EQUAL DIVISIONS IN THE SUPREME COURT: HISTORY, PROBLEMS, AND PROPOSALS

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Since first confronting the problem of the effect of an equal division, the Supreme Court has imposed a flat rule of affirmance of the lower court's decision. Although this rule has the advantage of extreme ease of application, it ignores the strong policies implicated in certain classes of cases. At times, institutional and jurisprudential considerations militate strongly in favor of a rule of reversal. Professors Reynolds and Young explore the history and justification of the rule of affirmance, and propose an alternative approach more sensitive to the policies involved in the case under review.

I. INTRODUCTION

The theory that a system of laws provides, at any time, one right answer—one uniquely correct way of disposing of a case—occasionally has been endorsed by judges and scholars. At one time endorsement often resulted from heartfelt belief.[1] More recently, some advocates seem to find the truth of that notion established by its usefulness.[2] For those who would themselves believe or at least convince others of the existence of one right answer, one fact proves especially inconvenient: judges disagree; judges dissent. Disagreement proves especially troublesome in constitutional law because dispositive rules are often open textured and a judicial decision can thwart the workings of other branches of government, particularly Congress. In this context, it is obvious that the Court makes law and that the effect of doing so is of great importance. These facts raise questions of the legitimacy of judicial conduct, but do not decide them. By now those not happy with judicial lawmaking are at least

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1. See K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 24 (1960) for a description and rejection of the "one right answer" view.

2. Ronald Dworkin has argued that our legal system should assume that there is one right answer to most questions concerning the existence of rights. He asserts this even for cases in which reasonable judges would reach different results after applying identical legal materials — rules, principles and policies—to identical facts. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 279-90 (1977). Llewellyn surely would take issue with this position. *See* K. LLEWELLYN, *supra* note 1, at 24-25 & n.17.

reconciled to a great deal of it. The problem of legitimacy is most acute, however, when the disagreement is dead even. In that case there can be no question of presuming that the majority is correct or, for those less illusioned, no possibility of following majority rule, designed like a coin flip, to provide some answer. It is ironic that the Supreme Court, established to provide the right, or at least the best possible, answer to justiciable federal questions, faced the problem of equal division in the first constitutional case it decided.[3] The Court's answer to the problem was to reach for another largely mechanical rule having some surface logic and roots in English legal practice—the rule that the decision appealed from should be affirmed. That rule has been unremittingly applied by the Court ever since.

Because of the way appellate systems have been viewed historically,[4] the Court seems to have viewed the rule of affirmance as inevitable. Inevitable it is not. Although it may be a good rule in many cases, the rule needs thoughtful reexamination. Moreover, it is a bad rule in at least two identifiable cases: those in which a successful attack on federal legislation or a criminal conviction would be sustained by an even vote. Beyond these categories of cases, we urge generally that the Court be aware that affirmance on equal division is not inevitable and consider, as cases arise, whether an institutional rule of reversal would be more appropriate than the usual rule of affirmance. Before discussing these matters, however, we first survey the history of current practices and some possible methods for avoiding equal divisions altogether.

II. THE EQUAL DIVISION: SHOULD THERE BE CONCERN?

The legal profession's neglect of equal divisions is surprising given their history and frequency.[5] Equal divisions have hardly been rare in the history of the Court, and they occur with some frequency today. Between 1925 and 1982, we have located 123 equal divisions, an average of two per year.[6] Is the

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3. Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792).

4. As a result of an implicit presumption favoring the decision appealed from, that decision stands unless the appeals court takes affirmative action, *i.e.,* finds it erroneous. The appeals court is regarded as incapable of taking such action unless a majority of a quorum agree that the decision below was in error. For a full discussion of such a view, see *infra* notes 73-74 and accompanying text.

5. Scholars have paid virtually no attention to the problem. *But see* W. REYNOLDS, JUDICIAL PROCESS IN A NUTSHELL 32-34 (1980). The recent affirmance of the conviction of former Governor Mandel of Maryland sparked some law review commentary on equal divisions. The affirmance took the form of an evenly divided en banc court of appeals decision which vacated a panel decision that had overturned a conviction. United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979), *vacated on reh'g by an equally divided court,* 602 F.2d 653 (4th Cir.) (en banc) (per curiam), *cert. denied,* 445 U.S. 961 (1980). *See also* Note, United States v. Mandel: *The Mail Fraud and En Banc Procedural Issues,* 40 MD. L. REV. 550, 580-88 (1981).

6. This number was derived by searching the LEXIS data bank, which only includes cases decided since January 1, 1925. Cases in which only part of the decision involved an equal division are included. Multiple cases decided by the Court with a single order were counted as a single equal division. The number of equal divisions per decade has fluctuated somewhat:

1925-1932: 2 equal divisions
1933-1942: 24 equal divisions
1943-1952: 31 equal divisions
1953-1962: 28 equal divisions

lack of attention due to the absence of cause for concern?

The effect of deadlock can be overstated. Although all cases before the Supreme Court, by definition, are important, surely some are more important than others. It would have been desirable, for example, if the Supreme Court had definitively resolved whether the Federal Trade Commission could assert jurisdiction over the American Medical Association, but the recent affirmance on equal division of the case raising that question will not shake the foundations of the Republic.[7] Moreover, delay in authoritative resolution will generally not be a serious problem. A deadlock caused by a missing Justice can be solved by the appointment of a new one, and a deadlock created by a recusal is not likely to affect a series of cases because the recusal usually is caused by the Justice's relation to the parties rather than to the issues, and, therefore, can be cured in a later case.

In some circumstances, however, problems created by an equal division can be serious. The Supreme Court, the apex of our federal judicial system, can profoundly affect the activities of both the states and the coordinate branches of government.[8] The Court is responsible both for guiding and controlling the growth of constitutional law, and for performing its function as the ultimate interpreter, and sometimes maker, of laws in the federal system. When it affirms by an equal division, it has failed to resolve authoritatively a problem of at least some national importance.[9] Thus, there is often more at stake than the harm caused by the failure to clarify the law for future cases. In

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1963-1972: 20 equal divisions

1973-1982: 18 equal divisions

Unlike their cousins, the plurality opinions, equal divisions do not seem to be on the increase; since the inception of the New Deal the average has been 2.3 per year, a pattern followed with fair consistency. There were six equal divisions in the 1980 and 1981 Terms: American Medical Ass'n v. Fed. Trade Comm'n, 102 S. Ct. 2004 (1982); Common Cause v. Schmitt, 102 S. Ct 1266 (1982); Kissinger v. Halperin, 452 U.S. 713 (1981); Staats v. Bristol Laboratories Div., 451 U.S. 400 (1981); Diamond v. Bradley, 450 U.S. 381 (1981); Walter Fleisher Co. v. County of Los Angeles, 449 U.S. 608 (1981).

7. American Medical Ass'n v. Fed. Trade Comm'n, 102 S. Ct. 2004 (1982).

8. *See* Commission on Revision of the Federal Court Appellate System *Structures and Internal Procedures: Recommendations for Change,* 67 F.R.D. 195, 209 (1975).

9. Certainly cases in which any court strikes down a federal law as unconstitutional or in which a state court upholds a state law despite a constitutional challenge are important cases. The intuitive obviousness of that proposition is confirmed by Congress' decision to include such cases in the Court's mandatory appellate jurisdiction, 28 U.S.C. §§ 1252, 1257(1)-(2) (1976). Even in nonconstitutional cases much may be at stake and resolution at the highest level may be clearly desirable. The outcry over the inability of the United States to appeal the quashing of indictments in the *Beef Trust Case* (United States v. Armour & Co., 142 F. 808 (N.D. Ill. 1906)), illustrates how great that concern may be. *See* Frankfurter, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System,* 39 HARV. L. REV. 325, 336-41 (1926).

The national importance of certiorari cases is shown by the rule of four, which requires at least four Justices to conclude that the Court, overburdened as it is, should hear the case. Although Congress has provided a deadlock avoiding mechanism only for direct appeals from the district court, 28 U.S.C. § 2109 (1976), discussed *infra* note 53, Congress has indicated that it recognizes the importance of resolving other cases at the highest level, for the Court must hold those cases over if a majority of Justices believe resolution is possible during the next term. *Id.*

On August 10, 1982, the House Judiciary Committee approved a bill that would make all of the Supreme Court's appellate jurisdiction discretionary. H.R. 6872, 97th Cong., 2d Sess., 128 CONG. REC. H72 (1982). The Senate approved a similar bill during the previous Congress. S. 450, 96th Cong., 1st Sess., 125 CONG. REC. 7648 (1979).

cases of sufficient importance, authoritative resolution of the case by the nation's highest tribunal is essential.[10] Several situations illustrate the potential harm of an equal division.

First, in those rare cases in which an equal division occurs because of the long and indeterminate absence of a Justice,[11] a whole series of cases challenging a regulatory program could be affected. Second, the result in one case *can* have dramatic impact, for example, when the case is a class action on behalf of a broadly defined nationwide class of plaintiffs who succeed in enjoining an important governmental program.[12] Indeed, in such cases, the res judicata effect may be as potent as the stare decisis effect of a unanimous Supreme Court decision. In such a case, affirmed by an equally divided Supreme Court, it matters little that the decision has no binding effect in other circuits. Third, even in cases posing none of these problems, equal divisions can prolong a geographical inconsistency that may cause major problems in the administration of a federal program. Inconsistency in application of the tax laws, for example, could seriously undermine public confidence in that largely self-administered program. Moreover, affirmance by equal division in criminal cases may erode confidence in the basic fairness of our system of justice. Finally, inconsistent results in related cases may also erode confidence in the judicial process.[13]

Avoiding equal divisions is particularly important in cases involving constitutional issues. For compelling reasons, these issues should be resolved at the highest level. First, they are often issues whose resolution has great impact on the functioning of federal, state, and local governments, as well as on personal rights. More important, perhaps, is the immediate effect of questionable lower court decisions affirmed by an equally divided court. Willard Hurst described how much havoc can be wreaked by unreviewed lower court decisions:

> the middle 1930s showed how federal policy and administration could be brought to a standstill by a flood of injunctions in lower federal courts pending review by the Supreme Court. Timing is often of the essence in law and in politics; the practical power of lower federal courts to *suspend* the operation of a policy for months pending Supreme Court review can be of great impact.[14]

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10. A Justice sometimes will note expressly that he is joining the majority only in order to avoid consigning the problem to "the limbo of unexplained adjudications," Inman v. Baltimore & Ohio R.R., 361 U.S. 138, 141 (1959) (Frankfurter, J., concurring).

