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# "I Vote This Way Because I'm Wrong": The Supreme Court Justice as Epimenides

BY JOHN M. ROGERS*

## INTRODUCTION

Possibly the most unsettling phenomenon in the Supreme Court's 1988 term was Justice White's decision to vote contrary to his own exhaustively stated reasoning in *Pennsylvania v. Union Gas Co.*[1] His unexplained decision to vote against the result of his own analysis lends support to those who argue that law, or at least constitutional law, is fundamentally indeterminate. Proponents of the indeterminacy argument sometimes base their position on the allegedly inescapable inconsistency of decisions made by a multi-member court. There is an answer to the inconsistency argument, but it founders if justices sometimes vote, without explanation, on the basis of their colleagues' determinations with which they disagree. This is just

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[1] ___ U.S. ___, 109 S. Ct. 2273 (1989). Epimenides the Cretan is reported to have said, "All Cretans are liars." D. HOFSTADTER, METAMAGICAL THEMAS: QUESTING FOR THE ESSENCE OF MIND AND PATTERN 7 (1985); *Titus* 1:12; *see generally* Hicks, *The Liar Paradox in Legal Reasoning*, 29 CAMBRIDGE L.J. 275 (1971). For fascinating variations on the Epimenides paradox outside of the legal field, see D. HOFSTADTER, GÖDEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID 5-24 (1980). Self-referential statements like the Epimenides paradox lie at the heart of Kurt Gödel's remarkable Incompleteness Theorem. *Id.* at 15-19.

Following the preparation of this article, Justice Kennedy voted against his own position in Arizona v. Fulminante, ___ U.S. ___, 59 U.S.L.W 4235 (U.S., March 26, 1991). His vote was analogous to Justice White's in *Union Gas*. See n. 124, *infra*.

what Justice White did when he cast the deciding vote to affirm the lower court's decision in *Pennsylvania v. Union Gas Co.*

Justice White acted contrary to the overwhelming weight of precedent, as will be demonstrated below His vote is anomalous because justices almost always vote to reverse or affirm based purely on their independent analysis, regardless of the majority's rejection of a portion of that analysis. Justice Scalia followed the normal rule in the very same case by dissenting.[2] In *Union Gas*, Justices White and Scalia each reached different conclusions regarding the effect of a majority's rejection of part of his analysis, but these different conclusions were neither explained nor apparently even perceived. Yet Justice White's opinion determined the resolution of the case, and also arguably made a difference as to what the law will be in the future. How a justice determines when to follow his or her own analysis or to defer to the majority on an issue bears some examination. Justices ought to be able to articulate reasons why they act or do not act upon their own legal views.

*Union Gas* involved whether a state could be held liable as a third-party defendant for clean-up costs under sections 104 and 106 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (hereinafter CERCLA).[3]

Justice Brennan wrote a plurality opinion upholding the lower court's decision. He and Justices Marshall, Blackmun, Stevens, and Scalia found that the language of CERCLA evinced an intent to hold states liable. Justices White, Rehnquist, O'Connor, and Kennedy disagreed. Justice Brennan and Justices Marshall, Blackmun, Stevens, and White found that the Constitution permitted Congress to create such a cause of action when legislating pursuant to the commerce clause, but Justices Scalia, Rehnquist, O'Connor, and Kennedy disagreed.

The opinions can be summarized as follows. If X is "the language of CERCLA permits suit against a state in federal court," and Y is "the Constitution permits Congress to create such a cause of action when legislating pursuant to the commerce clause,"

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|---|---|
| (1) X & Y | Brennan, Marshall, Blackmun, Stevens; |
| (2) not X & Y | White; |
| (3) X & not Y | Scalia; |
| (4) not X & not Y | Rehnquist, O'Connor, Kennedy |

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[2] Pennsylvania v. Union Gas Co., ___U.S. ___, 109 S. Ct. 2273, 2303 (1989) (Scalia, J., dissenting).

[3] 42 U.S.C. §§ 9601-9657 (1980).

All agreed that if both X and Y were present, then the lower court's holding that Pennsylvania may be liable would be upheld (result r), but if either X or Y were not present, then the lower court's holding would be reversed (not r). Applying the rule *X and Y require r, otherwise not r*, there would be five votes for not r. Only four justices accepted both premises necessary for upholding state liability. Yet the decision and holding of the Court was that Pennsylvania may be liable. This happened because Justice White accepted the judgment of the majority of the Court, even though he disagreed and argued vigorously for six pages to the contrary that the language of CERCLA did not show sufficient intent to hold states liable:

> My view on the statutory issue has not prevailed, however; a majority of the Court has ruled that the statute, as amended, plainly intended to abrogate the immunity of the States from suit in the federal courts. I accept that judgment. This brings me to the question whether Congress has the constitutional power to abrogate the States' immunity [He agreed that it does.]
> Accordingly, I would affirm (footnote omitted).[4]

Justice White could just as easily have stated the following:

> Because the statute does not abrogate the immunity of the States from suit in the federal courts, it does not matter whether or not Congress has the constitutional power to do so, although I agree that it does. Accordingly, I would reverse.

Justice White gave no further explanation for his decision to defer to the majority with whom he disagreed. Justice Scalia, on the other hand, voted to reverse without any express consideration of whether to accept the majority's rejection of his view of the Constitution. But he *could* have said something analogous to the words of Justice White:

> My view on the constitutional issue has not prevailed, however; a majority of the Court has ruled that Congress has the constitutional power to abrogate the States' immunity and I accept that judgment. This brings me to the question whether the statute, as amended, plainly intended to abrogate the immunity of the States from suit in the federal courts. [He agreed that it does.]
> Accordingly, I would affirm

What reasons might there be for such different approaches to a justice's ruling on the basis that he or she is wrong? Is there law

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[4] 109 S. Ct. at 2295 (White, J., concurring) (footnote omitted).

on the subject, or is the determination committed to the discretion of the individual justice? Should it be? If there is law, why is it not articulated? To answer these questions, the logical first step is to see how Supreme Court justices have answered them in the past.

Part I of this Article begins to answer the previously stated questions by reference to some 150 Supreme Court cases that might have resulted in a justice's decision to vote against his own analysis.[5] In these cases no justice took the occasion presented to decide a case contrary to his own logic. Part II completes the discussion of precedent by exploring six additional cases in which justices did apparently vote against their own determination of the law in the cases before them. For several reasons, none of these cases provides an adequate basis for the decision made by Justice White in *Union Gas*.[6] Part III discusses several possible policy goals that might have driven Justice White to vote as he did.[7] This Article concludes that a Supreme Court justice should not vote contrary to his own stated analysis, because such action is harmful and destabilizing to the determinacy of the law

## I. A SHORT TAXONOMY OF PRECEDENTS

### *A. Appellate Decisions and the Basics of Propositional Logic*

The only way to grasp the extent to which the justices have refrained from doing what Justice White did is to examine precedent to determine when such an action might have previously occurred. At the outset it is necessary to ascertain the pool of situations where a justice or justices faced the possibility of deferring to the majority vote of others on an issue that would have caused a different result in the case. The possibility only exists when each of at least two legal premises is needed to reach a particular result.

The situation can be described abstractly as follows: Assume everyone agrees that both legal premise X and legal premise Y are necessary to reach decision R, reversal. If three justices determine X but not Y, three justices determine Y but not X, and three justices determine both X and Y, then if each justice looks solely to his or her own analysis, only three justices will vote to reverse, and the judgment will instead be A, affirmance. But if the first three justices

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[5] *See infra* notes 8-56 and accompanying text.

[6] *See infra* notes 57-77 and accompanying text.

[7] *See infra* notes 78-122 and accompanying text.

yield to the six others with respect to the issue of Y, in spite of their own judgment, then the case will be reversed.

There are about 150 Supreme Court cases in which a justice might have deferred to the majority's resolution of an issue, thereby affecting the result of a case. The clearest examples are cases like *Pennsylvania v Union Gas Co.*,[8] in which all justices expressed their views on both X and Y [9] For instance, in *NLRB v. Wyman-Gordon Co.*[10] the NLRB required an employer to provide a list of its employees' names and addresses to unions seeking to organize the employees. The Board based its decision on its earlier *Excelsior* ruling, which had enunciated a general requirement that employment lists be furnished to unions. The two premises required for reversing the NLRB were roughly as follows: (X) the *Excelsior* "rule" was improperly promulgated under the Administrative Procedure Act, and (Y) if the *Excelsior* rule were improperly promulgated, then the agency decision must be reversed even if the agency could have made the same decision without relying on *Excelsior*. There was no question that X and Y together would have required reversing the agency action, and Justices Douglas[11] and Harlan[12] so voted. Justice Fortas and three others adopted X but expressly rejected Y [13] Justice Black and two others expressly adopted Y but rejected X.[14] The result was to uphold the agency action, despite the fact that a majority supported each of the two parts of the syllogism (X & Y), and no one doubted the overall syllogism (X & Y require R).

This problem potentially arises every time a majority is made up of (1) a plurality, and (2) a concurrence that refuses to adopt a necessary portion of the plurality's analysis. This occurs whenever

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[8] ____ U.S. ____, 109 S. Ct. 2273 (1989).

[9] *See* American Trucking Ass'ns v. Smith, ____U.S. ____, 110 S. Ct. 2323 (1990); Michael H. and Victoria D. v. Gerald D., ____U.S. ____, 109 S. Ct. 2333 (1989); Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983); Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980); Lalli v. Lalli, 439 U.S. 259 (1978); Gosa v. Mayden, 413 U.S. 665 (1973); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972); Dutton v. Evans, 400 U.S. 74 (1970); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); James v. United States, 366 U.S. 213 (1961); National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949); Kovacs v. Cooper, 336 U.S. 77 (1949); United States v. Alcea Band, 329 U.S. 40 (1946). This class of cases also may include North Dakota v. United States, ____U.S. ____, 110 S. Ct. 1986 (1990) and Metromedia v. City of San Diego, 453 U.S. 490 (1981).

[10] 394 U.S. 759 (1969).

[11] *Id.* at 775-80 (Douglas, J., dissenting).

[12] *Id.* at 780-83 (Harlan, J., dissenting).

[13] *Id.* at 761-69.

[14] *Id.* at 769-75 (Black, J., concurring in the result).

there is any substantive difference in the holdings of a plurality decision and a concurrence.[15]

But what about those situations where *either* one of two premises is sufficient for a decision, and the plurality adopts one, the concurrence another? For instance, X *or* Y requires R. The situation is not really different if we assume that without X or Y then A (not R) is required. That is usually the situation in appellate cases: if one of several alternative bases for reversal is not adopted, the lower court's decision is upheld.[16] In terms of propositional logic, this point can be demonstrated by starting with the following statement:

if (X or Y), then R, otherwise A.

This can be stated another way as,

if and only if (X or Y), then R.

That in turn is the same as saying,

if and only if (not (X or Y)), then A.

Since (not (X or Y)) is the logical equivalent of (not X and not Y), we can say,

if and only if (not X and not Y), then A.

In sum, this proves that

if and only if (X or Y), then R

is the logical equivalent of

if and only if (not X and not Y), then A.

In other words, if either of two grounds is sufficient for reversal, and no other grounds are properly presented, then affirmance is required if ground X *and* ground Y are each rejected. A court determination resulting from one of several disjunctive premises can be stated as well in the conjunctive by stating that the *opposite* results from the *conjunction* of the negative of each of the premises.[17]

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[15] Supreme Court judgments without majority opinions have been analyzed and criticized as their frequency has increased. *See* Davis & Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59; Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756 (1980); Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127 (1981); Note, *Lower Court Disavowal of Supreme Court Precedent*, 60 VA.L.REV. 494 (1974); Comment, *A Suggestion for the Prevention of No-Clear-Majority Judicial Decisions*, 46 TEX. L. REV. 370 (1968); Comment, *Supreme Court No-Clear-Majority Decisions: A Study in Stare Decisis*, 24 U. CHI. L. REV. 99 (1956); *see also* Swisher, *The Supreme Court—Need for Re-Evaluation*, 40 VA. L. REV. 837 (1954).

[16] If R can result even without X or Y, then there must be another sufficient premise for R—let's call it Z—such that if X or Y or Z, then R. There may be even more reasons to reverse a lower court's decision, but issues are usually limited on appeal, and if the appellant does not win on any of those issues, then the lower court's decision is upheld. Thus we can assume a limited number of alternative bases for reversal.

