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Strategic Voting on Multimember Courts

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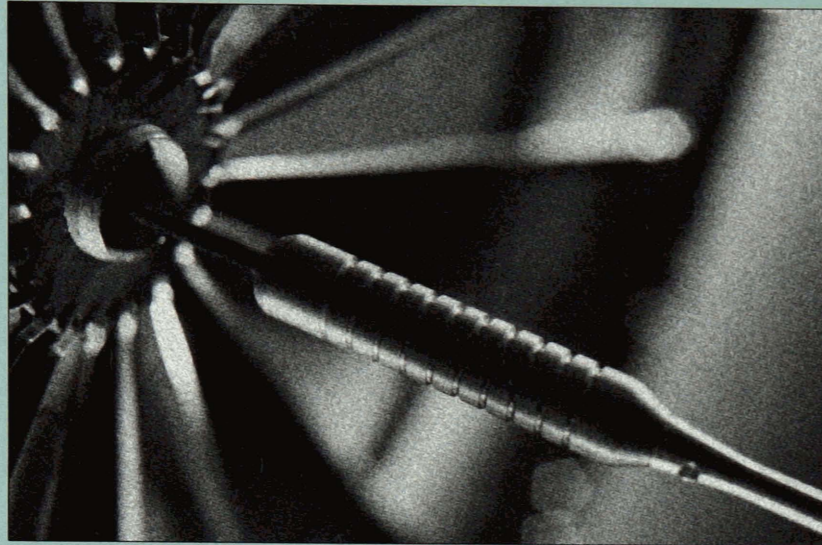
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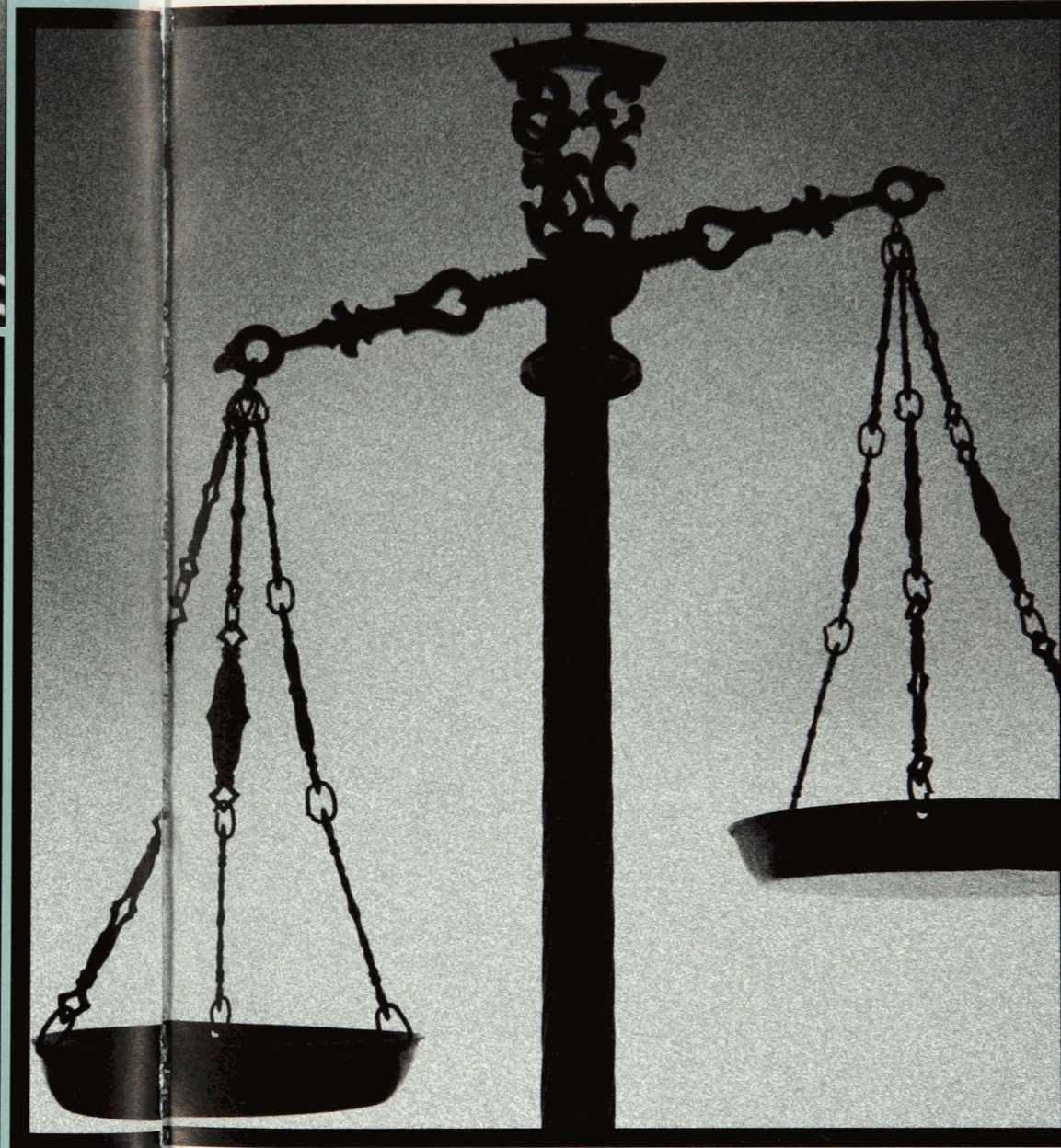
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STRATEGIC voting