11. An example is Justice Jackson's service as Special Prosecuter at the Nuremburg War Crimes Trial. *See infra* note 34.

12. *See, e.g.,* Common Cause v. Schmitt, 512 F. Supp. 489 (D.D.C. 1980) (three-judge court), *aff'd by an equally divided court,* 455 U.S. 129 (1982), discussed *infra* text accompanying note 97.

13. A dramatic example is provided by two recent cases involving presidential immunity. In Kissinger v. Halperin, 452 U.S. 713 (1981), *aff'g* 606 F.2d 1192 (D.C. Cir. 1979), the Supreme Court's split decision let stand a lower court's ruling that a President could be held civilly liable for certain actions. The following year, the Court, in a different case, held the President absolutely immune from civil liability. Nixon v. Fitzgerald, 102 S. Ct. 2690 (1982).

14. Hurst, *Review and the Distribution of National Powers,* in SUPREME COURT AND SUPREME LAW 140, 141-42 (E. Cahn ed. 1954) (emphasis added). "In 1935, 36 federal judges issued some sixteen hundred injunctions preventing federal officials from carrying out federal laws." A. SCHLESINGER, JR., THE POLITICS OF UPHEAVAL 824 (1960).

If, on review in such cases, the Supreme Court equally divides, the "suspension" of federal law and policy can be permanent (in practical effect). *Common Cause v. Schmitt*[15] shows that even today federal legislation can be suspended although half of the sitting Justices believe that action unwarranted. Finally, there is the suspicion, impossible to allay or confirm, that an equal division was reached because it was a convenient way to decide a troublesome case. This suspicion does little to encourage faith in the judiciary. Thus, the case for preventing equal divisions is strong. Prevention, however, should occur only if the medicine prescribed to avoid deadlock is less harmful than the disease itself.

III. HISTORY

The problem of equal division is as old as the Supreme Court. Indeed, *Hayburn's Case,*[16] apparently the first constitutional decision by that tribunal, involved an even split among the six Justices.[17] Although *Hayburn's Case* affirmed the decision below,[18] it was not until a generation later that the Court, in *The Antelope*, expressly articulated the rule, followed to this day, that an equal division requires affirmance of the decision under review.[19] That holding comes to us laconically enough; Justice Marshall simply noted that one of the issues was a question on which much difficulty had been felt.

> It is unnecessary to state the reasons in support of the affirmative or negative answer to it, because the court is divided on it, and consequently, no principle is settled. So much of the decree of the circuit court [as deals with this issue] is affirmed.[20]

Within a year, Marshall had repeated the holding: "No attempt will be made to analyze [certain cases] . . . because the judges are divided. . . . Conse-

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15. 512 F. Supp. 489 (D.D.C. 1980) (three-judge court), *aff'd by an equally divided court*, 455 U.S. 129 (1982).

16. 2 U.S. (2 Dall.) 419 (1793).

17. Currie, *The Constitution in the Supreme Court: 1789-1801,* 48 U. CHI. L. REV. 819, 825 (1981). The existence of an equal split can be gleaned only from newspaper accounts. *Id.* at 824.

18. Because they believed the Supreme Court lacked subject matter jurisdiction, three Justices voted to refuse a writ of mandamus to the lower court. Those Justices prevailed on equal division. The reasoning of the three Justices who favored issuing the writ is not known. *Id.* at 822-25.

19. 23 U.S. (10 Wheat.) 66 (1825). Although tradition has *The Antelope*, as "apparently the first occasion of an equal division," Neil v. Biggers, 409 U.S. 188, 191-92 (1972), Professor Currie's research has shown that not to be so. *See* Currie, *supra* note 17, at 824-25.

20. *The Antelope*, 23 U.S. at 126-27. This was not Marshall's first brush with the problem of equal divisions. Four years earlier he had written an opinion in a case in which the Supreme Court was asked to issue a writ of error to compel a new trial in a criminal case; the circuit court being divided on that motion. An equal division in the circuit courts (which were two-judge courts) was one ground for appeal to the Supreme Court under the Judiciary Act of 1801. The Court held, however, that such a division of the circuit court was "not one of those divisions of opinion which is to be certified to this court . . . ." United States v. Daniel, 19 U.S. (6 Wheat.) 542, 549 (1821).

Justice Marshall was probably aware as well of an earlier decision by Judge Cranch in the Circuit Court for the District of Columbia. Henry v. Ricketts, 11 F. Cas. 1188 (C.C.D.C. 1809) (No. 6385). The court in that case divided evenly on a question of evidence. The issue was whether defendant's objection to certain evidence had been waived as plaintiff asserted in a motion. Because of the deadlock, the court held that the motion (waiver) must fail.

quently, the principles of law which have been argued cannot be settled; but the judgment is affirmed, the court being divided in opinion upon it."[21]

Thus, it was settled early in Supreme Court jurisprudence that affirmance on equal division was to be the rule. It took somewhat longer for the Court to make clear the stare decisis effect of an equal division. Writing for the Court in an 1868 case, *Durant v. Essex Company*,[22] Justice Field stated that although the decision of an equally divided Court is "conclusive and binding in every respect upon the parties," the prevailing rule of practice "prevents the decision from becoming an authority for other cases of like character."[23] Field's justification for the proposition that equal divisions are to have no precedential value was murky.[24] He cited no clear American precedent, instead finding that proposition implicit in the Court's established attitude toward equal divisions and in his view that under both the American and the English practice an equal division can result in no "affirmative action," but rather leaves matters as they stood.[25]

Field was undoubtedly aware of at least one English case, and some American commentary, that dealt explicitly with the stare decisis effect of an equal division.[26] The English case indicated that an equal division was to

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21. Etting v. Bank of the United States, 24 U.S. (11 Wheat.) 59, 78 (1826). In view of the later practice of not writing opinions in cases of equal division, it is interesting that Marshall prefaced his holding with a discussion and commentary on the facts developed at trial. *Id.* at 73-78.

22. 74 U.S. (7 Wall.) 107 (1868).

23. *Id.* at 113. The case had been heard previously by the Supreme Court, which had affirmed the dismissal below. The plaintiff filed again.

24. *Id.* at 110-13. Field's language is not altogether clear:

> *The statement which always accompanies a judgment in such case, that it is rendered by a divided court,* is only intended to show that there was a division among the judges upon the questions of law or fact involved, not that there was any disagreement as to the judgment to be entered upon such division. *It serves to explain the absence of any opinion in the cause, and prevents the decision from becoming an authority for other cases of like character.* But the judgment is as conclusive and binding in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case.

Id. at 113 (emphasis added). Apparently, the statement that the Court is divided explains the absence of opinion and prevents the decision from being an authority. This view assumes that courts already follow the rule (whatever its origins) that an equal division is not precedent. Thus, Field simply is stating that it is important not just to affirm when a court divides evenly, but to make clear that the Court was divided so that future courts can follow the no precedent rule.

Note that Field did not explain the source of the no precedent rule; he assumes its existence. Field may have inferred the rule from English practice *(id.* at 110-13), from his view of good sense, from the practice of not writing opinions, or from any combination of the foregoing.

25. *Id.* at 110; *see infra* text accompanying notes 73-75.

26. During oral argument in *Durant,* Justice Grier stopped the appellees from arguing the effect of an affirmance by an equally divided court. He referred them to a note of an unreported decision in Pennsylvania, which he said was "clear and satisfactory." *Id.* at 109 (Reporter's Note). That review, included in 74 U.S. (7 Wall.) at 753, as an appendix to the report, contains the earliest known examination of the rule of affirmance and takes a surprising view of the stare decisis problem. *Id.* at 755. The reviewer, Horace Binney Wallace, correctly cited an English case as holding that an affirmance by equal division is to stand as precedent. *Id.* at 754, *citing* Catherwood v. Caslon, 153 Eng. Rep. 108 (Ex. 1844). *Catherwood,* in turn, relied on an earlier equal division in the House of Lords as precedent. 153 Eng. Rep. at 109-10, *citing* Regina v. Millis, 8 Eng. Rep. 844 (H.L. 1844). *Millis* was, indeed, an equal division. *Id.* at 982.

stand as precedent,[27] and the commentary apparently accepted this view as the American rule.[28] Without citing either case or commentary, Field took a contrary view and in his opinion for the Court completed the American law on equal divisions. In 1972, when the Supreme Court wrote its most recent exegesis on equal divisions,[29] the tenets were the same as in Field's time: an equal division (1) affirms the lower court; (2) binds the parties by means of res judicata and allied doctrines; and (3) is not regarded as precedent.[30] In its nearly 200 years, the Supreme Court has never decided a case inconsistently with any of these propositions. Moreover, since the time it clearly articulated these propositions, the Court has endorsed them in the broadest terms,[31] never suggesting the possibility of exception.

In addition to observing these apparently hard and fast rules, the Justices have adhered strongly, if not universally, to the practice of not publishing opinions dealing with substantive issues on which they have divided equally.[32] Occasionally an individual Justice or two, or more rarely all of the participating Justices, have deviated from this practice.[33] Far more common is a simple statement of the tie and affirmance, a statement which does not present even a line-up of the Justices on the issues.

IV. MEANS FOR AVOIDING EQUAL DIVISION

There are at least two ways to avoid the problem of equal divisions. The first would eliminate the numerical deadlock among the Justices, either by granting a rehearing or by ensuring that a panel with an even number of Justices never sits. A second method would designate a tie-breaking Justice. This section considers those options.

