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Ways of Criticizing the Court

Frank H. Easterbrook

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Critics have attacked Supreme Court decisions not only for their substance, but also for their structure and inconsistency. Professor Easterbrook responds to these critics by arguing, first, that the increasing caseload of the judiciary, coupled with the techniques of Supreme Court case selection, makes more fractured decisions inevitable. Second, Professor Easterbrook applies Arrow's Theorem to show that it is impossible for critics to demand consistent decisions from the Supreme Court without requiring it to sacrifice its essential institutional nature.

I. INTRODUCTION

THERE are two general ways of criticizing the Supreme Court. First, the critic may propose some fundamental principles and say that the pattern of decisions or a particular decision is inconsistent with these principles. He may say, for example, that constitutional decisions should be based solely on the words of the document and the contemplation of the framers, that the Court should make decisions on the basis of prevailing beliefs about fundamental values, or that the antitrust laws should be interpreted to foster allocative efficiency. The critic may label decisions inconsistent with these first principles as wrong or misguided. Practitioners of this method of criticism base their arguments on documents, proceedings, and standards external to the Court.

The second method of criticism challenges the performance of the Court as an institution. The critic may say that the Court is divided too frequently, does not adequately explain its decisions, or hands down decisions that are inconsistent with one another. He may say, in other words, that the Court is fragmented or disregards precedent.[1]

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[1] I do not consider "time and motion" studies of the Court — for example, analyses of its caseload and arguments that changes in its jurisdiction or internal procedures will improve the quality of its decisions. For recent criticism of such studies, see G. CASPER & R. POSNER, THE WORKLOAD OF THE SUPREME COURT (1976); Casper & Posner, *The Caseload of the Supreme Court: 1975 and 1976 Terms*, 1977 SUP. CT.

This second method is the source of much effective rhetoric employed by legal scholars and by the Justices themselves. The critic takes a case, extracts a principle ("value") that accounts for the outcome — special credit if the "real" value is not the one the Court professed to employ — and maintains that in some other case the Court gave different weight to that value. The critic may say that the Court has disregarded a duty to follow or overrule the earlier case in order to achieve consistency, or that it has failed in its obligation to explain the inconsistency. If, as often occurs, any effort to explain the apparent inconsistency leads to disagreement among the Justices, the critic may point out that the proliferation of opinions and the expression of disagreement cause people to doubt that the Court is following the law rather than its members' whims; it may be said that too much disagreement diminishes the Court's prestige, makes its claim to the final say questionable, or even draws the rule of law into question. The critic has an especially vulnerable target when the Court combines inconsistency with fragmentation, sometimes to the point of conceding that its decisions are not consistent and cannot be made so.[2]

I argue in this Article that the second form of criticism is of limited force; indeed, in some circumstances such criticism is worthless. (As the ensuing discussion makes clear, though, I distinguish criticism of the Court *as an institution* from criticism of the foibles of particular Justices. I do not mean to say that it is pointless to criticize a particular Justice for inconsistency or thick-headedness.) The most powerful challenge to the Court as institution deals with inconsistent decisions, but I want to postpone discussing it. I start with the milder criticism of divisions within the Court and return in Part III to the meaning of the demand for consistency.

REV. 87; *see also* Hutchinson, *Felix Frankfurter and the Business of the Supreme Court, O.T. 1946–O.T. 1961*, 1980 SUP. CT. REV. 143 (discussing one Justice's suggestions for changes in the internal procedures of the Court). The studies of internal operating procedures raise questions different from those I examine here.

[2] *Compare* Robbins v. California, 101 S. Ct. 2841 (1981) (plurality decision) (marijuana found in wrapped packages under the deck of a station wagon during a warrantless search of the automobile must be suppressed), *with* New York v. Belton, 101 S. Ct. 2860 (1981) (cocaine found in a zippered pocket of a jacket in the back seat of a car during a warrantless search of the automobile is admissible). As Justice Stevens observed, six Justices thought that the cases required identical treatment, 101 S. Ct. at 2855 & n.1 (Stevens, J., dissenting), and Justice Powell, a member of the majority in both cases, conceded that the principles informing fourth amendment jurisprudence are confused. *Id.* at 2847–51 (Powell, J., concurring in the judgment); *see also* United States v. Ross, 102 S. Ct. 386 (1981) (granting certiorari, Court asks the parties to brief the question whether *Robbins* should be reconsidered).

II. DIVIDED DECISIONS

Criticism of the Court for being divided is a hardy perennial. Plurality decisions are subject to special scorn.[3] Critics say that the Court should try harder to reach agreement on a majority opinion, because plurality decisions deprive the bench and bar of necessary guidance. Divisions of all sorts, including too many dissenting opinions, are said to indicate poor draftsmanship and a general lack of collegiality, leadership, or statesmanship on the Court.[4] The Justices are sensitive to criticism of this sort; Justice Rehnquist recently filed a spirited, if solitary, dissent.[5]

The critics of the Court usually assume that the source of the disagreement is insufficient discussion or reflection by the Justices, or perhaps the press of too many cases. Thurman Arnold once replied that this position showed "an ignorance of the rules of elementary psychology,"[6] but this is a weak response. People often change their views after discussing problems with others, and the Justices' similar legal backgrounds should make them amenable to each other's persuasion in many cases, even though there is bound to be a residuum of disagreement. Moreover, the Justices believe that a show of agreement is beneficial to the institution — witness the efforts to achieve unanimity in *Brown v. Board of Education*[7] and *United States v. Nixon*[8] — and collegial work and compromise are essential to the ability of the Justices to agree. The Justices would decide cases by majority opinions and

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[3] *See, e.g.*, 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, 757–60 (1980); Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127 (1981) [hereinafter cited as Note, *Plurality Decisions*]; Comment, *Supreme Court No-Clear-Majority Decisions: A Study in* Stare Decisis, 24 U. CHI. L. REV. 99 (1956).

[4] *See, e.g.*, P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 82 (2d ed. 1973); *id.* at 11 & n.2 (Supp. 1981); Cox, *The Supreme Court, 1979 Term — Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 72–73 (1980); Hart, *The Supreme Court, 1958 Term — Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959). The latter two articles exemplify a strain of criticism characterized by Professor White as the school of reasoned elaboration, *see* White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973), from a phrase used in H. Hart & A. Sacks, The Legal Process 161 (tent. ed. 1958) (available in Harvard Law School Library).

[5] Rehnquist, *"All Discord, Harmony Not Understood": The Performance of the Supreme Court of the United States*, 22 ARIZ. L. REV. 973 (1980).

[6] Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298, 1313 (1960).

[7] 347 U.S. 483 (1954); *see* R. KLUGER, SIMPLE JUSTICE 678–99 (1975).

[8] 418 U.S. 683 (1974); *see* B. WOODWARD & S. ARMSTRONG, THE BRETHREN 287–347 (1979).

reduce the number of dissents if they could do so at reasonable cost to themselves.

Critics of the institution also sometimes say that disagreement and plurality decisions arise because the Justices are not particularly good at what they do. If they are dense or uncomprehending, the argument runs, they will not even agree on what is pertinent to the decisions, let alone on how to dispose of cases. Yet this argument, too, is unsatisfactory. Today's Justices are not demonstrably less able than those of earlier times; nonetheless, the number of dissenting and concurring opinions and plurality dispositions continues to increase.[9] The increase has been especially marked during the last ten years, although between January 1972 and September 1981 only one new Justice joined the Court. This suggests that the explanation for the increase in divided and plurality decisions lies in changes in the conditions under which the Court operates rather than in the way particular Justices handle their jobs. I offer below some explanations of divided decisions that depend on such changed circumstances; if these explanations hold, then the increase in the number of divided and plurality decisions does not reflect poorly on the Court but may, instead, show that the Justices have accommodated well to the new circumstances.

A. The Case Selection Process

It is easy to reach agreement on easy cases, but the Court does not decide many easy cases. Its certiorari jurisdiction allows it to select cases that seem interesting or important, the very cases most apt to produce divisions. Congress has whittled away at the Court's mandatory docket.[10] It is likely that

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[9] There were 35 plurality decisions from 1900 to 1955 and 43 more from 1955 to 1968. From 1969 to 1981 there were 95. In addition to the 88 decisions for this period collected in Note, *Plurality Decisions*, *supra* note 3, at 1147, there were seven plurality decisions in the 1980 Term: Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882 (1981); Robbins v. California, 101 S. Ct. 2841 (1981); California Medical Ass'n v. FEC, 101 S. Ct. 2712 (1981); Rosales-Lopez v. United States, 451 U.S. 182 (1981); Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981); Michael M. v. Superior Court, 450 U.S. 464 (1981); Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981). The growth is too great to be accounted for by the increase in the number of cases the Court has decided on the merits during the period. For data on the number of cases heard and decided, see Hellman, *The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970's*, 91 HARV. L. REV. 1709, 1730–34 (1978).