[17] Conversely, the situation in *Wyman-Gordon* could have been stated in the disjunctive:

Most cases involving a disagreeing plurality and concurrence can be categorized in one of the following ways:

(1) If X and Y, then A,
(2) If X and Y, then R;
(3) If X or Y, then A;
(4) If X or Y, then R.

Since statements X and Y can include negations, it follows from the above discussion that each of the latter two formulations can be stated as one of the first two. For instance, assume X is "the statute of limitations has run" and Y is "the defendant has immunity." If these are the only issues raised on an appeal from a lower court's decision allowing recovery, then all would agree:

(4) If X or Y, then R, otherwise A.

But we could just as easily assign to X and Y the opposite values: assume X is "the statute of limitations has not run" and Y is "the defendant is not immune." Then instead we have:

(2) If X *and* Y, then A, otherwise R.

All situations (3) and (4) can thus be expressed in the form of either (1) or (2).

Now we can generalize an appellate judgment of affirmance (A) or reversal (R) simply as result (r). Thus, every situation involving a plurality and concurrence—at least where one of the two opinions does not accept a necessary element of the other's analysis—can be expressed as follows:

If X and Y, then r, otherwise not r.

### *B. Cases Containing Formal Differences*

Most plurality opinion cases can be parsed this way. Such cases constitute most of the relevant pool to be used to determine what Supreme Court justices have done in the past when presented with the opportunity to defer to a disagreeing majority on part of their analysis. Some cases with plurality opinions, however, may involve merely formal differences. Justices may disagree over the way to say things that they agree upon. Perhaps the most striking example is *Flood v Kuhn*,[18] in which Justices Burger[19] and White[20] concurred

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if the *Excelsior* rule were properly promulgated (not X), *or* such an error does not invalidate the subsequent adjudicatory decision if the subsequent decision could have been arrived at independently (not Y), then upholding the agency decision is required (not R).

[18] 407 U.S. 258 (1972).

[19] Flood v. Kuhn, 407 U.S. 258, 285-86 (1972) (Burger, C.J., concurring) (Burger also expressed a desire for congressional action).

[20] *Id.* at 285 (White, J., concurring).

in an opinion by Justice Blackmun upholding the exemption of professional baseball from federal and state antitrust laws, but refused to join that part of the majority opinion that described the colorful history of the game of baseball. Sometimes Justices prefer to explain themselves in a shorter[21] or

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[21] *See, e.g.*, Murray v. Giarratano, ____U.S. ____, 109 S. Ct. 2765 (1989) (Kennedy, J., concurring); Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 1011 (1988) (Stevens, J., concurring); Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 481-88 (1981) (Blackmun, J., concurring); Ballew v. Georgia, 435 U.S. 223, 245 (1978) (White, J., concurring); Jeffers v. United States, 432 U.S. 137, 158 (1977) (White, J., concurring); *id.* at 158-60 (Stevens, J., concurring); Carey v. Population Servs. Int'l, 431 U.S. 678, 702-03 (1977) (White, J., concurring); Meek v. Pittenger, 421 U.S. 349, 387-96 (1975) (Rehnquist, J., concurring and dissenting); Kirby v. Illinois, 406 U.S. 682, 691 (1972) (Powell, J., concurring); Poe v. Ullman, 367 U.S. 497, 509 (1961) (Brennan, J., concurring); Culombe v. Connecticut, 367 U.S 568, 635-36 (1961) (Warren, C.J., concurring); DeVeau v. Braisted, 363 U.S. 144, 160-61 (1960) (Brennan, J., concurring); Barr v. Matteo, 360 U.S. 564, 576-78 (1959) (Black, J., concurring); Association of Westinghouse Salaried Employees v. Westinghouse Elec. Co., 348 U.S. 437, 461 (1955) (Warren, C.J., concurring); Keegan v. United States, 325 U.S. 478, 498 (1945) (Rutledge, J., concurring); Barnes v. The Railroads, 84 U.S. (17 Wall.) 294, 310 (1872) (Bradley, J., concurring).

Concurring justices may just be uncomfortable with decisions that they join. *See, e.g.*, Teague v. Lane, ____U.S. ____, 109 S. Ct. 1060, 1078-79 (1989) (White, J., concurring); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 763-64 (1985) (Burger, C.J., concurring); *Ballew*, 435 U.S. at 245-46 (1978) (Powell, J., concurring); United States v. Midwest Video Corp., 406 U.S. 649, 675-76 (1972) (Burger, C.J., concurring); Spevack v. Klein, 385 U.S. 511, 519-20 (1967) (Fortas, J., concurring); Irvine v. California, 347 U.S. 128, 138-39 (1954) (Clark, J., concurring).

Justices also may expressly reject part of a plurality opinion as superfluous, although they otherwise concur to make a majority. *E.g.*, Ohio v. Akron Center for Reproductive Health, ____U.S. ____, 110 S. Ct. 2972, 2976 (1990) (O'Connor, J., joining only Parts I-IV); *id.* at 2993-95 (Stevens, J., concurring); Jett v. Dallas Indep. School Dist., ____U.S. ____, 109 S. Ct. 2702, 2724 (1989) (Scalia, J., concurring); Asarco Inc. v. Kadish, ____U.S. ____, 109 S. Ct. 2037, 2053-54 (1989) (Brennan, J., concurring); United States v. Bagley, 473 U.S. 667, 685 (1985) (White, J., concurring); United States v. Shearer, 473 U.S. 52, 59 (1985) (Brennan, J., concurring); *id.* at 60 (Marshall, J., concurring); Board of Educ. v. Pico, 457 U.S. 853, 883-84 (1982) (White, J., concurring); Massachusetts v. United States, 435 U.S. 444, 470-71 (1978) (Stewart, J., concurring); Alfred Dunhill, Inc. v. Republic of Cuba, 425 U.S. 682, 715 (1976) (Stevens, J., concurring); Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 147-48 (1973) (Blackmun, J., concurring); United States v. Sisson, 399 U.S. 267, 308 (1970) (Black, J., concurring); *see also* Bellotti v. Baird, 443 U.S. 622, 652-56 (1979) (Stevens, J., concurring); United Jewish Orgs. v. Carey, 430 U.S. 144, 171 (1977) (Brennan, J., concurring); *id.* at 180 n.* (Stewart, J., concurring); Coolidge v. New Hampshire, 403 U.S. 443, 490-92 (1971) (Harlan, J., concurring); The Passenger Cases, 48 U.S. (7 How.) 283, 410-11 (1849) (Wayne, J., concurring).

A concurring Justice also may agree with the plurality on a common dispositive ground, but disagree on another issue. *See* City of Richmond v. J.A. Croson Co., ____U.S. ____, 109 S. Ct. 706, 734-35 (1989) (Kennedy, J., concurring); *id.* at 735 (Scalia, J., concurring); Young v. United States *ex rel.* Vuitton et Fils, 481 U.S. 787, 815-25 (1987) (Scalia, J., concurring); Pembaur v. Cincinnati, 475 U.S. 469, 485-87 (1986) (White, J., concurring); *id.* at 491 (O'Connor, J., concurring); Rose v. Lundy, 455 U.S. 509, 532-38 (1982) (Brennan, J.,

longer[22] fashion. In some cases the necessary fifth vote is provided by a justice concurring without any opinion at all.[23] In such situa-

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concurring); Loper v. Beto, 405 U.S. 473, 485 (1972) (White, J., concurring); United States v. White, 401 U.S. 745, 755-56 (1971) (Brennan, J., concurring); see also Griffin v. Illinois, 351 U.S. 12, 20-26 (1956)(Frankfurter, J., concurring).

[22] Justices Frankfurter and Harlan provided the necessary votes for a majority in Braunfeld v. Brown, 366 U.S. 599 (1961), and Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961), with a separate opinion that begins as follows:

> So deeply do the issues raised by these cases cut that it is not surprising that no one opinion can wholly express the views even of all the members of the Court who join in its result. Individual opinions in constitutional controversies have been the practice throughout the Court's history. Such expression of differences in view or even in emphasis converging toward the same result makes for the clarity of candor and thereby enhances the authority of the judicial process.

McGowan v. Maryland, 366 U.S. 420, 459 (1961) (footnote omitted) (Frankfurter, J., concurring) (This concurrence was used in *McGowan* and four other cases. It spans over one hundred pages and includes an appendix featuring several fold-out charts.); *see also* California v. Byers, 402 U.S. 424, 434-58 (1971) (Harlan, J., concurring); United States v. Kaiser, 363 U.S. 299, 305-325 (1960) (Frankfurter, J., concurring).

Other cases in which concurrences can perhaps best be described as different statements of similar reasoning are the following: Thornburg v. Gingles, 478 U.S. 30, 104-105 (1986) (O'Connor, J., concurring); Pacific Gas & Elec. Co. v. California Pub. Util. Comm'n, 475 U.S. 1, 21-26 (1986) (Marshall, J., concurring); Clements v. Fashing, 457 U.S. 957, 973-76 (1982) (Stevens, J., concurring); FCC v. Pacifica Found., 438 U.S. 726, 755-62 (1978) (Powell, J., concurring); Moore v. City of East Cleveland, 431 U.S. 494, 513-21 (1977) (Stevens, J., concurring); Lehman v. City of Shaker Heights, 418 U.S. 298, 305-308 (1974) (Douglas, J., concurring); Williams v. United States, 401 U.S. 646, 660-65 (1971) (Brennan, J., concurring); Baird v. State Bar of Arizona, 401 U.S. 1, 9-10 (1971) (Stewart, J., concurring); *In re* Stolar, 401 U.S. 23, 31 (1971) (Stewart, J., concurring); Coleman v. Alabama, 399 U.S. 1, 11-14 (1970) (Black, J., concurring); Hutcheson v. United States, 369 U.S. 599, 622-28 (1962) (Brennan, J., concurring); Haley v. Ohio, 332 U.S. 596, 601-607 (1948) (Frankfurter, J., concurring); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 466-72 (1947) (Frankfurter, J., concurring); *Keegan*, 325 U.S. at 495-98 (1945) (Black, J., concurring); *see also* Cassell v. Texas, 339 U.S. 282, 290-96 (1950) (Frankfurter, J., concurring).

[23] Turner v. Murray, 476 U.S. 28, 38 (1986) (Burger, C.J., concurring); Bowen v. American Hosp. Assn., 476 U.S. 610, 648 (1986) (Burger, C.J., concurring); Robbins v. California, 453 U.S. 420, 429 (1981) (Burger, C.J., concurring); Walter v. United States, 447 U.S. 649, 660 (1980) (Marshall, J., concurring); American Export Lines v. Alvez, 446 U.S. 274, 286 (1980) (Burger, C.J., concurring); Gardner v. Florida, 430 U.S. 349, 362 (1977) (Burger, C.J., concurring); Lemon v. Kurtzman, 411 U.S. 192, 209 (1973) (White, J., concurring); Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 524 (1957) (Burton, J., concurring); Burns v. Wilson, 346 U.S. 137, 146 (1953) (Jackson, J., concurring); International Bhd. of Teamsters v. Hanke, 339 U.S. 470, 481 (1950) (Clark, J., concurring); Cox v. United States, 332 U.S. 442, 455 (1947) (Frankfurter, J., concurring); Gayes v. New York, 332 U.S. 145, 149 (1947) (Burton, J., concurring); Muhlker v. New York and Harlem R.R. Co., 197 U.S. 544, 571 (1905) (Brown, J., concurring); Lapeyre v. United States, 84 U.S. (17 Wall.) 191, 200 (1872) (Davis, J., concurring).

Similarly uninformative are concurrences that join only part of the plurality opinion, but say nothing about the unjoined part. Kuhlmann v. Wilson, 477 U.S. 436, 438 (1986); Segura v. United States, 468 U.S. 796, 797 n.† (1984); INS v. Lopez-Mendoza, 468 U.S. 1032, 1034

tions it is difficult to ascertain whether differences between the concurring and plurality opinions are stylistic or substantive.