A. Postponement or Reconsideration of Decision

1. Postponement

An equal division can occur only when an even number of Justices sit, an occurrence requiring the absence of at least one Justice. This can occur either

27. Catherwood v. Caslon, 153 Eng. Rep. 108, 109-10 (Ex. 1844), *citing* as precedent, Regina v. Millis, 8 Eng. Rep. at 844, 982 (H. L. 1844); *see supra* note 26.

28. *Durant*, 74 U.S. (7 Wall.) at 753 (Reporter's Note).

29. Neil v. Biggers, 409 U.S. 188, 191-92 (1972). *Neil* expressly confirms the rule of affirmance and the rule of no precedential value. For a modern statement that the practice in equal divisions is to write no opinion, see Ohio *ex rel* Eaton v. Price, 364 U.S. 263, 264 (1960).

30. Compare the language of the cases cited in *supra* note 26 with Field's statements in *Durant,* 74 U.S. (7 Wall.) 107, 110-13 (1868). The equal division closely resembles in effect the unpublished opinion issued by many appellate courts. *See generally* Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform,* 48 U. CHI. L. REV. 573 (1981).

31. *See* Neil v. Biggers, 409 U.S. 188, 191-92 (1972).

32. *See, e.g.,* Eaton v. Price, 364 U.S. 263, 264 (1960); Durant v. Essex Co., 74 U.S. (7 Wall.) 107, 113 (1868).

33. *See, e.g.,* Eaton v. Price, 364 U.S. 263, 264 (1960); Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 561 (1840). *See infra* notes 111-21 and accompanying text.

through recusal of an individual Justice or because of a death or resignation.[34]

The most obvious method for ensuring the participation of an odd number of Justices in a case is to postpone argument until events eliminate the likelihood of deadlock.[35] In some cases the costs of delaying justice will be low—when the participation of an even number results from the brief illness of a Justice, or from a vacancy soon to be filled, for example. In other sorts of cases, particularly those resulting from most recusals, the length of the delay involved in the strategem would render it very costly. The costs involved in delaying justice, therefore, depend upon both the type of case involved and the probable length of time necessary to secure a tie-breaking Justice. Thus, cases in which justice or policy demands speedy resolution would not be prime candidates for postponement when the equal division stems from a recusal not likely soon to cure itself.[36] Although it is probable that the Court on occasion has postponed a formal decision because it appeared equal division was likely, it is impossible to determine how frequently that has occurred.[37]

2. Rehearing

Alternatively, after an equal division, the Court might grant a petition for rehearing in order to substitute a decision on the merits.[38] Occasionally, the

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34. Far more equal divisions in the period 1925-1982 were caused by recusal or temporary absence (75%) of one or more of the Justices than were caused by a vacancy on the Court (25%).

No Justice in that period contributed to an abnormally large number of deadlocks through recusal. The Justices with the most such recusals were Douglas (12), Jackson (12), Clark (11), and Stewart (11). Jackson had the highest number of recusals per year served (0.9), a statistic explained by his prior service as the Solicitor General, his absence to serve as Special Prosecutor at the Nuremberg War Crimes Trial, and his lengthy illness shortly before his death.

35. The famous *Charles River Bridge Case* (Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837)) provides a dramatic example:

> The bridge arguments concluded on March 11 [1831]; five days later, the Court announced that it was unable to agree on a judgment and ordered the case continued. John Marshall and his colleagues never reached a final decision, however, and the case lingered in a kind of limbo until a largely reconstituted court heard new arguments *six years later.*

S. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE 57 (1971) (emphasis added). *See also id.* at 54-56. The decision in Virginia v. West Virginia, 78 U.S. (11 Wall.) 39 (1870), was apparently held up for the same reason. See Justice Field's statement in Durant v. Essex Co., 74 U.S. (7 Wall.) 107, 112, concerning the postponed decision in *Virginia v. West Virginia.*

Similar to the practice of postponement on equal division was the apparent practice of the Court in 1972, when there were two vacancies, of not passing on a certiorari petition if three members of the Court thought it should have been granted. Because of the delay, it was possible, when the vacancies were filled, to decide whether to hear cases of potential national importance in accordance with the Rule of Four.

36. An Attorney General turned Justice, for example might recuse himself for a long period of time from certain types of litigation. Another example is Justice Stewart's recusal from cases on review from the Supreme Court of Ohio, *e.g.*, Raley v. Ohio, 360 U.S. 423 (1959), because his father served on that court.

37. *See supra* note 35. Daniel Webster suggested in correspondence that the Court, on at least one occasion, postponed a decision while awaiting the return of Justice Todd, the tie-breaker, from his circuit-riding duties. Letter from Daniel Webster to Jeremiah Mason, February 23, 1819, in 16 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 51-52 (Little, Brown & Co. 1903). *See also* 18 U.S. (5 Wheat.) vii (Reporter's Note, 1820).

38. *See* R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 791-92 (5th ed. 1981).

Court has resolved an equal division by granting a rehearing when circumstances, such as the appointment of a new Justice, augured well for breaking the deadlock.[39] Since 1925 that has occurred in at least a dozen cases.[40] Rehearings in this context apparently have always been granted during the Term of the original equally divided decision.[41] If the Court continues to adhere to such a "Term rule" or even to a two-Term rule of thumb,[42] a large number of equal divisions will not be amenable to a rehearing solution. Indeed, when the Term rule is applied, only equal divisions occurring as a result of a Justice's brief absence or just before a new appointment are likely to be cured by rehearing.

In order to address more generally the equal division problem by means of rehearing, the Court would have to extend the time within which a rehearing will be granted. In cases not involving equal divisions, the Court has dispensed with a hard and fast "same Term" rule, occasionally granting rehearings in the Term following that of the original decision,[43] and once delaying for three years.[44] The practice of delayed rehearing has been trenchantly criticized[45] because expectations can be upset if the possibility of a late rehearing is not known, or its use not kept within precise bounds. Even if a clear but long limit were known to be possible, speedy justice would suffer. In the typical equal division, permitting the lower court to have the last word is the lesser evil when compared with the long period of uncertainty that might follow an equal division if the deadlock, for example, results from the recusal of a Justice based on a prior relationship with the parties to the litigation.[46]

There may be some cases, however, in which a long delay can be justified. The Supreme Court both dispenses justice to individual parties and functions as constitutional oracle of last resort. It must weigh the interests of speedy justice against the costs of allowing the decision of a lower court to have dispositive and dramatic national impact. Particularly in the case of significant litigation such as the hypothesized case seeking an injunction against the federal government when injunctive relief has been granted, but stayed pending appeal, delay may be appropriate.[47] If the lower court decision favoring the class is affirmed, that tribunal effectively has made law for the whole country, law that may cripple a federal regulatory program. Surely in such a case, and

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39. *Id.*

40. *See, e.g.,* Toucey v. New York Life Ins. Co., 313 U.S. 596, *granting reh'g to* 313 U.S. 538, *rev'd,* 314 U.S. 118 (1941).

41. *Id. But see infra* note 43 for cases granting later rehearing in other contexts.

42. *See infra* note 43 and accompanying text.

43. Gondeck v. Pan American World Airways, 382 U.S. 25 (1965) (approximately three years); United States v. Ohio Power, 353 U.S. 98 (1957) (approximately 18 months). *See generally* R. STERN & E. GRESSMAN, *supra note* 38, at 781-89.

44. Gondeck v. Pan American World Airways, 382 U.S. 25 (1965).

45. *See* Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights,* 80 HARV. L. REV. 91, 132-35 (1966).

46. An example would be the recusal of a former Attorney General from litigation in which he had participated.

47. Indeed, this mild remedy follows a fortiori from our proposal that the decision below in these cases should be reversed.

perhaps in others, lengthy delay is justified unless personal rights would be substantially abridged.[48] Because of the importance of the issue, however, postponement would be preferable to an initial affirmance followed by a rehearing. Although the latter is simply a disguised instance of the former, the uncertain nature of the rehearing method may cause confusion and misplaced reliance in the interim.

B. Designation

Another method of avoiding equal divisions is the designation of a judge from another court to hear the case and break the deadlock. This device, which a number of state courts use,[49] could be employed either before argument if it were apparent that only an even number of Justices would sit, or upon rehearing following the equal division.[50] Federal statutory law at present, however, permits only the temporary assignment of a district judge to the court of appeals, and expressly forbids the assignment of a judge of an inferior court to the Supreme Court.[51] This prohibition no doubt reflects the grave prudential and constitutional questions that would attend such an assignment. Although the answer is by no means clear, such an assignment might violate provisions of article III, including the requirement that there be "one Supreme Court."[52]

Were it constitutional to provide for designation, the benefits in most

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48. Postponement of ultimate vindication always causes some injury in fact. Nevertheless, some postponement is compatible with balanced justice. Criminal defendants, for example, are ordinarily required to present their federal constitutional defenses to the highest state courts that can hear the matter before seeking federal relief. Thus, a criminal defendant must often suffer through a criminal trial that would prove unnecessary were the Supreme Court's views known in advance. *See* Douglas v. City of Jeanette, 319 U.S. 157, 162-64 (1943). When, however, recognized rights would be lost if the postponement were required, the Court has made exceptions to established procedures. *See* Harris v. Washington, 404 U.S. 55, 56 (1971) (per curiam); *see also* Note, *The Finality Rule for Supreme Court Review of State Court Orders,* 91 HARV. L. REV. 1004, 1010-12, 1027-32 (1978). The problem, of course, lies in determining when harm is sufficiently grave and avoidable at reasonable cost to warrant recognizing a right to avoid the harm in particular context, *e.g.*, a right to an immediate appeal. With respect to deciding whether and for how long to postpone in an attempt to avoid deadlock, the Court similarly must attempt to balance inchoate interests.

49. *See, e.g.,* MD. CONST., art. IV, § 18(b) (by constitution); MINN. CONST., art. 6, § 2 (by constitution); MONT. CONST., art. VII, § 3(2) (by constitution); HAWAII REV. STAT. § 602-11 (1976) (by statute); N.J. PRACTICE 2:13-2A (Supp. 1983) (by statute).