on multimember courts

— BY EVAN H. CAMINKER

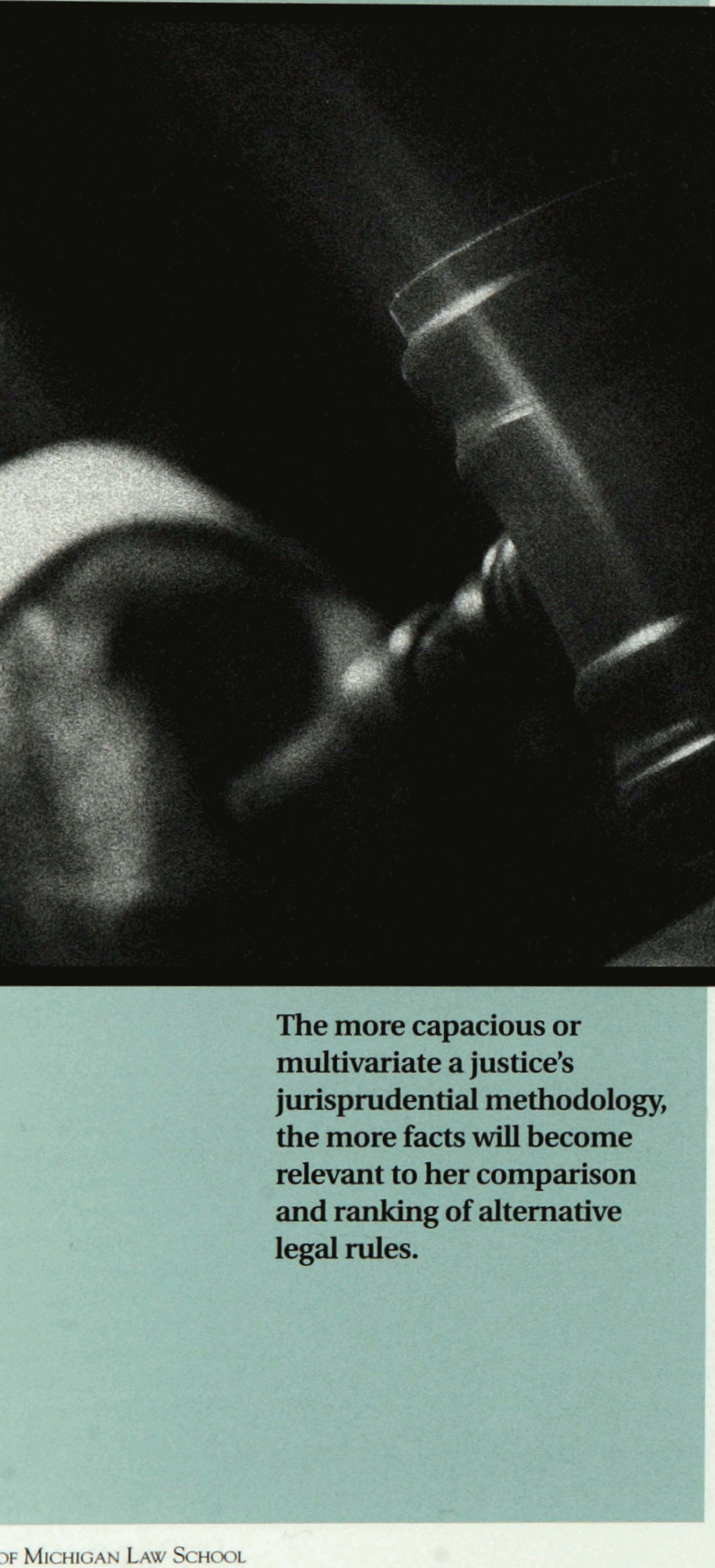


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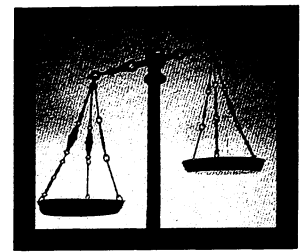
In appellate adjudication, decisions are rendered by a multimember court as a collective entity, not by individual judges. Yet legal scholars have only just begun to explore the formal and informal processes by which individual votes are transformed into a collective judgment. In particular, they have paid insufficient attention to the ways in which the vote of each individual judge is influenced by the views of her colleagues on a multimember court.

In recent years, a growing number of political scientists exploring judicial behavior have modeled this aspect of adjudication. Some theorists have recognized, as Lee Epstein and Jack Knight write in *The Choices Justices Make* (1998), that judges "are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of others, of the choices they expect others to make, and of the institutional context in which they act." In certain contexts, a rational judge will deviate from her *personal* sincere views about the law in order to secure the most desirable *collective* decision possible, given the views held by the other relevant participants (judges or other governmental actors) who share input into that final collective decision.

This political science scholarship is either empirical or predictive, identifying when strategic behavior does or is likely to occur. It tells us nothing about how judges *ought* to operate. This normative question is my focus here: Under what circumstances, and for what ends, may a judge appropriately engage in strategic behavior as a member of a multimember court? Not infrequently, as Lewis Kornhauser and Lawrence Sager have noted ("The One and the Many: Adjudication in Collegial Courts," 81 *California Law Review* 1 [1993]), a judge will discover that by supporting an outcome or rationale with which she disagrees, she can prevent her court's adoption of some other outcome or rationale that she thinks worse either for justice in the case before her or for the state of the law in general. When such



The more capacious or multivariate a justice's jurisprudential methodology, the more facts will become relevant to her comparison and ranking of alternative legal rules.



opportunities arise, must a judge always vote for rules that reflect her best personal judgment as to how a legal issue ought to be addressed without considering how her input will affect the Court's collective output? Or may the judge vote to secure what she deems the best possible collective resolution of the case, even if to do so she must strategically suppress or misrepresent her sincere personal views?

Throughout this article, I shall use the term "sincere voting" to refer to the vote that represents an individual judge's top-ranked or ideal judgment as to what constitutes the best response to resolve a discrete legal controversy, without considering the impact of his vote on the substantive collective result in his court or in other institutions. In other words, a judge votes sincerely if he supports the position that he honestly thinks should win and that he would endorse were he alone on the court. I shall use the term "strategic voting" to refer to a judge's decision to vote for a position that does not truly reflect his "sincere" judgment in order to secure the best feasible outcome given the influence of his colleagues in the decisionmaking process. To make this inquiry more manageable, I confine my focus to strategic behavior in merit determinations by justices on the U.S. Supreme Court.

Strategic decisionmaking

At the outset, let me identify this project's central premise concerning judicial motivation: Subject to resource constraints, judges endeavor to discern and render their best judgment as to the proper resolution of cases according to their best conception of the law. By this assumption I intend to distinguish my analytical approach from that employed by much recent literature concerning judicial behavior, which posits that judges employ instrumental rationality to advance one or more personal agendas (such as a desire to imbue the substantive content of the law with their personal policy preferences, to enhance their professional reputation and personal prestige, and to enhance leisure).

The strategic pursuit of legitimate adjudicatory values falls into two categories: strategic voting to improve the institutional efficacy of the Court's collective product through its quantitative form ("form-driven" strategies); and strategic voting to improve the substantive content of the Court's collective product ("content-driven" strategies). Before delving into the details, however, let me introduce an analytic approach that is relevant for assessing the attractiveness of strategic voting across a range of circumstances.

