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The Mechanics of Judicial Vote Switching

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Abstract: In a handful of cases, including one from last Term, the United States Supreme Court was divided between upholding, remanding, and overturning a lower court decision, with no majority in favor of any of these three dispositions. In each of these cases, at least one Justice switched his or her vote to achieve a majority. With the Supreme Court taking ever fewer cases and producing increasingly complicated split decisions, we may expect this pattern to recur more often. This Article, drawing upon game theory and public choice scholarship, addresses how and why this practice of strategic vote-switching emerged, and contrasts the practice with alternative solutions.

Introduction

In 2003, *Green Tree Fin. Corp. v. Bazzle*[1] splintered the United States Supreme Court. Justice Breyer, joined by Justices Scalia, Souter, and Ginsburg, voted to remand the case.[2] Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy, voted to reverse the South Carolina Supreme Court decision.[3] Meanwhile, Justice Thomas voted to uphold the decision below.[4]

The remaining decision-maker, Justice Stevens, found himself in a situation unusual for Supreme Court Justices.[5] Excluding his vote, there were four votes to remand, three votes to reverse, and one vote to uphold. Justice Stevens stated that he preferred to "simply affirm the judgment of the Supreme Court of South Carolina. Were I to adhere to my preferred disposition of the cases, however, there would be no controlling judgment of the Court."[6] That is, if Justice Stevens voted to affirm, the Court would be deadlocked 3-4-2 in favor of overturning, remanding, and upholding, respectively.

What should a Supreme Court Justice do in this situation?

Justice Stevens cited the first instance in modern history of a similar potential for deadlock.[7] In *Screws v. United States*,[8] a 1945 case, four Justices voted to remand the case, three Justices voted to reverse, and one Justice voted to affirm. This left Justice Rutledge who preferred to affirm the lower court's decision. Fearing a 3-4-2 deadlock, Justice Rutledge switched his vote to remand "in order that disposition may be made of this

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[1] 539 U.S. ___, 123 S. Ct. 2402, 2003 U.S. LEXIS 4798 (June 23, 2003). For a preliminary analysis of the issues raised in the case, see H. Ron Davidson *et al.*, "*Green Tree Fin. Corp. v. Bazzle*: The Uncertain Fate of Class Arbitration," 3-10 MEALEY'S LITIG. REP. CLASS ACTIONS 29 (2003) (with Bob P. Davis & Eldad Z. Malamuth); *The Supreme Court, 2002 Term: Leading Cases: III Federal Statutes and Regulations: C. Federal Arbitration Act*, 117 Harv. L. Rev. 410 (2003).

[2] 123 S.Ct. at 2404.

[3] *Id.* at 2408.

[4] *Id.* at 2411.

[5] Similar U.S. Supreme Court multidimensional triple choice cases are of two types. The first group of cases involves Justices switching from affirming to remanding. *See, e.g.* (1) *Screws v. United States*, 325 U.S. 91, 113 (1945) (Rutledge); (2) *Turner Broadcasting Sys., Inc. v. FCC,* 512 U.S. 622 (1994) (Stevens); (3) *Ben Chavez v. Martinez*, 123 S. Ct. 1994, 2003 U.S. LEXIS 4274 (May 27, 2003) (Kennedy, Stevens, and Ginsburg); (4) *Olmstead v. Georgia Dept of Human Resources*, 527 U.S. 581 (1999) (Stevens); (5) *Bragdon v. Abbott*, 524 U.S. 624 (1998) (Stevens).

The second group involves Justices switching from overturning to remanding. *See, e.g.* (1) *Von Moltke v. Gillies*, 322 U.S. 708, 709 (1948) (Black, Douglas, Murphy and Rutledge); (2) *Klapprott v. United States*, 335 U.S. 601, 616 (1949) (Rutledge) (judgment modified by *Klapprott v. United States,* 336 U.S. 942 (1949) with a different majority); (3) *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 410 (1954) (Frankfuter, Reed, Jackson, and Burton). *See also Action House, Inc. v. Koolik*, 54 F.3d 1009, 1014 (2d Cir. 1995) (Chief Judge Newman) (citing other cases).