[10] Congress has passed the Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 5, 88 Stat. 1706, 1709 (1974) (codified as amended at 15 U.S.C. § 29 (1976)), and the Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, § 14(a), 84 Stat. 1880, 1890 (codified as amended at 18 U.S.C. § 3731 (1976)), to limit authorized

the residual group of discretionary cases contains an increasingly high proportion of the hard-to-decide problems that call forth divisions.

Some of the discretionary cases involve conflicts among the circuits, and the process that generates conflicts also generates divisions on the Court. Lower courts sometimes produce conflicting decisions because they do not do their homework, but more often conflicts arise because the legal issue is hard and the Court's precedents appear to look in two (or more) directions. In such circumstances an inferior court will have trouble anticipating what the Supreme Court would do with the matter. A case thus is hard for the lower courts and produces a conflict precisely when the Justices will find it hard as well.

Indeed, the Court's docket should contain more and more difficult cases as time goes on, even if there is no change in the extent of its control over which cases it will hear. Assume that some fixed proportion of all cases litigated in court are "hard." This is a reasonable assumption; parties have an incentive to settle cases to save the costs of litigation, and the existence of a judicial decision indicates that the parties were unable to agree on the outcome.[11] The pressure to settle cases strongly influences the attributes of the cases left to judicial resolution; even if there is no single "hardness index" of litigated cases over the years, it is unlikely that litigated cases today are significantly easier or harder than those put to judges twenty or fifty years ago. Now suppose the Justices always choose the hardest cases for their adjudication. If lower courts

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appeals from single district judges. It also has limited the jurisdiction of three-judge district courts and, consequently, the number of direct appeals under 28 U.S.C. § 1253 (1976). Only decisions of federal appellate courts holding state statutes unconstitutional, *id.* § 1254(2), decisions of state courts upholding state statutes against federal constitutional challenge, *id.* § 1257(2), decisions holding federal statutes unconstitutional in certain cases, *id.* §§ 1252, 1257(1), and some cases involving reapportionment, the Voting Rights Act § 5, 42 U.S.C. § 1973c (1976), and the Federal Election Campaign Act § 314, 2 U.S.C. § 437h(b) (1976), now may be appealed directly to the Court.

The effects are striking. In the 1980 Term, the Court issued 138 full opinions, of which 21 (or 15%) involved appeals. The Court issued 116 opinions after granting certiorari and one on original jurisdiction. In the 1969 Term, by contrast, the Court issued 94 full opinions, of which 31 (or 33%) involved appeals. Only 61 opinions were issued in certiorari cases and two in original jurisdiction cases. Some of the appeals in the 1980 Term were from leftover three-judge courts; the number of appealable decisions should decline still further in the future. (The opinion counts are the author's, from a survey of the *United States Reports* and the *Supreme Court Reporter*.)

[11] For a short description of the circumstances that influence the settlement-versus-litigation decision, see Easterbrook, Landes & Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & ECON. 331, 353–64 (1980).

dispose of 1000 cases per year, and two percent (twenty cases) are genuinely hard, then only twenty percent of the Court's docket will be hard if it hears 100 cases per year.

As the number of cases decided in the lower courts increases, so too does the proportion of the Supreme Court's docket that is hard. If lower courts dispose of 50,000 cases every year, and 1000 (the same two percent) are hard, the Supreme Court will be inundated with tricky, division-creating problems. The more carefully the Court selects the hard cases from among those presented to it, the more divided it will become when addressing the merits. It would not help the Court to hear fewer cases; the whole docket still would be hard. Nor would it help to interpose another layer of appellate courts.

The number of cases handled by the lower courts has indeed increased.[12] That alone is enough to explain why divisions have multiplied. Moreover, it may well be that the proportion of litigated cases that must be called hard is increasing. As I explain in Part III, the Court is bound to produce a steady (and perhaps steadily increasing) stream of inconsistent decisions. As the number of these inconsistent precedents grows, a higher percentage of all legal disputes becomes hard to resolve; a judge almost always will find that one or another of the inconsistent decisions supports each party. Once it becomes difficult to decide any case without dishonoring at least one precedent (or the values implicit in that precedent), all cases are hard.[13]

B. The Guidance Process

Professor Cox suggests that "[a] greater effort to obtain consensus, perhaps by shortening opinions and limiting them to points of common agreement, might beneficially reduce the volume of concurring and separate opinions."[14] Doubtless the Court can agree on a result more easily than five or more Justices can agree on the many propositions of law and logical steps that make up a full opinion. The Court's attempt to provide reasoned explanations for its decisions thus contributes to the extent of disagreement among its members. But the assertion that it is "beneficial" to write skeletal opinions in

[12] The courts of appeals terminated 3434 appeals in 1940; they terminated 20,887 appeals in 1980. 1980 AD. OFF. U.S. CTS. ANN. REP. 1.

[13] There may be other reasons why cases are hard to decide. Certain questions expose fundamental moral tensions in society, and other questions are hard because they are novel. It seems unlikely that hardness from these sources decreases over time.

[14] Cox, *supra* note 4, at 72.

order to obtain more agreement is dubious. Indeed, Professor Cox evidently does not believe his own prescription, for on the same page he complains that the Court's "opinions often lack the full exposition necessary to fit the decisions into a coherent body of law."[15]

The Court's critics cannot have things both ways. The Court cannot be wrong both in saying too much and in explaining too little. True, the author of a particular opinion (who is often a law clerk attempting to execute poorly understood instructions) may be maladroit, and his clumsy attempt at "full exposition" may provoke concurring and dissenting opinions, but surely this is not the dominant cause of disagreement among the Justices. More commonly, "full exposition" and disagreement coincide because the more the Court tries to explain the nature and limits of its principles, the more targets for disagreement it presents. It is appropriate to criticize the opinion by saying that a given point is wrong, but it is bootless to attack because the Justices attempt to explain. That some reasons will be mistaken or opaque, and that even the author of the opinion will say so on occasion,[16] is just a risk of the business. A good lawyer learns to read the Court's opinions with the possibility of mistake in mind and to distinguish casual or unconsidered assertions from the propositions that have received the attention and assent of the Court.

One man's "full exposition" is another man's obiter dictum, and I do not want to defend the practice of filling opinions with detours and excursions. Nonetheless, a complete statement of the Court's rationale, of all major and minor premises necessary to the decision, or of the limits of the holding may be invaluable. The more the Court says, the more help it offers in planning. Longer and more detailed opinions are a rational and desirable response by a Court that cannot significantly increase the number of cases it hears but wants to offer guidance on the increasing number of problems it must address.[17] The Court's effort to offer more guidance through fuller statements of its governing principles in turn provokes

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[15] *Id.*

[16] *See* United States v. Scott, 437 U.S. 82, 86–87 (1978) (Rehnquist, J.), *overruling* United States v. Jenkins, 420 U.S. 358 (1975) (Rehnquist, J.).

[17] Sometimes the need to offer guidance arises from the Court's earlier decisions. It could have eliminated a hundred thorny problems by deciding Roe v. Wade, 410 U.S. 113 (1973), the other way, as it should have done. *See* Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159. But often the Court is dragged into the fray when Congress passes a statute saying, in effect: "This is a problem, please do something about it." *See, e.g.*, H. FRIENDLY, BENCHMARKS 41–64 (1967).

disagreement, but this must often simply supply evidence that the Court is adapting (well) to the fact that it can hear a smaller and smaller portion of all disputes.[18]

This also means that there is nothing intrinsically wrong with long opinions, written in several parts, joined by different coalitions of Justices in each part.[19] These opinions often are attacked as displays of useless erudition suitable only for law reviews, but it is hard to understand the force of this criticism. Long opinions may be difficult for the bench and bar to interpret, but they are no more difficult to deal with than a series of short opinions, each sketching (modestly and tentatively) an approach to a smaller part of the problem.

Now the Court frequently has a choice of ways to approach a problem, and this may be a source of disagreement. Again and again the Court fractures because some Justice wants to announce a bright line rule governing many similar cases while others conclude that a balancing or "totality of the circumstances" test is proper.[20] Each of these approaches has dis-

[18] There are, of course, other explanations for divided decisions. One is that some or all Justices spurn principles of stare decisis. I consider in Part III the role stare decisis plays in producing consistent decisions. Another is that some or all Justices engage in "substantive reasoning," Note, *Plurality Decisions*, *supra* note 3, at 1140–44; that is, that the Justices reassess the wisdom of enactments on the basis of their own principles of The Good (or principles they attribute to current, enlightened thought) rather than on the basis of principles drawn from statutes and the Constitution. Substantive reasoning produces divisions because no Justice has the means to persuade another that he is wrong; assertions about the content of natural law cannot be "wrong" in the customary sense. For a compelling demonstration, see Moore v. City of E. Cleveland, 431 U.S. 494 (1977). A related source of division is the use of "values" reasoning: the Justice infers from a constitutional provision or prior holding the "values" it supports and then uses the values so extracted as a premise in an argument for some additional result. This method of reasoning leads to indeterminate results because the Justices have no way to agree on the weight to be attached to these values. Once the reasoning process is cut loose from the text and its history, the Justices are practically compelled to decide cases on the basis of their notions of The Good. *See* CBS v. Democratic Nat'l Comm., 412 U.S. 94, 145 (1973) (Stewart, J., concurring) (discussing "the dangers that beset us when we lose sight of the First Amendment itself, and march off in blind pursuit of its 'values'"). Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882 (1981), in which the Court tried to decide whether the value of commercial advertising exceeds the value of reducing the number of eyesores — in exactly the way a legislature would have weighed these values — provides a sufficient illustration. I do not, however, view objections to substantive reasoning or to values reasoning, and to the divisions they produce, as objections to the performance of the Court as an institution. They are more properly classed as objections, based on first principles, to the Court's premises and conclusions. If substantive reasoning is a legitimate method of deciding cases, then it is wrong to criticize the Court for the disagreements that are bound to ensue.