A. Assessing the magnitude of perceived error (MPE) of the Court's output.

On a multimember court, sincere voting by a justice will often lead to a collective outcome that she believes is wrong. She might, through strategic voting, be able to improve the collective outcome from a position she considers wrong to one she considers less wrong. To decide whether it is worth seizing this opportunity, she must first consider how important it is for her to supplant the greater error with the lesser one.

To make this assessment, she must determine not only her sincere order of preference for various rules (R1 through Rn); she must also establish the relative degree of error in adopting each suboptimal rule. This latter determination I shall call the "magnitude of perceived error" (MPE). The following factors, among others, may be relevant to this calculation:

■ **Error costs.** What principles are at stake in the choice between two rules? What tangible benefits or burdens are being allocated? A justice might care more about articulating the best rule when it will determine issues of personal liberty, say guilt/innocence or imprisonment/execution, than when the rule will determine issues of financial consequence, say availability of punitive damages, or amoral policy concerns, say a procedural pleading requirement.

■ **Error size.** What is the size of a rule's perceived error? If the legal issue involves personal liberty, how much will be wrongly granted or denied? If the legal issue involves money, how much will be wrongly allocated?

■ **Error rigidity.** Can those governed by the rule circumvent its erroneous application? A justice might care more about correctness with rules that impose immutable requirements on private conduct than with those that merely establish default rules around which private parties can maneuver.

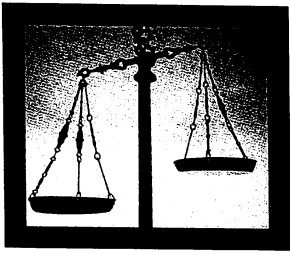
■ **Error duration.** How much precedential significance will the legal rule have? The more frequently the same or substantially equivalent issues will arise in the future, the greater the temporal "ripple effect" created by the Instant Case, and thus the more important it is to be correct today.

■ **Error certitude.** How confident is the justice in her rankings based on the aforementioned variables? The more certain she is about R1, the more she will perceive any error as significant.

An MPE assessment of this sort, in one form or another, determines a justice's incentive to engage in form-driven and content-driven strategic voting. Of course, the particular factors (and weights thereof) included in a justice's MPE assessment are derived from her jurisprudential paradigm, and, more specially, the judgment criteria that guide her legal interpretations. The more capacious or multivariate a justice's jurisprudential methodology, the more facts will become relevant to her comparison and ranking of alternative legal rules.

B. Strategic voting to improve the form of collective decisions.

The form of a multimember court's product refers to the size of the justice's agreement (e.g., unanimous, majority, plurality, or singular). Specific coalition sizes can promote various institutional values, and occasionally a justice's desire to shape a particular coalition will incline her to endorse an outcome she views as substantively suboptimal. She might vote insincerely with respect to substance to forge a majority coalition supporting a disposition of the case, she might do so to forge a majority coalition supporting an opinion articulating a specific legal rule, and she might do so to forge a supermajority coalition such as a unanimous opinion.



1. Formation of majority-disposition coalitions.

If the Instant Case presents three or more plausible dispositions, sincere voting might mean that no majority agrees on a single preferred disposition (for example, the justices might split among affirm, reverse, and remand). Under the Court's prevailing aggregation rules, such a division prevents the Court from deciding the case.

The Court could avoid the potential impasse through various voting protocols, including: (a) adopt the disposition with largest plurality support (if any); (b) hold a "run-off" vote between the top two vote-getting dispositions; or (c) compare dispositions two at a time, and select the option that defeats all other alternatives in head-to-head competition if one emerges.

The Court has eschewed these structured routes. Rather, individual justices "play chicken" until one faction gives in and shifts to its second-ranked rather than top-ranked disposition. In the final set of opinions issued, each of the factions (which might include from one to four justices) articulates its sincere position. But one of the minority factions then explains that, in order to construct a majority-disposition coalition necessary to decide the case, the faction members will join another faction by voting for what they consider to be the second-best disposition.

A justice's willingness to switch from his sincere to second-best disposition should depend on both institutional and substantive variables. First, how much value does he place on constructing a majority-disposition coalition such that the Court can issue a judgment in the Instant Case? Second, based on the magnitude of perceived error assessment, how strong is his preference for his top-ranked disposition (D1) over his second (D2), and his second-ranked over the third (D3)?

It is difficult to determine just how frequently sincere voting generates such three-disposition impasses. The practice of resolving them does suggest, however, general acceptance of an adjudicative norm that sincere views about case disposition may be sacrificed in order to facilitate the Court's case-deciding function.

2. Formation of majority-opinion coalitions.

Perhaps much more frequently, a majority of the Court will agree on a single disposition but disagree as to the optimal legal rule justifying that disposition. Sincere voting will leave the majority disposition supported by two or more divergent rules, each championed by a minority faction of one to four justices. Such fractured support for the Court's disposition undermines various institutional values.

First, a fractured decision undermines the clarity of the legal rules that will govern future disputes, thereby increasing the unpredictability of the law's application to primary conduct and increasing the costs of future decisionmaking by subsequent courts confronting the same legal issues. Second, it undermines the durability of legal rules, both by weakening the precedential value of the Instant Case, and perhaps also by diminishing public respect for judicial decisions generally. Third, it undermines the expressive function of adjudication, by failing to articulate a singular, coherent justification for the judicial decisions.

In response to these institutional concerns, one or more justices often deviates from her substantively preferred rule in order to accommodate her colleagues sufficiently to form a majority-opinion coalition. Sometimes, the vote-shifting faction's opinion candidly reveals the decision to vote strategically. More frequently, the vote-shifting faction suppresses its sincere views in the published opinions, and the strategic behavior can be detected, if at all, only through careful research of what occurred behind the scenes. For example, as Epstein and Knight note in *The Choices Justices Make*, Justice Powell voted insincerely in *Nixon v. Fitzgerald* 457 U.S. 731 (1982) in order to forge a majority coalition; they quote Powell: "[I]t is evident that a Court opinion is not assured if each of us remains with our first preference votes As I view the *Nixon* cases as uniquely requiring a Court opinion, I am now prepared to

defer to the wishes of you [Chief Justice Burger], Bill Rehnquist, and Sandra" [Sandra Day O'Connor] in order to forge a single opinion of the Court.

It is frequently assumed that, in making these calculations, the majority will converge in a moderate or median position. This may well be quite likely when the justices' ideal points can be lined up nicely in a single-peaked fashion along a single dimension, for instance, from liberal to conservative. Convergence on a center position along the spectrum is not guaranteed, however, depending on the effects of small-group dynamics.