A third group, which appears in lower courts, involves switches from remanding to overturning. *See, e.g.* (1) *Riley v. Taylor*, 277 F.3d 261 (2001) (3rd Cir. 2001) (Becker changing from remanding for further determinations on the appropriateness of a habeas proceedings to overturning a lower court decision and granting a writ of habeas corpus); (2) *People v. Harris,* 36 Cal. 3d 36 (1984) (Grodin). Professors Abramowicz and Stearns would add the case of *Bush v. Gore*, 531 U.S. 98 (2000), as a multidimensional triple choice case. Michael Abramowicz and Maxwell L. Stearns, *Beyond Counting Votes: The Political Economy of* Bush v. Gore, 54 Vand. L. Rev. 1849, (2001) (using the term "multidimensional"). Unidimensional cases are discussed in Part I.A.

[6] 123 S.Ct. 2402.

[7] *Id.*

[8] 325 U.S. 91, 113 (1945).

case."[9] Following this precedence, Justice Stevens agreed to remand the case in *Green Tree Fin. Corp. v. Bazzle* despite his stated preference to uphold.[10] Every time there has been no majority on the disposition of a case, at least one Justice switched his or her vote to achieve one.

But why?

The reason for the rule in *Screws* remains a mystery. No United States Supreme Court Justice who switched his or her vote has ever offered justifications for the rule in *Screws* requiring a majority. Lower courts also fail to offer any rationales for the rule,[11] even though many are baffled by the practice.[12] Only California Supreme Court Justice Grodin has offered a (tautological and succinct) justification, asserting that it would "obviously [be] intolerable" for a Justice not to switch his or her vote to achieve a majority. [13] Finally, commentators, who touch on the rule tangentially,[14] do not fare better that Justice Grodin in elaborating on the rule. They call it "necessary"[15] and "appropriate"[16] to avoid "judgment impasse."[17]

For the litigants in *Green Tree* and *Screws* and other cases, these justifications from the bench and commentators are unconvincing. First, the *Screws* rule requiring a majority seems to contradict a long-established principle that no vote switching is necessary when the Court is tied 4-4.[18] Furthermore, no majority is needed as to the reasoning of the Court, so – one could argue – no majority is required for a case's disposition either.[19] Third, no majority of any Court has ever accepted the rule in *Screws* (and those Justices who do adopt the rule cite no cases, tradition or norms to support it).[20] For these reasons, the rule should not govern the wide-range of cases that it does.

This Article explains the nuts and bolts of *Screws* requiring a majority disposition. The first description for the mechanics of judicial vote switching focuses on the phenomenon of negotiating or contracting around the default rule. Specifically, without a vote switch, cases like *Green Tree* and *Screws* would be treated as an

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[9] *Id.*

[10] 123 S. Ct. 2411.

[11] There are additional options available to a court, including denying the writ of certiorari as improperly granted. Although this Article does not deal with this option as extensively as it does with the three most prevalent options, the ability to deny the writ affects behavior. *See* Part III. C.

[12] *Colleman v. Jahncke Serv., Inc.*, 341 F.2d 956 (5th Cir. 1965) (confusion over how to interpret *Maryland Casualty Co. v. Cushing*, 347 U.S. 409 (1954), and stating "it is impossible to say what the *Cushing* case stands for"); *Pedcor Mgmt. C. Welfare Benefit Plan. V. Nations Pers. Of Tex, Inc.*, 343 F.3d 355 (5th Cir. 2003) (confusing generated by *Green Tree*).

[13] *People v. Harris*, 36 Cal. 3d 36, 71 (1984) (switching from remand to overturn).

[14] *See, e.g.*, Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 Mich. L. Rev. 2297 (1999) (calling the practice "play[ing] chicken" but avoiding discussing it); Maxwell L. Stearns, *Should Justices Ever Switch Votes?* Miller v. Albright *in Social Choice Perspective*, 7 S. Ct. Econ. Rev. 87, 109 (1999) (simply mentioning the practice). *But see*, Saul Levmore, *Ruling Majorities and Reasoning Pluralities*, 3 Theoretical Inq. L. 87 (2002) (directly asking this question). Dean Levmore's argument will be discussed in Part III, C.

