shared view of constitutional doctrine that justifies that result; or (2) uphold the Idaho law and ratify an extant legal doctrine that treats legislative distinctions on grounds of gender as unexceptional. The outcome in our altered *Reed*, in all probability, would be very different than that in *Tidewater*. For the six Justices who join in the view that the Idaho law is unconstitutional,⁶⁰ it seems very likely that their conviction that constitutional doctrine should be hostile to gender distinctions of this sort is more durable than the force of their disagreement on doctrinal specifics. Accordingly, we can well imagine that most

59. While a plausible, indeed likely, account of the distribution and durability of convictions among the Justices deciding *Tidewater*, this is not wholly secure. All of the Justices probably thought that the extension of diversity jurisdiction to the District of Columbia was a good thing, and the willingness of five Justices to embrace otherwise dubious rationales for that outcome may reflect their strong sense that the logic of our constitutional union must accommodate an action so reasonable and so intimately associated with national concerns.

Many modern analysts would resolve the tension in *Tidewater* with some variation on the theme of "protective jurisdiction." Roughly, the argument runs: Congress could legislate a comprehensive code governing legal transactions implicating residents of the District of Columbia. If Congress did so, diversity cases involving these residents would arise under federal law and hence would fit within Article III "arising under" jurisdiction. That being the case, Congress ought to be able to serve its federal custodial role for the District of Columbia in a fashion less intrusive to the interplay of state law by refraining from enacting a federal code but nevertheless placing diversity cases involving District residents within the protective jurisdiction of the Article III judiciary. See PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 476-77 (3d ed. 1988).

60. We are talking here about our fictionalized version of the outcome in *Reed*. See *supra* text accompanying note 53.

if not all of these six would readily prefer (1) to (2), and further, that most or all of the dissenting Justices would admit that this was true of their siblings who favored the majority outcome. Again, it is precisely this situation that makes case-by-case voting so appealing in the circumstances of our altered *Reed* adjudication. We see in *Reed* the Court coalescing in a general antipathy to gender discrimination, but in disarray as to the appropriate doctrinal vehicle for effectuating that antipathy. Under these circumstances, it is the invalidation of the Idaho law which ought to prevail.

What we have done, in effect, is transfer to the collective environment of a collegial court the process of reflective equilibration that commends itself to an individual seized with an internal conflict of normative belief. In the face of such a conflict, the individual has to choose between the conflicting elements on the basis of the durability of her commitment to each. In paradoxical cases, the pulling apart of rationale and outcome presents a collegial court with a roughly analogous conflict. As the analogy suggests, an inquiry into the comparative durability of the court's conflicting commitments—of the sort we have exemplified in our discussions of *Tidewater* and *Reed*—can offer a reason for the court to prefer one of the two voting protocols over its rival.

B. Path Dependence

Imagine two lawsuits brought by downriver landowners against an upriver company that accidentally discharged poisonous waste into the river and injured each plaintiff. In a suit by Landowner 1, which is adjudicated first, the company defends on the grounds that it was not negligent and hence not liable for the harm, while Landowner 1 claims that strict liability is the appropriate measure of liability. This unsettled question reaches the state appeals court, which rules as follows:

LANDOWNER 1		
Judge	Standard of Liability	Liability (Outcome)
<i>A</i>	negligence	N
<i>B</i>	strict	Y
<i>C</i>	strict	Y
strict		Y

Subsequently, the second landowner sues. The standard and fact of the company's liability having been established, Landowner 2 would have clear sailing but for the fact that some years earlier she entered into a contract with the company in which she received a substantial lump sum

payment in exchange for an easement, the granting of mineral rights, and a waiver of liability for any injury caused by the non-negligent acts of the company. The company defends on the basis of the waiver, while Landowner 2 argues, with some state law authority in support, that waivers of this sort are against public policy because sensitive features of the environment are implicated. This case goes to the same appeals court, which rules as follows:

LANDOWNER 2		
Judge	Waiver Enforceable	Liability (Outcome)
<i>A</i>	N	Y
<i>B</i>	Y	N
<i>C</i>	N	Y
	N	Y

So far, we have two unexceptional appellate events. In each the landowner prevailed, and two legal rules are established or explicated: that companies such as this one face strict liability for accidents of this sort; and that waivers like the one agreed to by Landowner 2 are unenforceable.

Cagey readers may have guessed where this leads. Suppose we alter these facts only to this extent: Landowner 2 is the only party injured by the company's accidental discharge and she alone brings suit. Hence the issues of liability and waiver are heard by the appeals court together. Assuming for the moment that case-by-case voting applies, this would be the result:

LANDOWNER 2, COMBINED (PARADOXICAL)			
Judge	Liability Standard	Waiver Enforceable	Liability (Outcome)
<i>A</i>	negligence	N	N
<i>B</i>	strict	Y	N
<i>C</i>	strict	N	Y
	strict	N	N

As a final wrinkle on this, note that if we reverse the views of Judges *A* and *B* on the question of whether the waiver is enforceable, nothing changes with regard to the separate actions brought by Landowners 1 and 2, but the combined action brought by Landowner 2 brings yet another reversal of fortune for her:

LANDOWNER 2, COMBINED (NONPARADOXICAL)

Judge	Liability Standard	Waiver Enforceable	Liability (Outcome)
<i>A</i>	negligence	Y	N
<i>B</i>	strict	N	Y
<i>C</i>	strict	N	Y
	strict	N	Y

It seems arbitrary and wrong that Landowner 2, who would have prevailed in her action had Landowner 1 litigated the standard of liability question independently, should lose when she litigates both questions together. Put differently, if we think about the views each judge holds on each question as a distinct unit of belief, it seems arbitrary and wrong that the specific identity of the judges who hold particular belief-units should matter in Landowner 2's combined case when they are irrelevant in the separate cases of Landowners 1 and 2. We can capture the structural anomaly that drives these observations in yet another fashion, if we remember our earlier discussion of the role of dissenting opinions in collegial courts. Dissents, we observed, read in the subjunctive; they do not formally undermine the identity or force of the court's judgment or opinion. In a paradoxical case, 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. In the paradoxical version of Landowner 2's combined case, for example, it is the fact that Judge *B*, rather than Judge *A*, dissents from her colleagues' view that makes the waiver unenforceable and defeats Landowner 2's recovery of damages.

This presents a compelling case for the adoption of the issue-by-issue protocol, but only under certain circumstances implicit in our example. What gives this example bite is the independence of the liability and waiver questions. We assume that we and the judges are operating in a legal context where each of these questions is considered to be doctrinally crisp, categorical, and binary—as distinct, for example, from an inquiry into the general equity of the conflict between the parties. We also assume that the appellate court's view of either of these questions is not regarded by any of the judges as a reason for changing her own view of the remaining question. Under these conditions of issue independence, issue-by-issue voting avoids an anomalous and unjust outcome.