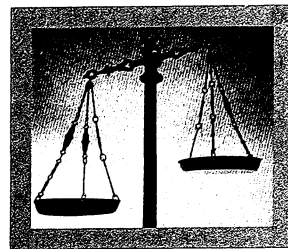
And sometimes the options under discussion cannot easily be aligned along a single dimension. Thus convergence in form does not theoretically imply movement toward a schematically median or substantively moderate position.

3. Formation of supermajority coalitions.

More infrequently, justices coordinate their voting to produce a unanimous opinion. Unanimity establishes a very durable judicial precedent, and it may elicit greater respect from nonjudicial actors, both ensuring short-term compliance with the Instant Case disposition and ensuring long-term respect for the decision's underlying principles. More specifically, coordinated unanimity appears to be strategically deployed to counter perceptible threats to the Court's legal (and sometimes moral) authority.

Even where unanimity is not attainable, justices might also feel some impulse to add another voice to an existing majority coalition. Such "extra" joinders may add to a precedent's durability, which a justice might value even at the cost of a sincere vote.

For each of the types of coalitions described in this section, a justice would weigh the institutional values to be gained against the costs of insincerity in the particular case, which may include institutional costs as well. Form-driven strategic voting appears to be a generally accepted practice on the Court. It is difficult for outsiders to identify each occurrence, however; justices understandably do not candidly announce their decisions to form



insincere coalitions when doing so would undermine their strategic purpose of projecting solidarity.

C. Strategic voting to improve the content of legal rules.

Due to conventional voting protocols, appellate courts offer individual judges fewer opportunities to engage in content-driven strategic voting than are available to members of many other collegial bodies. For example, legislatures often decide issues through a series of votes comparing two options at a time, sometimes called a motion-and-amendment process, such that savvy, sophisticated voting on early choices frequently can manipulate the ultimate path of alternative pairings and hence the substantive outcome. On the Supreme Court, each justice typically registers a single vote to dispose of the entire case, rather than a vote resolving each issue raised by the case. Thus multiple-issue cases do not generally present a justice with an opportunity to misrepresent her views on one or more issues just to dictate the preferred resolution of the case as a whole.

This said, a justice may still have the opportunity to guide the Court's collective output toward her sincere view through various forms of strategic voting behavior. I will focus primarily on two such scenarios, one unilateral and one bilateral.

1. Unilateral strategic voting to influence a discrete legal rule.

Sometimes a justice, by supporting a legal rule with which she disagrees, can unilaterally prevent a collective outcome that she considers even worse. Such a unilateral strategy might be attractive in either of two circumstances, both of which can helpfully be illustrated by focusing on Justice Brennan's behavior in *Craig v. Boren* 429 U.S. 190 (1976).

Under an intentionally simplified version of the case, the relevant legal issue was whether discrimination on the basis of sex should be subject to strict scrutiny (SS), intermediate scrutiny (IS), or rational basis scrutiny (RBS). Suppose the justices' first-rank judgments divided them into three equal-sized factions as follows: Justice

Brennan's faction preferred SS; Justice Powell's faction preferred IS; and Justice Rehnquist's faction preferred RBS. Justice Brennan's first-rank judgment can be gleaned from the fact that he recently had advocated SS in *Frontiero v. Richardson* 411 U.S. 677 (1973), though he had failed to convince a majority. But in *Craig*, Brennan circulated a draft opinion for the Court that advocated intermediate scrutiny, a view that ultimately won the day.

Brennan apparently concluded that it was preferable to vote strategically to establish a durable precedent now for IS, rather than to vote sincerely for SS. There are two different scenarios under which such a strategic maneuver makes sense. The first ("*Craig I*") involves an effort to influence the precedential significance of the decision, assuming that all other justices remain steadfast; and the second ("*Craig II*") involves an effort to influence the collective outcome by encouraging another justice to change her vote.

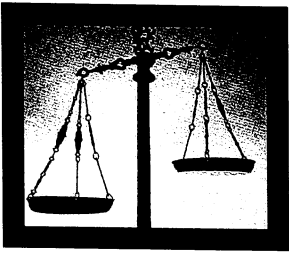
First, Brennan might have assumed that the Court would remain fractured across the three tests as described above, and that Powell and his faction would join the Brennan faction in invalidating the sex-based classification. If so, Powell's IS test would have established a precedent of sorts under the narrowest-grounds rule. But Brennan might plausibly have feared that an increasingly conservative Court would embrace RBS in a future case, brushing the weak *Craig* precedent for IS aside. Brennan could then try to pretermit this most disfavored possibility by strengthening the *Craig* precedent, through joining Powell's position to forge a majority-opinion coalition invalidating the statute under intermediate scrutiny. This *Craig I* scenario illustrates Brennan's ability to forestall a highly disfavored outcome (a majority-backed precedent for RBS in a future case) by influencing the precedential significance of the Instant Case.

The *Craig II* scenario involves an effort by a strategic-minded justice to induce a colleague to change her articulated position, thus changing the collective outcome in a favorable direction. Such an opportunity may arise whenever the colleague's

preference is multidimensional, meaning there are two or more variables that drive her ranking of rules. In such circumstances a justice sometimes can, by strategically repositioning himself, create or destroy multidimensional options and thus influence the colleague's selection from among the available options.

For example, suppose Justice Powell and his faction are concerned with both the substance and form of the collective decision in *Craig*. Powell favors IS, but he also favors construction of a majority-opinion coalition to secure the concomitant institutional benefits. Suppose further that Powell's form-driven preference dominates, such that he prefers to forge a majority opinion even at the cost of abandoning IS. If Powell prefers RBS to SS, then he would be inclined to join the Rehnquist faction at RBS to secure the institutional values of a majority-opinion coalition. Brennan could rationally try to forestall this most disfavored possibility by embracing IS rather than SS. This strategic maneuver would induce Powell to stay with IS rather than shift to RBS, by enabling Powell to secure both his preferred substance (IS) and form (joining Brennan in a majority-opinion coalition). This *Craig II* scenario illustrates Brennan's ability to avert a highly disfavored outcome (a majority-backed precedent for RBS in the Instant Case) by influencing a colleague's vote in this case.