[15] John M. Rogers, "'I Vote This Way Because I'm Wrong': The Supreme Court Justice as Epimenides," 79 Ky. L.J. 439, 458 (1991).

[16] Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 Wm. & Mary L. Rev. 643, 672 (2002)

[17] *Id.*

[18] *See* Part II. A.

[19] *See* Part III. C.

[20] *See* Part III. B.

affirmation by a divided court.[21] For example, in the *Green Tree* context, the decision of the South Carolina Supreme Court would be upheld since there was no majority originally to displace the state court decision.

Given this default rule, Justices of the U.S. Supreme Court have an incentive to find more a preferable disposition of the case. In *Green Tree*, a majority of the Justices might have preferred remanding the case to upholding it. As such, the Justices had an incentive to engage in vote switching to achieve the more favorable disposition. As discussed in more detail in Part II, this approach explains the direction of the vote-switches in all of the cases as a form of concealed negotiations around the default rule of affirmation.

Some, however, do not agree that upholding is the default rule in cases like *Green Tree*. Judge Rogers has argued that remanding is the default rule in practice, for reasons that will be criticized in Part II. B.[22] Professors Kornhauser and Sage have argued that issue-by-issue voting should be the default rule,[23] and the flaws with their approach are discussed in Part II. C. Because there is also some language in the opinions to support these alternative default rules and there is no conclusive proof that the affirm default rule is correct,[24] I offer a second and more complex reason for the *Screws* rule: negotiations *over* the default, and not *around* it.

As discussed in Part III, one could also explain the phenomenon observed in *Green Tree* as a procedural submajority rule that affects which default rule governs deadlocked cases. In *Green Tree*, Justice Stevens alone was able to prevent a debate over whether upholding (as I suggest), remanding (as Judge Rogers suggests), or issue-by-issue voting (as Professors Kornhasuer and Sage suggest) is the default rule in cases like *Screws* and *Green Tree* by switching his vote on the merits. Whenever cases like *Screws* arise, a submajority group of Justices close debate over the default rule by switching their votes. To phrase the second and more complex description of the mechanics of judicial vote switching, if the Court lacks unanimity over the default rule, any submajority can thwart deliberation and consensus over it by resorting to vote switching.

Before turning to the complexities involved with the *Screws* rule, it is worth pausing to note that this Article is entirely descriptive. The Economics literature shows

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[21] See Part II. A.

[22] John M. Rogers, "'I Vote This Way Because I'm Wrong": The Supreme Court Justice as Epimenides," 79 Ky. L.J. 439, 458 (1991) ("In these situations, it makes sense for the 'middle' position [namely remand] to obtain.").

[23] *See* Lewis A. Kornhauser and Lawrence G. Sage, *The One and the Many: Adjudication in Collegial Courts*, 81 Calif. L. Rev. 1 (1993). *See also*, David Post and Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels,* 80 Georgetown L. J. 743, 744 (1992).

[24] Specifically, I mean a three-way deadlock that was affirmed (without any vote switch) by a deadlocked Court. Such a decision would clearly demonstrate that affirmation is the default rule and was explicitly recognized. The most suggestive case is *United States v. Jordan et al.*, 342 U.S 911 (1952) in which "The judgment [was] affirmed by an equally divided Court." The exact make-up of this equal division remains unclear for we only learn in the two-sentence opinion that Justice Frankfuter voted to dismiss the writ as improperly granted. *Id.* How the other Justices (and how many of them) voted remains unclear.
There are reasons why the Justices would want to have the default rule hidden, for example, to be used to create the artificial deadlocks discussed in Part I. C. Consequently, the lack of a clear explanation of the contours of the default rule in cases like *United States v. Jordan* is not surprising.

that strategic behavior is inevitable,[25] and any default rule will induce some Justices to switch his or her vote in some situations. No default rule will be "strategyproof."[26] Furthermore, the problem of cycling is inescapable as demonstrated by the famous work of Kenneth Arrow.[27] The goal here is not to suggest that one default rule or one strategy to avoid cycling is better than another, but rather to offer explanations for a phenomenon that has generated much confusion and little consensus.