[19] *See, e.g.*, Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977).

[20] All of the recent cases under the religion clauses fall within this group, as do the recent decisions evaluating the constitutionality of capital punishment. These cases feature two bright line tests and a balancing approach between them. *See, e.g.*,

tinctive costs and benefits, and in any given case a strong argument might be made for either.[21] Neither is likely to be "right" in the sense that rational Justices would be required to assent if only they thought long and hard enough. When such disagreements develop among the Justices, the only compromise that would produce a semblance of agreement is for the bright line adherents to yield to the balancing adherents. Those favoring a bright line may believe that, after further exposure to the problem, their colleagues will be more willing to adopt a clear line of demarcation; certainly a balancing test will produce plenty of litigation that the bright line adherents can use in arguments with their colleagues.[22]

Few would argue that the Court should conceal the disagreement and issue an opinion adopting a balancing test. That would simply mislead bench and bar about the actual state of affairs and deny them information pertinent to future developments. It would conceal a position that may prevail after repeated litigation and conceal as well information about how some Justices would weigh the factors to be balanced.[23]

Wolman v. Walter, 433 U.S. 229 (1977) (establishment clause); Woodson v. North Carolina, 428 U.S. 280 (1976) (death penalty); *cf.* Rosales-Lopez v. United States, 451 U.S. 182 (1981) (inquiry into racial or ethnic prejudice on voir dire for trial on charge of violent crime between members of different racial or ethnic groups); Hampton v. United States, 425 U.S. 484 (1976) (relevance to entrapment defense of predisposition to commit crime).

[21] *See* Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 SUP. CT. REV. 127.

[22] Balancing approaches make the application of legal rules less certain. It becomes difficult to know how the case will be decided until the evidence has been introduced and the judge has ruled. Indeed, some balancing tests can be read as signals to the lower courts that just about any decision will be acceptable in a given case. *See, e.g.*, Barker v. Wingo, 407 U.S. 514 (1972) (announcing a balancing test for speedy trial clause cases). The decrease in certainty will produce more litigation, and a greater proportion of the litigated cases will be tried rather than settled. For the technical argument about why uncertainty increases litigation and discourages settlement, see Easterbrook, Landes & Posner, *supra* note 11.

[23] Such concealment is a matter of policy in many continental courts, which regularly issue unanimous per curiam opinions no matter how deep the division within the court. But this show of unanimity often comes at the expense of reducing the opinion to a string of homilies or, as one scholar put it, "abstract" propositions. J. WETTER, THE STYLES OF APPELLATE JUDICIAL OPINIONS 26 (1960). It is doubtful, too, that the tradition of unanimity in these courts produces a cohesive body of law. The German Constitutional Court, for example, has decided both that the government must provide subsidies for academic research, 20 Bundesverfassungsgericht [BVerfG] 56 (1966) (interpreting GRUNDGESETZ [GG] art. 21(1)), and that the government is forbidden to provide subsidies for political parties, 35 BVerfG 79 (1973) (interpreting GG art. 5(3)). In each case the court relied on a constitutional provision declaring that the activity in question must be free (*"frei"*). In the case of research, free meant

And the concealment would not affect the disposition of the case in any material way. When one group of Justices explicitly endorses a bright line test and another adopts a balancing approach, the balancing approach prevails under the principle that the holding of a case in which there is no majority opinion is "'that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[24]

Once more, I do not argue that the Court's displays of division are costless. But critics who treat division as undesirable per se, or as evidence of the Justices' sloth or lack of aptitude, are out of line. Divided decisions stem in large measure from circumstances beyond the Court's control, and they go hand in hand with the attempts at reasoned explanation that most of the Court's critics endorse. There will be, at any given time, some optimal amount of division, and that amount rises as the proportion of all cases reviewed by the Court falls.

III. INCONSISTENT DECISIONS

A. Introduction

Everyone thinks that the Court should be consistent. Consistency is, it seems, an essential attribute of any institution that decides on the basis of statutes, constitutions, and criteria other than the Justices' preferences. The Court cannot logically say in December that a criminal defendant has a "valued right" to a jury verdict and in May that the deprivation of this right is irrelevant.[25] Similarly, it cannot say that freedom of

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"at no cost to the researcher"; in the other case, free meant "with no risk of government control." The court did not attempt to reconcile the decisions.

[24] Marks v. United States, 430 U.S. 188, 193 (1977) (unanimous in relevant part) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell & Stevens, JJ.)).

[25] *Compare* Bullington v. Missouri, 101 S. Ct. 1852 (1981) (prosecutor may not seek an increase in the defendant's penalty at a separate trial, which will be held anyway in light of other events), *with* United States v. DiFrancesco, 449 U.S. 117 (1980) (prosecutor may appeal in order to seek an increase in the defendant's penalty). Six Justices thought that *Bullington* and *DiFrancesco*, which were decided five months apart, raised identical problems; three Justices did not, and their views carried the day. Both decisions were 5–4. *See* Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001 (1980); *see also* Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81 (analysis of the Court's double jeopardy jurisprudence and an argument that it contains a tangle of inconsistent values given arbitrary (and shifting) weights).

Other lines of precedent have similar problems. *Compare* Kusper v. Pontikes, 414 U.S. 51 (1973) (holding unconstitutional, on ground that it impairs voters' freedom of

speech is a more important constitutional value than a defendant's right to a fair trial, that fair trial is more important than military preparedness, and that military preparedness is more important than free speech. To do so is to say that at least one decision is wrong or that they do not rest on the same document. Thus, the propositions that decisions must be consistent, that principles must be followed unless the decisions announcing them are overruled, and that decisions rest on principles of general applicability are put by the Court's critics as logical implications of the proposition that the Court is supposed to follow statutes and a written Constitution. If this is so, an inconsistent Court is a willful, irresponsible Court.[26]

Yet while admitting that it is bound by the written documents, the Court continues to hand down inconsistent decisions, to dishonor precedents, and to change the weight attached to particular constitutional and statutory provisions or the values derived from them. Perhaps the Justices are hoodwinking us (or themselves) in asserting that they are governed by rules external to their preferences, but fraud of this sort cannot account for *all* of the inconsistencies. Some scholars defend the Court by saying that inconsistencies arise because the Court tries to write narrowly,[27] and its work cannot be consistent (or clear) when there are intervals of time between very short steps.[28] Others say that the Court fails because the

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association, a statute prohibiting those who have recently voted in one party's primary from voting in another's), *with* Democratic Party v. La Follette, 450 U.S. 107 (1981) (holding unconstitutional, on the ground that it impairs the regular party members' freedom of association, a statute requiring the party to accept delegates selected under a system that allows voters to choose on the spot in which party's primary to participate).

[26] For representative statements of the position, see Hart, *supra* note 4, at 99; Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 7 (1979); Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1315 (1975); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 11–12 (1959). For a less representative, but no less effective, challenge to the Court's claim to exercise authority when it acts inconsistently, see F. RODELL, WOE UNTO YOU, LAWYERS! 63–99, 119–34 (1939). The demand for consistency (which is strongest when used to challenge the Court's assertion of authority) frequently is translated into judgments about the propriety of particular decisions. For two especially bald arguments of the form: "Case *A* gives one weight to a constitutional value and case *B* another; therefore, the first-decided or last-decided case is wrong," see Findlater, *Retrial After a Hung Jury: The Double Jeopardy Problem*, 129 U. PA. L. REV. 701 (1981) (first-decided case wrong); Perry, *Why the Supreme Court was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on* Harris v. McRae, 32 STAN. L. REV. 1113 (1980) (last-decided case wrong). The Court itself sometimes adopts this rhetoric. *See* Hudgens v. NLRB, 424 U.S. 507 (1976).

[27] *See* Arnold, *supra* note 6, at 1312.

[28] *See, e.g.*, Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 349–50 (1974).

Justices are not up to the arduous tasks. Still others say that consistency is the hobgoblin of small minds, that "technical legal theory stands . . . in the way of progress" and should be disregarded.[29] This position essentially holds that the Court is not bound by the past (however recent), even if part of the past is embodied in apparently authoritative written commands.[30]

I, too, seek to explain the Court's performance, but I offer a different perspective. Inconsistency is inevitable, in the strong sense of that word, no matter how much the Justices may disregard their own preferences, no matter how carefully they may approach their tasks, no matter how skilled they may be. I do not argue that consistency is always impossible. Some disputes may be resolved in consistent ways, and doubtless much inconsistency is attributable to slipshod work. But demands for perfect consistency can not be fulfilled, and it is inappropriate to condemn the Court's performance as an institution simply by pointing out that it sometimes, even frequently, contradicts itself.