### C. *Plurality Opinion Cases Based on Alternative Rationales*

#### 1. *Both issues reached.*

However, most plurality decisions contain alternative rationales. In cases like *Wyman-Gordon*, where the justices express views on both issue X and issue Y, we might most likely expect one justice to defer to a majority of his or her colleagues in order to avoid the anomaly of having a majority of judges determine X, and a majority of judges determine Y, with everyone agreeing that X and Y require R, yet instead having A. But in the fourteen or more times that the opportunity has been presented squarely, the justices have consistently voted otherwise, in accordance with their own positions.[24]

#### 2. *One issue not reached by some justices.*

There are additional cases, however, in which the same opportunity to defer has been presented, although the opportunity was perhaps not as obvious. In many cases justices did not reach the second of two issues because they disposed of the case based upon the first issue, while their colleagues decided the case based on the second issue after resolving the first. For instance, in many cases where X and Y required r, although some of the justices found X but not Y, others simply found not X without reaching Y The latter group could have found itself outvoted with respect to X and therefore have been logically required to reach issue Y In *Massachusetts v Oakes*,[25] the defendant was convicted of violating a subsequently amended state statute that prohibited adults from posing or exhibiting minors "in a state of nudity "[26] One argument for upholding the conviction was that an intervening amendment of the statute mooted the question of whether the statute was constitutionally overbroad. We can assume that all justices agreed that *if* the overbreadth issue were still alive (X), *and* if the statute were consti-

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n.* (1984); *see also Watson*, 487 U.S. at 1011 (Stevens, J., concurring); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 480 (1988) (White, J., concurring); United States v. Harris, 403 U.S. 573, 585 (1971) (Stewart, J., concurring); *id.* (White, J., concurring).

[24] *See supra* note 9.

[25] ____ U.S. ____, 109 S. Ct. 2633 (1989).

[26] Massachusetts v. Oakes, ____U.S. ____, 109 S. Ct. 2633, 2636 (1989).

tutionally overbroad (Y), then the defendant's conviction could not stand (r). Justices Scalia and Blackmun found that the overbreadth issue was not moot, but that the statute was not overbroad (X & not Y). Justices Brennan, Marshall, and Stevens in dissent agreed with Justices Scalia and Blackmun that the issue was not moot, but found that the statute was overbroad (X and Y). Justices O'Connor, Rehnquist, White, and Kennedy found that the subsequent amendment of the statute made overbreadth analysis inappropriate; they accordingly expressed no view of whether the statute was overbroad on its face (not X and not reach Y). Thus, even though a majority thought that the overbreadth question was viable, four justices (including Justice White) refused to decide that issue. Twenty-nine or more cases fit this mold.[27]

### 3. *Two issues not reached by some justices*

Even more opportunities to defer to a majority of the Court have occurred in cases involving plurality decisions where, X and Y being required for r, some justices find not-X and do not reach Y, while other justices do not reach X and find not-Y If all of the justices rejecting r had reached the issue that they did not reach and agreed with the dissent on that issue, then there would have been a majority for each of X and Y, and deference to the majority on the part of at least some of these justices would have meant a different result (r instead of not-r).

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[27] *See* Stanford v. Kentucky, ____U.S. ____, 109 S. Ct. 2969 (1989); Kungys v. United States, 485 U.S. 759 (1988); Lukhard v. Reed, 481 U.S. 368 (1987); O'Connor v. Ortega, 480 U.S. 709 (1987); Davis v. Bandemer, 478 U.S. 109 (1986); Bowen v. Roy, 476 U.S. 693 (1986); South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984); Michigan v. Clifford, 464 U.S. 287 (1984); Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981); Brown v. Louisiana, 447 U.S. 323 (1980); United States v. Mendenhall, 446 U.S. 544 (1980); City of Mobile v. Bolden, 446 U.S. 55 (1980); Parker v. Randolph, 442 U.S. 62 (1979); Parham v. Hughes, 441 U.S. 347 (1979); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977); Arnett v. Kennedy, 416 U.S. 134 (1974); Adams v. Illinois, 405 U.S. 278 (1972); United States v. 37 Photographs, 402 U.S. 363 (1971); Welsh v. United States, 398 U.S. 333 (1970); Jenkins v. McKeithen, 395 U.S. 411 (1969); Giles v. Maryland, 386 U.S. 66 (1967); Ker v. California, 374 U.S. 23 (1963); Glidden Co. v. Zdanok, 370 U.S. 530 (1962); Lathrop v. Donohue, 367 U.S. 820 (1961); Green v. United States, 365 U.S. 301 (1961); Sweezy v. New Hampshire, 354 U.S. 234 (1957); United States v. Five Gambling Devices, 346 U.S. 441 (1953); United States v. John J. Felin & Co., 334 U.S. 624 (1948).

Other cases that could perhaps be included in this category are the following: United States v. Paradise, 480 U.S. 149 (1987); Florida Dept. of State v. Treasure Salvors, 458 U.S. 670 (1982); Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980); The Mail Divisor Cases, 251 U.S. 326 (1920).

*Attorney General v Soto-Lopez*[28] is an example. *Soto-Lopez* involved an equal protection challenge to a New York state employment preference for those veterans who had entered the service from New York. All justices presumably would have agreed that if the right to travel did not require strict scrutiny (X) and if the statute had a rational basis (Y), then the statute did not violate the equal protection clause (r). Justices Brennan, Marshall, Blackmun, and Powell found that the right to travel required strict scrutiny, and accordingly voted to invalidate the statute without reaching the rational basis issue (not X and not reach Y).[29] Chief Justice Burger, on the other hand, found that the statute lacked a rational basis, and voted to invalidate the statute without reaching the right to travel/strict scrutiny issue (not reach X and not Y).[30] If Justice Brennan and his three colleagues *had* reached the rational basis issue and decided that the statute had a rational basis (not X and Y), and if Chief Justice Burger *had* reached the strict scrutiny issue and decided that strict scrutiny was not appropriate (X and not Y), then there would have been a separate majority for each of X and Y.[31] By refraining from reaching an issue, each of these five justices made what amounted to an implicit determination that it made no difference if the issue were decided. The refusal to reach an issue in these cases was thus a determination not to vote on the basis of deference to a majority of justices who disagree on an issue. Another seventeen cases fit within this class.[32]

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[28] 476 U.S. 898 (1986).

[29] Attorney General v. Soto-Lopez, 476 U.S. 898, 899-912 (1986). Justice Brennan expressly refused to "run the laws [initially] through a rational-basis analysis." *Id.* at 906 n.6.

[30] *Id.* at 912-16 (Burger, C.J., concurring). Chief Justice Burger expressly refrained from "adding dicta concerning the right to travel." *Id.* at 916.

Justice White concurred on the ground that the right to travel was not implicated, but that the classification failed the rational basis test (X and not Y). *Id.* at 916. Thus with respect to Justice White, this case is like *Oakes*.

[31] Justices O'Connor, Rehnquist, and Stevens dissented on the grounds that the right to travel did not require strict scrutiny and that the statute was rationally based (X and Y). *Soto-Lopez*, 476 U.S. at 924 (O'Connor, J., dissenting).

[32] *See* United States v. Kokinda, ____U.S. ____, 110 S. Ct. 3115 (1990); Webster v. Reproductive Health Serv., ____U.S. ____, 109 S. Ct. 3040 (1989); Pennsylvania v. Ritchie, 480 U.S. 39 (1987); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Cardwell v. Lewis, 417 U.S. 583 (1974); Furman v. Georgia, 408 U.S. 238 (1972); Apodaca v. Oregon, 406 U.S. 404 (1972); Mackey v. United States, 401 U.S. 667 (1971); Brown v. Louisiana, 383 U.S. 131 (1966); A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964); Manual Enter. v. Day, 370 U.S. 478 (1962); Trop v. Dulles, 356 U.S. 86 (1958); Terry v. Adams, 345 U.S. 461 (1953); Dennis v. United States, 341 U.S. 494 (1951); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); United States v. Williams, 341 U.S. 70 (1951).

Actually there are many more than seventeen such cases. Many cases in which the reasoning of a concurrence is either broader or narrower than that of the plurality are formally in this class of cases. A "broader" concurrence is one based on a theory that would result in more cases being decided in the direction of the respective case than the theory of the plurality For instance, in *Hoffman v Connecticut Dep't of Income Maintenance*,[33] Justices White, Rehnquist, O'Connor, and Kennedy held that the Bankruptcy Code did not abrogate a state's eleventh amendment immunity by clearly authorizing a bankruptcy court to issue a money judgment against a state that had not filed a proof of claim in the bankruptcy proceeding. Thus, states win these types of cases under the current Bankruptcy Code. Justice Scalia, concurring and providing the fifth vote for the state, held that Congress did not even have the power to lift the state's immunity. Under his theory, states win these types of cases under the current code and under any other code. In this sense, his concurrence is "broader." Over fifty concurrences to plurality decisions can be so characterized.[34] In these cases one might

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[33] ___ U.S. ___, 109 S. Ct. 2818 (1989).

[34] *See* Walton v. Arizona, ___U.S. ___, 110 S. Ct. 3047, 3058-68 (1990) (Scalia, J., concurring); Pennsylvania v. Muniz, ___U.S. ___, 110 S. Ct. 2638, 2652-54 (1990) (Rehnquist, C.J., concurring); Board of Educ. v. Mergens, ___U.S. ___, 110 S. Ct. 2356, 2376-78 (1990) (Kennedy, J., concurring); Chauffeurs, Local No. 391 v. Terry, ___U.S. ___, 110 S. Ct. 1339, 1349-53 (1990) (Brennan, J., concurring); FW/PBS, Inc. v. City of Dallas, U.S. ___, 110 S. Ct. 596, 611-14 (1990) (Brennan, J., concurring); County of Allegheny v. ACLU, ___U.S. ___, 109 S. Ct. 3086, 3134-46 (1989) (Kennedy, J., concurring); Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, ___U.S. ___, 109 S. Ct. 2994, 3018-26 (1989) (Blackmun, J., concurring); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 295-317 (1988) (Brennan, J., concurring); *id.* at 318-29 (Scalia, J., concurring); *Kungys*, 485 U.S. at 784-801 (Stevens, J., concurring); Boos v. Barry, 485 U.S. 312, 334-38 (1988) (Brennan, J., concurring); *Young*, 481 U.S. at 815-25 (Scalia, J., concurring); Gray v. Mississippi, 481 U.S. 648, 669-72 (1987) (Powell, J., concurring); Regan v. Time, Inc., 468 U.S. 641, 692-704 (1984) (Stevens, J., concurring); Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, 505 (1983) (O'Connor, J., concurring); Florida v. Royer, 460 U.S. 491, 509-13 (1983) (Brennan, J., concurring); Rosales-Lopez v. United States, 451 U.S. 182, 194-95 (1981) (Rehnquist, J., concurring); Allstate Ins. Co. v. Hague, 449 U.S. 302, 320-32 (1981) (Stevens, J., concurring); Fullilove v. Klutznick, 448 U.S. 448, 517-21 (1980) (Marshall, J., concurring); Richmond Newspaper, Inc. v. Virginia, 448 U.S. 555, 584-98 (1980) (Brennan, J., concurring); *Walter*, 447 U.S. at 660-62 (White, J., concurring); Godfrey v. Georgia, 446 U.S. 420, 433-42 (1980) (Marshall, J., concurring); United States v. Crews, 445 U.S. 463, 477 (1980) (Powell, J., concurring); New York Tel. Co. v. New York State Dept. of Labor, 440 U.S. 519, 547-51 (1979) (Blackmun, J., concurring); Bell v. Ohio, 438 U.S. 637, 643-44 (1978) (Marshall, J., concurring); Wise v. Lipscomb, 437 U.S. 535, 547-49 (1978) (Powell, J., concurring); Coker v. Georgia, 433 U.S. 584, 600 (1977) (Brennan, J., concurring); *id.* at 600-01 (Marshall, J., concurring); Wolman v. Walter, 433 U.S. 229, 255 (1977) (White and Rehnquist, JJ., concurring); Roberts v. Louisiana, 428 U.S. 325, 336 (1976) (Brennan, J., concurring); *id.* at

assume that the justices concurring on a broader ground, if they were to assume for the moment that the broader reasoning was in error, would naturally adopt the narrower ground adopted by their colleagues in the plurality, leading to the same result. If so, there is no way in which deference to a majority of the Court could lead to a different vote. Stated differently, these cases arguably are not ones in which there is the opportunity for the "broader" reasoning justices to vote against themselves, since even if they deferred to the rejection of the broader reasoning, they would certainly accept the narrower *a fortiori*, and vote in the same manner anyway