I. Background of the *Screws* Problem

To understand the nuts and bolts of the *Screws* rule, one must first understand the two situations in which the rule is applied. Cases in the first group are so-called "unidimensional triple choice cases"[28] because the Justices are confronted with one issue in which there are three different choices for the outcome. Cases in the second group, so-called "multidimensional triple choice cases,"[29] are more complex. Justices must decide more than one issue, and the way in which each Justice solves the multiple issues will determine how he or she votes on the outcome of the case. The difference between uni- and multidimensional cases is best understood by looking at examples.

A. Unidimensional Triple Choice Cases

The case of *Gertz v. Robert Welch, Inc.*[30] is reflective of the several unidimensional triple choice cases discussing the Freedom of the Press.[31] Elmer Gertz, a member of the National Lawyers Guild for 15 years, represented the family of a youth killed by a Chicago policeman in 1968. The American Opinion printed articles about the civil rights case in which the paper called Mr. Gertz a "Leninist" and an official of the "Marxist League of Industrial Democracy." Mr. Gertz sued, and the jury awarded him $50,000. Under Illinois law, the jury was allowed to measure damages but not to assess the recklessness of the newspaper.[32]

Following the verdict, the federal trial judge entered a judgment not withstanding the verdict in favor of Robert Welsch, Inc., owner of the American Opinion. The trial judge held that that the leading Freedom of the Press case, *New York Times v. Sullivan*, applied and that the First Amendment protected the press from libel suits by private individuals. The Court of Appeals for the Seventh Circuit affirmed the trial court's decision.[33]

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[25] Allan Gibbard, *Manipulation of Voting Schemes: A General Result*, 41 Econometrica 587 (1973) (proving no solution), Matthew Satterthwaite, *Strategy-Proofness and Arrow's Conditions: Existence and Correspondence Theorems for Voting Procedures and Social Welfare Functions*, 10 J. Econ. Theory 187 (1975), (same); Allan Gibbard, *Manipulation of Schemes that Mix Voting with Chance*, 45 Econometrica 665 (1977) (discussing whether randomly picking a winner prevents switching), Douglas H. Blair, *On the Ubiquity of Strategic Voting Opportunities*, 22 Int'l Econ. Rev. 649 (1981) (listing possible exceptions in very limited cases which do not apply here). Strategic behavior could be limiting if each Justice were given a lottery ticket and the winner of the lottery would determine the case. See text in conclusion. In addition, the lottery system would not necessarily be a Condorcet winner between various procedures.

[26] *See n 25*.

[27] Kenneth J. Arrow, *Social Choice and Individual Values* (2d Ed. 1963).

[28] *See, e.g.* Michael Abramowicz and Maxwell L. Stears, *Beyond Counting Votes: The Political Economy of* Bush v. Gore, 54 Vand. L. Rev. 1849 (2001).

[29] *Id*.

[30] 418 U.S. 323 (1974).

[31] U.S. Const. Amend. I.

[32] *Id*.

[33] *Id*. (citing 376 U.S. 254 (1964)).

Reasons to Uphold the Lower Court Decision

The United States Supreme Court Justices were divided on the whether the principles of *New York Times* applied to suits filed by private individuals. On one end of the spectrum, one finds those who believed in extending protections. Justice Douglas, who voted for absolute immunity in *New York Times*,[34] voted to uphold the dismissal of the complaint in *Gertz*. In his opinion, the American Opinion was entitled to absolute immunity in reporting issues of public concern, whether they involved public or private individuals.[35]

Justice Brennan agreed that the case should be dismissed but disagreed on the applicable legal standard. He would apply a "knowledge of its falsity or [] reckless disregard of the truth" standard instead of Justice Douglas' absolute immunity standard. Because there was no evidence of such knowledge or recklessness, Justice Brennan also voted to dismiss the case against the paper. [36]

Reasons to Reverse the Lower Court

Justice White voted to reinstate the jury verdict. He believed that "those who wrote the First Amendment [did not] intend[] to prohibit the [] Government . . . from providing the private citizen a peaceful remedy from damaging falsehood." *New York Times v. Sullivan* carved out an exception for libel against public individuals because "[i]n a democratic society . . . the citizen has the privilege of criticizing his government and its officials." Beyond this exception, "the First Amendment did not confer a 'license to defame the [private] citizen.'"[37]