The designation of a tie-breaker has ancient roots. In Durant v. Essex Co., 74 U.S. (7 Wall.) 107, 111 (1869), Justice Field observed that an English statute, dating from the reign of Edward III, provided that if the King's Bench or Common Pleas were divided evenly, "the case is to be adjourned to the Exchequer Chamber, and there be argued before all the justices of England." If they divide equally it was "to be determined at the next Parliament by a prelate, two earls and two barons . . . ."

50. In Maryland, for example, judges are specially assigned to the court of appeals on a routine (but not universal) basis when a member of the court does not sit. There have been cases in which the court of appeals has split 4-3 following reargument; the initial argument having been held before six judges, with an apparent tie-breaker added for reargument. *E.g.,* Winterwerp v. Allstate Ins. Co., 277 Md. 714, 357 A.2d 350 (1976).

51. 28 U.S.C. § 294(d) (1976).

52. U.S. CONST. art. III, § 1. Proposals for a National Court of Appeals were opposed not only on the basis of prudence, but also on the ground that the court would violate the Constitution's command that "[t]he judicial power of the United States, shall be vested in one Supreme

cases would be low and the costs high. The authority of a decision in which a tie is broken by a designation would probably be weak,[53] particularly in constitutional law, an area in which the Court has been more than willing to overrule its own precedents.[54] Designation might well undermine the respect accorded even unpopular Supreme Court decisions.[55] It would be a circumvention of the political checks a Justice must pass in the nominating and approval process, checks designed to ensure that it is ultimately the majority will, however filtered, which determines the composition of our highest countermajoritarian institution.[56] Using a designated judge would be tantamount to

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Court . . . ." *See* Gressman, *The Constitution v. The Freund Report,* 41 GEO. WASH. L. REV. 951, 960-64 (1973).

The "one Supreme Court" objection directly applies to the proposed National Court of Appeals. The Freund Report suggested creation of a court of last resort to serve in a variety of important cases; opponents countered with the argument that it would be a second Supreme Court forbidden by the Constitution. FEDERAL JUDICIAL CENTER STUDY GROUP, REPORT ON THE CASE LOAD OF THE SUPREME COURT (1972).

The argument against designation is less direct. It would contend that there is but one supreme court, *The* Supreme Court. When a judge is appointed, it is clear that he will serve on what the Constitution refers to as the Supreme Court. In addition, what the Constitution refers to as the Supreme Court is identified as a specific institution. The Constitution refers to other federal courts generically as inferior federal courts and presumably gives Congress much leeway as to their existence and composition. Consequently, temporarily or even permanently moving a judge from one lower federal court to another should be within congressional power—at least if, at the time of the judge's appointment, that prospect is reflected in the law governing the structure of the lower federal courts. Moving a judge to the Supreme Court, the argument continues, requires an appointment to that Court. Support for that argument is provided by the need felt, at least in some states, to provide specifically for that designation in the Constitution.

The above arguments are not clearly dispositive, however. Although the Constitution says there shall be one Supreme Court, it does not make clear that an inferior federal court judge also cannot be appointed a Supreme Court Justice to serve when designated. If judges of the lower federal courts were routinely named to serve as Supreme Court Justices by designation, the appointment and advice and consent problem discussed in the text would evaporate. The decision to appoint or to give consent could be made in light of potential Supreme Court duties. The only serious constitutional question would be whether an institution staffed by some permanent and other part-time, but lifetime, Justices could be what the Constitution means by "Supreme Court."

53. This is not necessarily the case, however. In 1948 Congress provided a procedure for dealing with the failure of a quorum on appeal from a district court. 28 U.S.C. § 2109 (1976). When that happens, the three most senior judges of the court of appeals of the circuit from which the case came hear it by certification from the Supreme Court and render an opinion, which is final. Section 2109 has been used only once, in the famous *Alcoa* monopolization case, United States v. Aluminum Co. of America, 148 F.2d 416 (1945). *Alcoa* has long been treated as if it were a precedent of the Supreme Court, perhaps due to the forceful nature of Learned Hand's opinion.

54. The traditional rule has been that the Supreme Court is more willing to overrule constitutional precedents than it is to overrule other kinds of precedent. The usual cite is Burnett v. Coronado Oil & Gas Co., 285 U.S. 393, 406-08 (1932) (Brandeis, J., dissenting). *See generally* Monaghan, *Taking Supreme Court Opinions Seriously,* 39 MD. L. REV. 1 (1979).

55. The American people often dislike Court decisions that protect obnoxious or despised members of society, but the people respect appeals to their conscience or idealism. Americans comply even if complainingly, with the decisions against the constitutionality of legislation that can be explained by the Court to violate the Bill of Rights . . . . The people seem to regard the Court as their conscience . . . .

Levy, *Judicial Review, History, and Democracy: An Introduction,* in JUDICIAL REVIEW AND THE SUPREME COURT 41-42 (L. Levy ed. 1967).

56. "From an early time appointments to the Supreme Court, as compared with those to a lower bench, have been made with prime reference to the policy views of prospective nominees as well as to their supposed representation of sections and interests." Hurst, *supra* note 14, at 141.

The real question, of course, is not that of blind or malicious majorities striking down constitutional barriers, but of differing interpretations of the meaning of the Constitu-

the choice of a new Justice, albeit for only one case.[57] Neither permitting the Chief Justice to designate nor resorting to a random selection process is a full substitute for a current political check.[58]

A further problem is that unless a designated judge were to sit to hear all kindred issues for a period of time, his appointment might well lead to inconsistency in the law.[59] Perhaps it is for these reasons that we are not aware of any legislative proposal to permit assignment of lower court judges to the Supreme Court in cases in which the Court splits or a quorum fails.[60]

On the other hand, the prudential problems of designation can be overstated. Many Supreme Court opinions do not turn on legal issues of great national importance, but turn rather on questions of law application or law making for which it might be said that it is more important that the question be settled than that it be settled right.[61] Hence, it might be desirable to establish a designation system, perhaps limited to cases which do not raise constitutional issues.[62]

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tion. The crucial question is not so much whether an act does or does not conform to the Constitution (for everyone agrees that it should), but *who* shall judge as to conformity.

Commager, *Judicial Review and Democracy,* in JUDICIAL REVIEW AND THE SUPREME COURT, *supra* note 55, at 66 (emphasis added). The paradox of a counter-majoritarian institution in a majoritarian society has engaged many scholars. *See, e.g.,* A. BICKEL, THE LEAST DANGEROUS BRANCH (1974). The most basic question asks from what perspective the antimajoritarian document is to be interpreted and applied. *See* Ely, *Foreword: On Discovering Fundamental Values,* 92 HARV. L. REV. 5 (1978). Judicial and scholarly disagreement on what, if any, is the "correct" perspective, has been widespread. As a result, the political checks that occur at the time of appointment, when the Senate can inquire into a nominee's jurisprudence, assume critical importance.

57. Although not the same as a permanent appointment to the Court, becoming Justice by designation does resemble a lifetime appointment because, for the particular case, the designee will have his vote counted as that of a Supreme Court Justice with all the usual national policy implications created by any precedent.

58. Appointments to the inferior federal courts are rarely subject to piercing senatorial and presidential scrutiny of the kind accorded those named to serve on the High Court. It is very doubtful that the possibility of assignment to the Supreme Court would enhance the scrutiny.

Designation by the Chief Justice suffers from the additional drawback of granting too much power to one individual. Congress has on at least one recent occasion allowed the Chief Justice of the United States to select the lower court judges who will decide politically sensitive cases. In 1978 Congress created two special courts. The first, comprising seven judges, has jurisdiction to consider applications for orders approving wiretaps in national security cases. 50 U.S.C. § 1803(a) (Supp. V 1981). The second court has jurisdiction to review decisions of the first court denying approval of a wiretap. *Id.* at § 1803(b). The judges of those courts are selected from the United States district courts and courts of appeals by the Chief Justice and designated by him to the new courts for terms of one to seven years, depending on the circumstances. *Id.* at § 1803 (d).

59. The observation is buttressed by the uncertain reception occasionally accorded 4-3 Supreme Court opinions. *See, e.g.,* Roofing Wholesale Co. v. Palmer, 108 Ariz. 508, 502 P.2d 1327 (1972) (en banc) (refusing to follow a 4-3 decision), *criticized in* 86 HARV. L. REV. 1307 (1973).

60. Had there been proposals to permit designation of a lower federal court judge to the Supreme Court, they might well have been discussed in the debate over the proposals for a National Court of Appeals as raising analogous problems. *See, e.g.,* Gressman, *supra* note 52.

61. *See* Burnett v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

62. Whether a case raised a constitutional issue could be determined by examining the questions presented on petition for certiorari. Note that the affirmance on equal division settles nothing, for it lacks precedential value. Below we propose to accord equal divisions a limited stare decisis effect in the lower courts. *See infra* note 111 and accompanying text.

It is, however, precisely in those compelling cases, when the benefits of Supreme Court resolution are greatest, that the costs of designation are greatest too. Think of the uproar, for example, if *Brown v. Board of Education*[63] had been decided by a bare majority, with the swing vote cast by a designated judge. On balance, therefore, the practice of designation, like rehearing, exacts too great a price to be an attractive solution to the equal division problem.[64]

V. Treating Unavoidable Equal Divisions

The preceding section suggests that it may be very difficult to find an acceptable method for avoiding equal divisions. If so, how should the Supreme Court treat those equal divisions that cannot be avoided? This section takes a critical look at the tenets of equal division doctrine.

A. The Rule of Affirmance on Equal Division

1. Three Options and an Explanation

The rule that an equal division affirms the decision of the court below was the first part of equal division doctrine to be settled. The wisdom of that rule cannot be evaluated without considering the options available to the Supreme Court when it is deadlocked. In the abstract, there are three possibilities: to refuse jurisdiction, to affirm, or to reverse.