The argument in the following pages is based on the developing theory of public choice. The theory is an outgrowth of the work of Kenneth Arrow, whose book *Social Choice and Individual Values*, published in 1951,[31] prompted an explosion of work by economists and political scientists that has become a separate discipline.[32] Arrow's followers began to examine with great care the operation of all systems for making collective choices: that is, methods of pooling individual preferences and decisions to arrive at a decision for the group. This work almost always concerns voting mechanisms, and the practitioners of the discipline commonly assume that there are no constraints on the choice of the voters, that people vote their preferences. But the theory is not limited to such unrestrained

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[29] *See* Arnold, *supra* note 6, at 1310.

[30] For arguments from a similar perspective, see Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Parker, *The Past of Constitutional Theory — And its Future*, 42 OHIO ST. L.J. 223 (1981); Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205 (1981). For effective answers to arguments of this sort, see Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981); Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review* (Book Review), 59 TEX. L. REV. 343 (1981) (reviewing J. ELY, DEMOCRACY AND DISTRUST (1980)).

[31] K. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963). The second edition recasts several aspects of the analysis and replies to some critics. *Id.* at 92–120.

[32] Mueller has written an excellent, nontechnical survey of the literature. D. MUELLER, PUBLIC CHOICE (1979). In the rest of this paper, I rely on many propositions and proofs from the public choice literature without attributing them to the technical work; the reader may find summaries of the proofs in Mueller's book.

preference voting; it may be applied as well to institutions whose voters are bound by some constraints.

The theory of public choice is new, and its discipline is unfamiliar to most lawyers. I know of only three lawyers who have brought public choice principles to bear on the legal system.[33] They used these principles to show that courts and agencies cannot simultaneously satisfy all demands made of them; they did not, however, discuss how courts combine the conclusions of judges to produce legal rules. Moreover, the economists who work in the public choice field have not discussed the courts, and political scientists who study the courts have not used the fulcrum of public choice principles.[34] Because the impossibility theorem proved by Arrow will strike many as counterintuitive, I want to begin the discussion with some propositions about voting and decisionmaking that predate Arrow, and then return to his general impossibility result.

B. Some Paradoxes of Voting

The Court decides cases by majority vote. Its ability to make consistent, principled decisions therefore depends on the existence of a system of voting that produces such outcomes. Yet voting systems are subject to many problems. First, decisions produced by voting will tend to be unstable even when

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[33] Epstein, *Voting Theory, Union Elections, and the Constitution*, 18 NOMOS: DUE PROCESS 333 (1977); Levine & Plott, *Agenda Influence and Its Implicatons*, 63 VA. L. REV. 561 (1977); Spitzer, *Multicriteria Choice Processes: An Application of Public Choice Theory to* Bakke, *the FCC, and the Courts*, 88 YALE L.J. 717 (1979); Spitzer, *Radio Formats by Administrative Choice*, 47 U. CHI. L. REV. 647 (1980); Weingast, *Regulation, Reregulation and Deregulation: The Political Foundation of Agency Clientele Relationships*, 44 LAW & CONTEMP. PROBS., Winter 1981, at 147. Plott and Weingast are economists.

The article by Levine and Plott demonstrates the importance of the order in which things are decided and suggests the importance of public choice principles for other legal problems, including decisionmaking by courts. Levine & Plott, *supra*, at 563, 593–94. Weingast applies public choice principles to the relationship between Congress and regulatory agencies. Epstein and Spitzer use public choice to show that agencies cannot simultaneously fulfill all demands made of them, even though the demands appear reasonable taken singly.

[34] Political scientists' studies of courts have concentrated on measuring the rate of agreement among judges and determining whether these agreements were associated with socioeconomic status, political background, or other similarities. More recent work also has studied the methods of reaching agreement and of exercising influence through judicial office. *See, e.g.*, S. GOLDMAN & T. JAHNIGE, THE FEDERAL COURTS AS A POLITICAL SYSTEM (2d ed. 1976); W. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964); D. PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT (1980); D. ROHDE & H. SPAETH, SUPREME COURT DECISION MAKING (1976). Murphy notes the existence of path dependence but does not elaborate, W. MURPHY, *supra*, at 86–87; the others do not mention any public choice principles.

the same voters participate in all decisions; second, the sequence in which issues are decided frequently controls the outcome of the process; third, any voting system can be manipulated by people who do not honestly state their positions.

1. Cycling. — Majority voting systems may be unstable when there are more than two possible outcomes and different voters do not rank the outcomes in the same order. An example illustrates the problem.

Suppose the Justices have studied the establishment clause,[35] and different Justices reach different conclusions about the meaning of that provision. I assume here, and throughout this Article, that each Justice comes to his own position after a process of reasoning deemed adequate and legitimate by traditional standards — that is, the positions are based on a study of the language and history of the clause and a careful analysis of the Court's earlier decisions, and each is internally consistent. I also assume that, in deciding a case, each Justice operates independently; each listens to, but is not bound by, the arguments of any other, and each votes according to his own conclusions. Three Justices conclude that all public acts that directly or indirectly aid religion violate the clause; call this position *A* for absolutism. Three more conclude that any public act is constitutional if it is neutral between religious and nonreligious associations (*N* for neutrality). The remaining three conclude that the clause requires balancing, in which the purpose of the act, its effect on religion, and the extent of entanglement between state and religion all play a role (*B* for balancing). It is a detail that three Justices have each position; the problem would be the same (although the presentation would be more complicated) if the numbers were different and there were more than three interpretations of the clause.

Each group of Justices, moreover, has a preference between the two positions taken by the others. The Justices who take position *N* (neutrality) may believe that position *B* (balancing) more accurately reflects the design of the framers and the Court's cases than does position *A* (absolute ban on aid). The Justices who take position *B* may conclude that *A* is more nearly correct than *N*. And the Justices who take position *A* may conclude that *N* is more nearly correct than *B*. This last is not as odd as it first appears: these Justices conclude that the clause embodies a bright line test and that any attempt at balancing is worse than either bright line test because it im-

[35] "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

merses the Court in the details of a process properly left to the legislature.

The Justices thus hold the following legal positions:

	Group of Justices		
	1	*2*	*3*
Legal Position	A	B	N
(by order of	N	A	B
preference)	B	N	A

When a case under the establishment clause comes before the Court, the Justices always vote according to their conclusions. But this voting will not lead them to agree on a rule, no matter how they go about the task. They cannot settle on rule *A*, because the Justices in groups 2 and 3 (a majority) believe that rule *B* is a more accurate construction of the clause than rule *A*. Yet rule *B* cannot be chosen either, because a majority (those in groups 1 and 3) would select rule *N* over rule *B*. And, to complete the cycle, a majority (in groups 1 and 2) would select rule *A* over rule *N*. No matter what the Court does, a majority would always vote to change the rule.

Cycling of this sort is inescapable when the Justices vote independently and two other conditions hold. First, no position is held by five Justices and at least one Justice holds each of the three positions. This is often true, because many legal problems admit of three or more plausible legal positions, and the method of the Justices' appointment ensures that most plausible legal positions find some support on the Court.[36] Second, the Justices hold "multi-peaked" preferences — in other words, the Justices do not rank the options in the same sequence. If the Justices substantially agree on the ranking of the choices other than their own, the results of voting will be stable. In the example presented above, if group 3 ranks the options *N*, *A*, *B*, then the Court will settle on rule *A*. Cycling will be troublesome to the extent that legal disputes are characterized by multi-peaked preferences, a subject I postpone to Section C of Part III.

Although I have used an example of cycling that involves a plurality decision, such opinions are not an essential ingredient. Cycling is produced by the conclusions of the Justices,

[36] *See infra* pp. 826–27.

not by how they express these conclusions. Even if they paper over the differences, say by agreeing on an opinion expressing the views of whichever group holds the deciding votes in a given case, that will not prevent a different group from holding the deciding votes in a different case. In such circumstances multiple opinions become desirable because of the additional information they provide to the parties, as I observed in Section B of Part II.

2. Path Dependence. — The example I have just given may appear to overlook stare decisis.[37] Perhaps the Justices can reach and adhere to a single rule if they modify their positions, over time, by respecting the holdings of intervening cases. My assumption that the Justices continue to vote in accordance with their original conclusions seems to make stare decisis pointless. I do not hold that position.