Chief Justice Burger, also dissenting, voted to reverse the dismissal and reinstate the jury verdict, but for reasons different from those offered by Justice White. A standard of negligence, the Chief Justice argued, would force newspaper editors to reconsider what they published. Nevertheless, Chief Justice Burger believed that private lawyers in Mr. Gertz's position should be allowed to sue for libel. "The right to counsel would be gravely jeopardized if every lawyer who takes an 'unpopular' case, civil or criminal, would automatically become fair game for irresponsible reporters and editors."[38]

Reasons to Remand with a Recklessness Standard

So far, there were two groups of Justices: Justices Douglas and Brennan who wanted to uphold; and Chief Justice Burger and Justice White who wanted to reverse. A third group, composed of Justices Powell, Stewart, Marshall, and Rehnquist, ordered a new trial. First, these Justices held that *New York Times* did not explicitly govern cases of libel against *private* individuals. Nevertheless, they held that no jury could impose liability without first finding fault on the part of the publisher. Because the trial court instructed the jury it did not need to find fault pursuant to Illinois law, these four Justices ordered a new trial in which the jury would be properly instructed.[39]

Before turning to Justice Blackmun's crucial vote, it would be useful to place the positions of the Justices along a spectrum. On one end, we have Justice Douglas with an absolute immunity standard, and Justice Brennan with a recklessness standard. Chief

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[34] 376 U.S. 254 (1964).
[35] 418 U.S. 323
[36] *Id.*
[37] *Id*.
[38] *Id*.
[39] *Id*.

Justice Burger and Justice White are on the other end of the spectrum, deferring to state law over what standard to impose in the case. Finally, Justice Powell found himself in the center, requiring proof of fault.

Absolute Immunity	Recklessness	Proof of Fault	State Law
<----------			---------->
Douglas	Brennan	Powell +3	Burger + White
Uphold	Uphold	Remand	Reverse

The final decision-maker, Justice Blackmun, agreed with Justice Brennan that *New York Times* applied and that a private litigant must prove either knowledge of falsehood or reckless disregard for the truth. However, he noted how fractured the Court appeared and was concerned by the uncertainty that division could create. "If my vote were not needed to create a majority, I would adhere to my prior view [and uphold]. ... I feel that it is of profound importance for the Court to come to rest in the defamation area and to have a clearly defined majority position that eliminates the unsureness defined by [] diversity." Because "[a] definitive ruling [] is paramount," he concurred in remanding the case for a new trial despite his preference for upholding the dismissal of the verdict.[40]

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[40] *Id*. *Gertz v. Robert Welch, Inc.* is reflective of a series of cases in which the Justices were divided along a spectrum on the extension of *New York Times v. Sullivan* to private individuals. Consider *Time, Inc. v. Hill.* 385 U.S. 374 (1967). On one end of the spectrum, one finds Justices Black and Douglas who argued the First Amendment creates an absolute immunity for the press. Consequently, they voted to reverse a verdict against a publisher. *Id*. On the other end of the spectrum, one finds Justice Fortas, joined by Chief Justice Warren and Justice Clark. These Justices believed that a jury instruction requiring proof of "reckless or wanton disregard of the plaintiff's rights" was sufficient and voted to uphold the New York court's award of damages. *Id.*

Justice Brennan, joined by Justices Clark, Stewart, and White, believed that the New York jury instructions were insufficient and that the case should be remanded. They said, the "trial judge [must] instruct the jury that a verdict of liability could be predicated only a finding of knowing or reckless falsity in the publication of the [ ] article." *Id*. Justice Harlan, while agreeing that the case should be remanded, dissented because he believed that the appropriate standard was negligence. *Id*.

Conceptually, the Justices fall along the following spectrum:

Plaintiff's rights	Negligence to Truth	Reckless to Truth	Absolute Immunity
<----------			---------->
Fortas +2	Harlan	Brennan +3	Black +1
Uphold	Remand	Remand	Reverse

Since there was no majority on the disposition of the case, Justices Black and Douglas shifted their position from reversing to remanding using the recklessness standard.