In both scenarios illustrated through *Craig I* and II, Justice Brennan could rationally conclude that the project of best implementing the law according to his intrinsic and relational judgment criteria dictated a strategic choice to eschew his sincere position SS and enshrine his second-ranked rule IS now, thereby averting the present or future possibility of his third-ranked RBS. This archetypal scenario of unilateral strategic behavior can be modeled as follows, applying the "magnitude of perceived error" (MPE) concept developed earlier. According to Justice Brennan's intrinsic and relational judgment criteria, his ranking of the three rules proposed in



Craig is as follows: R1 = SS, R2 = IS, and R3 = RBS. When deciding whether to vote strategically, Brennan should consider both the likelihood of the Court ultimately settling on each option and the MPE represented by the two suboptimal rules, R2 and R3. With respect to the former variable, the more confident Brennan is that unless he forges a majority opinion coalition for IS in the Instant Case a majority will embrace RBS in a near future case (*Craig I*) or even the Instant Case (*Craig II*), the more willing he should be to vote strategically. With respect to the latter variable, the more he views R2 as a minor error and R3 as a major one, the more willing he should be to vote strategically and create a minor error in order to prevent a serious one.

Unilateral strategic maneuvering of these types is likely a common occurrence, even though it typically cannot be detected by others. Justices quite frequently change their views over the course of a decision. Of course, this sometimes reflects a change in sincere views. Sometimes this behavior is driven by the institutional benefits of a majority opinion coalition, but anecdotal evidence suggests that this is not the primary motivation. Most of the time, I think justices care about forging a majority coalition only if it settles on a rule they support — at least support enough. If asked whether they would prefer a majority-opinion coalition to coalesce even if they would be left in dissent or concurrence, I'd bet most often they would say no. If my surmise is correct, then much of the documented position jockeying and concession granting on the Supreme Court reflects strategic behavior designed to improve the content of legal rules.

2. Bilateral vote trading.

Justices will sometimes confront an opportunity to trade votes with one another; each of two justices votes for the other's sincere view on one issue in exchange for the other's support of his sincere view on another. Such an agreement can be either explicit or tacit.

a. Explicit vote trades. Consider the following “vote-trading exemplar” illustrating explicit vote trading across two separate cases. Suppose the Court's docket contains two separate cases, Case Search raising the question whether a particular search violates the Fourth Amendment, and Case Cruel raising the question whether a particular mode of execution violates the Eighth Amendment. The tentative conference vote in Case Search is 5-4 for the criminal defendant, with Justice Wapner in the majority and Justice Judy in the dissent. The tentative conference vote in Case Cruel is 5-4 for the state, with Justice Judy in the majority and Justice Wapner in the dissent. Suppose Wapner is close to indifferent about his apparent victory in Case Search, but is very troubled by his apparent loss in Case Cruel; conversely, suppose Judy is close to indifferent about her apparent victory in case Cruel, but is very troubled by her apparent loss in Case Search. Wapner and Judy then agree to trade votes across the two cases; Wapner switches to vote for the state in Case Search, and Judy switches to vote for the criminal defendant in Case Cruel. From the perspective of each justice, the trade has improved the overall state of the law; each views the trade as creating what he or she considers a minor error but corrects what he or she considers a more major error. Justice Wapner is willing to sacrifice his feasible victory in Case Cruel (the “sacrificed case”) for a more meaningful victory in Case Search (the “acquired case”); for Justice Judy, the “sacrificed” and “acquired” cases are reversed.

It is very difficult to identify clear examples of explicit vote trading. My own sense, in accord with that of other scholars, is that explicit vote trading rarely — and perhaps never — takes place.

b. Tacit vote trades. On the other hand, my sense (again in accord with others) is that a form of implicit and informal vote trading is common. Sometimes, a justice — let's use the fictional Judge Wapner — quickly joins a draft opinion circulated by a colleague even through the doctrinal rule articulated does not reflect his sincere

position. Wapner nevertheless joins quickly and without criticism, indeed perhaps with praise — because (a) he thinks the error is relatively minor, and (b) he wants to encourage the author to sign onto an opinion in a completely separate but more significant case that Wapner has recently circulated or will circulate soon.

Of course, such tacit back-scratching “agreements” are not formally enforceable. The social norms of cooperation and congeniality prevailing on the Court, however, might strongly encourage a practice of presumptive reciprocity. Thus, while explicit vote trading seems to be shunned in word and deed, a softer form of tacit trading may well be commonplace.

Normative constraints on strategic voting

Form-driven strategic voting appears relatively uncontroversial; content-driven strategic voting engenders much greater controversy. Explicit vote trading is frequently denounced, though generally without clear explanation. The more common but subtle forms of tacit vote trading and *Craig*-like unilateral maneuvering either are ignored or provoke lukewarm concerns. My strong sense is that there is considerable disagreement about the proper line between acceptable and unacceptable strategic behavior and the reason for drawing it.

Litigant-focused constraints

A. Sacrosanct disposition objections.

The primary function of even appellate adjudication is commonly said to be resolving a concrete legal dispute between two or more litigants, with the articulation of legal principles being incidental to that task. Even assuming as I do here that justices identify governing legal rules first and derive dispositions from them, one might believe that once the proper resolution of the dispute is identified, the

putatively victorious litigant becomes "entitled" to that resolution.

This view underlies what I call the sacrosanct disposition constraint on strategic behavior: a justice may vote strategically for a suboptimal rule only if her insincere vote leads to the same disposition as her sincere vote would have done. Legal rules are fair fodder for strategic play, but sincerely derived case dispositions are sacrosanct.

Depending on whether one believes this sacrosanct disposition principle should be unyielding or merely presumptive, a sincere disposition might impose either a "hard" or a "soft" constraint on rule-focused strategizing.

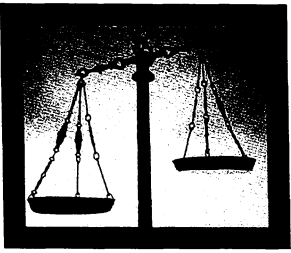
Many people, were they a litigant in Case Search or Cruel, would be quite disturbed if they would have won had a justice voted sincerely, but lost because the justice voted strategically to improve the collective legal rule.

The strength of this underlying intuition, however, can be questioned on its own terms. To begin with, the intuition confronts an interesting temporal question. By hypothesis, strategically improving the legal rule today affects not only who wins the Instant Case but also who will win future cases, changing future winners (under the sincere rule) to future losers and *vice versa*. Why should the entitlement of today's would-be winner under sincere voting trump the entitlement of the future's would-be winner under the strategically secured improved rule?