Stare decisis serves valuable functions when there are but two tenable legal conclusions. A doctrine of adherence to rules prevents changes in the composition of the Court from defeating settled expectations, and rule-adherence in general reduces the risks people must endure in planning their activities. Rule-adherence is in the Justices' interest, too, because it shields them from incessant importunings to change the rules; people are less likely to file suits when they know that they must convince the Court to change the rules and it has announced its unwillingness to do so. Moreover, each Justice may find it advantageous to follow rules announced by his predecessors, so that successors will follow his rules in turn. Stare decisis thus enhances the power of the Justices.[38]

Even so, stare decisis *as a doctrine* is of limited utility. The fact that the Justices have reached a given conclusion once is good evidence that they would do so again, with or without the aid of a formal doctrine of rule-adherence; knowledge of the likely adverse result would discourage people from continuing to test the settled rule. A rigid application of a doctrine of rule-adherence would prevent the Court from correcting plain blunders, while a flexible application of the doctrine (to allow blunder correction) reduces the doctrine to

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[37] I use "stare decisis" here to refer to a doctrine that precludes the reassertion of legal arguments raised (by the parties or the courts) and rejected after consideration. The doctrine has not been used to preclude arguments that "merely lurk in the record, neither brought to the attention of the court nor ruled upon." Webster v. Fall, 266 U.S. 507, 511 (1925); *see* Stone v. Powell, 428 U.S. 465, 480–81 & nn.14, 15 (1976); United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 37–38 (1952).

[38] *See* Landes & Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 273 (1976).

shambles by stripping it of the power to insulate rules from challenge and change.[39]

Whatever one's view of the doctrine, stare decisis does not offer a solution to the problem of cycling when there are three or more plausible legal positions. Suppose the first case under the establishment clause, in the example from the previous Section, pitted one party urging rule *A* against another urging rule *N*. Rule *A* would prevail. But it would not make sense to say that stare decisis should be invoked to insulate rule *A* from further consideration. That would make the prevailing rule depend on the fortuity that the lawyers for the parties in the first case urged only rules *A* and *N*, not rule *B*. To invoke stare decisis to close the debate after the first case is to make the choice of constitutional doctrine essentially arbitrary.

To make matters worse, the conjunction of stare decisis and multi-peaked preferences would aggravate the problem of path dependence. If rules *A* and *N* were debated and rule *A* prevailed, the lawyers in the next case would introduce rule *B*. Under principles of stare decisis, rule *N*, the loser in the previous case, would be out of consideration, while rule *B* would be an allowable outcome because it was not previously rejected. Rule *B* would prevail over rule *A*. Rule *B* would stand because all other rules would have been rejected; nonetheless, if rules *B* and *N* had been urged by the parties in the first case, rule *A* would have emerged as the eventual winner. There are many other possible paths of decision, each leading to a result that is arbitrary or even bizarre.

One of the most interesting findings of the public choice literature is that the decisions of any group are sensitive to the order in which it considers the options. One theorem states that it is possible to construct a decision path that ends with *any* rule, as long as each step is taken by majority vote and,

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[39] Stare decisis is applied so loosely that it seems fair to say that it does not exist as a doctrine. The Court frequently changes rules it views as mistaken, invoking stare decisis only when the first decision induced substantial detrimental reliance. *Compare* Flood v. Kuhn, 407 U.S. 258 (1972) (using stare decisis to exempt baseball from antitrust), *with* Monell v. Department of Social Servs., 436 U.S. 658 (1978) (overriding stare decisis to find municipal corporation liable under 42 U.S.C. § 1983 (Supp. III 1979)), *and* Quern v. Jordan, 440 U.S. 332 (1979) (stare decisis used to find that § 1983 does not abrogate 11th amendment immunity of the states); *compare* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) (stare decisis used), *with* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (previously announced per se rule of antitrust liability overruled). *See generally* K. LLEWELLYN, THE COMMON LAW TRADITION 77–91 (1960) (collecting ways of following or dispatching precedent); Israel, Gideon v. Wainwright: *The "Art" of Overruling*, 1963 SUP. CT. REV. 211 (same); *supra* note 16; *infra* note 56.

at every step, earlier decisions are respected.[40] Majority voting plus stare decisis is thus a formula under which the Court may produce any outcome favored by any number of Justices, however small, even though a majority of Justices would reject that rule if they could do so on the basis of first principles.

An example may be helpful. Courts often proceed by resolving one question and then deciding whether another question is sufficiently like the first that it should be treated in the same way. For instance, the Court may hold that a constitutional right of privacy prevents the states from prohibiting abortions during the first two trimesters. Someone then asserts that the same constitutional right of privacy disables the states from prohibiting any form of sexual conduct between (among?) consenting adults. The Court, adhering to stare decisis, puts out of mind any question about the propriety of the abortion decision and asks: Are the cases identical under the privacy analysis used in the abortion case? Answering "yes," it holds all laws regulating sexual conduct to be unconstitutional.

Now reverse the order of decisions. First, the sexual conduct case arises. The Court holds that there is no constitutional right of privacy broad enough to ban state regulation of such conduct. Then it holds that the same principles apply to abortion, which means that states may prohibit abortion.

The example does not depend on any implausible assumptions. Assume that three Justices have a very broad view of constitutional privacy, three conclude that the Constitution never protects privacy in sexual matters, and three conclude that the Constitution requires a sensitive balancing of privacy and other interests. The last three, and only they, would conclude that the abortion and sexual conduct cases present different problems. Thus, six Justices (and the Court) will hold that the cases must be treated identically, but the way they will be treated will depend on which case comes up first, because the order of presentation determines the votes of the three Justices who would distinguish the two statutes.

The upshot of stare decisis is that the meaning of the constitutional right of privacy is uncertain; everything depends on the fortuitous order of decision.[41] Yet this is plainly un-

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[40] McKelvey, *General Conditions for Global Intransitivities in Formal Voting Models*, 47 ECONOMETRICA 1085 (1979). For an illustration in which the authors, by manipulating the order of decisions, caused a flying club to buy planes that only a minority of members wanted, see Levine & Plott, *supra* note 33, at 571–81, 600-04.

[41] The problem of path dependence is especially visible when the Court must make two or more decisions in a single case. Take, for example, Apodaca v. Oregon, 406 U.S. 404 (1972). The case posed the question whether the Constitution requires jury unanimity in state criminal cases. The Court had held in Duncan v. Louisiana, 391

satisfactory; no sensible theory of constitutional adjudication, interpretive or noninterpretive, allows such happenstance to determine the course of the law. The order of decisions has nothing to do with the intent of the framers or any of the other things that might inform constitutional interpretation.[42]

The best way out of the trap of path dependence (but not out of the problem of cycling) is to relax or abandon stare decisis when there are three or more competing positions. This is essentially what the Court has done, and the result is exactly what the critics decry: plurality decisions with each of three (or more) positions expressed; Justices who adhere to their views despite intervening cases' apparently inconsistent decisions; the revisiting of rules adopted and abandoned in the past. I give some recent examples in the margin.[43] For all of

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U.S. 145 (1968), that the state and federal rules must be identical, but it had not decided what the rule is. Eight Justices in *Apodaca* reaffirmed the position that state and federal rules must agree; five Justices concluded that federal juries must be unanimous. But because one of the five, Justice Powell, also thought that state and federal rules could be different, the Court held that state juries need not be unanimous. This has been denounced as "illegitimate." Note, *Plurality Decisions*, *supra* note 3, at 1133. But consider what would have happened if the first decision, instead of holding that state and federal rules must be identical, had held that state juries need not be unanimous, the second had decided that state and federal rules must be identical, and the third had posed the question of unanimity in federal cases.

Or take National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949), a case decided 3–2–4. It presented the question whether Congress may authorize federal courts to hear suits between residents of the District of Columbia and citizens of a state under the diversity jurisdiction of article III. Three Justices concluded that the District is not a "state" for constitutional purposes and thus that article III cannot support jurisdiction, but that Congress may act under article I and grant the article III courts some jurisdiction not authorized by article III. Two Justices thought that article III absolutely bans the assumption of any non-article-III jurisdiction but that residents of the District of Columbia are citizens of a state for purposes of article III. Four Justices reasoned that District residents are not citizens of a state, and they agreed with the two that article III prohibits Congress from granting jurisdiction not there provided. At the end of the case, then, District residents are not citizens of a state (7–2), and so there is no article III jurisdiction (7–2); courts established under article III may not assume any jurisdiction unless provided in that article (6–3). The Court ordered an article III court, nonetheless, to adjudicate a suit between District residents and citizens of a state (5–4). What does stare decisis compel the Court to do the next time District residents file such a "diversity" suit and the same problem is presented?

[42] In some approaches to adjudication, the result should depend on the mores of the community at the time of decision. *See, e.g.*, Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278 (1981). If this is an appropriate method, the outcome of a case may depend on the time at which the dispute is resolved because mores change over time. But I assume for current purposes that mores (and the legal positions of the Justices) are unchanged. Path dependence makes the outcome turn on the order of decision even though nothing of arguable importance to the decisions changes.

[43] *Compare* Roe v. Wade, 410 U.S. 113 (1973) (abortion), *with* Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), *aff'g mem.* 403 F. Supp. 1199 (E.D. Va. 1975)

the objections to this outcome, it seems preferable to an aggravated form of path dependence, under which the Court adopts and adheres to positions that a majority of the Justices find constitutionally untenable.