In part two below we propose that, on equal division of the Justices, the Supreme Court occasionally should reverse the decision appealed from. In what follows immediately we set aside that novel proposal and ask why, once the Supreme Court has decided that an equal division should leave the lower court's decision undisturbed, it chose to do so by affirming that decision rather than by dismissing the appeal.

Under the prevailing view, the Court is seen as unable to take action on equal division. Because an equal division is accorded no stare decisis effect, the thrust of the current doctrine is that the Supreme Court has not acted; therefore, the decision below is undisturbed. Under these circumstances one would expect initially that the Court would simply relinquish jurisdiction on equal division rather than follow the present practice of affirming. Justice

63. 347 U.S. 483 (1954). The Court in *Brown* found that segregated public schools violate the equal protection clause of the fourteenth amendment because "[s]eparate educational facilities are inherently unequal." *Id.* at 495.

64. An alternative not considered in the text would be for the Justices to agree to a process that would select a Justice who would bow out of the case, leaving an odd number of participating Justices. This proposal raises issues of principle including those of consistency identical to those involved in designation. *See supra* text accompanying note 59. Of course, as long as the Justices agree to such a process, the constitutional problems involved in designation are avoided. Were Congress to specify a process for involuntary recusal, serious issues involving the Justice's constitutionally guaranteed life tenure and general prohibitions on congressional court-tampering would be raised. *Cf.* United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) (suggesting the federal courts will occasionally find and enforce limits on congressional tampering with judicial operations).

Field, in his opinion in *Durant,* took precisely the view that an equal division appeal warrants in effect the dismissal of the appeal:

> In cases of appeal or writ of error in this court, the appellant or plaintiff in error is always the moving party. It is affirmative action which he asks. The question presented is, shall the judgment, or decree, be reversed? If the judges are divided, the reversal cannot be had, for no order can be made. The judgment of the court below, therefore, stands in full force. It is, indeed, the settled practice in such case to enter *a judgment of affirmance*; but this *is only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity with the action of the court below*, and that the court can proceed to enforce its judgment. *The legal effect would be the same if the appeal, or writ of error,* were dismissed.[65]

Surely, if dismissal of the appeal were a possibility open to the Court, it would be, as Field recognized, the most forthright judgment. Why, then, did the Supreme Court develop and adhere to the practice of affirmance?

There are two likely reasons. The first is that the English practice was to affirm in the event of a deadlock that could not be broken.[66] Perhaps of more importance, until the great transformation of the Supreme Court's appellate jurisdiction occurred between 1891 and 1925, that jurisdiction was predominantly mandatory.[67] Thus, in most cases the Court had to enter an order on the merits. After 1925, when the Judges Bill[68] completed the metamorphasis, discretionary review became the dominant form.[69] These changes rendered it possible for the Court to consider large parts of its jurisdiction truly discretionary, and the practice of dismissing a petition for certiorari on equal division might well have developed.[70] This would have involved some stretching of the doctrine of improvident grants of certiorari;[71] and, more importantly, a dismissal practice would have led to disparity with appeals, in which the exercise of jurisdiction is mandatory. Although the Court has stretched the judicially discovered nonsubstantiability exception to its "mandatory" appellate jurisdiction to such lengths that mandatory jurisdiction has begun to appear to be discretionary, that development has been subject to embarrassingly sharp criticism.[72] The Court would well warrant the scathing attack it would incur if

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65. Durant v. Essex Co., 74 U.S. (7 Wall.) 107, 112 (1868) (emphasis added).

66. Justice Field noted that although English practice attempted to avoid equal divisions, *id.* at 111, unavoidable equal divisions resulted in affirmance, *id.* at 112-13. See the discussion of Catherwood v. Caslon, 153 Eng. Rep. 108 (1844) *supra* note 26, at 57.

67. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 35-37, 40-41 (1953) [hereinafter cited as HART & WECHSLER].

68. H.R. 8206, 68th Cong., 2d Sess., 66 CONG. REC. 2928 (1925).

69. HART & WECHSLER, *supra* note 67, at 41.

70. The petition would have been dismissed as having been granted improvidently.

71. For a discussion of the doctrine, see R. STERN & E. GRESSMAN, *supra* note 38, at 369-74. The data, however, do not indicate that the Court is dealing with equal divisions by dismissing the petition for certiorari in that way: eleven of the last twelve equal divisions, for example, have involved certiorari cases.

72. See Justice Clark's statement that during his eighteen years as a Supreme Court Justice "appeals from state decisions received treatment similar to that accorded petitions for cer-

it defined substantiability of a federal question in terms of the Court's ability to find a majority. As a result, dismissal of appeals in equal division cases is neither politically possible nor doctrinally justifiable.

To the extent the Court continues formally to sustain the decisions below when it has divided evenly, the Court might consider treating certiorari cases differently and dismissing the writ as granted improvidently. Surely the notion that a grant once provident has become improvident neither stretches language nor the policy behind the improvidence rule. This solution is not satisfactory, however, because the Court cannot change its practice on appeal under the current statutory law; because the Court might reasonably wish to treat substantively identical certiorari and appeals practices as formally identical; and finally, because little is at stake except accurate labeling.

2. Deeply Embedded Assumptions Supporting the Rule of Affirmance

The preceding analysis explains why the Court, desiring to let the judgment below stand, employed the rule of affirmance rather than dismissal. That analysis, however, does not address the more fundamental question of why the Court has without exception chosen to affirm rather than reverse when an equal division occurs. Although today we are so conditioned to the rule of affirmance that it seems to be the only possible choice, there are cases in which a rule of reversal would be preferable. The apparent inevitability of the rule of affirmance stems from a particular view of the significance of an equal division. Justice Field's opinion for the Court in *Durant* makes clear the nature of this view:

> It has long been the doctrine in this country and in England, where courts consist of several members, that *no affirmative action can be had in a cause where the judges are equally divided* in opinion as to the judgment to be rendered or order to be made. If *affirmative action* is necessary for the further progress of the cause, the division operates as a stay of proceedings. If the *affirmative action* sought is to set aside or modify an existing judgment or order, the division operates as a denial of the application, and the judgment, or order, stands in full force, to be carried into effect by the ordinary means.
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> . . . .
>
> In cases of appeal or writ of error in this court, the appellant or plaintiff in error is always the moving party. It is *affirmative action* which he asks. The question presented is, shall the judgment, or decree, be reversed? *If the judges are divided, the reversal cannot be had, for no order can be made.*[73]

In Field's view a majority is necessary for the Court to act; hence, when the Court evenly divides it takes no action. Because Field viewed the order of affirmance as the equivalent of the dismissal of the appeal, the decision ap-

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tiorari . . . ." Hogge v. Johnson, 526 F.2d 833, 836 (5th Cir. 1975) (Clark, J., concurring). *See also* Hart, *The Supreme Court 1958 Term: Foreword: The Time Chart of the Justices,* 73 HARV. L. REV. 84, 89 n.13 (1959).

73. 74 U.S. (7 Wall.) at 110-112 (emphasis added).

pealed from is left standing. Implicit seems to be the proposition that the Supreme Court either cannot or will not accord to its equal division a significance other than "no affirmative action."[74]

The rule of affirmance for equal divisions in appellate cases follows logically from the rule of "no affirmative action." But surface logic in law is not invincible and must retreat before contrary precedent or other logic based on better policy. Thus, it must be asked whether the no affirmative action rule is supported by sound policy and by case law.

There is some support, ironically, from Field's own pen in *Durant*, for a more fluid analysis in original jurisdiction cases. After setting forth the no affirmative action view for appellate cases, he contrasted the effect of equal division in original cases. He concluded that the significance of an equal division—negative or affirmative—is itself a question that must be resolved by the Court according to sound policy:

> [I]n the case of the demurrer, *the effect of a division would depend,* we think, *upon the rules of practice established in such cases,* for in the absence of a settled practice or general rule of court upon the subject, the judges disagreeing as to the demurrer might disagree also as to the effect of their inability to decide it, as was the fact in this court in the case between the Commonwealth of Virginia and West Virginia, argued upon demurrer to the bill at the last term.[75]

Field thus recognized that in an original jurisdiction case, by majority rule, the Court may choose a rule defining the significance of the failure to muster a majority.

Virginia v. West Virginia,[76] the case referred to by Field, was an equal division in conference only; ultimately, a majority decided the case. Field's statements are simply passing commentary about the views of some Justices on how equal divisions on certain trial issues ought to be resolved. In the middle of this century, however, in *In re Disbarment of Isserman,*[77] the Court at least partially exposed its view of its own latitude in choosing to accord affirmative significance to equal division in original cases.

Before 1954, the Supreme Court's rules provided that, upon being disbarred in a state proceeding, a member of the bar of the United States

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74. A special rule on precedent in equal divisions is necessary because, according to some views of what constitutes precedent, it is the bare *decision*, coupled with the facts, that provides the *ratio decidendi. See, e.g.,* Goodhart, *On Determining the Ratio Decidendi of a Case,* 40 YALE L. J. 161 (1930). This view is generally associated with English courts and does not comport with current American views.

75. *Durant*, 74 U.S. (7 Wall.) at 112 (emphasis added). The no affirmative action doctrine has been used in other courts to resolve a question when there was no decision below. *E.g.,* State *ex rel.* Att'y Gen'l v. City of Avon Park, 108 Fla. 641, 672, 149 So. 409, 420 (1933) (demurrer to original action overruled when court split evenly; a majority is necessary to sustain a demurrer). *Cf.* Henry v. Ricketts, 11 F. Cas. 1188 (C.D.D.C. 1809), discussed *supra* note 20. One court noted that it was the "universal rule" that upon equal division, "the subject matter with which it [the tribunal] is dealing must remain the status quo." *In re* First Cong. Dist. Election, 295 Pa. 1, 12, 144 A. 735, 739 (1928).

76. 78 U.S. (11 Wall.) 39 (1870).

77. 345 U.S. 286 (1953), *vacated on reh'g,* 348 U.S. 1 (1954).