The trouble with this last analysis is that acceptance of a broader ground does not necessarily require acceptance of the narrower.[35] In

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336-37 (Marshall, J., concurring); Woodson v. North Carolina, 428 U.S. 280, 305-06 (1976) (Brennan, J., concurring); *id.* at 306 (Marshall, J., concurring); Jurek v. Texas, 428 U.S. 262, 277-79 (1976) (White, J., concurring); Proffitt v. Florida, 428 U.S. 242, 260-61 (1976) (White, J., concurring); Gregg v. Georgia, 428 U.S. 153, 207-26 (1976) (White, J., concurring); Roemer v. Board of Pub. Works, 426 U.S. 736, 767-70 (1976) (White, J., concurring); Codispoti v. Pennsylvania, 418 U.S. 506, 518-22 (1974) (Marshall, J., concurring); United States v. Falstaff Brewing Corp., 410 U.S. 526, 545-72 (1973) (Marshall, J., concurring); Tilton v. Richardson, 403 U.S. 672, 661-71 (1971) (White, J., concurring); McKeiver v. Pennsylvania, 403 U.S. 528, 557 (1971) (Harlan, J., concurring); *Coolidge*, 403 U.S. at 491 n.* (1971) (Harlan, J., concurring); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 57 (1971) (Black, J., concurring); Oregon v. Mitchell, 400 U.S. 112, 135-52 (1970) (Douglas, J., concurring); *id.* at 152-229 (Harlan, J., concurring); *id.* at 229-81 (Brennan, J., concurring); Baldwin v. New York, 399 U.S. 66, 74-76 (1970) (Black, J., concurring); Associated Press v. Walker, 388 U.S. 130, 170-72 (1967) (Black, J., concurring) (this case was heard together with another and is titled as *Curtis Pub. Co. v. Butts.*); Cheff v. Schnackenberg, 384 U.S. 373, 380-84 (1966) (Harlan, J., concurring); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413, 421 (1966) (Black, J., concurring); Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of America v. Jewel Tea Co., 381 U.S. 676, 697-735 (1965) (Goldberg, J., concurring); Jacobellis v. Ohio, 378 U.S. 184, 196-97 (1964) (Black, J., concurring); Burns v. Wilson, 346 U.S. 137, 146-48 (1953) (Minton, J., concurring); Watts v. Indiana, 338 U.S. 49, 56-57 (1949) (Douglas, J., concurring); Turner v. Pennsylvania, 338 U.S. 62, 66-67 (1949) (Douglas, J., concurring); Harris v. South Carolina, 338 U.S. 68, 71-73 (1949) (Douglas, J., concurring); Lustig v. United States, 338 U.S. 74, 80 (1949) (Black, J., concurring); Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 96-99 (1948) (Rutledge, J., concurring); Newark Fire Ins. Co. v. New Jersey Bd. of Tax Appeals, 307 U.S. 313, 323-24 (1939) (Frankfurter, J., concurring).

Other cases in this category may include Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 294-95 (1986) (White, J., concurring), and Oregon v. Bradshaw, 462 U.S. 1039, 1047-51 (1983) (Powell, J., concurring).

[35] This can be stated more formally as follows. Assume (X and Y) imply not-r, and (not-X or not-Y) imply r. Three justices hold not-X and three hold not-Y, resulting in a court holding of r. Not-X is "broader" than not-Y if not-X requires (or implies) not-Y. For instance, "there is never jurisdiction under statute A" is broader than "there is no jurisdiction under statute A on these facts" since "there is never jurisdiction" requires the conclusion that "there is no jurisdiction on these facts." But just because a justice accepts not-X and therefore not-Y, does not mean that the same justice cannot logically reason, but *if* X, then Y. For example,

*McKeiver v Pennsylvania*,[36] a four-justice plurality held that the sixth amendment did not guarantee the right to a jury trial in state juvenile proceedings. Justices Harlan and Brennan concurred separately Although Justice Harlan's concurrence was based on the broader ground that the sixth amendment did not extend the right to a jury trial to states, he did express the view that if the sixth amendment applied to the states, then he "would have great difficulty" holding that the right was not guaranteed in juvenile proceedings.[37] Similarly, in *Gosa v Mayden*,[38] a four-justice plurality held that the rule of *O'Callahan v Parker*[39] (that crimes tried by military court martial must be service-connected) did not apply retroactively. Justice Rehnquist concurred on the broader ground that *O'Callahan* was wrongly decided and should be overruled.[40] However, Justice Rehnquist also determined that *O'Callahan should* be applied retroactively if it were to be applied at all.[41] In these cases as well as in those cases where the broader concurrence expresses no opinion on the narrower issue, the more or less direct inference is that the justice had the opportunity to defer to a majority of his or her colleagues on the broader issue, and in refraining from even reaching the narrower issue implicitly held that it would make no difference to do so. Otherwise, the concurring justice's analysis is incomplete. Accordingly, these cases must be included among those in which justices have determined that it would not be appropriate to vote against their own position.

For the purposes of the present analysis, we should also include those cases in which the concurrence is narrower. A "narrower" holding is one based on a theory that would result in fewer cases being decided similarly to the respective case than the theory employed by the plurality In *Thompson v Oklahoma*,[42] Justices Stev-

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"there is never jurisdiction under this statute," but "if there is ever jurisdiction under this statute, then there is jurisdiction on these facts." In other words, one can consistently hold (1) not-X, (2) r, (3) not-Y, (4) but if X, then Y and not-r. Of course the same reasoner could also consistently decide (4) differently—if X, *not* Y. For example, "even if there is ever jurisdiction under the statute, there is no jurisdiction on these facts." Thus the fact that not-X implies not-Y does not resolve the issue of Y if the justice is willing to defer to disagreeing justices on the issue of X.

[36] *McKeiver*, 403 U.S. at 528.

[37] *Id.* at 557 (Harlan, J., concurring).

[38] *Gosa*, 413 U.S. at 665.

[39] 395 U.S. 258 (1969), *overruled by* Solorio v. United States, 483 U.S. 435 (1987).

[40] *Gosa*, 413 U.S. at 692 (Rehnquist, J., concurring).

[41] *Id.* Justice Black's concurrence in *James*, 366 U.S. at 223-25, is similar.

[42] 487 U.S. 815 (1988).

ens, Brennan, Marshall, and Blackmun held that capital punishment could not be applied for a crime committed while the defendant was under 16 years old.[43] Justice O'Connor provided the necessary fifth vote to vacate the death sentence, but she based her decision on the narrower ground that defendants who were below age 16 at the time of the offense may not be executed under authority of a state statute that specifies no minimum age at which the commission of a crime can lead to execution.[44] Another fifty cases fit this pattern of plurality decision plus a narrower concurrence.[45] They are really no

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[43] Thompson v. Oklahoma, 487 U.S. 815, 818-38 (1988).

[44] *Id.* at 857-58 (O'Connor, J., concurring).

[45] *See* Peel v. Attorney Registration & Disciplinary Comm'n, ___U.S. ___, 110 S. Ct. 2281, 2293-96 (1990) (Marshall, J., concurring); *Brendale*, 109 S. Ct. at 3015-17 (Stevens, J., concurring); Price Waterhouse v. Hopkins, ___U.S. ___, 109 S. Ct. 1775, 1795-96 (1989) (White, J., concurring); Texas Monthly, Inc. v. Bullock, ___U.S. ___, 109 S. Ct. 890, 905-07 (1989) (Blackmun, J., concurring); Florida v. Riley, ___U.S. ___, 109 S. Ct. 693, 697-99 (1989) (O'Connor, J., concurring); Franklin v. Lynaugh, 487 U.S. 164, 183-88 (1988) (O'Connor, J., concurring); EEOC v. Commercial Office Prod. Co., 486 U.S. 107, 125-26 (1988) (O'Connor, J., concurring); City of St. Louis v. Praprotnik, 485 U.S. 112, 132-47 (1988) (Brennan, J., concurring); Welch v. State Dept. of Highways, 483 U.S. 468, 495-96 (1987) (Scalia, J., concurring); Town of Newton v. Rumery, 480 U.S. 386, 399-403 (1987) (O'Connor, J., concurring); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 116-21 (1987) (Brennan, J., concurring); California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 292-95 (1987) (Stevens, J., concurring); FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 265-66 (1986) (O'Connor, J., concurring); Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 483-89 (1986) (Powell, J., concurring); City of Riverside v. Rivera, 477 U.S. 561, 581-86 (1986) (Powell, J., concurring); Ford v. Wainwright, 477 U.S. 399, 418-27 (1986) (Powell, J., concurring); Caldwell v. Mississippi, 472 U.S. 320, 341-43 (1985) (O'Connor, J., concurring); Wasman v. United States, 468 U.S. 559, 573-74 (1984) (Powell, J., concurring); South Carolina v. Regan, 465 U.S. 367, 382-84 (1984) (Blackmun, J., concurring); Barclay v. Florida, 463 U.S. 939, 958-74 (1983) (Stevens, J., concurring); Texas v. Brown, 460 U.S. 730, 747-51 (1983) (Stevens, J., concurring); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 89-92 (1982) (Rehnquist, J., concurring); California Medical Ass'n v. FEC, 453 U.S. 182, 201-04 (1981) (Blackmun, J., concurring); NLRB v. Retail Store Employees Union, 447 U.S. 607, 616-18 (1980) (Blackmun, J., concurring); *id.* at 618-19 (Stevens, J., concurring); Vitek v. Jones, 445 U.S. 480, 497-500 (1980) (Powell, J., concurring); *Pacifica Found.*, 438 U.S. at 755-62 (Powell, J., concurring); Houchins v. KQED, Inc., 438 U.S. 1, 16-19 (1978) (Stewart, J., concurring); Will v. Calvert Fire Ins. Co., 437 U.S. 655, 667-68 (1978) (Blackmun, J., concurring); *Coker*, 433 U.S. at 601-04 (Powell, J., concurring); Cantor v. Detroit Edison Co., 428 U.S. 579, 603-05 (1976) (Burger, C.J., concurring); Singleton v. Wulff, 428 U.S. 106, 121-22 (1976) (Stevens, J., concurring); Elrod v. Burns, 427 U.S. 347, 374-75 (1976) (Stewart, J., concurring); United States v. MacCollom, 426 U.S. 317, 329-30 (1976) (Blackmun, J., concurring); United States v. Mandujano, 425 U.S. 564, 584-609 (1976) (Brennan, J., concurring); *id.* at 609 (Stewart, J., concurring); Hampton v. United States, 425 U.S. 484, 491-95 (1976) (Powell, J., concurring); Frontiero v. Richardson, 411 U.S. 677, 691 (1973) (Stewart, J., concurring); *id.* at 691-92 (Powell, J., concurring); Peters v. Kiff, 407 U.S. 493, 505-07 (1972) (White, J., concurring); *Rosenbloom*, 403 U.S. at 57-62 (White, J., concurring); Powell v. Texas, 392 U.S. 514, 548-54 (1968) (White, J., concurring); *In re* Sawyer, 360 U.S. 622, 646-47 (1959) (Stewart, J., concurring);

different from the cases in which the concurrence is broader, except in the relative number of justices to take the broader or narrower position. Regardless of whether the justices employing broader reasoning are in the plurality or the concurrence, their failure to assume arguendo that they are wrong on the broader issue rejected by a majority implies the irrelevance of such an inquiry

There are occasional examples, however, where a concurring justice—whose vote is needed to determine the case[46]—proceeds to decide an issue on the hypothetical assumption that he or she wrongly determined the broader issue.[47] A justice will reach an issue that need not be reached under his or her own analysis and justify examination of the issue on the ground that the other justices disagree on the issue. But generally this has occurred only when the justice's resolution of the second issue leads to the same result as analysis of the first issue. Reaching the second issue in this situation amounts to no more than a decision on alternative grounds. For

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Reid v. Covert, 354 U.S. 1, 41-64 (1957) (Frankfurter, J., concurring); *id.* at 65-78 (Harlan, J., concurring); Gallegos v. Nebraska, 342 U.S. 55, 68-73 (1951) (Jackson, J., concurring); United States v. Pewee Coal Co., 341 U.S. 114, 119-21 (1951) (Reed, J., concurring); Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662, 668-69 (1949) (Burton, J., concurring); Klapprott v. United States, 335 U.S. 601, 616 (1949) (Burton, J., concurring); Colegrove v. Green, 328 U.S. 549, 564-66 (1946) (Rutledge, J., concurring); New York v. United States, 326 U.S. 572, 586-90 (1946) (Stone, C.J., concurring); Texas & Pac. Ry. Co. v. Leatherwood, 250 U.S. 478, 482-83 (1919) (McReynolds, J., concurring); Wheeler v. Sohmer, 233 U.S. 434, 441-46 (1914) (McKenna, J., concurring); Mayor v. Ray, 86 U.S. (19 Wall.) 468, 481-85 (1873) (Hunt, J., concurring).