The Justices in *Rosenbloom v. Metromedia, Inc.* took positions along a similar spectrum. 403 U.S. 29 (1971). Justice Marshall, joined by Justice Stewart, held that the standard was low: anything above strict liability would be sufficient. *Id*. Justice Harlan argued that proof of negligence was required. These Justices voted to overturn the Third Circuit Court of Appeal's decision to dismiss the verdict. *Id*.

On the other end of the spectrum, Justice Black, concurring, re-iterated his belief in an absolute immunity. *Id*. Justice White, concurring, required proof of actual malice. *Id.* Finally, Justice Brennan, joined by Chief Justice Burger and Justice Blackmun, required a "reasonable care" standard but noted that there was "no evidence in the record to support a conclusion that respondent 'in fact entertained serious doubts as to the truth' of its reports." *Id.* Justice Douglas did not participate.

Conceptually, we have the following spectrum:

Strict Liability	Negligence	Reasonable Care	Malice	Absolute Immunity
<----------				---------->
Marshall +1	Harlan	Douglas +2	White	Black
Reverse	Reverse	Uphold	Uphold	Uphold

B. Multidimensional Triple Choice Cases

Screws v. United States and *Green Tree Fin. Corp. v. Bazzle* differ from cases like *Gertz v. Robert Welch, Inc*. in that more than one issue was presented to the Justices. Consider these two multidimensional triple choice cases in chronological order.

Mr. Screws, a white police officer in Georgia, handcuffed, beat, and dragged Robert Hall, an African American, during the course of an arrest. Hall later died, and the United States prosecuted Screws and his accomplices for acting "under color of any law" to deprive Mr. Hall's "rights, privileges, or immunities secured or protected by the Constitution and laws of the United States." The jury convicted Screws without being instructed of any intent requirement under the statute; Screws appealed the case to the United States Supreme Court.[41]

Four questions were before the Court:

(1) Did the statute apply?
(2) If it did, was the statute unconstitutional?
(3) If it was unconstitutional, could the Court limit the statute to make it constitutional?
(4) Finally, if the Court could limit the statute, was a new trial necessary?

Reasons to Overturn the Conviction

Justices Roberts, Frankfuter, and Jackson, dissenting, first addressed the question of whether the statute applied to police officers like Screws. To be liable, the acts of the officers needed to be committed "under color of any law." Since Screws had acted outside his capacity as an agent of the state, these Justices believed that his acts were beyond the statute, and the charges should be dropped.[42]

Next, Justice Roberts argued that the charges should be dropped because the act was unconstitutionally vague. The statute's domain, he wrote for the two other Justices, "is unbounded and therefore too indefinite. Criminal statutes must have more or less specific contours. This has none."[43]

Third, Justices Roberts, Frankfuter, and Jackson felt "it was settled early in our history that prosecutions in the federal courts could not be founded on any undefined body of so-called common law." Consequently, these three Justices refused to limit the statute to make it constitutional. Despite the gravity of Mr. Screws' offense, he should be freed.[44]

There was no vote switching in this case since there was a majority in favoring of upholding the judgment below. The outcome, however, would be different had (1) there been evidence of a lack of reasonable care and (2) the trial court instruct the jury under a negligence standard. Under this hypothetical fact pattern, Justices Harlan and Marshall would uphold a verdict. Justice Douglas, however, would remand the case to have a jury determine whether reasonable care was exercised. Finally, Justices White and Black would vote to reverse the verdict, finding the negligence standard insufficient.

Thus, while no vote switch occurred in *Rosenbloom v. Metromedia*, the positions of the Justices create the potential for deadlock in future cases. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), has a similar potential. *United States v. Vuitch*, 402 U.S. 62 (1971), is cited in these cases, but is best understood as a multidimensional triple choice case. *See* Part I. B.

[41] 325 U.S. 91, 113 (1945).

[42] *Id*.

[43] *Id*.

[44] *Id*.