Justice White's vote in *Union Gas* may have been motivated by exactly this sense. Well before *Union Gas*, the Court had established that Congress, when it was acting pursuant to the authority of the civil rights amendments, could abrogate the Eleventh Amendment immunity of the

states.⁶¹ Justice White and four of his colleagues in *Union Gas* were prepared to hold that Congress enjoyed the same authority when acting under more mundane powers granted in the original Constitution, such as the Commerce Clause.⁶² Had they done so in a prior case, this view of Congress' authority would have governed in *Union Gas*. Under those circumstances, the five Justices who believed that Congress in SARA manifested with sufficient clarity its intent to abrogate immunity would have simply so held, and Pennsylvania would have been vulnerable to suit in federal court. Justice White's eccentric vote in *Union Gas* forces the issue-by-issue outcome, and prevents what otherwise would have been an anomalous result.⁶³

In cases like *Union Gas* or the landowner case, one could reach the opposite outcome by taking a different view of the relationship between the constituent issues. In the landowner case, for example, a judge might believe that strict liability is appropriate because of strong public policy concerns supporting environmental protection. Those same concerns argue for nonenforcement of the waiver. Under this view, in the combined paradoxical case, Judge B's position that liability should be strict and the waiver enforceable has, at least on the surface, a contradictory character. Under these circumstances, the two issues of liability and waiver do not exhibit the appropriate independence to sustain the conclusion that issue-by-issue adjudication is necessarily the more appropriate protocol.⁶⁴

C. *Special Environments: The Criminal Appeal*

Thus far, we have been considering reasons for choosing one of the two voting protocols in paradoxical cases without distinguishing among substantive legal categories. At least one group of cases, appeals from criminal convictions, seems worthy of separate attention. The existence of one such group raises the possibility that there are others.

Consider the case of a criminal defendant, convicted at trial, who

61. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

62. But had Justice White not voted to make the state vulnerable to suit, the majority view of Congress' authority in *Union Gas* would have been impaired as authority, since it then might be characterized as "dicta" rather than "holding." It is far from clear that this artificial and formal distinction survives in Supreme Court adjudication under circumstances like these. Casual comments clearly not meant to be part of the process of deciding the case actually before the Court are disregarded as authority, but not formal determinations of issues treated by the Court as salient to the outcome.

63. Kennedy's vote in *Arizona v. Fulminante* may have been motivated by a similar sense on his part. But *Fulminante* is a three-issue case, and even if the one question of general law (whether the harmless error doctrine applies to the admission of involuntary confessions) is taken out of the case, the distribution of votes on the two remaining, case-specific questions is still paradoxical. In principle, the same argument about independent questions should hold in these circumstances, though its intuitive appeal is somewhat blunted.

64. For the equivalent dependent-issue view of *Union Gas*, see *infra* notes 81-83 and accompanying text.

objects to her conviction on the following grounds: first, that evidence was admitted that was the product of an unlawful search and seizure in violation of the Fourth Amendment, and second, that her improperly obtained confession was admitted in violation of the Fifth Amendment. By now, readers will anticipate how the appeals court responds:

CRIMINAL APPEAL			
Judge	Fourth Amendment Violated	Fifth Amendment Violated	New Trial (Outcome)
<i>A</i>	Y	N	Y
<i>B</i>	N	Y	Y
<i>C</i>	N	N	N
	N	N	Y

Under the case-by-case protocol, the appeals court will order a new trial; under the issue-by-issue protocol, the conviction will stand. Paradoxical criminal appeals like this have induced appellate courts in several cases to adopt the issue-by-issue protocol and uphold the convictions.⁶⁵ This is somewhat surprising, in light of the acceptance of case-by-case voting among the American judiciary generally. It is even more surprising because many persons confronted with an example of this sort would sense that an injustice would be done the defendant if issue-by-issue voting prevailed, especially if the crime in question carries a substantial punishment.⁶⁶

Case-by-case voting does not always favor the defendant, nor does it always have a comparable tug on one's intuition in criminal cases. Suppose a defendant convicted of a serious felony claims on appeal that evi-

65. See, e.g., *United States v. Bazzano*, 712 F.2d 826 (3d Cir. 1983) (employing an issue-by-issue protocol), *cert. denied*, 465 U.S. 1078 (1984).

66. Rogers reaches for a capital case in support of his broad claim for case-by-case voting in paradoxical cases generally. Rogers, *supra* note 1, at 472-73. He posits an imminent execution and four Justices who believe that capital punishment violates the Fifth Amendment but not the Eighth, four others who believe that capital punishment violates the Eighth but not the Fifth, and one Justice alone who believes that capital punishment is constitutional. It seems obvious to Rogers that issue-by-issue voting, which would send the defendant to his death, is unjust. This certainly seems right, notwithstanding the contrary views of Post and Salop, who are as committed to issue-by-issue voting at all costs as Professor Rogers is to case-by-case voting.

But Professor Rogers tries to prove far too much with this compelling example. Setting aside for the moment the special concerns that may attach to criminal appeals, the case draws much of its force from the fact that eight Justices believe that capital punishment is unconstitutional, and their disagreement over the grounds for that view seems plainly subordinate in importance to their underlying agreement. As such, the capital punishment case is a particularly poignant example of our modified *Reed*. See *supra* text accompanying note 53. Paradoxical cases of this sort clearly should be decided case-by-case. Other sorts of cases, like *Tidewater*, our landowner case, or differently configured criminal cases, however, clearly demand issue-by-issue treatment. See *supra* text accompanying notes 40-50.

dence seized in violation of the Fourth Amendment was admitted at her trial. The state disputes the Fourth Amendment claim, and further argues that even if the admission of the disputed evidence was illegal, it was harmless error. The appeals court suffers its chronic paradoxical tic:

HARMLESS ERROR CASE

Judge	Fourth Amendment Violated	Harmless Error	New Trial (Outcome)
<i>A</i>	Y	Y	N
<i>B</i>	Y	N	Y
<i>C</i>	N	N	N
	Y	N	N

Here, the defendant prevails only if the appeals court votes issue-by-issue.⁶⁷

In paradoxical appeals from criminal convictions, one of two propositions is always true: a majority of the judges on the appellate court agree that the conviction of the defendant was illegal, or in the alternative, shifting majorities agree on each of the subordinate propositions necessary to support the proposition that the conviction of the defendant was illegal. Either of these circumstances ought to give an appellate court pause. Serious criminal convictions alter the status quo in a drastic way. They stamp an individual guilty and subject her to imprisonment. Even in an era in which we are frightened and dismayed by the propagation of lawless violence around us—perhaps especially in such an era—we would do well to insist that we not cheat on our own standards of fair process or shortchange criminal defendants of their substantive legal rights. A court sensitive to these concerns might well take the view that any conviction compromised to the point of paradox ought to be overturned.