[46] There are some cases where a dispositive number of justices decided that the court had jurisdiction *and* reached the merits in a certain way, and an extra justice, while finding no jurisdiction, nonetheless reached the merits. *See* City of Phoenix v. Kolodziejski, 399 U.S. 204, 218 n.3 (1970) (Stewart, J., dissenting); Mills v. Alabama, 384 U.S. 214, 222-23 (1966) ("separate opinion" of Harlan, J.); Kesler v. Dep't of Pub. Safety, 369 U.S. 153, 174 (1962) (Stewart, J., concurring in part); *id.* at 175-82 (Warren, C.J., dissenting); Florida Lime & Avocado Growers v. Jacobsen, 362 U.S. 73, 86 (1960) (Douglas, J., dissenting). In each of these instances the particular justice's vote could not affect the outcome, and it therefore mattered little how he voted or whether his separate opinion was called a "concurrence," a "dissent," or neither. *See also Konigsberg*, 353 U.S. at 276-312 (Harlan, J., dissenting) (rejecting majority finding of jurisdiction and further proceeding to reject majority decision on the merits).

In a somewhat analogous situation, in *Regan*, 465 U.S. at 370-81, Justice Stevens joined part of what otherwise would have been entirely a plurality opinion, thus rendering that part an "opinion of the Court," but he clearly *dissented* because he disagreed with the second step of the plurality's reasoning. *Id.* at 403-19 (Stevens, J., dissenting). Justice Blackmun had concurred on a ground narrower than that of the plurality, *id.* at 382-84, making Justice Stevens's vote not necessary for the result.

[47] *See* Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 731 (1987) (O'Connor, J., concurring); Rose v. Mitchell, 443 U.S. 545, 574 (1979) (Rehnquist, J., concurring); Lockett v. Ohio, 438 U.S. 586, 619 (1978) (Marshall, J., concurring).

instance, *United States v Jorn*[48] involved a criminal mistrial and subsequent dismissal of the information on retrial, on double jeopardy grounds. On direct appeal, reversal was appropriate only if (X) the decision was appealable under the Criminal Appeals Act *and* (Y) retrial would not violate the double jeopardy clause. Justices Harlan, Burger, Douglas, and Marshall held that the decision was appealable, but that retrial violated the double jeopardy clause (X but not Y).[49] Justices Black and Brennan stated that the Court lacked jurisdiction; "[h]owever, in view of the decision by a majority of the Court to reach the merits, they join[ed] the judgment of the Court." (Not X and not Y.)[50] Justices Black and Brennan deferred to the majority with respect to the preliminary issue of jurisdiction, but reached the same result they would have reached if they had not done so.

Such cases may not involve rejection of the idea that a justice will defer to a majority of disagreeing colleagues on an issue, but the cases certainly do not reflect an acceptance of that idea.

### *D. Cases Containing Shifting Majorities*

If there is precedent for deference to the majority, it would most likely occur in a case involving a plurality opinion, like *Pennsylvania v Union Gas*. It is also conceivable that such a result can occur in a case in which a majority opinion has different majorities supporting each of two parts of the opinion. Such an opinion is not a plurality opinion, and can be called a "shifting majority" opinion. A case with a "shifting majority" opinion, in which both X and Y are required for r, might conceivably look like the following:

Majority opinion by A. Part I holding X joined by Justices A, B, C, D & E
Part II holding Y joined by Justices A, B, C, F & G
Therefore r.

Concurrence by F & G: "although we disagree with X, we join the majority opinion to establish Y and concur in r"

Concurrence by D & E: "although we disagree with Y, we join the majority opinion to establish X and concur in r"

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[48] 400 U.S. 470 (1971).

[49] United States v. Jorn, 400 U.S. 470, 472-87 (1971).

[50] *Id.* at 488.

Dissent by H & I: We reject X and Y and dissent.

In this hypothetical, even though fewer than 5 justices decide both X and Y, the deference to disagreeing majorities implicit in the concurrences results in r, but there is no plurality opinion.

An examination of the shifting majority decisions of the Supreme Court, however, turns up only one such concurrence, to be discussed at a later point.[51] Instead, shifting majority opinions generally arise in two types of cases. The first is when there are really two cases before the Court, in the sense that two distinct remedies are sought.[52] For instance, *Whitcomb v Chavis*[53] involved two distinct challenges to Indiana's state legislative apportionment. One dealt with whether Marion County should be divided into single-member districts, while the other dealt with whether the entire state had to be reapportioned because of large population-per-senator variations. Justices Burger, Black, Blackmun, and Stewart joined Justice White's majority opinion holding that Marion County could remain a multi-member district. Justices Douglas, Brennan, and Marshall, but not Stewart, joined Justices White, Burger, Black and Blackmun in holding that state-wide reapportionment was required. Here two different claims existed rather than two steps in the resolution of one claim, and no justice voted on the premise that he was wrong.

The second type of shifting majority opinion involves a two-step analysis in which one step is not necessary to the Court's conclusion.[54] Stated formally, where X and Y are required for r, one majority finds X and another majority finds not Y The

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[51] *See infra* notes 69-77 and accompanying text (discussing *Vuitch*, 402 U.S. at 62).

[52] Georgia v. South Carolina, ____U.S. ____, 110 S. Ct. 2903 (1990) (different portions of boundary dispute); County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) (claim and cross-claim); Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) (prospective and retroactive relief); Buckley v. Valeo, 424 U.S. 1 (1976) (challenges to different statutory provisions); Whitcomb v. Chavis, 403 U.S. 124 (1971) (redistricting of one county and reapportionment of entire state); *see also* Hodgson v. Minnesota, ____U.S. ____, 110 S. Ct. 2926 (1990) (different provisions of abortion statute); Atchison, Topeka, & Santa Fe Ry. v. Wichita Bd. of Trade, 412 U.S. 800 (1973) (remand to agency and court injunction pending resolution of remand); Malinski v. New York, 324 U.S. 401 (1945) (different criminal defendants).

[53] 403 U.S. at 124.

[54] *See*, Penry v. Lynaugh, ____U.S. ____, 109 S. Ct. 2934 (1989); Mitchell v. Forsyth, 472 U.S. 511 (1985); *Rose*, 443 U.S. at 545; United States v. SCRAP, 412 U.S. 669 (1973); United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655 (1973); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967); Allen v. Regents of the Univ. Sys. of Georgia, 304 U.S. 439 (1938).

holding of the shifting majority is therefore not-r. For instance, in *Allen v Regents of the University System of Georgia*,[55] Justice Roberts delivered the shifting majority opinion. If there were jurisdiction to challenge a particular tax (X), and the tax were unconstitutional (Y), an injunction would issue to stop collection of the tax (r). Justices Butler and McReynolds joined Justices Roberts, Brandeis, and Hughes in finding jurisdiction (X). Justices Stone and Reed joined Justices Roberts, Brandeis, and Hughes in holding that the tax was valid (not-Y). Justice Black held that the Court did not have jurisdiction (not-X), but apparently found the tax to be constitutional (Y), and therefore concurred in the judgment (not r). Only Justices Butler and McReynolds found that there was jurisdiction and that the tax was invalid (X & Y imply r). There was no occasion in this situation for any of the concurring justices to defer to a majority on one of the issues and vote against himself, and thereby change the result. If Justices Stone and Reed had assumed jurisdiction because a majority found it even though they rejected it, they still would have voted against the injunction on the grounds that the tax was constitutional. If Justice Black had assumed jurisdiction, he could have dissented on the ground that the tax was invalid (he did not do so), but it only would have increased the number of dissenters to three and would not have changed the result of the case. This class of cases largely fails to disclose any precedent for a justice's deference to a disagreeing majority [56]

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[55] 304 U.S. at 439.

[56] Edgar v. Mite Corp., 457 U.S. 624 (1982), is a shifting majority decision that falls in neither category, but which nonetheless provides no precedent for voting against one's own position. In *Edgar*, if (X) the case was not moot and (Y) the Illinois statute was unconstitutional, then (r) the lower court's injunction against enforcement of the statute would be affirmed. Justice Blackmun joined Justices White, Burger, Stevens, and O'Connor in the opinion of the Court, which held (X) the case was not moot. *Id.* at 630. Justices White, Burger, Stevens, O'Connor, and Powell joined the opinion of the Court holding that the Illinois statute violated the commerce clause. *Id.* at 643-47. But Justice Powell did not concur in the *judgment* of the Court affirming the injunction. *Id.* at 646. The judgment of affirmance resulted only because Justice Blackmun, while disagreeing on the commerce clause issue, found (also Y) that the statute violated the supremacy clause. *Id.* at 634-40 (plurality opinion). Justice Powell's vote in *Edgar* thus is precisely analogous to Justice Stevens' vote in *South Carolina v. Regan*. *See supra* note 46. *See also Muniz*, 110 S. Ct. at 2644-49, which appears to be analogous to *Edgar*.

There are instances in which a justice provided a fifth vote for a majority *opinion* by writing a separate concurrence reflecting the justice's desire to create a majority. *See* United States v. Ross, 456 U.S. 798, 825 (1982) (Blackmun, J., concurring); Gertz v. Robert Welch, Inc., 418 U.S. 323, 354 (1974) (Blackmun, J., concurring); Int'l Ass'n of Machinists v. Street,

## II. DISTINGUISHABLE PRECEDENTS

As discussed above, over 150 Supreme Court cases involving plurality majority opinions indicate that a justice should not defer to a majority that disagrees on a dispositive issue.[57] In contrast, justices in six cases prior to *Union Gas* have voted contrary to their own analysis. As will be shown, however, five of these cases could not have been decided any other way. The remaining case is an unwise anomaly. Thus, they serve as little precedent for such a practice.

### *A. The Triple Choice Cases*

In five of these cases the Supreme Court had *three* possible choices. In *Maryland Casualty Co. v. Cushing*[58] representatives of victims of a towboat accident brought suit against liability insurers under a Louisiana direct action statute. The court of appeals held that the suit was not foreclosed by the federal Limited Liability Act. Justices Frankfurter, Reed, Jackson, and Burton reasoned that the federal act required dismissal of the state claims altogether.[59] Justices Black, Warren, Douglas, and Minton held that the federal act did not impair the state law [60] Justice Clark, however, rejected both of these results, finding that the federal act required the district court to delay consideration of the state law

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367 U.S. 740, 778-79 (1961) (Douglas, J., concurring). Although these instances may be troubling, see Kelman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227, 267-28, they are distinguishable in a significant way from votes like Justice White's in *Union Gas*. The concurring justice in these cases actually joined the opinion of the Court, for whatever reason, and thus voted upon a rationale that he accepted. That is presumably what is meant by "joining an opinion."

[57] *See supra* notes 9, 27, 32, 34, 45 and accompanying text.

Professor Leonard performed a similar examination of the high court cases of four states. *See* Leonard, *The Correctness Function of Appellate Decision-Making: Judicial Obligation in an Era of Fragmentation*, 17 LOY. L.A.L. REV. 299, 339 & n.203 (1984). Two Indiana Supreme Court cases in which there were votes analogous to Justice White's vote in *Union Gas* sparked Professor Leonard's inquiry. *Id.* at 317-25 (describing Bryan v. State, 438 N.E.2d 709 (Ind. 1982), and Peoples Bank & Trust Co. v. Stock, 403 N.E.2d 1077 (Ind. 1980)). Professor Leonard looked at criminal cases in the high courts of California, New York, Alabama, and Indiana during the period 1973 to 1983, and found no precedent for voting against one's position.

In an examination of the ethical implications of "paradoxical voting," Aimee Imundo noted the difficulty of determining how rare such voting behavior has been. Imundo, *Paradoxical Voting in the Supreme Court*, 3 GEO. J. OF LEGAL ETHICS 867, 883 (1990).