Supreme Court would be suspended and required to show cause why he should not be removed from the list of those admitted to that bar.[78] Isserman was suspended under that rule.[79] After Justice Clark recused himself[80] in the show cause proceeding, the Supreme Court split four to four. Because Isserman had not shown cause, that is, because he had not rebutted the prevailing presumption, he was disbarred.[81] The Court, in other words, by its own rule chose to allow state disbarment to raise a federal presumption against members of its own bar; the state order did not operate by its own force to disbar Isserman. Thus, according to the Court's interpretation of its own rules in *Isserman,* the presumption disposed of an equal division.

Shortly after the original disposition of *Isserman,* the Supreme Court amended its rules to require that a majority decide that cause had not been shown before an attorney would be disbarred.[82] Not long afterwards, the Supreme Court granted Isserman a rehearing. As a result of a change in the Court's personnel, the vote this time was four to three in Isserman's favor.[83]

Isserman holds interest for two reasons. First, its initial disposition demonstrates that the Court can and has chosen to accord affirmative significance to an equal division. On equal division, Isserman was disbarred. Although the Court later changed its rule to accord no affirmative action to equal division in disbarment cases, there is no indication that it did so because of a view that "no affirmative action" is the universally proper result on equal division. Indeed, the dissenters in the first *Isserman* case did not complain about the disbarment on equal division rule. Their remarks dealt with their reasons for voting not to disbar; they did not deal with the correctness of the result given the votes that occurred.[84] If according affirmative action to equal division had been seen by the dissenters as universally and fundamentally wrong, it is likely they would have said so. Although we have no record of the Court's deliberations in changing its rule, it seems likely that change resulted from a policy analysis in the specific context of a disbarment. The Court may well have concluded that something resembling a presumption of leniency ought to decide an equal division in such contexts in which the potential loss is great.

Isserman not only demonstrates that the Court can choose to accord affirmative action to an equal division; it makes clear how the Court can make such a choice. This is the second lesson of *Isserman*. Because in the original jurisdiction cases the important policy of supporting a lower court's judgment is not implicated, it is much easier to see the wealth of other policies that bear on a principled choice of rules for dealing with equal division. Under the

78. Sup. Ct. R. 2(5), 345 U.S. 286 (1953).

79. *Isserman,* 345 U.S. at 287.

80. *Id.* at 290.

81. *Id.* at 286, 290.

82. This became rule 8, later deleted in the 1980 revision of the Supreme Court's rules, apparently because the problem occurs so infrequently as not to deserve a special rule. Bennett & Gressman, *The Supreme Court's New Rules for the Eighties,* 85 F.R.D. 487, 515, n.22. (1980).

83. *In re* Disbarment of Isserman, 348 U.S. 1 (1954).

84. *Isserman,* 345 U.S. at 290-94 (Jackson, J., dissenting).

original *Isserman* rule, for example, the dispositive policy was the efficiency of giving presumptive effect to highly relevant and probably accurate state proceedings.

Although *Isserman* and the statements by Justice Field are concerned with questions arising on original jurisdiction, both have implications for the equal division in appellate cases. Both suggest an alternative to the current practice of rote affirmance. The desirability of an alternative should not be surprising; the no affirmative action doctrine derives from procedural rules designed to deal with problems different from those presented by an equal division. The no affirmative action doctrine analogizes an appellant's burden of convincing on legal issues to a plaintiff's burden of persuasion on most issues of fact. The usual burden of proof rules were designed to deal with the allocation of the burden of proving facts, a problem quite different from the proper allocation of the burden of convincing on a legal issue. Once that difference is recognized, the need to inquire de novo into the equal division problem, rather than to follow blindly a rule designed for other situations, should also be recognized.

This inquiry can move from the abstract to the concrete with an example inspired by Justice Field's demurrer case. Suppose, in an original jurisdiction case, the Justices divide four to four on the legal sufficiency of a defense that is supported by stipulated facts. Should the result depend upon who would have had to establish the facts underlying the defense—should the defense fail, in other words, because by analogy to the usual rules of burden of proof, the defendant has the burden on that matter? Should it depend upon who had the burden of going forward or upon who had the burden of persuasion, assuming the two to be different? Should rules designed to allocate the responsibility for initiating a factual inquiry or for persuading on the facts—presumably fashioned to provide economy based upon considerations of motivation, warning and access to facts—have anything to do with who ought to prevail on even divisions over a question of law? In such cases the issue has been raised, argued, and considered by the Court, and the policies that dictate the shape of the burden of proof system simply have no force.[85]

Sound policy, at least in the form of economy of application, may well support the affirmance rule in the garden variety even division. Once freed of the view that affirmance on equal division is inevitable, courts and commentators can inquire into the desirability of a different rule for cases in which policies supporting reversal may outweigh those supporting affirmance. Examined below are some candidates for another rule, including cases in which the lower court has struck down a federal statute and cases in which the court below affirmed a criminal conviction. Sound decisionmaking by the Court requires an inquiry into alternative solutions that properly recognize competing

85. The allocation of the burden of proof, of course, can be made to achieve substantive goals. Such allocations differ markedly from the current equal division allocation because the latter does not seek to serve any well identified and carefully considered goals.

considerations.[86]

Any inquiry into alternative solutions must address two concerns. First, the solution should turn on policy, on analysis of the institutional and jurisprudential concerns that a particular problem implicates. Second, the solution must be practical. The rule of affirmance does have the advantage of extreme ease of application. Any substitute must be subject to at least some form of cost-benefit analysis. Those two concerns are addressed in the following section.

B. Policy Analysis in Equal Division Cases

1. The Search for Guidance

Inquiry into alternatives to the rule of affirmance must not be conducted in a vacuum. A procedure familiar to students of interest analysis in conflicts cases[87] can be employed to provide a principled basis for Supreme Court action in the event of an equal division. The inquiry should be directed at those policies and principles, both institutional and jurisprudential, that can be recognized as authoritative elsewhere in our legal system and that can be used to legitimate judicial action when, as in the equal division situation, more traditional legal analysis fails. The search, in other words, should be for solutions that reflect policy analysis, policies derived from basic institutional considerations.

An equal division by the Supreme Court is a statement from the highest level of our judicial system that the issues are close, balanced on a knife's edge. This statement, not that made by the court below, is the last definitive statement of the federal judicial system. Still, the case does not remain balanced on the knife because even a nondecision (such as relinquishing jurisdiction) is, in fact, a decision in favor of the result reached below.[88] It is necessary, therefore, to examine whether any policies support across the board application of the present rule of affirmance.

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86. The declaratory judgment proceeding provides another example of the problem discussed in the text. If in a nisi prius case a multi-judge court splits evenly on an issue necessary to the grant of a declaratory judgment, how should an appellate court proceed? To refuse a declaration in favor of the party seeking declaration of a legal right leads to the difficulty that the other party could have sought a declaration of no right. Should the same issue be resolved differently depending on which party seeks the declaration? Perhaps the best way of dealing with the matter is to treat the refusal to grant a declaratory judgment in such cases as a non-declaration containing no determination of substance. That variation from usual practice would reflect a principled departure from usual declaratory judgment practice—a departure made to deal with the peculiar problem of even division.

87. The analogy between the equal division problem and developments in the theory of conflicts of law is striking. For much of this century the territorial theory of the RESTATEMENT OF CONFLICT OF LAWS (1933) held the nation's courts in thrall. That theory, like the rule of affirmance, imposed a flat rule of decision (*e.g.*, lex loci delecti) in each case without regard to the policies represented by the competing laws. Conflicts law today, however, generally inquires into those policies and considers how best to accommodate competing policies. Similarly, we propose inquiry into institutional and jurisprudential policies that might, in some instances, replace the rigid rule of affirmance.

88. *See* H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN MAKING AND APPLICATION OF LAW 534-37 (10th ed. 1958).

It is tempting to assume that support of the judgment in the lower court is grounded in the policy of attempting to reach a correct decision on the facts and substantive law. It is also tempting to view decisions of the lower courts as being "right" more often than not. The equal division in the Supreme Court itself, however, demonstrates that, from a realistic point of view, the probability of "correctness" is imaginary. Beyond that, the lower court may have taken a position contrary to the majority of other lower courts. The lower court, for example, may be the only one of a number of courts of appeals to have decided a question in a particular way. If any position is likely to be "correct," it is that of the majority of circuits, yet we would not assume that the Supreme Court, on equal division, should impose the majority rule on the minority circuit. Thus, a desire to achieve a "correct" solution cannot support the rule of affirmance on equal division.

As a consequence, it is plain that if the rule of affirmance is anything more than a bright-line solution employed in the absence of strong countervailing policies, it is based only on the policy of enhancing the dignity of the lower federal courts and permitting the circuits and the states to operate as jurisprudential laboratories. Even assuming that the rule of affirmance is supported by those policies and, therefore, is more than a bright-line rule designed to fill a policy vacuum, those are frail policies indeed to withstand the stern competition offered by policies implicated in certain classes of cases. Equal divisions in those cases raise fundamental questions concerning the allocation of power in our federal system.

2. Competing Policies

a. The Presumption of Constitutionality. The presumption of constitutionality has many sources. Perhaps the most obvious is the notion that legislators, like judges, take a prescribed oath to uphold the Constitution; a statute represents, therefore, the considered judgment of a co-equal branch that a course of action satisfies the requirements of organic law.[89] The presumption also stems from the ability of a legislature to develop and evaluate facts in a way different from, and, in some respects, superior to that of a court; the legislature, therefore, is better able to appreciate the circumstances that led to a particular choice. Moreover, legislation may require an accommodation of competing constitutional provisions;[90] again, the choice made by the legislature should be entitled to great deference.[91]

Overriding all of these reasons, however, is the recognition by many

89. On the duty of Congress to consider the Constitution, see P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 44-46 (1975). *But see* Mikva, *How Well Does Congress Support and Defend the Constitution?,* 61 N.C.L. REV. 587 (1983).