67. Post and Salop, anxious to counter Rogers' capital punishment case, see *supra* note 66, offer one of their own. They posit a defendant convicted of first degree murder and sentenced to death. The sentencing statute provides capital punishment for both the murder of a police officer and for murder committed under certain aggravating circumstances. A lower court has overturned the death sentence, finding that the statute is inapplicable because the murdered police officer was off duty, and the jury did not clearly find the appropriate aggravating circumstances. On appeal, four judges find the statute applicable on peace officer grounds only, four find it applicable on aggravated circumstances grounds only, and one finds it not applicable at all. As a result the execution will proceed, despite the court having rejected both bases for the death sentence. Post & Salop, *supra* note 1, at 761.

Post and Salop want to engage our sympathies for issue-by-issue adjudication with this example, and they succeed, though perhaps not so forcibly as Rogers moves us towards case-by-case adjudication. But the real point of these intuitive salvoes ought to be clear: a blanket commitment to either protocol is a highly unsatisfactory way of approaching the doctrinal paradox.

D. Hierarchical Management

One of the most important functions of appellate adjudication is the supervision of lower courts. We call this function "hierarchical management." Paradoxical cases can impair this core responsibility of appellate courts. Consider two examples, both of which we have already encountered. In the first, a convicted defendant appeals her conviction, claiming that some of the evidence admitted in her trial was seized in violation of the Fourth Amendment and that other evidence was admitted in violation of the Fifth Amendment. She convinces only one of three judges of the validity of her Fourth Amendment claim, and one other judge of the validity of her Fifth Amendment claim.⁶⁸ The second example is our modified version of *Reed*, in which six Justices agree that the Idaho gender preference is unconstitutional, but disagree sharply on the doctrinal rationale for that outcome.⁶⁹

If the appellate courts employ the case-by-case protocol in these cases, hierarchical management difficulties will immediately present themselves. In the criminal case, the problem is obvious: the trial court has been instructed to retry the case in the face of two claims of error, both of which have been rejected by a majority of the appellate court. How should the second trial differ from the first? In the plurality opinion case, the problem for lower courts is more likely to arise in future cases, where the various doctrinal directives that were stitched together to produce the appellate outcome may diverge in their prescriptions. How is a lower court to choose among the divergent appellate instructions in such a case?

Without more, these puzzles present a good reason for abandoning the case-by-case protocol. Issue-by-issue dispositions of paradoxical cases have the substantial advantage of offering clear guidance to the lower courts. In cases like *Tidewater* and our hypothetical downstream landowner case, where reasons already exist for favoring issue-by-issue voting, hierarchical management concerns provide a powerful additional reason to favor issue-by-issue adjudication. In other cases, where there is doubt as to the appropriate voting protocol, these concerns could be decisive. But in still other cases there will be strong competing considerations.

In our two-ground criminal appeal case, for example, the social interest we have in the fairness of criminal justice gives us a reason to overturn a conviction that two of the three judges think was constitutionally infirm, even though the lower court will be bereft of guidance. Similarly, in our modified *Reed*, concern about developing doctrine to support the judicial consensus that gender discrimination is constitution-

68. See *supra* text accompanying note 65.

69. See *supra* text accompanying note 53.

ally suspect almost certainly outweighs the detriment to managerial clarity caused by case-by-case voting.

We can draw two lessons from these observations. First, while hierarchical management is a substantial appellate concern weighing in favor of the issue-by-issue protocol, in some cases it must yield to greater competing concerns. Second, when appellate courts follow the case-by-case protocol in paradoxical cases, lower courts are presented with jumbled mandates. In the balance of this section, we explore the problems and options of lower courts under these circumstances.

1. Problems of Guidance on Remand

The situation of the trial judge after remand of a criminal case is particularly problematic. She, after all, was unpersuaded by the defendant's claims in the first place, and in a sense has been vindicated in her judgment since two of the three appellate judges agreed with each of her rulings. Nevertheless, the one option not open to her is that of repeating both her rulings and admitting the same evidence in the second trial. Should she exclude all the contested evidence? If not, which part of the evidence, if any, should she exclude?

To a substantial degree, the trial judge may be relieved of this decision by the prosecutor. The prosecutor has a strategic decision to make: by withdrawing either the evidence implicating the Fourth Amendment or that implicating the Fifth Amendment, the prosecutor can hope to satisfy any concerns the trial judge may have in the second trial and choose to forego the evidence that she deems less important to her case. The trial judge can in fact press this decision on the prosecutor by indicating her inclination to exclude all of the implicated evidence if the prosecutor declines to forego a portion of it on her own initiative.

Even if the prosecutor does withdraw part of the evidence, there are two circumstances in which the trial judge might insist on excluding the remaining contested evidence as well. First, it is at least possible that she will have been persuaded to exclude the remaining evidence by one or both of the appellate judges who voted for reversal. In this case, if the judge continues to think that the evidence that the prosecutor was prepared to withdraw voluntarily is admissible, she might give the prosecutor the opportunity to produce that evidence instead. Second, the judge might believe that the two issues of exclusion are connected in such a way that the interests of coherence are better served if both batches of evidence are excluded. If she does believe the two issues are linked, she ought to be empowered to exclude both, even though the voting distribution among the judges of the appeals court indicates that only Judge C shared this view. After all, the appeals court has put her in this difficult position in the first place by virtue of its disarray, and should welcome the furthering of the dialogue by the trial judge.

As messy as this situation is, we should note that it is made considerably more tractable because we are dealing with a criminal case, entailing a limited right of appeal on the part of the state. Suppose it were a civil case with the same general structure: a woman claims she was raped by a man who is tried and acquitted of rape, and she then brings a suit seeking damages for sexual assault. At trial, the judge admits into evidence (1) the defendant's criminal acquittal, and (2) evidence about the plaintiff's prior sexual behavior. The plaintiff loses and appeals on the basis of these contested evidentiary rulings. The appeals court divides:

CIVIL SEXUAL ASSAULT CASE			
Judge	Should Exclude	Should Exclude	New Trial (Outcome)
	Acquittal	Prior Sexual Conduct	
<i>A</i>	Y	N	Y
<i>B</i>	N	Y	Y
<i>C</i>	N	N	N
	N	N	Y

Suppose this court votes case-by-case and remands for a new trial. If the trial judge excludes evidence on one or both of the contested matters, the plaintiff wins, and the defendant appeals, the appeals court will be caught in a difficult position. If each judge maintains her former position and feels at liberty to vote accordingly, then whatever the trial judge does, the court will reverse again.⁷⁰ For example, if the trial judge excluded evidence of the plaintiff's prior sexual conduct, Judges *A* and *C* will find this error, and both will vote to reverse; if the trial judge excluded all the contested evidence, then *B* and *C* will find the exclusion of the acquittal error, *A* and *C* will find the exclusion of prior conduct error, and all three judges will vote to reverse!

Almost any alternative would be better than an endless loop of reversals. Once the appeals court has voted case-by-case in the first appeal, each of the three judges should feel obliged to affirm the trial court on the second appeal, as long as evidence on at least one of the contested matters has been excluded.

70. Technically, the court asks the question: "Did the trial court judge act within her discretion when she excluded the evidence?" Thus, Judges *B* and *C*, who ruled that admission of evidence of the acquittal was within the trial judge's discretion, may consistently rule that it was also within the trial judge's discretion to exclude the same evidence. In practice, however, some questions of evidence are treated as binary.