[58] 347 U.S. 409 (1954).

[59] Maryland Casualty Co. v. Cushing, 347 U.S. 409, 422 (1954) (plurality opinion).

[60] *Id.* at 432-38 (Black, J., dissenting).

claim until the limitation proceeding under the federal act was concluded.[61] Justice Frankfurter's plurality opinion stated that he would reverse the court of appeals and reinstate the district court dismissal of the complaints, but

> [i]n order to break the deadlock resulting from the differences of opinion within the Court and to enable a majority to dispose of this litigation, we vacate the judgment of the Court of Appeals and order the case to be remanded to the District Court to be continued until after the completion of the limitation proceeding.[62]

Unless one of the three voting groups voted against its own position, there would be no judgment from the Court. A different majority rejected each of the three possible conclusions. At least one group had to vote against its own position. In these situations it makes sense for the "middle" position to obtain, and that is the result of the Frankfurter group's vote. If the Black group had done the same thing to avoid a deadlock, then the same result (remand) would have occurred. And if Justice Clark had changed his vote just to avoid a deadlock, an anomaly would have resulted. For instance, if Justice Clark had voted to dismiss altogether, but voted his own views in the future, then a subsequent case in which the limitation proceeding had been concluded could permit the state proceeding, thus permitting the inconsistent result of federal preemption in one case but not another on identical facts. Consistency supports the way in which the deadlock was resolved.

Three very similar cases involving the mutually exclusive triple choice of whether to affirm, remand, or reverse occurred in the decade prior to *Maryland Casualty*.[63] The fifth and most recent triple-choice

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[61] *Id.* at 423-27.

[62] *Id.* at 423 (plurality opinion).

[63] *See* Klapprott v. United States, 335 U.S. 601, 619 (1949) (Rutledge, J., concurring); Von Moltke v. Gillies, 332 U.S. 708, 726-27 (1948) (plurality opinion); Screws v. United States, 325 U.S. 91, 134 (1945) (Rutledge, J., concurring).

In the last case Justice Rutledge stated:

> If each member accords his vote to his belief, the case cannot have disposition. Stalemate should not prevail for any reason, however compelling, in a criminal cause or, if avoidable, in any other. My views concerning appropriate disposition are more nearly in accord with [remand than with] outright reversal. Accordingly, in order that disposition may be made of this case, my vote has been cast to [remand].

*Id.*

*See also* Inman v. Baltimore & Ohio Ry., 361 U.S. 138, 141 (1959) (Frankfurter, J., concurring), in which Justice Frankfurter provided the fifth vote for affirmance, instead of his preference for dismissal of certiorari as improvidently granted, so that affirmance would not be based on an unexplained 4-4 decision. (Note that the result for the respondent would have been the same in either case).

case is *Connecticut v Johnson*.[64] The Connecticut Supreme Court reversed a criminal conviction on federal due process grounds. Justices Blackmun, Brennan, White, and Marshall agreed that there was a due process violation and voted to affirm.[65] Justice Stevens reasoned that the Supreme Court lacked jurisdiction to review the state court's action.[66] Justices Powell, Burger, Rehnquist, and O'Connor found jurisdiction but no due process violation.[67] Justice Stevens voted along with the Blackmun group although his reasoning would have lead to dismissal of the writ of certiorari rather than affirmance: "Because a fifth vote is necessary to authorize the entry of a Court judgment, however, I join the disposition which will allow the judgment of the Connecticut Supreme Court to stand."[68]

These five cases represent the exception that demonstrates the rule. The justices voting against their own position expressly justified their actions as necessary for the Court to issue a judgment. By negative implication, the only principle that will trump the uniform practice of Supreme Court justices' voting consistently with their own reasoning is the fundamental rule that a court must decide the case before it.

### *B. The Remaining Case—A Shifting Majority*

The remaining case is the shifting majority decision in *United States v. Vuitch*.[69] The issue was whether the District of Columbia could prosecute a doctor under an abortion statute. The district court dismissed the indictment on the grounds that the D.C. statute was unconstitutionally vague, and the government appealed directly to the Supreme Court under a federal statute permitting direct appeals when federal statutes are held unconstitutional. All of the justices presumably would have agreed that if (X) the Supreme Court had jurisdiction despite the fact that the challenged federal statute applied only to the District of Columbia, and (Y) the statute could be constitutionally applied to defendant, then (r) the dismissal of the indictment should be reversed. Justice Black's two-part shifting majority opinion was joined in its entirety by Chief Justice Burger and Justice White. Justice Black held that the Court had jurisdiction and that the statute could

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[64] 460 U.S. 73 (1983).
[65] Connecticut v. Johnson, 460 U.S. 73, 74-88 (1983) (plurality opinion).
[66] *Id.* at 88-90 (Stevens, J., concurring).
[67] *Id.* at 90-102 (Powell, J., dissenting).
[68] *Id.* at 89-90 (Stevens, J., concurring).
[69] 402 U.S. 62 (1971).

be constitutionally applied (X and Y therefore r.) Justices Douglas and Stewart joined Justice Black's opinion to hold that the Court had jurisdiction,[70] but for different reasons found that the statute could not constitutionally be applied to the actions of the defendant,[71] and therefore dissented (X but not-Y therefore not-r). Justices Harlan, Brennan, Marshall, and Blackmun found that the Supreme Court lacked jurisdiction (not-X).[72] If these justices believed the Court lacked jurisdiction it follows that they should not have voted to reverse, and that is indeed how Justices Brennan and Marshall voted (not-X implies not-r without deciding Y). Justices Blackmun and Harlan, however, joined Justice Black's opinion with regard to the constitutionality of the abortion statute, and voted to reverse, despite their opinion that the Court lacked jurisdiction (not-X and Y imply not-r but vote r anyway). Justice Harlan did so "substantially for the reasons set forth in . Justice Blackmun's separate opinion,"[73] which in turn stated:

> Although I join Mr. Justice Harlan in his conclusion that this case is not properly here by direct appeal under 18 U.S.C. 3731, a majority, and thus the Court, holds otherwise. The case is therefore here and requires decision.
>
> The five Justices constituting the majority, however, are divided on the merits. [He described each position.]
>
> Because of the inability of the jurisdictional-issue majority to agree upon the disposition of the case, I feel obligated not to remain silent as to the merits. [He cited four cases.] Assuming, as I must in the light of the Court's decision, that the Court does have jurisdiction of the appeal, I join Part II of Mr. Justice Black's opinion and the judgment of the Court.[74]

Thus, although a majority of the justices did not believe that the Court could legally reinstate Vuitch's indictment, the indictment was nonetheless reinstated.

The cases cited by Justice Blackmun were all distinguishable. One was a triple-choice case where such a vote was necessary to decide the case.[75] One was essentially a decision on alternate grounds.[76]

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[70] United States v. Vuitch, 402 U.S. 62, 63 n.* (1971).

[71] *Id.* at 74-80 (Douglas, J., dissenting); *id.* at 96-97 (Stewart, J., dissenting).

[72] *Id.* at 81-96 (Harlan, J., concurring).

[73] *Id.* at 96 (Harlan, J., "dissenting as to jurisdiction").

[74] *Id.* at 97-98 (opinion of Blackmun, J.).

[75] *Screws*, 325 U.S. at 134 (Rutledge, J., concurring); *see supra* note 63 and accompanying text.

[76] United States v. Jorn, 400 U.S. 470, 487-88 (1971) (statement of Black and Brennan, JJ.); *see supra* notes 48-50 and accompanying text.

The other two were cases in which the justice's vote was unclear and made no difference in the outcome.[77] Thus, Justice Blackmun's action was largely unprecedented.

## III. THE ALLEGED JUSTIFICATIONS

### *A. Analogy to Stare Decisis*

The votes of Justices Harlan and Blackmun in *Vuitch*, supported by simple *ipse dixit*, are pretty meager authority compared to the overwhelming precedent against what Justice White did in *Union Gas*. Nonetheless, his action has a certain plausibility to it. It seems analogous to the rule of stare decisis. If the majority has decided, then one should follow the majority's analysis for the same reasons that justify stare decisis. This approach, however, does not bear careful examination.

None of the policies underlying stare decisis supports deference to a majority in the same case. The primary justification for stare decisis is the predictability that is gained by conforming to precedent.[78] Those who are affected by law should be able to ascertain it and rely upon it. If a court decides a case a certain way, persons affected by the law involved should be able to anticipate that an indistinguishable fact situation will be decided in the same way However, there is no way that anyone can have relied upon a majority's resolution of an issue in the very case that is being decided. The reliance justification for stare decisis does not support deference to a disagreeing majority in the same case.

Reliance interests do not totally explain the doctrine of stare decisis, however. Over the years, courts have developed rules dictating when stare decisis should or should not apply [79] For instance, courts more easily overrule precedent that is itself inconsistent with previous precedent,[80] and precedent that is unworkable.[81] The Su-

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[77] Mills v. Alabama, 384 U.S. 214, 222-23 (1966) (separate opinion of Harlan, J.); Kesler v. Dep't of Pub. Safety, 369 U.S. 153, 174, 179 (1962) (Stewart, J., concurring in part, and Warren, C.J., dissenting); *see supra* note 46.

[78] R. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION 60-69 (1961); Maltz, *Judicial Precedent*, 66 N.C.L. REV. 367, 368-69 (1988); Schauer, *Precedent*, 39 STAN. L. REV. 571, 597-98 (1987).

[79] *See* Comment, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344, 1346-47 (1990).

[80] *E.g.*, Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 241 (1970); United States v. Darby, 312 U.S. 100, 116-17 (1941).

[81] *E.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

preme Court has held that stare decisis applies more strictly in statutory than in constitutional cases.[82] Such meta-principles regarding when to apply stare decisis can be ascertained by lawyers as readily as the primary legal rules.[83] Expectation or reliance interests underlying stare decisis can thereby be reconciled with what is frequently the refusal of modern courts to follow precedent. Lawyers, in other words, can advise clients as to the likelihood that their cases will be decided in the same way as previous cases. For this reason, reliance interests do not entirely explain the doctrine of stare decisis.[84] It is also difficult to use reliance as a basis for asking a court to rely upon an obscure case that a lawyer through diligent effort has managed to dig up to support the client's position. There is no way that the client can have relied upon the case, yet few would doubt the relevance of the case for that reason.

The more fundamental policy supporting stare decisis is that it is intrinsically fairer for like cases to be decided in a like manner.[85] Consistency is embedded in our very idea of what is "law" Only a distinguishing fact that somehow justifies a different result, or a conclusion that the previous case was clearly wrong, justifies deciding a case differently from precedent. Otherwise we will have a government of "men and not law" Judges will differ on what distinctions are significant, and on how clearly a precedent must be wrong to be overruled (though meta-principles can develop on these issues), but the underlying premise that like cases should be decided in a like manner remains. In the case of a justice's consideration of whether to defer to a disagreeing majority in the same case, however, there is no "other" case with which to be consistent. Thus, neither of the most important policies supporting stare decisis can be used to justify such deference.

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[82] *E.g.*, Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977); *see* Maltz, *supra* note 78, at 388-93; Comment, *supra* note 79, at 1344 (doctrine of stare decisis least predictable in area of constitutional law). This meta-rule has been criticized recently. *See* Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422 (1988); Eskridge, *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988).

[83] Professor Kelman analyzed in detail the extent to which individual justices have felt bound by prior holdings to which they dissented. Kelman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227. He found no "pat formula" to explain the varying actions of the justices in this regard, and suggested guidelines in order to reconcile the competing policies of (1) settling the law and (2) abiding by one's convictions. *Id.* at 297-98.

[84] The circularity of reasoning involved in using reliance as a justification for stare decisis has been shown in other ways. *See* R. WASSERSTROM, *supra* note 68, at 76-79.

[85] R. WASSERSTROM, *supra* note 78, at 69-72; Kornhauser and Sager, *Unpacking the Court*, 96 YALE L.J. 82, 104 (1986); Maltz, *supra* note 78, at 369-70; Schauer, *supra* note 78, at 595-97.

Other policies supporting stare decisis are similarly not furthered by deference in the instant case. One argument for reliance on precedent is the judicial efficiency derived from courts not having to reevaluate a previously considered legal issue.[86] There is no comparable efficiency gained from deferring to a majority in a case currently under consideration. Just as much analysis is required to determine that the justice disagrees in the first place!