3. Strategic Voting. — All of the examples I have used so far assume that every Justice voted honestly, in accordance with his own conclusions. But Justices need not do so; one Justice may improve the result, as he sees things, by voting strategically.

In the establishment clause example, group 1 prefers rule *A* to rule *N* and rule *N* to rule *B*. The three Justices who hold this position know from discussions how their colleagues have evaluated the constitutional arguments. They know that if they vote honestly the Court will cycle endlessly among the rules, and that if stare decisis is invoked to end the cycling they may well lose entirely. If rule *A* is matched against rule *N* in the first case, *A* will prevail, and then in the next case *B* will dominate *A*. The least preferred rule, as group 1 sees things, becomes entrenched. Anticipating this result, group 1 may decide to vote for rule *N* in the first case. Rule *N* will then prevail; there will be no cycling. In this sense strategic voting, concealing one's real conclusions, is a cure for the cycling of outcomes.[44]

To call voting "strategic" is not necessarily to invoke a pejorative. The Court's critics are asking the Justices to vote strategically when they say that some Justices should subordinate their own legal views to those of others in order to achieve a majority decision. But even when Justices comply with this request, they cannot improve the Court's performance. When there are three positions, firmly held, among the Justices, which ones should yield in order to achieve agree-

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(state may prohibit certain private sexual activity); *compare* Bordenkircher v. Hayes, 434 U.S. 357 (1978) (state may withhold favors from a defendant who refuses to plead guilty and may even up the ante in reply to the refusal), *and* Corbitt v. New Jersey, 439 U.S. 212 (1978) (same), *with* Blackledge v. Perry, 417 U.S. 21 (1974) (state never may penalize someone for the exercise of a constitutional right or make the exercise of that right costly), *and* Carter v. Kentucky, 450 U.S. 288 (1981) (same). In these cases a majority of the Court is steadfast, with some always voting in favor of and some always against the asserted constitutional right, while a minority changes sides, creating the apparent inconsistencies. The problem is not limited to constitutional interpretation. *Compare* Albernaz v. United States, 450 U.S. 333 (1981) (two statutes create distinct offenses that may be punished cumulatively if each requires proof of a fact the other does not), *with* Busic v. United States, 446 U.S. 398 (1980) (statute authorizing enhanced penalties for use of firearm in committing felony may not be applied when underlying felony also allows same enhancement). *See generally* cases cited *supra* notes 2 & 25 (fourth amendment and double jeopardy cases).

[44] For a proof, see Rubinstein, *Stability of Decision Systems Under Majority Rule*, 23 J. ECON. THEORY 150 (1980).

ment? There is no principle for making such a decision; each Justice properly may conclude that someone else should yield. If each one yields part of the time, the path of the Court's decisions becomes unpredictable and erratic. In the establishment clause example, different patterns of yielding could produce any of the rules A, B, or N; and if all the Justices engage in strategic yielding, the result is the same as if none does.

Invocation of stare decisis also may be a form of strategic behavior. The Justices in group 1 may assert that their vote for rule N rather than the preferred rule A is justified by stare decisis. When some Justices follow stare decisis and others do not, strategic behavior is at work. Those who follow earlier cases selectively are strategic manipulators.[45] Those who always follow earlier cases in an institution that generally does not do so will lose power relative to those who follow earlier cases selectively. Justice Harlan and perhaps Justice Stevens belong in this category.[46]

The important point is not how one characterizes the decision to yield or not yield, to follow or not follow earlier cases. It is, rather, that Justices may choose, for apparently legitimate reasons, to cast votes for legal positions they do not hold. The results are stable, but hardly desirable. If even one of nine Justices votes strategically, the Court will take and adhere to positions a majority of the Justices would reject as a matter of first principles. One may criticize that Justice for manipulating the others, but it is hard to criticize the Court as an institution for this outcome.

There is, moreover, no way out. One of the theorems of the public choice literature demonstrates that no voting system can be designed that is proof against strategic voting and the problems it causes. The theorem is too technical to state fully or prove here, but it is powerful. It was proved independently by two economists, and it led a third to remark: "The impos-

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[45] *Compare* Bellotti v. Baird, 443 U.S. 622, 651–52 (1979) (Rehnquist, J., concurring) (expressing disapproval of the existing rule but willingness to follow the principle until the major precedent is overruled), *with* Wolman v. Walter, 433 U.S. 229, 255 (1977) (White & Rehnquist, JJ., concurring in the judgment) (continuing refusal to accept establishment clause test announced in earlier cases; casting deciding votes on some issues on the basis of a different test), *and* Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980) (majority composed of Burger, C.J., and Stewart, White, Powell & Rehnquist, JJ., deciding establishment clause case on grounds asserted to be the same as the governing test but in fact more like those earlier offered by White & Rehnquist, JJ., in separate opinions).

[46] *See* California v. Sierra Club, 101 S. Ct. 1775, 1781 (1981) (Stevens, J., concurring) (stating strong preference in favor of recognizing stare decisis); Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147, 151–55 (1981) (Stevens, J., concurring).

sibility theorem of Gibbard and Satterthwaite is so definitive that it ought to cap a 200-year-old search for an ideal voting procedure: There is no ideal voting procedure."[47]

C. Arrow's Impossibility Theorem and Consistent Decisions

The examples I have used so far deal with the way in which the Court addresses a single issue: the construction of the establishment clause, the right of privacy, and so on. Someone who believes that the Court has an obligation, as an institution, to be consistent may insist that I have been too selective and have stacked the examples. Surely, this critic would say, the Court can be consistent as a rule, even if bizarre counterexamples can be constructed. And the critic is right in one sense. Nothing in the theory of public choice supplies an explanation for a sudden about-face when there are only two possible legal positions.[48]

A demand for consistency as a rule nonetheless asks the impossible of the Court. Arrow's Theorem, for which he won the Nobel Prize, considers a system of pooling individuals' conclusions to produce a collective decision that obeys the following five conditions:

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.
5. Transitivity: If the collective decision selects A over B and B over C, it also must select A over C. This is the requirement of logical consistency.

The theorem proves that no voting system can satisfy the five conditions simultaneously.

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[47] Feldman, *Manipulating Voting Procedures*, 17 ECON. INQUIRY 452, 472 (1979). Feldman's article contains a short proof of the impossibility theorem, which was proved initially by Gibbard, *Manipulation of Voting Schemes: A General Result*, 41 ECONOMETRICA 587 (1973), and Satterthwaite, *Strategy-Proofness and Arrow's Conditions: Existence and Correspondence Theorems for Voting Procedures and Social Welfare Functions*, 10 J. ECON. THEORY 187 (1975).

[48] There is no explanation for contradictions of the sort observed in Diamond v. Diehr, 450 U.S. 175 (1981), and Parker v. Flook, 437 U.S. 584 (1978).

Arrow's Theorem will strike most people as counterintuitive. It states that circular preferences, path dependence, and other problems are endemic to collective decisionmaking systems and, indeed, that they are produced by the very things we find desirable in such systems. The power of the theorem lies in the proof of such a counterintuitive proposition. Much of the public choice literature arose from efforts to prove Arrow wrong. The efforts failed; the theorem is now accepted without question. I omit a proof here not because the reader should accept Arrow's result on faith, but because the proof is complicated and has been replicated many times in the public choice literature.[49]

The principal criticism of the Court as institution is that its decisions do not satisfy condition 5 — that is, they are inconsistent. (I postpone for a moment the question whether transitivity and consistency are the same thing.) Arrow established that any process for making collective choices that satisfies conditions 1 to 4 cannot also satisfy the transitivity condition. One of the five conditions must go unsatisfied in every collective decisionmaking body. It is necessary, then, to look at conditions 1 to 4 carefully in order to determine whether the Court should be expected to satisfy them, and if not, which should be abandoned.[50]

The first two conditions appear to be essential parts of any method of judicial decisionmaking. If all nine Justices conclude that the first amendment protects the right to wear black armbands at school, that must be the Court's decision. Condition 1 means here that the Justices do not delegate their authority to someone else. And condition 2, nondictatorship, also holds. The Court cannot allow one Justice always to decide the cases, to be the dictator, just because that Justice believes very strongly in his position while the other eight find hard questions to be close questions and are less sure of their conclusions. Condition 2 means here that the Court is an institution of *collective* choice,[51] that it decides by voting, and that every vote has the same weight. People take it for granted

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[49] For a proof that avoids excessive notation, see D. MUELLER, *supra* note 32, at 186–88.

[50] Both D. MUELLER, *supra* note 32, at 188–201, and A. MACKAY, ARROW'S THEOREM, THE PARADOX OF SOCIAL CHOICE (1980), contain thoughtful discussions of the five conditions and the case for believing that each is an appropriate requirement for a decisionmaking institution.

[51] It is possible, of course, to have a Supreme Court with only one Justice. Then the nondictatorship condition does not hold, and the other four can be satisfied. Someone who places a high value on consistent decisions might believe that a single-judge court, with all its costs, would be preferable to the prevailing state of things.

that the vote of a Holmes or a Brandeis counts no more than the vote of a Butler or a Byrnes.