Moreover, the intuition seemingly presumes that litigants care more about winning than about establishing favorable legal rules. This is not always so. Some litigants expect to be repeat players in similar future cases, and they may be willing to sacrifice a particular victory for a more favorable legal rule over the long run. Some litigants who do not expect repeat play may nevertheless care more about establishing favorable legal principles than about winning the discrete dispute, either because they are representing others in class litigation or because they care about the expressive content of the law.



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If persuasive on its own terms, the disposition constraint would preclude some other common adjudicatory practices besides vote trading. First, the constraint contravenes some well-accepted norms governing solo decisionmaking that lead justices to support locally suboptimal decisions. Even if Justice Solo's intrinsic judgment criteria incline her to prefer rule R1 leading to disposition D1, she might strategically endorse R2 and D2 either to embrace *stare decisis* and maintain consistency with, or, alternatively, to compensate for, a prior case that she views as wrongly decided. Or, she might decide the Instant Case suboptimally to establish the best long-term precedent for a series of cases. Taken seriously, the disposition constraint would appear to rule out each of these well-accepted adjudicatory practices.

Second, the disposition constraint also rests in tension with some more controversial norms governing solo decisionmaking. As earlier discussed, Alexander Bickel's "passive virtues" sometimes lead justices to deny favorable judgments to would-be winners; concerns about public resistance sometimes lead justices to deny immediate remediation to victorious litigants; concerns about congressional overruling might lead justices to shy away from sincere rules in a manner depriving a would-be winner of a favorable judgment.

Third, the disposition constraint would appear to rule out form-driven maneuvers in certain contexts. When a justice strategically forms a majority-disposition coalition to avoid a three-disposition impasse, by definition she votes for a disposition other than her sincere choice. With respect to strategic voting designed to forge a majority-opinion coalition, sometimes one or more justices might diverge from their sincere disposition in order to do so. The disposition constraint would rule out such form-driven maneuvers.

B. The litigant participation objection.

This objection starts with the premise that adjudication is primarily party-driven, in the sense that the judicial decision is designed to respond to the factual proofs and reasoned arguments advanced by adversarial parties. Concomitantly, the integrity of adjudication also entails a reasoned decisionmaker, one who will respond to and fairly evaluate the reasoned arguments of the parties.

Explicit or tacit vote trading partially undermines the meaningfulness of party participation in the Instant Case by introducing an influential element — the Other Case — that cannot readily be identified in advance. Parties cannot fairly be expected to anticipate, let alone brief, the entire set of other cases that might end up influencing the decision in the Instant Case through a vote trade; that set consists of every other case on the Court's docket.

As a result, decisions influenced by vote trading are arbitrary from the litigants' perspective in the sense that they cannot participate meaningfully, through reasoned argument, in the *critical* judicial determination — the trading justices' comparative evaluation of error magnitudes.

Whether this objection is powerful enough to explain the consensus antipathy toward vote trading, however, turns on the significance one attaches to meaningful party participation through the presentation of reasoned arguments. The more central one views this role on either instrumental or intrinsic grounds, the more troubling vote trading becomes. But the more one believes that party-driven adjudication, while perhaps a good idea, is not normatively essential, then the less troubling vote trading becomes. At the far extreme, if one views parties as helpful but non-crucial judicial assistants, then the justices' resort to decisionmaking means beyond the parties' ken is not that disturbing at all. Recall that even vote trading does not devalue or ignore litigant participation entirely; it just values some non-participatory aspects of reasoning as well.

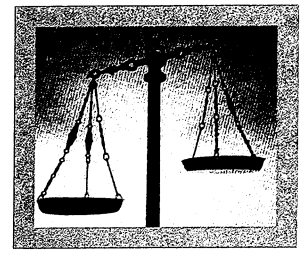
Reasoned justification constraints

This section explores a series of related objections as applied, at least initially, to bilateral trading. Each objection reflects a theme common to many jurisprudential paradigms: when justices declare what the law is en route to deciding cases, we expect them to base that declaration on reasoned argument of a certain form.

A. Adjudication as a justificatory practice.

Many respectable jurisprudential paradigms hold that adjudication is, first and foremost, a justificatory practice. According to this view, the legitimacy of courts' authority turns on the fact that adjudication is a form of justification or reason giving, in a way that other forms of decisionmaking are not. If a judge does not have a reasoned justification for a legal decision, she has no legitimate claim to the exercise of coercive authority over the litigants. As a result, we are rightly hostile to any adjudicatory practice that undermines the process and integrity of justification, even if that practice in some sense "improves" the doctrinal rules ultimately produced. Process, not result, is paramount.

With this process focus in mind, one might challenge explicit and tacit vote trading as depriving the two traded decisions of the type of reasoned justification necessary to judicial legitimacy. After all, there seems to be an element of arbitrariness to the decisionmaking in both involved cases. In the vote-trading exemplar, for example, Justices Wapner and Judy do not take each of Cases Search and Cruel into account when deciding the other one because the result in one case influences their sincere ranking of the available rules in the other. Rather, they take the other case into account only because of the happenstance that, given the particular lineup of all nine justices in both cases, there is an available trade that both believe improves the set of results. If Justice Wapner were asked why he voted the way



he did in Case Search, he could not provide a complete answer without mentioning the role played by Case Cruel. While this reference would partially “explain” his decision, on the surface it would hardly seem to “justify” it, at least in any sense familiar to the judicial enterprise.

But reliance on familiarity here is dangerous, precisely because multimember decisionmaking may enable novel but still legitimate notions of justification. Viewed in isolation, Wapner’s decision in Case Search seems unprincipled; he has seemingly “sacrificed” this case for law improvement elsewhere. But why view Case Search in isolation? The mere possibility of bilateral vote trading essentially allows a justice to vote on two issues at once as a packaged deal, an option generally unavailable to judges sitting alone. Consider Justice Wapner’s approach to the vote-trading exemplar. Wapner sincerely supports Rule S+ over Rule S- in Case Search and Rule C+ over Rule C- in Case Cruel, but if everyone votes sincerely the Court will endorse Rule S- in Case Search and Rule C- in Case Cruel. Wapner can trade across the two cases with Justice Judy, meaning he can control whether the Court produces rules S+ and C- (by voting sincerely) or rules S- and C+ (by trading). Put differently, Wapner can change the relevant “choice set” from a choice among single rules to a choice among rule combinations.