90. A statute forbidding certain forms of private racial discrimination, for example, may hamper freedom of association. *See* Runyon v. McCrary, 427 U.S. 160 (1976). A law requiring an owner to permit certain speech in his shopping center may limit the owner's property rights. *Cf.* Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

91. For an examination of various occasions for judicial deference, see P. BREST, *supra* note 89, at 979-86, 1004-10.

judges and scholars that judicial review is inherently antidemocratic and that the will of the people should not be overborne unless that will can be authoritatively found to conflict with fundamental law.[92] This view of James Bradley Thayer[93] and his latter day followers[94] does not confine the operation of the presumption of constitutionality to cases turning on questions of fact. The soundness of their view is questionable to the extent it asserts that individual Justices should defer to Congress on pure judgments of constitutional law, as opposed to judgments of constitutional legislative fact.[95] The requirement that an individual Justice presume strongly but not conclusively in favor of another institution's reading of the Constitution is difficult to comprehend. The problems of prescribing the presumption for decisions of individual Justices simply do not exist at the institutional level, however. When the institution is deadlocked after the individual Justices have voted according to their own views of judicial review and the substantive constitutional question involved, the notion of a presumption favoring constitutionality is workable and desirable. Underlying it is the simple assumption that when the highest counter-majoritarian institution is of two minds on whether a measure violates minority rights under our social contract, the presumption should favor the outcome of the majoritarian process.[96]

Although this Article does not undertake a full critical analysis of the use made of the presumption of constitutionality in general, the presumption seems particularly appropriate as a force in Supreme Court equal division cases. Using the presumption to break the deadlock better reflects the republican nature of our government than does either the designation device or the current practice of affirming. Using the presumption, however, would raise a number of important questions: Would it matter what sort of governmental

92. Professor Choper has suggested that more deference should be accorded congressional action in some contexts—*e.g.,* federal legislation impinging on state sovereignty—than in others—*e.g.,* a dispute between the President and Congress. J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980). *Cf.* Cohen, *Congressional Power to Interpret Due Process and Equal Protection,* 27 STAN. L. REV. 603, 613-14 (1975) (suggesting that Congress has more "institutional competence" and, hence, is better able to legislate under § 5 of the fourteenth amendment in areas in which state and national interests conflict than in the arena of civil liberties).

93. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law,* 7 HARV. L. REV. 129 (1893). Thayer found in the decisions of the state and federal courts a rule requiring a clear showing of unconstitutionality as a prerequisite to judicial invalidation. *Id.* at 140-43. Thayer endorsed this rule. *Id.* at 143-53, 155-56. *See also* Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review,* 35 U. FLA. L. REV. 209, 230-31 (1983).

94. For expressions of agreement with Thayer, see S. GABIN, JUDICIAL REVIEW AND THE REASONABLE DOUBT TEST 27-46 (1980); Frankfurter, *A Note on Advisory Opinions,* 37 HARV. L. REV. 1002, 1003-04 (1924).

95. *See* C. BLACK, THE PEOPLE AND THE COURT 192-222 (1960).

96. West German law provides that, in the case of a tie vote in the Constitutional Court, a violation of the constitution or other federal law cannot be found. Federal Republic of Germany, Law Concerning the Federal Constitutional Court § 15, P. 2, Sen. 4.

Occasional efforts have been made in Congress to require that decisions invalidating a statute have the concurrence of a majority, or even more than a majority, of the Supreme Court. *See, e.g.,* S. KUTLER, *supra* note 35, at 35, 45-46, 74-77. A congressionally-imposed rule of decision raises serious constitutional problems. *See* United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).

action the lower court struck down? Which, if any, of the presumptions of constitutionality is such a force? Under what circumstances should that happen?

i. Federal Statutes. The presumption of constitutionality is at its strongest in the case of federal statutes, because the statute was produced by the federal majoritarian process. In addition, the executive (the third branch of government) has concurred (or had its veto overridden by a super-majority). A case in which a lower court held a federal statute unconstitutional would be, therefore, the best candidate for the application of an institutional presumption of constitutionality to reverse the decision of a lower court.

Common Cause v. Schmitt[97] provides a dramatic example. The district court in that case held unconstitutional the federal statutory prohibition on individual campaign contributions greater than $1000. The Supreme Court, evenly divided, affirmed. The decision below has effectively eliminated a very important component of the federal regulation of elections, a component supported by both Congress and the President. The even split in the Supreme Court makes clear that the argument for constitutionality of the Act is as close to success as is the opposing argument. In that situation, the argument for deferring to the considered views of the Court's coordinate branches—until a majority of the Supreme Court disagrees—is strong.[98]

ii. Federal Executive and Administrative Action. The presumption of constitutionality is sufficiently forceful to warrant its use when the equal division involves action taken by or done under the direct authorization of the President of the United States, especially when that action is consistent with legislative directions in that area. Other executive and administrative action, however, is too loosely connected to the majoritarian process and too far removed from the work of a coordinate branch of government to warrant a presumption having as much force as that in favor of a lower federal court's decision.[99] Further, any attempt to differentiate among agency actions based on the closeness of that action to the political process is bound to prove very difficult. The Supreme Court, however, may be able to work out a useful set of presumptions for this area on a case by case basis. Although this Article does not suggest such a set, the Court should bear this possibility in mind when reviewing decisions in the administrative law field.

iii. Actions by States. The difficulty in cases in which the Supreme Court

97. 512 F. Supp. 489 (D.D.C. 1980) (three-judge court), *aff'd by an equally divided court,* 455 U.S. 129 (1982).

98. Support for the need to have a majority of the Court resolve a constitutional issue comes from no less an authority than John Marshall. When illness prevented Justices Duvall and Johnson from sitting, with the remainder of the Court apparently divided, Marshall put two cases over until the next Term "under the expectation that a larger number of the judges may then be present." Briscoe v. Commonwealth's Bank, 33 U.S. (8 Pet.) 118, 122 (1834). Marshall noted that "the practice of this court is, not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, *unless four judges concur in opinion thus making the decision that of a majority of the whole court." Id.* (emphasis added).

99. See C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 89-90 (1969), for a discussion of the inadvisability of deferring to a constitutional decision made by "Police Chief Doe."

divides evenly on the constitutional validity of an action by a state is that resolution by a majoritarian presumption, which should occur with federal statutes, simply will not work. Half the Justices believe that supreme federal law—itself the product of a majoritarian process—forbids the state action in question. The other half believes that the supreme federal law permits the choice state government made.

Thus, the case is balanced on a knife's edge; a simple *intra*systemic majoritarian presumption cannot be used to break the deadlock because the conflict is an *inter*systemic one, a problem of federalism. The Constitution provides no clear presumption for dealing with doubtful cases of federal limits on state authority. An ardent federalist might argue that a dispositive presumption should be recognized in favor of the product of the broadest majoritarian process, that is, a constitutional limitation or other federal law. Certainly when the state law arguably interferes with the operation of the federal government this view has some force.[100] An ardent defender of states' rights could argue, on the other hand, that the federal government is one of limited powers and that close questions should be decided in favor of state power.

Although there is considerable sentiment that, in general, in close cases the courts should not invalidate an act of Congress, there does not appear to be a clear consensus on how such states' rights issues should be resolved. Under such circumstances when other policies, like equally opposed vectors, cancel, the policies favoring affirmance of the decision should be used to dispose of the case.

b. Policy Considerations: The Presumption Favoring Criminal Defendants. Considerations other than institutional ones may be employed to avoid an equal division. If our system of law has a built-in tilt in favor of the constitutionality of certain acts of government, it also has a clear tilt favoring criminal defendants. The familiar presumptions of fact in favor of a criminal defendant,[101] together with the principle of strict construction of criminal statutes,[102] demonstrate this bias. Our system of criminal justice evidences a great concern that persons not be convicted of crimes unless clear law as applied to

100. Justice Taney once took the position that the Supreme Court in its capacity of umpire of the constitutional validity of state acts, is more like an entity separate from both the state and federal governments than it is like a third branch of the federal system. Gordon v. United States, 117 U.S. 697, 699-701 (1864) (published in 1886). If one agrees that the great but not perfect independence of federal judges leads to their neutral application of the Constitution in state-federal disputes, then concern over the nondemocratic nature of judicial review of state statutes is lessened. Taney's premise lends some weight to an argument against application of an appellate court presumption of constitutionality in favor of state action. On this view there is a low probability of lower court bias.

101. *See In re* Winship, 397 U.S. 358, 361-64 (1970) (describing both common law practice and the constitutional rules requiring proof of innocence beyond a reasonable doubt).

102. For examples of the federal judicial policy of construing criminal statutes in favor of leniency, see Busic v. United States, 446 U.S. 398, 406 (1980); Rewis v. United States, 401 U.S. 808, 812 (1971); Bell v. United States, 349 U.S. 81, 83 (1955). For examples of strict construction against the government in state criminal proceedings, see People v. Lutz, 73 Ill. 2d 204, 212-13, 383 N.E.2d 171, 174 (1978); Keeler v. Superior Court, 2 Cal. 3d 619, 631, 470 P.2d 617, 624, 87 Cal. Rptr. 481, 488 (1970).

clear fact so warrants.[103] That concern placed in the context of an equal division argues forcefully that a conviction should not be sustained unless affirmed by a majority of the highest court to hear the case.[104]

c. Conflicts of Presumptions. We earlier recognized and endorsed some limited presumptions of invalidity of lower court decisions and a concomitant rule of reversal. In some cases those presumptions may clash with one another. Suppose a lower court has upheld state action that conflicts with a federal statute, the holding below being that the federal statute is unconstitutional. If the Supreme Court should divide evenly in such a case the Court should follow the usual affirmance rule, but for equal divisions involving federal statutes generally, the Court should employ a presumption of validity, and reverse the decision invalidating an act of Congress. Any inconsistency between these two situations is more apparent than real. The analysis of the state action problem suggests that when federal law of any sort, constitutional or statutory, places a doubtful limit on state action, there is no constitutional textual indication of, and no clear consensus upon which to build, an appropriate presumption. Hence, for cases involving state legislation challenged on grounds of inconsistency with a federal statute, challenged in turn on grounds of encroaching on state power, the absence of a presumption justifies the affirmance rule.