The fourth condition — independence of irrelevant alternatives — restates the principle that intensity of convictions does not count on a court and adds a new requirement: a Justice should not choose one of the options before the Court because of positions on other things that are not pertinent to the dispute. If the Court is asked to decide the meaning of the eighth amendment, its determination ought not to be influenced by the belief of one Justice that the provision was not properly adopted; still less should the decision be influenced by the strongly held belief of one Justice that the negligence system is a wicked way to handle automobile collision cases or that plaintiffs with red hair (or black skin) ought to lose. In any judicial system, irrelevant alternatives must be disregarded. Logrolling,[52] one way of handling intensity of preferences about "extraneous" matters in legislative systems, is excluded; so too is bribery.

That leaves the third condition, range. Now it might seem that a system for deciding cases ought *not* to admit any collection of views and ought *not* to allow the Justices to rank the alternatives in any order. To allow such open-ended positions and rankings seems to say that there are no legal rules, that the Justices just vote their conceptions of The Good and disregard any written documents they purport to construe. Because everyone believes that some arguments and choices are closed to Justices even if open to members of Congress, it apparently becomes necessary to reject condition 3, thus saving the condition of logical consistency.

It is not possible, however, to reject condition 3 with such dispatch. It is not an especially stringent condition. That one option or one ranking of options is inadmissible does not negate the condition. Range holds as long as at least three options remain and these three may be ranked in any order (that is, that the choices may be multi-peaked). So the fact that an option such as interpreting the establishment clause to allow an official national religion is conceded by all to be out of bounds does not negate the condition; the three options of absolutism, neutrality, and balancing are enough.

Because the range condition depends on the existence of three choices, which may be ranked in multi-peaked fashion, Arrow's Theorem explains inconsistent decisions only if many legal disputes involve such options and rankings. Certainly

[52] Logrolling is a form of strategic voting, and its presence could negate condition 4. *See also infra* note 63.

some disputes do not; there may be only two plausible options, and even when there are three, the Justices may rank them in single-peaked ways.[53] But it is equally certain that many disputes are characterized by three choices held in multi-peaked ways. The examples I have given based on the establishment clause and the right of privacy illustrate the point.

Multi-peakedness becomes more and more likely as the number of dimensions of choice increases.[54] Even when the Justices' conclusions in each dimension are single peaked, the combination may have many peaks. And legal disputes often require choices in many dimensions.[55] A given constitutional case may require the Court to consider the intersection of several provisions, each embodying several values and each with a distinctive structure. There are at least as many dimensions of choice as there are values (or provisions) in question.

Antitrust law provides a useful example. Justices have been divided about the utility of bright line tests and about the objectives of antitrust law. Some Justices believe the per se doctrine (a bright line test) should be employed frequently; others conclude that the rule of reason (a balancing approach) is preferable. Some Justices think that the statutes call for consideration of a multitude of economic, social, and political factors; others that only considerations of allocative efficiency count. In any given antitrust case, then, there are at least four admissible approaches (per se rule for political values; per se rule for efficiency; rule of reason for political values; and rule of reason for efficiency). There will be further subdivisions, but the example is enough to show how the opportunity for multi-peaked preferences arises here and in many other disputes as well. Whenever the Court is grappling with the intersection of two or more statutes, constitutional provisions, or principles, there are bound to be inconsistencies in its answers — as there surely have been in the antitrust decisions.

Even when choices have multiple dimensions, the Court might escape multi-peakedness if Justices were appointed from among a group with similar background and training. In some legal systems judges are promoted from court to court in a way that screens out those whose views are distinctive; perhaps

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[53] *See supra* p. 816 (table of multi-peaked preferences). If group 3 ranked the choices *N*, *A*, *B*, the preferences would be single peaked. For an argument that at least some disputes have only one admissible choice, see Michelman, *Politics as Medicine: On Misdiagnosing Legal Scholarship*, 90 YALE L.J. 1224 (1981).

[54] *See* D. MUELLER, *supra* note 32, at 195.

[55] Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394–404 (1978).

such selection processes hold to a minimum the number of cases that will be subject to Arrow's Theorem. But the Justices are not promoted from lower courts by a method that rewards conformity with prevailing norms; to the contrary, Presidents often appoint particular Justices because they value the new Justices' different perspective on legal affairs.

The appointing process ensures that Justices will have multi-peaked responses to many issues. But even if Justices were chosen for conformity to some single method of adjudication — if all Justices agreed on a single method of determining which choices are out of bounds — that would not ensure consistent decisions. Suppose, for example, the Justices were to agree that the structure of the Constitution is the sole standard for assessing the meaning of the text. That would enable them to resolve with dispatch many questions the Court now finds troubling. But the resolution of old questions would call forth new ones. Cases would arise in which the text was unclear, the history cloudy, the principles in conflict. These cases might never before have been seen to be hard, but they would be hard for Justices who decided cases as these hypothetical Justices did. For reasons I discussed in Part II, the Court deals with the hardest questions, the ones likely to produce disagreement. The process of evolution of legal rules ensures this disagreement.[56] And many of these hard cases would have at least three choices, with no restrictions on the ranking of these choices. No matter how great the agreement

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[56] *See supra* pp. 805–07. The process is nicely illustrated by some of the Court's recent interstate commerce cases. The Court has been reworking its treatment of the negative implications of the interstate and foreign commerce power. *See* Hellerstein, Hughes v. Oklahoma*: The Court, the Commerce Clause, and State Control of Natural Resources*, 1979 SUP. CT. REV. 51. The early cases in the series were easy for the Court, and decisions were unanimous or close to it. *See, e.g.*, Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979); Hughes v. Oklahoma, 441 U.S. 322 (1979), *overruling* Geer v. Connecticut, 161 U.S. 519 (1896); Department of Revenue v. Association of Wash. Stevedoring Cos., 435 U.S. 734 (1978), *overruling* Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422 (1947); Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), *overruling* Spector Motor Serv. v. O'Connor, 340 U.S. 602 (1951); Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976), *overruling* Low v. Austin, 80 U.S. (13 Wall.) 29 (1872). But the announcement of new principles just moved the line of uncertainty between the permitted and the prohibited, and it took only a few years for hard cases at the new line of uncertainty to arrive. *See, e.g.*, Commonwealth Edison Co. v. Montana, 101 S. Ct. 2946 (1981) (6–3 decision, with one of the six dubitante); Sears, Roebuck & Co. v. County of Los Angeles, 449 U.S. 1119 (1981), *aff'g by an equally divided Court* 85 Cal. App. 3d 763, 149 Cal. Rptr. 750 (1979); Reeves, Inc. v. Stake, 447 U.S. 429 (1980) (5–4 decision). *See generally* H.L.A. HART, THE CONCEPT OF LAW 121–32 (1961) (discussing the open texture of legal rules).

of the Justices on these fundamental principles, the hardest cases still would satisfy the range condition.

It is most unlikely, though, that the Justices will be able to reach agreement on fundamental principles of constitutional interpretation. There is no agreement on such matters within the legal profession. Some would choose strict adherence to the language of a statute or constitutional provision, coupled with analysis of the legislative debates; others would choose a form of cost-benefit analysis; still others would choose some form of philosophical or natural law approach. There is no device for ruling any set of choices out of bounds and refusing to count the votes of Justices who do not conform to these decisions.

I do not argue that no choices are out of bounds. Far from it. I would argue vigorously that the Court must discover and carry out the design of any given provision; that cost-benefit and moral concerns play no legitimate role in the process (unless the drafters instructed the Court to incorporate them); that the "evolution" of society after a provision has been drafted should be ignored by the Court.[57] But I am probably in the minority in favoring such an out-of-bounds rule, and neither I nor anyone else has a method for insisting that the Justices honor such a rule. The Supreme Court *is* our society's device for deciding that certain choices are out of bounds. This implies that the Justices themselves are not constrained by an out-of-bounds rule and ought not to be. Such a rule could constrain the Justices only if some body were authorized

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[57] *See* Easterbrook, *Due Process and Parole Decisionmaking*, in PAROLE IN THE 1980S, at 77 (B. Borsage ed. 1981); Easterbrook, *Privacy and the Optimal Extent of Disclosure Under the Freedom of Information Act*, 9 J. LEGAL STUD. 775, 783 n.39 (1980); *cf.* Posner, *Economics, Politics, and the Reading of Statutes and the Constitution* (forthcoming in *University of Chicago Law Review*, vol. 49) (arguing that the approach to constructing a provision should depend on its source — whether general public benefit or interest group politics). In saying that the Court must follow the design of a provision, I do not necessarily mean the intent of its drafters. Public choice principles suggest that the "drafters," as a group, may have no consistent intent. The written product nonetheless may have a structure that governs questions of interpretation.