Finally, stare decisis can be justified on the ground that the collective wisdom of courts over the years should generally supersede the relatively limited insights of a court hearing a single case at a precise point in time.[87] This argument by its nature has no applicability to the possibility of deference to judges deciding the same case at the same point in time. None of the justifications for stare decisis supports voting as Justice White did in *Union Gas*.

### *B. Coherence and Consistency*

Even though the rationales for stare decisis do not support Justice White's deference, there are other possible justifications that should be explored. Some would maintain that such voting improves the coherence of the law. An ephemeral improvement in coherence, however, comes at the cost of a mortal wound to consistency The problem of incoherence can be shown by again considering the anomalous nature of cases like *Wyman-Gordon*, in which the effective holding of the multi-member Court as a whole reflects the views of none of the justices. The incoherent result of the anomaly is made clearer by comparing the result in *Wyman-Gordon* with the results of two hypothetical cases decided the next day, "*Wyman-Gordon II*" and "*Wyman-Gordon III*." Recall that in *Wyman-Gordon* the NLRB required an employer to provide a list of the names and addresses of its employees to unions seeking to organize the employees. The Board based its action on an earlier decision, *Excelsior*, that had enunciated a general requirement that employers furnish employment lists to unions. The two premises required for reversing the NLRB were roughly (X) the *Excelsior* "rule" was improperly promulgated under the Administrative Procedure Act, and (Y) if *Excelsior* were improperly promulgated, the agency de-

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[86] Maltz, *supra* note 78, at 370-71; Schauer, *supra* note 78, at 599; Wasserstrom, *supra* note 78, at 72-73; Florida Dep't of Health v. Florida Nursing Home Ass'n, 450 U.S. 147, 154 & n.12 (1981) (Stevens, J., concurring).

[87] *Florida Dep't of Health*, 450 U.S. at 154 & n.12 (Stevens, J., concurring); R. WASSERSTROM, *supra* note 78, at 75-79; Maltz, *supra* note 78, at 371-72.

cision must be reversed even if the agency could have made the same requirement without relying on *Excelsior* Justices Douglas and Harlan voted that X and Y together required reversal of the agency action, but they lost because Justice Black and two others rejected X, while Justice Fortas and three others rejected Y. Assume that in "*Wyman-Gordon II*" an *Excelsior*-like "rule" came about in a way that every Justice could agree that it was improperly promulgated, but that the circumstances regarding subsequent application were indistinguishable from *Wyman-Gordon*. Now Justices Black's group plus Justices Douglas and Harlan would have voted to reverse the agency, but presumably Justice Fortas's group would dissent.

Now assume that in "*Wyman-Gordon III*" the *Excelsior* "rule" came about exactly as in *Wyman-Gordon* but that the agency could not have taken the subsequent action without reliance on the previous "rule," so that all of the Justices now agree that if the previous "rule" were improperly promulgated, then reversal of the agency is required. Justice Fortas's group would now join Justices Douglas and Harlan to reverse the agency, while Justice Black's group would dissent. The anomaly is that *no* justice would find that *all three* cases were correctly resolved. No consistently applied logical theory can justify all three results.

This anomaly is closely related to the possibility of "cycling" identified by Professor (now Judge) Frank Easterbrook as an example designed to prove the impossibility of consistent decisionmaking by multiple-member courts.[88] Easterbrook relied on Arrow's Theorem, which demonstrates that given certain natural assumptions, consistency on the part of individual members of a multiple-member decisionmaking body precludes consistency on the part of the body as a whole. Easterbrook's example hypothesized one group of judges that reads the first amendment to forbid all aid to religion (the absolute or "A" position), a second group that permits such aid if it is neutral between religious and nonreligious associations (the neutral or "N" position), and a third group of judges that believes that the first amendment requires a balancing of factors to determine whether neutral aid to religion is permitted (the balancing or "B" position). The example further supposes that the A group as a second choice would prefer N over B, the N group would prefer B over A, and the B group would prefer A over N. Under these circumstances no one of the three rules can be consistently

[88] Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 814-17 (1982).

chosen in successive cases, at least when successive lawyers on either side argue just one of the three positions. When these opinions are considered together, the effective holding is one that no individual justice would support.

The possibility that this situation may exist led Easterbrook to the conclusion that "[a] demand for consistency as a rule asks the impossible of the [Supreme] Court."[89] Easterbrook supported this conclusion with an application of Kenneth Arrow's Nobel Prize-winning theorem to judicial decisionmaking. If a system of pooling individuals' conclusions to produce a collective decision obeys four conditions that Easterbrook found inescapable in the case of multi-member courts,[90] then the system cannot meet the condition of "transitivity." There is "transitivity" when, "[i]f the collective decision selects A over B and B over C, it also must select A over C."[91] Easterbrook states flatly that without this transitivity, "consistency is impossible."[92]

This is disheartening news for those who like to think about law as consistent, and extra ammunition for those who tout the indeterminacy of judicial determinations. Some people use this alleged indeterminacy as a weapon to undermine the consensus of the American polity about the limited role of courts in our constitutional system.[93] Put very simply, the idea is that courts are not really

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[89] *Id.* at 823.

[90] The four conditions that Easterbrook found "inescapable" are the following:

1. Unanimity: If all people entitled to a say in the decision prefer one option to another, that option prevails.

2. Nondictatorship: No one person's views can control the outcome in every case.

3. Range: The system must allow every ranking of admissible choices, and there must be at least three admissible choices with no other institution to declare choices or rankings out of bounds at the start.

4. Independence of Irrelevant Alternatives: The choice between options A and B depends solely on the comparison of those two.

*Id.* at 823-30. *Compare* Spitzer, *Multicriteria Choice Processes: An Application of Public Choice Theory to Bakke, the FCC, and the Courts*, 88 YALE L.J. 717, 758-64 (1979) (discussing the inherent difficulty of determining the nature of choice processes used by courts).

[91] Easterbrook, *supra* note 88, at 830.

[92] *Id.*

[93] *See* Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1239-48 (1984); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983); *see also* Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765, 766-73 (1982); Miller, *Toward a Definition of "The" Constitution*, 8 U. DAYTON L. REV. 633, 650-53 (1983). *See generally* Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283, 302 n.67 (1989) (for a collection of other examples); McArthur, *Abandoning the Constitution: The New Wave in Constitutional Theory*, 59 TUL. L. REV. 280, 298-99 (1984) (for a summary of the "nihilist" position).

constrained by the "law," so why not accept that the judiciary is a political entity much like the legislature or the executive. The asserted inconsistency of multiple-member court decisionmaking can be used to support this argument because even if law is sufficiently determinate to distinguish courts from political branches when courts are composed of single judges, that determinacy evaporates when there is group judicial decisionmaking. This is because where there is true inconsistency, there is indeterminacy True inconsistency leads inexorably to indeterminacy, because if you can prove both X *and* not-X (true inconsistency), then you can prove anything.[94] So if inconsistency is inevitable when we speak of multiple-member courts, then we are forced to accept indeterminacy along with it.

But wait. Maybe judges can attain group consistency by sacrificing individual consistency. Perhaps *this* is what Justice White was attempting in *Union Gas*. To avoid *Wyman-Gordon*-like anomalies, an individual justice could conceivably vote contrary to his or her own legal analysis, under the guise of accepting the majority's (incorrect) determination of that issue.

Indeed, avoiding group inconsistency might be an attractive basis for voting against one's own conclusions, if one sees consistency as a central goal. Easterbrook referred to the idea of voting against one's own conclusions, to provide a "cure for the cycling of outcomes," as "strategic voting."[95]

Easterbrook did not advocate strategic voting, however, because it does not solve the problem. There is no principled way to determine when to yield to other justices, "and if all the Justices engage in strategic yielding, the result is the same as if none does."[96] Arrow's Theorem is too powerful, according to Easterbrook, and regardless of strategic voting, judicial group decisionmaking always reflects inconsistency.[97]

While Easterbrook's analysis does not support Justice White's action in *Union Gas*, his argument remains disturbing to those who are unwilling to accept the wholesale indeterminacy of constitutional law Easterbrook's use of Arrow's Theorem, however, has been convincingly refuted by Professors Kornhauser and Sager.[98] They

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[94] For an engaging explanation of this, see R. SMULLYAN, FOREVER UNDECIDED: A PUZZLE GUIDE TO GÖDEL 57-58 (1987).

[95] Easterbrook, *supra* note 88, at 821.

[96] *Id.* at 822.

[97] *Id.*

[98] Kornhauser and Sager, *supra* note 85.

distinguish between consistency and coherence. While consistency is "simply the state of noncontradiction,"[99] coherence requires that a system's premises "form or reflect a unitary vision of that portion of the world modeled by the system."[100] It is simply wrong to say that multi-member courts cannot decide as consistently as one-judge courts.[101] The fact that the resulting overall rule may not make sense does not mean that it is applied inconsistently Kornhauser and Sager give a hypothetical example based on actual cases like *Wyman-Gordon*.[102] If the Court deciding *Wyman-Gordon* and hypothetically deciding *Wyman-Gordon II* and *III* were presented indistinguishable facts in subsequent cases, then it would decide each case just as it did the first time.[103] There is no special problem of like cases not being decided in a like manner.

Easterbrook's error was in finding "transitivity" to be necessary for consistency.[104] The rule that A will always be selected over B, that B will always be selected over C, but that C will always be selected over A, violates "transitivity" as the word is used by Easterbrook,[105] but such a rule *can* be consistently applied. The courts need only resolve future choices between A and B, B and C, and C and A, respectively in the same ways.[106]

Kornhauser and Sager agree, however, that multi-member courts cannot always be coherent.[107] The resulting overall rule, in other

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[99] *Id.* at 103.

[100] *Id.* at 105.

[101] *Id.* at 107-09.

[102] *Id.* at 108-09.

[103] This statement assumes consistency on the part of the individual justices, but that assumption is necessary also in order to find consistency on the part of one-judge courts.

[104] Easterbrook, *supra* note 88, at 830 ("Without transitivity, consistency is impossible").

[105] *Id.* at 823.

[106] Kornhauser and Sager also question Easterbrook's example:

> Easterbrook's model treats the existence of more than two alternatives in a somewhat odd way. While each judge has preferences over all alternatives, she is presented choices pairwise. On Easterbrook's interpretation of alternatives as rationales, such a restriction makes little sense. Judges simply are not asked in case A to choose between rationales I and II, in case B between rationales II and III, and in case C between rationales I and III. All of the rationales are available to the judge in each case; in each instance, she is asked to choose the best outcome.

Kornhauser and Sager, *supra* note 85, at 109 n.37; *see also* Revesz and Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1094 n.120 (1988). While Easterbrook's particular example may suffer from this criticism, it is not too difficult to construct a series of three decisions that as a group defy coherent explanation, such as the *Wyman-Gordon* triptych described in the text.

[107] Kornhauser and Sager, *supra* note 85, at 111.

words, does not reflect a unitary vision. It would perhaps be more accurate to say that the rule is arbitrary, or not rationally related in its entirety to sound policy The overall rule of the three *Wyman-Gordon* cases represents such an incoherent rule. In fact, similar incoherent rules can be extrapolated from *any* of the numerous cases identified above in which justices who reasoned differently in concurrences voted for the majority result.

The fact that multiple-member court decisionmaking is no less consistent than that of one-judge courts relieves those of us who oppose the indeterminacy attack on the traditional constitutional role of our courts. But we are still left with the problem of incoherence. It is at least unseemly for group courts to come up with rules that no individual judge would derive. Kornhauser and Sager suggest no answer to this problem.[108] Justice White's almost unprecedented vote in *Union Gas* forces us to examine whether his action is supported by the need to deal with incoherence.

First, one must understand that it is not difficult for lower courts to apply "incoherent" law For instance, in *First National City Bank v Banco Nacional de Cuba*[109] a majority consisting of a plurality of three justices and two single-justice concurrences concluded that the act of state doctrine[110] did not apply to the case, thus precluding a particular claim by Cuba against a New York bank. Justice Rehnquist for the plurality found that a so-called *Bernstein* letter[111] from the executive branch precluded application of the act of state doctrine. Justice Douglas rejected the plurality's reasoning but concurred on the ground that Cuba's claim was brought as a counterclaim and setoff.[112] Justice Powell rejected both the plurality's and Justice Douglas's reasoning but concurred on the ground that the seminal act of state case, *Banco Nacional de Cuba v. Sabbatino*,[113] should be limited.[114] Justice Brennan and three others dissented, rejecting each of the three different grounds.[115] The

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[108] *Id.* at 117.