2. *Problems of Guidance in Future Cases*

Plurality cases like our modified version of *Reed* pose the problem of hierarchical management in a different setting. Here, the reasons for the Supreme Court to vote case-by-case are virtually irresistible. The problem for the trial court is not as likely to arise in the case at bar as in a subsequent case in which the various rationales supporting the majority outcome diverge in the outcome they produce. In such a case, the trial judge must choose some rationale to govern the case before her; what should guide this choice?

At least three possibilities suggest themselves, which we will call the predictive, the participatory, and the narrowest grounds approaches. Under the predictive approach, the trial judge selects the rationale that she thinks the highest appellate court is most likely to choose when it ultimately resolves its doctrinal disagreements. Under the participatory approach, the trial judge selects the rationale that (1) is consistent with the outcome in the prior, plurality case, and (2) is the most attractive rationale—that is, the rationale she herself would choose were she a member of the highest court and committed to the outcome in the prior case.

The first two approaches offer different virtues. Roughly, the predictive approach responds to concerns of hierarchy and the participatory approach responds to concerns of dialogue and broadened experience. Given the doctrinal disarray that leads to plurality opinions of the sort we have been considering, the participatory approach seems superior. In the face of such disarray, predictions about future doctrinal equilibria are dicey at best, and in the face of such disarray, lower court judgment, experience, and argument are especially useful to the high court.⁷¹

Neither the predictive nor the participatory approach limits the choices of a lower court to the rationales voiced in the high court. The process of developing consensus might lead the high court to a different rationale than those presently sponsored by its factions, and the predictive approach must allow for that possibility. Similarly, under the participatory approach, the lower court might be persuaded that none of the rationales offered by the high court in the prior case offer the best justification for the outcome.

The third approach, the narrowest grounds approach, enjoys fairly wide support within the federal judiciary despite being more complex than the other two approaches.⁷² It is exemplified by a recent decision of

71. See Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 716-20 (1984) (arguing that percolation of issues in lower courts can lead to the Supreme Court producing sounder, more coherent decisions).

72. See, e.g., *Marks v. United States*, 430 U.S. 188, 193 (1977); *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976); *S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752, 765 n.18 (11th Cir.),

the Third Circuit Court of Appeals, involving a constitutional challenge to 1988 amendments to the Pennsylvania Abortion Control Act of 1982. In *Planned Parenthood v. Casey*,⁷³ the Third Circuit followed Justice O'Connor's view on abortion regulation, pursuant to which strict judicial scrutiny attaches only after a court has determined that the right of a woman to elect an abortion has been subjected to an "undue burden" by the regulation in question.⁷⁴ In the face of the unraveling within the Supreme Court of full support for the letter and spirit of *Roe v. Wade*,⁷⁵ the Third Circuit court may well have been justified in regarding Supreme Court doctrine as in a state of disarray comparable to a fractured plurality opinion. Further, it is possible that either the predictive or participatory approaches would have led the court of appeals to Justice O'Connor's position, despite its rather slender contemporaneous support in the Supreme Court. Indeed, in its review of the Third Circuit's decision, the Supreme Court moved somewhat closer to Justice O'Connor's approach.⁷⁶ But the court of appeals justified its choice at some length and on a quite different basis: it took itself to be obliged to find and follow the "narrowest grounds necessary to secure a majority" for the outcomes in the recent Supreme Court abortion cases,⁷⁷ and Justice O'Connor's position was chosen for that reason alone.

Before we consider the desirability of the "narrowest grounds" approach, we need to offer some further definitions of, and limitations to, the approach. The goal of the approach is to find a gravamen of decision such that if the lower court applies that gravamen and the Justices of the Supreme Court firmly hold to their respective doctrinal positions, the lower court's decision will be upheld. Several mechanical details follow from this goal.

First, the approach is available not in all splintered majority or plurality cases, but only in those cases where the rationales for the majority outcome are nested, fitting within each other like Russian dolls. This

cert. denied, 111 S. Ct. 2274 (1991); *Lundblad v. Celeste*, 874 F.2d 1097, 1102 n.4 (6th Cir.), *vacated*, 882 F.2d 207 (6th Cir. 1989), *vacated in part and modified*, 924 F.2d 627 (6th Cir.), *cert. denied*, 111 S. Ct. 2889 (1991).

73. 947 F.2d 682 (3d Cir. 1991), *aff'd in part and rev'd in part*, 112 S. Ct. 2791 (1992).

74. *Id.* at 695-97.

75. 410 U.S. 113 (1973).

76. Prior to the Supreme Court's decision in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), Justice O'Connor was the only Justice to have explicitly embraced the undue burden approach. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 530 (1989) (O'Connor, J., concurring in part and in the judgment). In *Planned Parenthood* itself, Justice O'Connor was joined by Justices Kennedy and Souter in advancing this approach. Their opinion announced the judgment of the Court, and was joined in spirit and in many details by Justice Stevens, *id.* at 2838-43 (Stevens, J., concurring in part and dissenting in part), and to a lesser extent by Justice Blackmun, *id.* at 2843-55 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). Justice O'Connor's approach could yet emerge as the stable understanding of the Supreme Court, but as of this writing the question remains very much in doubt.

77. *Planned Parenthood*, 947 F.2d at 693-94 & n.7.

means that in many cases, the narrowest grounds approach will not be available. Lower courts will then have to choose between the predictive and participatory approaches.

Second, as the Third Circuit points out in *Casey*, the target of the approach is not the narrowest ground that was offered in support of the pertinent majority outcome, but rather the narrowest ground that was necessary to create a majority in support of that outcome. The difference emerges only in cases where at least six Justices vote in support of the majority outcome, and advance among them at least three rationales. Suppose, for example, that three Justices advance the broadest rationale, two Justices an intermediate rationale, and one Justice the narrowest rationale. The "narrowest grounds necessary to secure a majority" is the intermediate rationale, since it and the broadest rationale commanded a majority without recourse to the narrowest rationale.

Third, for these purposes "narrow" is defined as follows: if the pertinent majority outcome upholds a law against constitutional attack, then the narrowest gravamen is that which upholds the fewest laws. Conversely, if the outcome invalidates a law on constitutional grounds, then the narrowest gravamen is that which invalidates the fewest laws.

So qualified, the narrowest grounds approach works well, in the sense that it identifies a gravamen of decision for a lower court that insulates that court from reversal if the rationales in the pertinent prior Supreme Court case are perfectly clear and the Justices remain perfectly faithful to their respective rationales. Suppose that in the most recent Supreme Court abortion case the majority outcome was supported by three Justices who applied the rational basis test, two Justices who applied the undue burden test, and one Justice who applied a slightly softened version of *Roe v. Wade* (a more robust test than undue burden but less than *Roe* proper); the remaining three Justices dissented, and held firmly to *Roe* itself. The narrowest grounds approach will select the undue burden test. If, in a subsequent case, the lower court applies the undue burden test and upholds a challenged regulation of abortion on that basis, the three Justices committed to rational basis and the two committed to undue burden will affirm. If the lower court applies the undue burden test and invalidates the challenged regulation, the three Justices committed to *Roe*, the one Justice committed to lenient-*Roe*, and the two Justices committed to undue burden will combine to affirm.