As illustrated earlier, Wapner can employ the “magnitude of perceived error” rubric to reason from his jurisprudential premises to the conclusion that he prefers package S- and C+ to package S+ and C-. His MPE assessment leads him to view collective outcome S- as a lesser error than collective outcome C-; he is therefore willing to endure the former to forestall the latter. He is not merely appraising the two combinations to see which he prefers in some troubling result-oriented sense. Rather, he is employing the very same process of reasoning that led him to prefer S+ over S- and C+ over C- in the first instance.

To be sure, the comparison of rule packages rather than individual rules is unfamiliar. But why would this reasoning process, deemed legitimate when used to favor one rule over another, suddenly become illegitimate when used to prefer one rule package over another? It cannot be problematic just because Wapner finds neither package ideal. This complaint would have too far-reaching consequences, as judges frequently must choose between two or more imperfect options when the optimal option is not feasible to secure. And it cannot be problematic just because there is a sense in which, in evaluating the MPEs associated with S- and C-, Wapner might be comparing “apples and oranges” if the two issues draw upon very different underlying principles. First, it is unclear whether such an apples-and-oranges comparison should be troubling from a theoretical standpoint. But in any event, this complaint would also have too far-reaching consequences, as judges frequently must compare fundamentally different principles in ranking alternatives.

Let us return to the initial claim here, that concern for cabining illegitimate assertions of coercive judicial authority dictates hostility toward any adjudicatory practice that undermines the process and integrity of justification, even if that practice in some sense “improves” the doctrinal rule ultimately produced. It is true that vote trading is generally described in terms of improved results, not proper process. But a justice can provide the same type of justificatory explanation for a trade as for a single-issue ranking: the outcome chosen best satisfied his intrinsic and relational criteria taking relevant MPEs into account. The only difference is that the justice in a vote-trading scenario ranks combinations of rules rather than single rules. This distinction does not appear to make the ranking process any less an exercise in reasoned justification.

One might nonetheless argue that the different ways of conceiving the choice set matters with respect to adjudicatory norms relating to explanation rather than justification. The next two sections consider other norms arguably undermined by vote trading: candor and noncommodification of judgments.

B. The candor objection.

Explicit and tacit vote trading would appear to lead a justice to endorse openly a justification different from her true motivation — the MPE calculation. Thus decisionmaking through vote trading violates an oft-proclaimed norm of judicial candor.

This presumption of candor is frequently justified on the ground that it disciplines judicial reasoning. The act of reducing one’s true thought processes to written form stimulates critical self-scrutiny, and the act of publication enables peers and the public to evaluate and hold individual justices accountable for their decisions. Vote trading partly avoids these disciplining and constraining effects of transparency, because the driving force behind a justice’s decision to trade — his comparative MPE assessment of the two rules involved — is not revealed, let alone publicly explained and justified.

These justifications for candor carry some analytical and rhetorical force, though their tangible effects are highly speculative. This said, deciding just how much force to give to such an objection is difficult. If embraced as a rigid constraint, the obligation of transparency would call into question a number of adjudicatory practices besides vote trading. Some sophisticated behaviors, including many of Alexander Bickel’s “passive virtues,” involve judicial dissembling. Moreover, many uncontroversial form-driven strategic maneuvers designed to forge coalitions of various sizes entail the suppression of sincere views — indeed, that is the whole point of forming unanimous-opinion coalitions. Finally, content-driven strategic maneuvers such as the unilateral *Craig*



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exemplar, while generally thought less controversial than bilateral maneuvers, entail the same misleading acts.

In the end, it is difficult to decide how much weight to give the candor objection to vote trading. In general, the candor constraint is more persuasive when viewed as a presumption than as an absolute. The question with vote trading, as with all of the other forms of judicial reasoning that involve dissembling to some degree or another, is whether the benefits in terms of furthering judicial goals is worth the cost. On this point, reasonable minds might reasonably disagree, and perhaps for many the answer will not turn on the particular type of strategic maneuver but rather the particular issue raised by or the context surrounding the Instant Case.

C. The commodification objection.

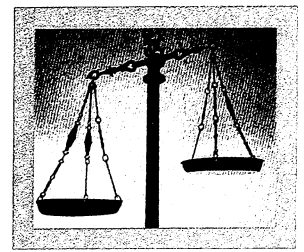
This objection posits that adjudicatory processes have expressive as well as functional significance, and argues that bilateral vote trading as a means of rule development undermines the ideal of adjudication as principled reasoning.

Vote trading can be described in crass transactional terms. A justice essentially uses the MPE assessment to ascribe a value to a given legal error, and then decides whether it is worth trading for an unrelated legal correction. Legal rules or judicial votes can be characterized as goods or services to be bartered within a judicial marketplace.

Such commodification of rules or their production might alter or deform our shared cultural understanding of adjudication and its role in securing the rule of law, by superimposing on

adjudication a preexisting set of cultural norms associated with market activity. Or so many might intuitively fear. Markets and adjudication, the intuition runs, do not mix.

In the abstract, these are serious claims. To my mind, however, the practice of vote trading as I've described it would not seriously threaten such profound alterations of social meaning. We are not talking here about a "literal" market, in which justices exchange a commodity for tangible currency.



In the vote-trading exemplar, justices trade votes based on their reasoned (though divergent) assessments of the rightness of two reasoned (though divergent) assessments of the rightness of two collective outputs. The “currency” of exchange is legal principle, not the traders’ own or the litigants’ preferences or desires. There is a sense in which two independent products, the rule in the sacrificed case and the rule in the acquired case, are appraised for their relative value. But justices appraise and compare the relative value of competing rules or justificatory positions all the time, without engendering a sense of problematic commodification.

Concededly, social meaning reformulation is not an on-off switch, and commodification can range on a continuum from complete to less-complete forms that “bear some indicia of commodification but are more attenuated,” as Margaret Radin wrote in *Contested Commodities* (1996). Thus, even if one agrees that the vote-trading exemplar is a far cry from a prototypical market exchange, she might still be somewhat troubled by indicia of commodification still remaining. I think that analytical argument cannot wholly resolve the dispute.

Judicial lawmaking constraints

The final set of objections revolves around a common intuition: vote trading crosses a conceptual or even constitutional line dividing adjudication and legislation. At one time this intuition might have been captured by the claim that courts “declare” rather than “make” law, and that focus on law-making is an *ultra vires* judicial function. A more sophisticated and modern version would propose that, in a meaningful sense, courts do make law, but do so in a peculiarly judicial manner. Something about vote trading makes it seem as though justices are making law in an inappropriate manner, and therefore, the practice transgresses the proper boundaries of adjudication.