[109] 406 U.S. 759 (1972).

[110] The act of state doctrine prevents the courts of one nation from passing judgment on the domestic actions of another nation taken within the latter's territory. Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

[111] The name derives from Bernstein v. N.V Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954).

[112] First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 770-73 (1972) (Douglas, J., concurring).

[113] 376 U.S. 398 (1964).

[114] *First Nat'l City Bank*, 406 U.S. at 773-76 (Powell, J., concurring in judgment).

[115] *Id.* at 776-96 (Brennan, J., dissenting).

case is like *Wyman-Gordon* in that there was a clear majority for each step of an analysis that would have led to a different result (applying the act of state doctrine), but that result did not occur because the majorities were composed of different justices.[116] Despite the "incoherent" nature of the law presented to lower courts, there is no reason that they cannot apply it consistently In *Banco Nacional de Cuba v. Chase Manhattan Bank*[117] the Second Circuit simply cumulated the views of the justices in *First National City Bank* to arrive at the "phenomenological" rule that where there is a *Bernstein* letter *and* where the claim was asserted as a counterclaim and setoff *and* where Justice Powell's limited reading of *Sabbatino* would permit it, the act of state doctrine does not apply.[118] In other cases resulting in "incoherent" law, the lower courts need only "add up" the opinions of the justices to ascertain the law [119] A "solution" to the problem of incoherent rules is not necessitated by the inconsistency or the alleged inability of lower courts to follow precedent.

Second, Justice White's cure for incoherence, if that is what it is supposed to be, is worse than the disease. It may be unseemly for the Court's jurisprudence to be incoherent at times, but at least the individual justices can remain coherent, and it would be even less seemly to have justices voting against their own positions. More fundamentally, voting against one's own position leads to the inconsistency and indeterminacy that mere incoherence does not. In order to examine why this is, one must first examine the effect of what Justice White did. Is the precedential effect of the *Union Gas*

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[116] Presumably all the justices would have agreed that *if* (X) *Bernstein* letters are ineffective, and (Y) counterclaim status is irrelevant, and (Z) *Sabbatino* should not be limited, then (r) the act of state doctrine should apply. Justice Rehnquist's three-judge plurality ruled not-X therefore not-r. Justice Douglas ruled X and Z but not-Y therefore not-r. Justice Powell ruled X and Y but not-Z therefore not-r. Justice Brennan's four-justice dissent ruled X and Y and Z therefore r. Thus separate majorities of at least five justices ruled for each of X and Y and Z, although the logical consequence of X and Y and Z is a different result from that which occurred.

[117] 658 F.2d 875 (2d Cir. 1981).

[118] Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 884-85 (2d Cir. 1981); *see also* Banco Nacional de Cuba v. Chem. Bank New York Trust Co., 822 F.2d 230, 236 (2d Cir. 1987).

[119] Another example, involving the fractured decision in National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949), is Greene v. Teffeteller, 90 F.Supp. 387, 388 (E.D. Tenn. 1950) ("precedent is established by the votes of the justices, not by the reasons given for their votes").

*See* Kelman, *supra* note 83, at 268. Professor Maltz has advocated that such an analysis be used on a justice-by-justice basis. Maltz, *The Concept of the Doctrine of the Court in Constitutional Law*, 16 GA. L. REV. 357 (1982).

decision different because of his vote than it would have been had there been the *Wyman-Gordon*-like anomaly that would have resulted had he voted his convictions? This is impossible to answer definitely because his action is so unprecedented. This necessitates examining each possibility

The less plausible possibility, perhaps, is that the precedential effect of *Union Gas* is the same regardless of which way Justice White voted, since his views on the congressional intent reflected by CERCLA are clearly stated, presumably for the reason that this is what he thinks about the issue. Why else state them? Lower courts in subsequent cases can follow what he said and add up the votes of the justices to reach their conclusions. The trouble with this is that it leads to inconsistency: if an indistinguishable case were to be presented to the lower court, and perhaps even to the Supreme Court, a result different from *Union Gas* would occur. Different results on indistinguishable facts are inconsistent. It is hard to accept that Justice White's vote has no precedential effect; otherwise the losing party in *Union Gas* would have been the victim of inconsistent decisionmaking.

Let us assume on the other hand that Justice White's vote changes the precedential effect of the decision. The law concerning the eleventh amendment is now presumably more coherent. But this occurs only because lower courts, in applying *Union Gas*, will treat Justice White's vote as a majority vote binding upon them, despite the fact that it was not supported by his reasoning. In order to anticipate other Supreme Court votes, and thereby to conform rulings to the Supreme Court's statement of the law, the lower court must now try to anticipate when individual justices will vote against their own positions. Apart from the triple-choice situation where the meta-rule is clear,[120] there is no ascertainable basis for voting against one's own position other than the very need to avoid the incoherence that is now being discussed. But that basis would support deferring to a majority in all cases where there is even the possibility of a *Wyman-Gordon*-like result. The practice, as I have tried to show, is overwhelmingly against this. If carried to extremes, it might even mean there could be no dissenting votes.

At the very least, it would lead to anomalies arguably far worse than what occurs now For instance, four justices could believe that execution of a defendant is precluded by the fifth amendment but

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[120] See *supra* notes 58-68 and accompanying text.

not the eighth amendment, while four more justices might believe that execution of a defendant is precluded by the eighth amendment but not the fifth amendment. Only one justice rejecting both arguments believes that the Constitution permits execution, but nonetheless off the defendant goes to the gallows.[121] This result cannot be right. In at least some situations, then, the courts will inevitably think in terms of a majority result rather than majority reasoning.

In addition, even if justices were to try to defer on every issue in which they disagree with a majority on an issue, there would be an enormous difficulty determining what is truly a different basis for decision, and what is just a different way of saying the same thing. Distinguishing those cases in which the concurrence is broader or narrower or distinct in its reasoning from those in which the concurrence was merely stating things differently from the plurality is not easy It would be necessary in every case involving a plurality opinion if general deference to majority reasoning were the rule. Such a general rule is indefensible.

Thus, a rule becomes necessary for determining when justices should defer. Any such rule must presumably reflect the underlying reason for ever deferring. The only conceivable reason for deferring requires deference to majority reasoning in all cases. That cannot be right, and no other rule presents itself.[122] None was suggested by Justice White, nor by Judge Easterbrook, nor by Professors Kornhauser and Sager. If the answer is "sometimes I do, sometimes I don't," then we now have the indeterminacy that the multi-member

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[121] Professor Leonard argues that such a result itself would violate due process. Leonard, *supra* note 57, at 326-36.

[122] The votes of Justices Harlan and Blackmun in *Vuitch* may suggest the possibility that deference to a disagreeing majority on an issue is appropriate where that issue is the jurisdiction of the Court. Incoherence may be particularly unseemly when the very jurisdiction of the Court depends in some sense on how some justices view the merits. The short answer to this is that the Court's jurisdiction in this sense was not at issue in *Union Gas*. And in a number of the cases that I have used to show that the precedent is against such votes, one of the issues was the jurisdiction of the Court, or more generally to the power of the Court, to decide another issue. *E.g.*, Davis v. Bandemer, 478 U.S. 109 (1986); Bowen v. Roy, 476 U.S. 693 (1986); *Banco Nacional de Cuba*, 406 U.S. at 759.

Moreover, a distinction between "jurisdictional" and "nonjurisdictional" issues would have little content for these purposes. In a sense it is beyond the jurisdiction of a court to make a judgment contrary to the law, and in this sense *every* issue is a jurisdictional issue. And if "jurisdictional issue" simply means "threshold issue," then the definition is circular, since no principle governs what issue is treated first. Even issues that we commonly think of as threshold issues—such as the statutory power of a court to hear a case—can logically be assumed *arguendo*, thereby *not* treating them first. *E.g.*, Norton v. Mathews, 427 U.S. 524, 532-33 (1976); *cf.* Crowell v. Benson, 285 U.S. 22, 92-93 (1932) (Brandeis, J., dissenting) (criticizing distinction between jurisdictional and nonjurisdictional factual issues).

nature of appellate courts formerly did not require. Not only is there individual inconsistency in the act of voting against one's views in the particular case, but there is now the court-level indeterminacy that runs counter to the traditional conception of the judicial role. This is too high a price for reducing incoherence.

## CONCLUSION

In the end, why can't we just live with incoherence? It occurs only in those cases where plurality opinions are possible. It is an inherent cost of having multi-member courts attempting to make consistent decisions. One conceivable alternative would be to have single-member appellate courts. The result would sacrifice accuracy for coherence. Regardless of how one defines "accuracy" in judicial decision-making,[123] it is hard to doubt that a multi-member court is more accurate in the long run than a single judge. There is simply more input. Moreover, reducing the number of Supreme Court justices to one would reduce the already limited control that the political branches have on the judiciary

Once we are committed to multi-member appellate courts, we must accept the cost of occasional incoherence. Trying to avoid it results in an indeterminate monstrosity At least with respect to "anomalous" decisions like *Wyman-Gordon* (and as *Union Gas* would have been, had Justice White voted his views), each particular decision can be legitimated to the litigants on the ground that a majority of Supreme Court justices, selected in constitutional fashion, have interpreted the Constitution to require the decision made. And unless there are different justices or justices change their minds (possibilities under any system), a subsequent indistinguishable case will be decided the same way. Different results will occur only when there is a distinguishing factor relevant to at least some of the justices. Of course the distinguishing factor may be considered relevant by fewer than a majority of the justices. But this fact will be present only in those cases where the Constitution is sufficiently unclear that there is a dispute on its meaning among the other justices. Decision-making in these circumstances certainly can retain the acceptance of the polity.

In contrast, avoiding the possibility of incoherence in individual cases will undermine the legitimacy of the courts. Litigants will lose particular cases that a majority of justices have reasoned they should

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[123] See Kornhauser and Sager, *supra* note 85, at 84-97.

win. But this will not always happen, and no principle will even arguably control when future litigants will win in cases that are in varying degrees analogous to previous cases. This can only undermine respect for the courts as bodies assigned by the Constitution the task of "saying what the law is." It is in this sense that Justice White's vote in *Union Gas* is so profoundly troubling.[124]

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[124] Following preparation of this article, Justice Kennedy voted against his own position in Arizona v. Fulminante, ____ U.S. ____, 59 U.S.L.W 4235 (U.S., March 26, 1991). The issue was whether a criminal conviction could be upheld where an allegedly coerced confession had been admitted into evidence at trial. Only four justices (White, Marshall, Blackmun, and Stevens) agreed that *both* (X) the confession was coerced, and (Y) admission of the confession was not harmless error. 59 U.S.L.W at 4236-37 and 4239-41. Yet both conclusions are logically required to throw out the conviction. Justice Scalia agreed with X but not Y, while Justice Kennedy agreed with Y but not X. Logically, Justice Kennedy should have voted to uphold the conviction, but he did not. (Chief Justice Rehnquist and Justice O'Connor held not—X and not—Y; Justice Souter held not—X. These three and Justice Scalia accordingly voted to uphold the conviction.)

In a concurrence, Justice Kennedy justified his vote as follows:

> In the interest of providing a clear mandate to the Arizona Supreme Court in this capital case, I deem it proper to accept in the case now before us the holding of five Justices that the confession was coerced and inadmissible. I agree with a majority of the Court that admission of the confession could not be harmless error when viewed in light of all the other evidence; and so I concur in the judgment to affirm the ruling of the Arizona Supreme Court [throwing out the conviction].

59 U.S.L.W at 4244 (Kennedy, J., concurring). Of course the mandate to the Arizona Supreme Court would have been just as clear (to uphold the conviction) had Justice Kennedy voted in accordance with his view that the confession was not coerced. See text accompanying notes 109-19.

This leaves only the argument that *Fulminante* was a capital case. But voting against one's position in a different capital case could result in *upholding* an otherwise invalid conviction, rather than vice versa. See text accompanying note 121, *supra*. It could be that a justice should only vote against his or her reasoning in order to *throw out* convictions in capital cases, but not to uphold convictions. Such a one-way rule would amount to a "tilt" on a substantive constitutional issue—a tilt that is not express, but rather embedded in the decisional structure.