But for all of its simple arithmetical charm, the narrowest grounds approach requires a justification that is not readily apparent. As we have already observed, it is available as an option only in cases where the fractured rationales of a divided Court are nested. Even when that is the case, its capacity to deliver an outcome that will enjoy the support of a majority of the Justices depends on the Justices holding fast to the views that have placed them in a state of dissensus such that no rationale can

command the support of a majority of the Court. Quite possibly, this dissensus bespeaks an instability in doctrine. Certainly evolution towards consensus is to be hoped for, and it often will take place. In the abortion rights context, for example, one imagines that the Justices feel some pressure to evolve a view that will command the support of a majority and that they are, in fact, likely to do so. Thus, the narrowest grounds approach can work only in those cases where the Court has settled into a pattern of nested disagreement. In effect, the narrowest grounds approach is derivative of the predictive approach; in the face of entrenched and nested disagreement, the predictive approach would commend the narrowest grounds test to the lower court.⁷⁸

The impulse behind the narrowest grounds approach is distinctly noncollegial. It sees the Court only as the sum of its warring parts, and neither anticipates nor contributes towards the resolution of doctrinal disarray.

E. Internal Management

The choice of voting protocols in a paradoxical case has consequences for the management not only of lower courts but also of the appellate court that makes the choice. These concerns for internal management, in turn, raise questions of "strategic behavior" on the part of the judges who comprise the appellate court. Strategic behavior is a complex issue that draws on ideas about the basic obligations of judges on a collegial court, and it deserves independent attention.

1. Administration

In our account, appellate courts decide cases in two stages. In the first stage, each judge states her conception of the controversy and how she would resolve each issue raised by that conception. In the second, the court reviews these individual judgments and determines how, in light of the distribution of convictions among its members, the court should resolve the controversy before it, and what rationale (or rationales, in a plurality case) it should advance in support of this resolution. This second stage is dominated by conventions that normally make these questions unproblematic. In paradoxical cases, however, the conventions run out, and the judges must then consider how their individual judg-

78. As we observed above, the predictive approach could commend the same result to a lower court as that pointed to by the narrowest grounds test, even if the lower court did not perceive that the disagreement of the higher court was entrenched and/or nested. The lower court could simply think that the rationale identified by the narrowest grounds test was in fact the most likely rationale to emerge as the majority view of the higher court. The Third Circuit could have taken this tack in *Planned Parenthood*, and would have been reasonably accurate in its prognostication, since for the moment, at least, Justice O'Connor's approach to the abortion controversy is gaining. See *supra* note 76.

ments should be factored into a collegial disposition of the case before them.

Administrative ease speaks in favor of case-by-case adjudication in paradoxical cases. Once the court decides that case-by-case adjudication is appropriate, decisions require only that judges note which resolution of the controversy had majority support. Adoption of an issue-by-issue approach, in contrast, presents the court with at least two additional difficulties. First, the court must decide which issues require resolution by each judge. Second, the judges must decide who defers to whom.

To resolve a controversy issue by issue, the judges must agree on what constitutes an issue. Recall, for example, the Third Circuit decision in *Planned Parenthood*. After the Court ruled that the relevant constitutional standard was an undue burden test, they then had to determine whether each of the challenged statutory provisions actually imposed an "undue burden" on some class of women. Different judges might have pointed to differing classes of women, such as poor women, women estranged from or endangered by the putative fathers, or minors. Similarly, different judges might have pointed to differing ways in which the regulation might be unduly burdensome, such as financially or psychologically. Not every combination of burden and class of women will constitute a distinct "issue." At some point, variations in description seem irrelevant.⁷⁹

In the metavote, then, 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. The disagreement that divides a court sufficiently to render the metavote significant, however, may also complicate the court's resolution of the question of what issues to decide. Moreover, the more splintered the array of issues, the more complex the ballot each judge marks, and the greater the judge's incentive either to "misrepresent" her "true" beliefs on an issue or to turn in an incomplete ballot.⁸⁰

Issue-by-issue adjudication will present courts with internal man-

79. This problem arises in the review of verdicts in criminal and civil juries. In *Schad v. Arizona*, 111 S. Ct. 2491 (1991), for example, the Supreme Court considered whether a jury needed to agree on the manner in which the homicide was committed in order to agree on conviction.

80. In the Supreme Court, a practice of issue-by-issue discourse is emerging that may considerably mitigate the administrative difficulties associated with issue-by-issue voting. It is now increasingly common for one Justice to write an opinion setting out her or his view of each of the issues in the case, and for other Justices to respond on this issue-by-issue basis, aligning themselves with sections in the majority brief or indicating the nature of their disagreement by writing separately or joining in the relevant portions of another colleague's opinion. See *supra* note 14. While this practice may in part reflect dissensus among the Justices as to various matters of legal substance, it does not seem to have been a matter of contention among them. Justices have usually been willing to address issues even when their own view of the merits would not have presented them, and there is little or no indication that they have been drawn into strategic practices of the sorts we worry about below. See *infra* Section V.E.2.

agement complications of a second sort, as well: that is, for some judges, their vote on one issue may be contingent on a particular outcome on another issue. *Union Gas* offers a graphic example. Recall that the Supreme Court therein confronted two issues: (1) did Congress have the power to abrogate the Eleventh Amendment bar on monetary damages against the states, and (2) did Congress exercise that power in the 1986 amendments to CERCLA? The Justices' views were as follows:

PENNSYLVANIA V. UNION GAS CO.

Justice	Power to Abrogate	Exercised in This Statute
Blackmun	Y	Y
Brennan	Y	Y
Marshall	Y	Y
Stevens	Y	Y
<i>White</i>	Y	N
Kennedy	N	N
O'Connor	N	N
Rehnquist	N	N
<i>Scalia</i>	N	Y

If the Court in *Union Gas* elected to decide the case issue by issue, the potential connection between the issues of power and intent could complicate matters. Suppose, roughly speaking, the Court must choose between two standards of power to abrogate ("limited" and "extensive"), and two tests of intent to abrogate ("stringent" and "loose"). Justice Scalia, presumably, resolves the two issues as shown because he believes that the best legal regime would limit the power to abrogate but would apply the loose test of congressional intent as to the exercise of that power. This view of the best legal regime is consistent with a firm belief that an extensive-power/stringent-test regime is superior to an extensive-power/loose-test regime.⁸¹

If Justice Scalia's commitment to a loose test of intent to abrogate is conceptually contingent on a limited view of Congress' power to abrogate, then it would seem inappropriate for the Court simply to tally the votes as shown and adopt the extensive-power/loose-test rule that would