More difficult are cases in which the presumption in favor of criminal defendants clashes with the presumption favoring the constitutionality of federal legislation. What should be done when the Court divides on the constitutionality of a federal statute challenged on constitutional grounds by a criminal defendant? One of the authors believes that the presumption in favor of the majoritarian process is so central as to outweigh the more amorphous policies favoring criminal defendants. The latter are drawn from constitutional provisions and canons of interpretation not directly applicable to the problem of equal division. When the case is on a knife's edge, should the general concern of the law for individuals outweigh the will of a majoritarian process that presumably considered the interests of such individuals in ap-

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103. It is the policy of this state to construe a penal statute as favorably to the defendant as its language and the circumstances of its application may reasonably permit; just as in the case of a question of fact, the defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of language used in a statute . . . .

Keeler v. Superior Court, 2 Cal. 3d 619, 631, 470 P.2d 624, 87 Cal. Rptr. 481, 488 (1970) (citations omitted).

> The rule that penal laws are to be construed strictly, is perhaps not much less old than [statutory] construction itself. It is founded *on the tenderness of the law for the rights of individuals;* and on the plain principle, that the power of punishment is vested in the legislative, not the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment.

United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1870) (emphasis added). Note it is not simply a desire to keep the Court within its sphere that Marshall saw as the object of strict construction. Were that the only reason, no distinction would be drawn between canons of construction in criminal and civil cases. It is only the "tenderness" of the law for the rights of individuals that justifies a particularly one-sided strict construction doctrine in criminal cases.

104. *See* Note, *supra* note 5, at 586-88.

proving legislation? It is important to remember that in such a case no majority of the Court has found a violation of a provision of the Bill of Rights. The other author believes, however, that the perception of unfairness in that situation, and the general strength of the policy favoring criminal defendants, should lead to a reversal of the conviction.[105]

3. Need for Issue-by-Issue Analysis

The analysis, in the cases described above, of how the Supreme Court should evaluate competing principles and policies is designed to illustrate the method of searching for institutional and jurisprudential concepts embedded in our law that will help it resolve equal divisions on a principled basis. Far more important than the analysis of particular categories of cases is the general conclusion that the Court should be aware of the possibility of identifying policies that by broad consensus of the Justices could be used to dispose of equal divisions in principled ways.[106]

This Article has not attempted to delineate all the possible presumptions, but suggests that the Court consider carefully their use in cases of even division. That raises the question of the procedure the Court should use in employing the presumption. In some cases, at least, it could be done by court rule.[107] Rules would be most useful in situations in which the desirability and effect of the presumption is clear, as it is in the cases of criminal conviction on a federal statute held unconstitutional below. Rulemaking, of course, increases predictability and consistency; and it has the further advantage of eliminating the possibility of an even split on whether to adopt the presumption. In other situations the presumption may be less clear and rulemaking, therefore, less appropriate, as in most cases reviewing administrative action. Consider a case before the Supreme Court on its original jurisdiction docket. In that situation there is no decision of a lower court. What should be the result if the Justices split evenly on the issue whether the Court has subject matter jurisdiction? One presumption that might be used construes federal court jurisdiction narrowly; thus, the case might be dismissed. More generally, however, one of the Court's roles is that of umpire of the federal system. That consideration argues forcefully for assumption of jurisdiction in a case such as the hypothetical.

Whatever the outcome, the interplay of presumptions in some situations could be quite complex, not readily accessible to an a priori rule-imposed solution. In those cases the Justices may agree that no special principles bear on how the tie should be broken; in that event, economy and the general principles discussed above recommend an affirmance. If the Justices believe strong

105. The authors, being divided evenly here, cannot make a recommendation on this issue.

106. The policy analysis for equal divisions can be employed by other appellate courts as well, if they should evenly divide. Other alternatives are perhaps more readily accessible to those courts; a federal circuit court, for example, could adopt procedures which ensure that an even number of judges never hear an *en banc* proceeding.

107. An example is the rule which was amended in response to the first *Isserman* decision. *See supra* text accompanying note 82.

policies are implicated, the Court should determine, in good common law fashion, how the competing presumptions play out against the backdrop of an actual case.

The only valid reason to affirm routinely on equal division is the economy of doing so. The use of presumptions generally would only be slightly less efficient. Once identified, the presumption of constitutionality, for example, can be applied effortlessly; the only burden on the Court would be that involved in establishing the presumption in the first instance. That would be a very small price to pay for the large benefit of according proper respect to the actions of another branch of government. The cost of weighing presumptions in a case such as the original jurisdiction hypothetical is greater.[108] Again, however, the resulting benefit, accommodating competing concerns fundamental to our government of laws, makes the game seem well worth the candle.[109]

4. Stare Decisis in Presumption Cases

The precedential effect of an equal division in the Court must turn on the impact of the decision on both the Court itself and on lower courts. An inferior tribunal should feel itself bound at least by the decision of the Supreme Court; consistency requires that it be treated as a high Court decision. Thus, if the Court splits evenly on the question of the constitutionality of a federal statute, no lower court should invalidate the law in the face of a similar challenge.[110]

The decision based on an equal division, however, should not be viewed as binding the Justices who did not participate. To take a position contrary to that established by an equal division should not be viewed as a vote to overrule a case. It is important to bear in mind that we are attempting, after all, only to determine the best way to deal temporarily with the absence of a definitive decision.

C. The No Opinion Practice

There is one simple device that the Court could use to ameliorate much of the impact of all equal divisions: In all cases, even ones in which an equal

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108. It might matter, for example, if a lower federal court is avilable to hear the case. If it is not, then no effective forum exists for resolving the dispute. The argument for exercising jurisdiction, therefore, would be stronger.

109. A problem may also be so rare as not to warrant a full rule to deal with it. An example is the rule dealing with disbarment in the Supreme Court, deleted in the 1980 revision because of the infrequency of the problem it addressed. *See supra* note 82.

Our proposal could be extended to require affirmance unless a majority of the Court could agree on a single opinion that would explain the result. We do not argue for such an extension, however, primarily because of the extreme difficulty in implementing it on a Court that has become accustomed to the practice of each Justice writing separately.

110. It is also possible that a lower court could extract more from the decisions in later cases. The process would resemble that used to decipher the precedential effect of a summary affirmance or dismissal for want of a substantial federal question. The process may resemble reading the entrails of sheep for clues to the secrets of the quark. *See generally,* W. REYNOLDS, *supra* note 5, at 104-06.

division is unavoidable, the Justices should write opinions explaining why they voted as they did. In this way some guidance could be given concerning the way in which the members of the Court view the problem.[111] Thus, each faction could write an opinion that might prove instructive to lower courts and invite critical commentary from judges and scholars.[112] There is no theoretical objection to that practice;[113] indeed it closely resembles the practice of issuing opinions in cases decided by a plurality.[114] In both situations the only reason to do so is to inform;[115] at least in the areas of plurality opinions that function has been served (too well, some might say). Nor would it be novel to have an exposition of position by members of the equal division; the practice has a long history. In *Holmes v. Jennison,* for example, Chief Justice Taney explained that the opinion below would be affirmed by an equal division; but "[i]t is, however, deemed advisable in order to prevent mistake or misconstruction, to state the opinions we have respectively formed."[116] A good thing the Court did so, for *Holmes* is the only explication of the effect of an extradition treaty between a state and a foreign nation.[117]

Holmes is by no means unique in its exposition. In recent years, occasionally a Justice has made a statement concerning his view of the case.[118] Somewhat more common is what might be styled partial expressions; in these cases a majority of the Court agrees on the disposition of part of the case and renders an opinion on that issue, leaving the rest of the case to be disposed of by the laconic notation, "affirmed by an equally divided court."[119] When the Court follows this procedure, it at least makes clear some of the law implicated in the case, a clear benefit. Further, explication of the grounds for an individual decision serves as the best possible check on the integrity of the Justices' decisionmaking.[120] Because failure to do so creates unnecessary speculation and confusion, it can at least be argued that the Court fails of its duty when the Justices do not set forth their thinking.[121]

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111. If the Court were to split evenly on the applicable rule of law, but, due to the circumstances of the case, all Justices agreed on the outcome, opinions would be written under current practice. A recent example is Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 102 S. Ct. 3260 (1982).

112. This is what happened, of course, in the most famous equal division of all, reported in Fuller, *The Case of the Speluncean Explorers,* 62 HARV. L. REV. 616 (1949).

113. Although the expression is dictum, so is the statement by different factions in many plurality opinions.

114. *See generally,* Davis & Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court,* 1974 DUKE L. J. 58.

115. Even if there is no holding, lower courts and the bar can learn the thinking of the Justices on the problem. There are also times when a "holding" can be inferred from common ground to a majority of the Court. *See id.* at 83-85.

116. 39 U.S. (14 Pet.) 540, 561 (1840).

117. L. HENKIN, FOREIGN RELATIONS AND THE CONSTITUTION 231 (1972).

118. *See, e.g.,* Biggers v. Tennessee, 390 U.S. 404, 404 (1968) (Douglas, J., dissenting).

119. *See, e.g.,* Raley v. Ohio, 360 U.S. 423, 442 (1959).

120. *See* Reynolds & Richman, *Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals,* 78 COLUM. L. REV. 1167, 1203-04 (1978).

121. See Justice Rehnquist's eloquent explanation of why he did not recuse himself in Laird v. Tatum, 409 U.S. 824 (1973).

VI. CONCLUSION

The Supreme Court has been content for over a hundred years to deal with the occasional problem presented by a tie vote among the Justices by the simple expedient of affirming without opinion, an act carrying no precedential weight. That practice has the virtue only of simplicity, failing to address either the Justices' obligations to the litigants or to other branches of government. This Article, by examining the equal division problem and proposing alternatives to the present system, aims to stimulate thought concerning the larger issue of mechanical application of judicial procedures.