We generally associate vote trading with legislative activity. Some people find judicial vote trading intuitively illegitimate, I believe, because they mentally associate the practice with the more familiar phenomenon of legislative logrolling. Based on this connection, they wrongly assume that the rationale for judicial vote trading would mimic that for legislative vote trading, and they (*rightly*) find the preference-satisfaction rationale underlying legislative logrolling anathema to judicial reasoning. The first assumption is wrong because judicial vote trading can be supported by reference exclusively to legal concepts and principles, and without necessary resort to problematic objects such as preference satisfaction.

Some might object that vote trading feels legislative in nature because it seems to focus on forward-looking law improvement rather than backward-looking law interpretation. “Law improvement” sounds like a legislative task.

This way of characterizing the judicial lawmaking constraint is rhetorically powerful. However, it ignores the significant extent to which well-accepted interpretive practices already contain a forward-looking, improvement-oriented element. As explained earlier, relational judgment criteria require justices to look forward as well as backward, to select a rule that is optimal over a run of related cases even if it might be suboptimal for the Instant Case viewed in isolation. The consistency criterion, for example, requires justices to envision the future cases in which today’s rule might apply and to fashion a rule today that traces the optimal trajectory.

A third objection adds the following premise: due to institutional distinctions between courts and legislatures, the goal of competency in lawmaking requires courts to employ a different lawmaking methodology than do legislatures. Legislatures are comparatively well designed to consider and study societal problems comprehensively, and to devise optimal forward-looking solutions thereto. In contrast, courts are not structured to be as proficient at seeing far into the future, or at perceiving and comprehensively

considering all of the ramifications and interests affected by proposed doctrinal rules.

Given these observations, the argument continues, we have much more confidence in justices’ ability to develop optimal forward-looking rules when the justices focus their attention on fashioning a direct response to the facts and context of the dispute before them, rather than when they engage in a self-conscious project of abstract law improvement.

While the premise of this objection — that courts should remain focused on contextualized decisionmaking — is both analytically and rhetorically powerful, the deduction that vote trading violates this norm demands greater scrutiny. First, each of the two cases involved in a vote trade satisfy the normal requirements for concreteness and adverseness. The trading justices (and the rest), therefore, start from a fact-bound, contextual setting and can reason outward when they construct their initial rankings of, and assess their magnitudes of perceived error for, the proposed rules in each case.

One might characterize the next reasoning step in the vote-trading process — the comparison of MPEs in the two cases — to be somewhat abstracted from the case contexts. When Justice Wapner considers whether the perceived sacrifice in Case Search is more than compensated by the perceived improvement in Case Cruel, he might ponder some seemingly abstract questions like the following: Is it more important for wrongful death sentences to be avoided than for wrongful privacy invasions to be allowed? This question (and others like it) is not tethered to a specific case. And yet, Justice Wapner would certainly be aware of how his answer to this question would ultimately affect his vote and therefore the disposition of these two concrete cases with identifiable parties. In other words, the case-specific consequences of his abstract reasoning would be readily perceptible, at both intellectual and visceral levels. This remains

a far cry from the sort of abstract legislative rulemaking against which the judicial practice is being measured.

Perhaps a slightly different concern animates the comparative competence objection. One might argue that the acceptance of vote trading as a legitimate practice will lead justices to shift the way they approach adjudication in all contexts, involving vote trading or not. The more justices start thinking about adjudication in terms of optimal rulemaking, a mental perspective facilitated by the constant search for potential gains from trade, the more they will become emboldened to make less case-tethered and context-disciplined decisions generally.

This feared transformation is certainly not fanciful; indeed, some might think justices are already prone to the disease of imagining themselves as unconstrained lawmakers and thinking about litigants as inconvenient obstacles. But neither is the transformation inevitable. Surely one can imagine that, even as justices self-consciously engage in vote trading, they also remind themselves of the importance of self-disciplined focus on case contexts, facts, and parties. The question becomes whether, as a prophylactic measure, a norm against vote trading should be articulated and internalized to forestall the risk of a concomitant shift in the justice's self-understood job description. In my view, the prophylactic seems unnecessary, but I recognize this is a subjective and speculative judgment.

Conclusion

As Justice Brennan has noted, "The Court is something of a paradox — it is at once the whole and its constituent parts. The very words 'the Court' mean simultaneously the entity and its members." Appreciation of this paradox is reflected in an exciting explosion of political science scholarship modeling judicial behavior, scholarship that both predicts and tests for various forms of strategic or sophisticated conduct, and also offers new conceptualizations of the relationship between individual judges and their multimember courts. In particular, there is growing recognition that judicial behavior is not shaped merely by ideological attitudes and conceptions of legal reasoning, but also

by formal institutional structures and informal role commitments. The question is not whether judges act in strategic or sophisticated ways, meaning whether they consider the consequences of their choices in light of the potential behavior of others. The question, rather, is what institutional commitments and conceptions shape and constrain judges' preferences and goals as they interact with colleagues to construct decisions of the Court.

In particular, as noted in *Supreme Court Decision-Making* (Howard Gillman and Cornell W. Clayton, eds., 1999), "[B]argaining among the justices is not merely a function of preferences plus an awareness of interactive effects; it is also an activity that is constituted by an evolving set of normative institutional perspectives. Because of these sorts of institutional effects the justices internalize an understanding of whether such behavior is to be considered professional, as well as an understanding of what forms of bargaining are acceptable. . . ."

One apparent "rule of the game" of collegial judging is that, while certain forms of output-focused strategic behavior are accepted (even encouraged) and others are quietly tolerated, explicit vote trading is disallowed. In theory, this observable but unwritten code of conduct might reflect a widespread judgment that, in the long term, vote trading is a counterproductive strategy for goal-oriented judges on collegial courts. My strong sense, however, is that judges (and scholars) believe vote trading is wrong, not just unwise. But why?

My conclusion here is that the answer is more complicated than initial intuitions might suggest. While vote trading and other strategic maneuvers can plausibly be viewed as furthering legitimate judicial objectives, I have sketched a number of objections suggesting that vote trading nevertheless constitutes improper judicial behavior. But different objections rest on very distinct foundational assumptions about the nature and purpose of collegial adjudication. Moreover, some (though not all) objections logically entail that certain accepted strategic practices should be equally disapproved as well. Finally, some objections apply to vote trading or other maneuvers only in some contexts but not others, nuances not reflected in current practice. My hope is that this inquiry will stimulate deeper reflection about the "paradox" of collegial adjudication, and perhaps assist judges in developing a more refined understanding of the norms of their profession.

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