81. This, of course, is not by way of criticism of the Court in *Union Gas*; we have hypothesized our own version of the state of affairs in *Union Gas* in order to illustrate an administrative cost of issue-by-issue adjudication. Specifically we have assumed that our hypothetical Justice Scalia ranks legal regimes as follows:

$$lp/li > lp/si > ep/si > ep/li,$$

while our hypothetical Justice White ranks legal regimes:

$$ep/si > ep/li > lp/si > lp/li,$$

where *ep* means "extensive power," *lp* means "limited power," *si* means "strict intent," *li* means "loose intent," and $>$ means "is preferable to" or "is more correct or appropriate."

result. Unlike a legislature, a court is not bound to take issues up in some process-driven order. Since a court's decisions limit its future options, the agenda-dependent nature of a parliamentary process of vote aggregation is especially unattractive. If each Justice's views are laid on the table in *Union Gas*, and the contingent nature of Justice Scalia's position understood, the preferred result would seem to be the extensive-power/stringent-test regime, with Pennsylvania prevailing on its claim of Eleventh Amendment immunity and Justice White achieving his most preferred outcome.

A different understanding of Justice White's appraisal of the four different legal regimes, however, would lead to another curiosity. We understand Justice White's votes for extensive power and strict intent to be an expression of his view that this regime is best. Suppose, additionally, that he believes a limited-power/loose-intent regime to be superior to a regime of extensive power and loose intent. Then, if he once more defers to Justice Scalia, he would alter his vote on the issue of power and the Court would endorse Justice Scalia's most favored regime of limited power and loose intent.⁸² The judgment of the Court now depends on whether Justice White defers to Justice Scalia, in which case the Court endorses a regime of limited power and loose intent, or on whether Justice Scalia defers to Justice White, in which case the Court endorses a regime of extensive power and strict intent.⁸³

2. Strategic Behavior

The complex interaction between Justice White and Justice Scalia in *Union Gas* invites speculation about the possibilities for strategic behavior in paradoxical cases. Justice Scalia, for example, believed that Congress lacked the power under the Commerce Clause to abrogate the states' immunity and, consequently, that Pennsylvania should not be vulnerable to suit in the case before the Court.⁸⁴ Had he voted—despite his judgment to the contrary—that Congress had not manifested its intent to

82. In this paragraph, we have assumed that our hypothetical Justice White evaluates the regimes as follows:

$$ep/si > lp/li > ep/li > lp/si.$$

while Justice Scalia's hypothetical views remain the same as in note 81.

83. The difficulty actually runs deeper than the implementation of the voting protocol. After all, the two issues of power and intent could have arisen in separate cases. In that event, if Justice White had the views described *supra* note 82, and Justice Scalia the views described *supra* note 81 (with the views of the other seven Justices "separable" in the sense that order of voting does not affect their preferences on either issue), the order in which these two cases arrived at the Court would determine which legal regime prevailed. The determination of which legal regime should prevail would be "path dependent." See *supra* Section V.B. This particular instance of path dependence, unlike that encountered in our discussion of *Tidewater* above, *supra* text accompanying notes 40-43, seems benign because the two issues are interrelated. A limited power standard, like a strict intent standard, restrains Congress (though in different ways); thus, we might expect the views of the appropriate outcome on these issues also to be interrelated in a complex fashion.

84. *Union Gas*, 491 U.S. 1, 42, 45 (1989) (Scalia, J., concurring in part and dissenting in part).

abrogate with sufficient clarity, he would have advantaged his more basic legal judgments. Pennsylvania would have been immune to suit, and the slender majority vote favoring Congress' power to abrogate would have been somewhat undercut as authority. Indeed, it is possible that Scalia could have declined to vote on the power to abrogate, and might have successfully discouraged his colleagues from fully airing their views on the question.

The use of the term "strategic" with regard to judging is implicitly pejorative. Presumably most observers would have thought it improper if Justice Scalia had misrepresented his judgment as to the sufficiency of Congress' manifestation of the intent to abrogate.

The specter of strategic behavior on multi-judge courts raises two questions. First, what characterizes strategic behavior? Second, does the possibility of strategic behavior offer guidance for the resolution of paradoxical cases?

In the usual game-theoretic framework, strategic behavior refers to instances when an agent "misrepresents" her preferences. Sincere behavior, by contrast, refers to instances when an agent acts straightforwardly on her preferences.⁸⁵ Consider, for example, the election of a single official from a list of five candidates. Each voter has a ranking of the five candidates. A voter asked to submit a ranking of the candidates acts strategically if the ranking she submits differs from her true ranking. If asked to vote for only one candidate, the voter acts strategically if she votes for someone other than her most preferred candidate.

Three features of collegial adjudication complicate the analysis of strategic behavior in the context of multi-judge courts. First, in deference to their colleagues, appellate judges are expected to compromise or deflect their views to some extent. Second, adjudication, unlike the voting paradigm in game theory, involves the rendering of judgments rather than the expression of preferences.⁸⁶ Finally, judges often decide controversies that raise more than one issue;⁸⁷ indeed, in paradoxical cases they are always called on to do so.

The simple line between strategic and sincere behavior seems inapt to multi-judge courts, where, as we have seen, the decisionmaking process is collegial and it is the norm for judges to sacrifice details of their convictions in the service of producing an outcome and opinion attribu-

85. On sincere voting, see D. Austen-Smith, *Sincere Voting in Models of Legislative Elections*, 6 SOC. CHOICE & WELFARE 287 (1989); Jean-Pierre Benoit & Lewis A. Kornhauser, *Voting Simply in the Election of Assemblies (May 1991)* (New York University Starr Center for Applied Economics, Working Paper No. 91-32, on file with authors).

86. On the distinction between judgment and preference, see Kornhauser & Sager, *supra* note 1, at 84-89.

87. Similar difficulties arise when individuals vote for candidates for assembly seats. Voters may act strategically in selecting their slate in order to achieve their optimal assembly. On this problem, see Benoit & Kornhauser, *supra* note 85.

table to the court.⁸⁸ We could amend the description of sincerity by stipulating that a judge who writes or joins an opinion of the court is sincere if she believes that her independent, detailed views and her collegial obligation combine to make her support of the court's opinion appropriate. But this is doubly unhelpful: it begs the question of what kind and degree of deflection of one's convictions are appropriate for a collegial judge, and it tests not for propriety but for individual belief of propriety.

For a collegial judge, strategic behavior is behavior that transgresses both her own convictions *per se*, and her convictions as appropriately modified to respond to the pressures of collegial unity and sound collegial outcome. This asks rather than answers the key question, but at least it does that much. A judge is entitled, indeed obliged, to deflect her conduct in deference to her colleagues. But she is not entitled to misrepresent her views or redirect her voting conduct in order to better advance her own candidates for rationale and outcome. A judge who disingenuously joins in an opinion dismissing a case on justiciability grounds in order to avoid an outcome on merits she regards as unjust, for example, has crossed this line.