Scholars who protest that the intent of the Framers is undiscoverable, *e.g.*, Brest, *supra* note 30; Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981), are only rediscovering Arrow's paradox. They use the conundrums of preference aggregation to argue that judges are free to enforce "rights" that now seem part of just government. But this is a non sequitur. The problems of preference aggregation no more support additional powers for judges to override legislative judgments than they support additional power for the Joint Chiefs of Staff to do so, or for Congress to override judicial judgments. The fact that we cannot discover "an" original intent of the framers does not mean that the document they wrote lacks a structure allocating powers in a determinate way.

to refuse to count the votes of a Justice who selected an inadmissible option. Yet how would that body make these decisions? To decide what is out of bounds is effectively to decide the case before the Court; the body that made the out-of-bounds decision for the Justices would acquire the same functions as the Supreme Court and would acquire its problems as well. After all, who would restrict the range of the choices of the boundary-setting body? Because the Court, almost by definition, is not subject to an external agency that restricts the ordering of its members' conclusions — and it ought not to be — we are driven to say that the range condition holds for the Court, that it ought to hold, and that it applies to a substantial number of the disputes that the Court must resolve.

Before concluding that conditions 1 to 4 hold, though, I think it is appropriate to consider once again the function of stare decisis. Perhaps earlier decisions of the Court establish which choices are out of bounds (so that in every case there are only one or two admissible options) or compel single-peaked rankings of legal conclusions; then condition 3 does not obtain. Or perhaps the Court's earlier decisions play the role of dictator. The sitting Justices may be painted as the visible hands of this dictator, so that condition 2 does not hold.

This position would be only superficially plausible. Precedents do not dictate results of hard cases; rather, cases are hard and arrive at the Court precisely when precedent has no compelling message. The decision in the 1973 abortion cases did not dictate the results in cases challenging statutory restrictions on the funding of abortions, statutes requiring parental or spousal consent, statutes requiring parental notification, statutes requiring warnings about risks, and so on. The 1973 cases surely suggested directions and important considerations, but it would be foolish to say that they contained the answers.

It is more plausible to say that precedent sets an out-of-bounds rule, albeit not an enforceable one. But how did the precedents come to be? Each is the result of earlier precedents and other considerations. The earlier precedents were created without the benefit of the rules supposedly contained in the stock of precedents that exists today. These earlier precedents, then, were created while condition 3, range, obtained for the Court. As a result, the earlier precedents could not be expected to comply with condition 5, logical consistency.[58] Yet

[58] For surveys of the Court's early constitutional decisions that show the Justices contradicting themselves again and again, see Currie, *The Constitution in the Supreme*

if the earlier precedents are bound to contain some inconsistencies, they set no useful rule. Given a proposition and its opposite (i.e., two inconsistent decisions), one can "prove" anything one likes. Reliance on precedent thus cannot overcome the application of Arrow's Theorem to the Court. And even if it could, it is far from clear that society would gain from its employment to this end; recall from Section B of Part III that one principal result of stare decisis is to make constitutional doctrine depend heavily on essentially arbitrary circumstances such as the order in which the Court considers cases.

Conditions 1 to 4 thus seem inescapable and condition 5 — transitivity — therefore cannot be satisfied. One final question needs attention here: Is transitivity the same thing as consistency? It both is and is not. Transitivity is the condition of logical ordering plus path independence:[59] if value *A* dominates *B* and *B* dominates *C*, then *A* must dominate *C*. Without transitivity, consistency is impossible. But transitivity does not exclude all logical problems; even when transitivity holds, plain contradictions may exist. Transitivity has nothing to say about the question whether *A* may co-exist with *not-A*. In other words, Arrow's theorem is not about cases in which there are only one or two possible outcomes.[60] (The paradoxes of voting discussed earlier, however, are quite capable of explaining flat contradictions.)

The Court's critics do not waste their ammunition on the easy cases such as judicial self-contradiction when there are only two plausible outcomes. The interesting cases of inconsistency involve tensions across many cases; the customary criticism takes the form of extracting from a case the values or principles that must have produced the decision and objecting to the Court's use of a different ordering of values or principles in some other case. Objections of this sort are ar-

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Court: 1798–1801, 48 U. CHI. L. REV. 819 (1981); Currie, *The Constitution in the Supreme Court: 1801–1835* (forthcoming in *University of Chicago Law Review*, vol. 49). Inconsistency has been present in the Court's cases from the beginning.

[59] K. ARROW, *supra* note 31, at 13–14, 118–20.

[60] I have made this point above, *see supra* pp. 825–26, in discussing the range condition. *See also* Sen, *Social Choice Theory: A Re-examination*, 45 ECONOMETRICA 53 (1977). It may seem that all adjudication has only two outcomes (the plaintiff wins or he does not), so that Arrow's Theorem is inapplicable. But this would be incorrect for two reasons. First, the court may choose from more than two options. The plaintiff may win nothing, a little, or a lot, and on one of many different rationales with different implications for other cases. Second, Sen's demonstration applies only when the collectivity's choices are strictly limited to two outcomes. If there are more than two outcomes (*A*, *B*, and *C*, for example), Arrow's Theorem is fully applicable, even if outcomes are compared only in pairs (i.e., *A* v. *B*, *B* v. *C*, *C* v. *A*).

guments that the Court's opinions, as a body, do not satisfy the transitivity condition. These objections go beyond attacks on particular decisions and challenge the Court's general consistency (which critics often associate with responsibility and "court-ness"), and it is exactly these objections that Arrow's Theorem forecloses in many cases.[61]

The conclusion of this analysis is unsettling, as any application of Arrow's Theorem is unsettling. I have argued that conditions 1 to 4 hold for the Supreme Court. As a result, condition 5, general logical consistency, cannot hold. Any general criticism of the Court, as an institution, for rendering inconsistent decisions is untenable. At least some inconsistency, and probably a great deal of inconsistency, is inevitable.

One implication of the inevitability of inconsistency is that, as time goes on and the stock of precedents grows, the Court is likely to assert broader powers to review the substantive decisions of the other branches. The availability of inconsistent precedents allows the Justices to "prove" anything they like, without fear of contradiction. The Court then either must return to first principles (disregarding its precedents) or decide cases on the basis of noninterpretive methods, such as beliefs about social consensus or the Justices' own fundamental values (the only course left open by the conflicting precedents). It is unlikely that the Justices would do the former. I find it curious that scholars and others who oppose noninterpretive modes of judicial decisionmaking also appear to favor greater reliance on stare decisis;[62] given the existence of inconsistent precedents, the two desires are not compatible.

IV. CONCLUSION

Some of my colleagues suggested, while we were discussing the application of Arrow's Theorem to the Court, that it would be inappropriate to end on such a negative note. What is left for legal discourse? The answer, I think, is: Almost everything that was there before. True, it is not possible to suggest some new, improved way of criticizing the Court. A powerful impossibility theorem shuts off institutional criticism. It does not, however, affect other kinds of criticism.

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[61] Some approaches to jurisprudence depend on the belief that a conscientious judge can extract a rule from existing cases if he tries hard enough — that is, they depend on the belief that earlier decisions are consistent and thus satisfy the transitivity condition. *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY 81–130, 279–90 (1977); L. FULLER, THE MORALITY OF LAW (rev. ed. 1969).

[62] *See, e.g.*, Monaghan, *supra* note 30.

As I suggested at the outset, nothing in Arrow's Theorem forecloses arguments based on first principles. One may contend that the Court is wrong, when the criteria of wrongness may be found outside the Court's decisions. A critic may also say that the Court flubbed a problem to which there were only two admissible outcomes; in such cases range does not hold, and the critic may insist on consistent decisions. The critic could suggest that the nature of the Court should be changed so that consistency becomes possible.[63] Or the critic may assess the performance of individual Justices. Because each Justice is dictator of his own decisions, he can satisfy the other conditions without logical contradiction, and he may be faulted for failing. There is no reason why we cannot ask each Justice to develop a principled jurisprudence and to adhere to it consistently. What we cannot do is ask the same of the Court, as an institution.

Calls for the Court to be united and to be consistent in all things are forms of utopian argument. Utopian arguments have been important in the development of political and legal theory, but we should not be deceived into believing that Utopia can be achieved. As usual, the perfect is the enemy of The Good, and excessive concern with utopian criticisms of the Court may divert us from useful ones.

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[63] *See supra* note 51. It is possible to suggest other changes. The purchase and sale of votes (bribery or aggravated logrolling) could negate condition 4 and lead to transitivity. Or if the transitivity condition is replaced with a demand for "acyclicality" — that is, stability — of decisions, the Court could satisfy the other four conditions with a few modifications. As I showed above, *see supra* pp. 815–21, stable decisions could be achieved if we are willing to tolerate path dependence and are willing to adopt a method of ensuring the power of stare decisis. Many scholars have concluded that this can be achieved with a dose of oligarchy — that is, giving a coalition smaller than a majority the power to block any decision. So, for example, "acyclicality" could be achieved with a rule under which any two Justices could block the Court from reaching a decision to overrule (or limit) an earlier case. I leave it for others to debate whether a Court characterized by oligarchy would be an improvement over a Court that fails the transitivity condition.