This example highlights the second complicating factor in analyzing strategic behavior in appellate adjudication: the distinction between stating preferences and rendering judgments. Suppose a group of nine persons are going out to dinner together, and want to choose among the three restaurants they all agree are the most attractive choices. They agree on a voting procedure in which each lists the restaurants in the order of her preference, and then they total the votes, with each first place vote counting three points, second place two, and third place one. Strategic behavior here can be described not only as the untrue expression of one's preferences, but also as a transgression of the underlying aim of the voting enterprise. If the group's objective is to go to the restaurant that maximizes the satisfaction of ordinal preferences among the group, then a member of the group who puts her second choice third in an effort to advantage her first choice is acting not only out of self-interest but also in subversion of the group's aim. On the other hand, consider a member of the group who, having voted sincerely, knew or assumed that her friends did likewise, but failed to get her first choice of restaurants: she would be disappointed, but she would agree that the group choice was the right one.

When we move from the collective expression of preferences to the collective rendition of judgments, the connection between sincerity and the aim of the enterprise can change in a way that affects both the incentive to engage in insincere behavior and the crispness of the line between proper and improper behavior. Consider a panel of nine judges who are

88. See *supra* text accompanying note 12.

judging a gymnastics event. This is a classic redundant enterprise: each judge forms her own independent judgment about the quality of the performance before her and then holds up a card representing an evaluation ranging from 0.0 to 10.0; these scores are then averaged. A judge who believes that her colleagues are sincere and that the quality of her colleagues' judgment over the run of performances is as good as her own has no incentive consistent with her role as judge to misrepresent her views. If her judgment is at substantial odds with the average tally, she is in the same position as the person who loses out in the choice of restaurant in the sense that she would agree that the group choice was the right one.⁸⁹

But the gymnastics judge might well not take this generous and detached view of the discrepancy between her views and the views of her colleagues. If she believes that some or all of her colleagues are more likely than she to be mistaken, or worse, to act insincerely, then matters change. She now has an incentive, *consistent with the evaluative enterprise of which she is a part*, to misstate her view. Thus, if she thinks it likely that the average of her colleagues' views will be a number that undervalues the quality of the performance she is judging, then she will have an incentive to overrate the performance in order to secure an evaluation that more fairly reflects the quality of the performance. She need not think herself infallible, or even a better judge overall than her colleagues. It is enough that she be satisfied that, in the instant case, her judgment is better than what she anticipates from her colleagues. This would not be surprising: human nature, after all, is somewhat at war with the kind of detached appreciation of process that permits one to

89. The situation parallels that of a statistician drawing inferences from random data. In many instances, some estimator that makes use of all the data better indicates the true state of the world than any single data point. As another example, consider bids for offshore oil leases. Each bidder has, from her own exploratory research, made some estimate of the oil reserves on the plot. Each bids according to that estimate (because each knows the results only of its own investigations). Each recognizes, however, that the average estimate of oil reserves more accurately reflects the actual reserves. This discrepancy between the average as the best estimate and individual estimates as the basis for bids explains the winner's curse in these auctions. For a summary of auction theory, discussing both common value and private value auctions, see Paul R. Milgrom & Robert J. Weber, *A Theory of Auctions and Competitive Bidding*, 50 *ECONOMETRICA* 1089 (1982). For a discussion of the winner's curse in oil reserve auctions, see *id.* at 1093-94.

The gymnastics case discussed in the text apparently differs from the oil lease case, because in the oil lease case, each bidder understands that she does not have as much information as the group of bidders as a whole. This difference, however, may be more apparent than real. Each gymnastics judge must explain any discrepancy between her judgment of the value of the performance and the judgments of the other judges. An acknowledgement that the other judges, like her, have conscientiously sought to render the *correct* judgment also recognizes that various factors, outside the control of any judge, influence each judge's evaluation. A belief that the process of aggregating judgments improves the overall decision is thus akin to the belief that the mean is the best unbiased estimate of the value of the oil lease. For an analysis of multi-judge courts as redundant enterprises from this perspective, see Omri Ben-Shahar, *Non-Dichotomous Choice Problems in Collegial Courts* 2-13 (n.d.) (unpublished manuscript, on file with authors).

doubt the correctness of one's own professional view of the matter.⁹⁰

In some instances, the conviction that one's own judgment is superior to that of one's colleagues may derive from deep disagreements over the nature of the task in which the judges are engaged. The gymnastics judges, for instance, may differ in their conception of what mixture of athleticism and balletic grace constitutes a good routine.⁹¹

Appellate judges have robust incentives of just this sort, incentives that are consistent with the objectives of their collegial enterprise, but that lead judges to misstate their views. Appellate judges form careful judgments about complex and controversial matters, matters about which the judges may often feel strongly. As colleagues in a deliberative process, they know one another's views and see the connection between the structure of these views and possible dispositions of the case before them. Not infrequently, there will be opportunities for an individual judge to make her court's disposition of a case more compatible with her convictions overall by misstating her convictions as to particulars. The details may vary, but the abstract structure of these situations is simple. A judge will discover that by supporting an outcome or rationale with which she disagrees, she can prevent her court's adoption of some other outcome or rationale that she thinks worse either for justice in the case before her or for the state of the law, in general.

The third circumstance that complicates our understanding of strategic behavior in appellate adjudication is the existence of multi-issue controversies.⁹² Once again, the definition of impermissible strategic

90. For a discussion of strategic opportunities in this context, see Ben-Shahar, *supra* note 89, at 13-23. Because Ben-Shahar focuses on the case where choices are made from a continuous set of options, it is not clear how this analysis applies to adjudication, where decisions are over two or some other finite number of outcomes.

91. As another example, consider jurors hearing a criminal case who differ not only in their view of the evidence but also in their view of the appropriate degree of protection against wrongful conviction owed to criminal defendants. In our system, jurors are supposed to disregard their personal views concerning the correct balance between a defendant's rights and criminal deterrence; each juror has an obligation to report her true evaluation of the guilt or innocence of the defendant. In a system in which the balance between defendant's rights and criminal deterrence was also open, so that jurors decided not only guilt or innocence but also size of the supermajority necessary for conviction, a juror who believed unanimity necessary for conviction might misstate her view on guilt or innocence if she believed that other jurors wrongly believed a supermajority of 75% sufficient.

92. Our earlier discussion already identified a difficulty that arises from issue-by-issue adjudication if judges consider themselves bound only by prior *case* results. Recall our simple contract case that presented questions of both contract existence and breach. See *supra* text accompanying note 21. Suppose that the rule of stare decisis requires only that a judge attend to the outcome of the prior case and not to the decision on particular issues. A judge who believed that no breach occurred would have an incentive to vote strategically against contract existence in order to avoid a doctrinal paradox.

This practice is justifiable in full only if we understand adjudication as preference aggregation. If we view adjudication as judgment aggregation, however, additional justification is required. Specifically, the judge must believe that judgments about the case are more accurate or reliable than judgments about the issues.

This difficulty may seem purely theoretical because of the oddity of using issue-by-issue

behavior is put under stress by this circumstance. The reasons are several. First, judges in multi-issue cases have views about each issue and about the case as a whole. In principle, judging is a reasoned enterprise such that judges are required to travel through the issues presented by their view of doctrine in order to justify a view about the outcome of the case. In some hard cases, however, as in our modified version of *Reed*, a judge's view about the outcome of the case may be considerably more clear and more deeply held than her understanding of how an evolving doctrine should be shaped to support not just that outcome, but the correct outcome in future cases as well. When a judge's view about the outcome of a case is dominant in this sense, her willingness to embrace views on individual issues about which she is doubtful seems less strategic.

A second difficulty arises when the resolution of two issues is not independent. In this circumstance, the "sincerity" of a vote may depend on how the other judges vote because a judge's view of issue 1 will depend on the way in which issue 2 was resolved. This lack of independence underlay our discussion of Justice Scalia's hypothetical views on power and intent issues in *Union Gas*.⁹³

VI

THE DOCTRINAL PARADOX IN RETROSPECT

Appellate adjudication is a collegial enterprise, in which agency of performance lies with the court, not with the judges as individuals. It is the decisions and opinions of courts, not of individual judges, that have authority—authority over both immediate controversies and future judicial deliberations. Judges who dissent from the outcome or rationale of their court typically speak in the subjunctive, announcing and justifying what they would have done were they the only judge on the court. Even so, there are not only concurring and dissenting opinions, but concurring and dissenting votes as well, and appellate courts are imperfectly or at least complexly collegial, as compared, for example, with joint authors or researchers, whose efforts are more fully collaborative.

The complexity of collegial agency among the judges of a multi-judge court is largely obscured by the durable opacity of conventional

adjudication in a regime in which *stare decisis* applies only to case results. One can imagine, however, a supreme court adopting issue-by-issue adjudication to meet its supervisory obligations, while binding itself only to prior case results in order to provide itself with an appropriate amount of flexibility. In this instance a judge less committed to hierarchical management may very well face an incentive to misrepresent her view on the contract issue in order to insure the proper case result.

Benoit and Kornhauser consider the problem of extending the concept of sincerity to a multiple-issue context when preferences are aggregated. That essay suggests a distinction between sincerity as "truthful revelation" of one's preference and sincerity as voting as if one's vote were decisive. See Benoit & Kornhauser, *supra* note 85, at 4, 19-20.

93. See *supra* text accompanying notes 81-82.

practices which remain largely unchallenged and hence unexamined. When strain does occur, the unreflective nature of our commitment to these practices becomes an institutional liability. The response of the American judiciary to cases in which the doctrinal paradox arises is an unhappy example.

Current appellate practice with regard to paradoxical cases is in shambles. The Supreme Court, in particular, has been unmindful of the existence of the paradox, even when confronted with cases whose dispositions turn on the choice of alternative voting protocols. The Court has a longstanding tradition of voting exclusively case by case, but applying this practice to paradoxical cases would be an act of habit, not a studied or justified choice appropriate to the paradoxical environment. When individual Justices have departed from case-by-case voting, their decisions to do so have been left unexplained and have gone largely unremarked upon by their colleagues.

Repair of this situation is not a simple matter. In many paradoxical cases, case-by-case voting produces arbitrary results and unsettles the orderly development of the corpus of legal doctrine. The unreflective perpetuation of case-by-case voting is a mistake, and issue-by-issue voting is clearly the better option in many cases. But in other cases—including simple plurality decisions in contexts where doctrine is unsettled—issue-by-issue voting fails, since it permits the lack of doctrinal consensus to subvert the evolving judgment of the court. What is required is a mechanism for choosing between these protocols in paradoxical cases and an understanding of the concerns that justify choice between the options.

The mechanism that seems best suited to the choice of voting protocols is the metavote. Confronted with a paradoxical distribution of convictions with regard to a case before them, the judges of an appellate court should engage in a second-stage discussion and vote on the question of whether to adopt the case-by-case outcome or the issue-by-issue outcome. The choice of outcome in paradoxical cases is a question of collegial agency distinct from the question of what outcome a judge deciding the case at issue would have chosen herself. While a judge's view of the merits of a controversy may inform the question of collegial agency, it will do so only to the extent that the reasons for preferring the case-by-case outcome or the issue-by-issue outcome make a judge's views of the merits pertinent.

The separate resolution of the question of collegial action in paradoxical cases has several advantages. It makes possible the development of a systematic, reflective jurisprudence of collective judicial action. It preserves the firmly entrenched practice of each judge casting her sovereign vote over the disposition of the case, while detaching that practice from an unconsidered commitment to case-by-case adjudication and

opening the door to issue-by-issue adjudication in appropriate cases. Most importantly, it offers a procedure for choosing between the protocols that does not insist on a blanket choice or a litmus test, but allows for nuance and particularity in the choice.

We have offered some initial observations about the reasons for choosing between case-by-case and issue-by-issue voting in paradoxical cases. Our discussion of these reasons touched five areas of concern.

First, cases are paradoxical when rationales and outcomes are set in conflict with each other. Judges who confront such cases must decide whether the court, in the aggregate, is more durably committed to its judgment as to the pertinent rationales or its judgment as to the outcome. In many splintered plurality cases, the court will be more committed to the outcome. In those circumstances, case-by-case voting should be the protocol of choice—our modified version of *Reed* being an example. But in other paradoxical cases, of which *Tidewater* is a poignant instance, the court will be more committed to the rationales, and issue-by-issue voting will be essential to the orderly development of the law.

Second, in multiple-issue paradoxical cases where the salient issues are perceived to be independent of each other, an appellate court has good reason to vote issue-by-issue. Case-by-case voting under these circumstances produces outcomes that are patently arbitrary and hence wrong.

Third, paradoxical appeals from criminal convictions may engender distinct concerns for the fairness of process and the substantive legal rights of those charged with crimes. The drastic consequences of being convicted of a serious crime may argue for a rule routinely favoring criminal defendants in paradoxical appeals.

Fourth, hierarchical management concerns weigh in favor of issue-by-issue voting in all cases. They will, of course, be outweighed in some cases. When the case-by-case protocol is best, all things considered, the problems of hierarchical management will have to be dealt with separately. We have offered some initial observations aimed at recognizing and addressing these problems.

Fifth, internal management concerns favor the case-by-case protocol since it both sidesteps the headache of securing agreement on the shape and size of the salient issues and avoids the difficult question of whether a judge should vote on an issue that she does not believe must be decided in order for a proper disposition to be made. The conceptual problems and administrative costs of issue-by-issue disposition may, however, be substantially ameliorated by conventional practices courts already have in place. The Supreme Court, for example, has in recent years evolved an issue-by-issue structure of deliberation and discourse that makes the possibility of issue-by-issue voting considerably more plausible and attractive than it would be otherwise. Indeed, it may be precisely this contempo-

rary inclination of the Court that tempted Justices White and Kennedy to cast the seemingly aberrant votes that have captured our attention in this Article.

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