Reasons to Remand the Case for a New Trial

Justice Douglas, joined by the Chief Justice, and Justices Black and Reed, disagreed. First, they believed Screws had acted under the color of state law when he murdered Mr. Hall. Next, they found that the statute, as applied, was unconstitutional. However, if the statute were "confined more narrowly than the lower courts confined it, it can be preserved as one of the sanctions to the great rights which the Fourteenth Amendment was designed to secure." They discussed how an intent requirement would cure the constitutional deficiency.[45]

After limiting the scope of the statute, these Justices voted to remand the case. "To convict it was necessary for [the jury] to find that petitioners had the purpose to deprive the prisoner of a constitutional right." A new trial would make a determination of the willfulness of Mr. Screws' actions.[46]

Reasons to Uphold the Conviction

Justice Murphy believed a new trial was not necessary and that the charges should be upheld. While it is true that a statute must "give[] fair warning" to the accused, he believed there was no dispute that Screws intended to murder Mr. Hall. "A new trial could hardly make [the] fact [that Screws acted willfully] more evident; the failure to charge the jury on willfulness was at most an inconsequential error." Consequently, the conviction should stand.[47]

This left one final decision-maker, Justice Rutledge. Excluding his vote, three Justices voted to reverse the charges, four voted to remand the case for a new trial, and one Justice voted to uphold the charges. Justice Rutledge agreed with the reasoning of Justice Murphy and wanted to uphold the charges. He wrote, "When, as here, a state official abuses his place consciously or grossly in abnegation of its rightful obligation, and thereby tramples underfoot the established constitutional rights of men or citizens, his conviction should stand when he has had a fair trial and full defense. ... Accordingly, I would affirm the judgment."[48]

What follows is the paragraph that supports a rule in favor of mandating a majority disposition:

> My convictions are as I have stated them. Were it possible for me to adhere to them in my vote, and for the Court at the same time to dispose of the cause, I would act accordingly. The Court, however, is divided in opinion. If each member accords his vote to his belief, the case cannot have disposition. Stalemate should not prevail for any reason, however compelling, in a criminal cause or, if avoidable, in any other. My views concerning appropriate disposition are more nearly in accord with those stated by Mr. Justice Douglas, in which three other members of the Court concur, than they are with the views of my dissenting brethren who favor outright reversal. Accordingly, in order that disposition may be made of this case, my vote has been cast to reverse the decision of the Court of Appeals and remand the cause to the District Court for further proceedings in

[45] *Id*.
[46] *Id*.
[47] *Id*.
[48] *Id*.

> accordance with the disposition required by the opinion of Mr. Justice Douglas.[49]

This was the entire argument in favor of vote switching.

To summarize the positions of the Justices, consider the following table:

	Roberts + 2	Douglas +3	Murphy/Rutledge
Color of Law:	No	Yes	Yes
Unconstitutional:	Yes	Yes	Yes
Fixable:	No	Yes	Yes
Harmless error:		No	Yes
	Dismiss	**Remand**	**Uphold**

Note that Justice Roberts' opinion does not touch on the harmlessness of the error.

The case of *Green Tree Fin. Corp. v. Bazzle* follows a similar pattern, but with a twist that is central to the analysis below: *Green Tree* is really two cases combined into one. Both Mr. and Mrs. Bazzles and Mr. Lackey entered into contracts with Green Tree Financial Corporation. These contracts, which were nearly identical, stipulated that disputes between "us" (i.e. Green Tree) and "you" (i.e. the Bazzles and Mr. Lackey) would be settled by arbitration. The contract language did not, however, discuss whether the Bazzles or Mr. Lackey could proceed on a *class-wide* basis in arbitration.[50]

After disputes arose under the Green Tree contracts, the lawyers for the Bazzles and Mr. Lackey sought a procedure known as class action arbitration. In the *Bazzle* proceedings, a *court* agreed to certify a class of similarly situated plaintiffs and then sent that class to arbitration. In the *Lackey* proceedings, however, the *arbitrator* (and not the court) certified the class and then proceeded with arbitration on a class-wide basis.[51] This distinction is important for reasons that will become clear in Part II. B.

Lawyers for Green Tree Financial Corp. argued that both the state trial court and the arbitrator violated the Federal Arbitration Act, which requires arbitration agreements to be interpreted "according to their terms." The terms of the contracts in *Bazzle* and *Lackey* provided for arbitration between "us" and "you". The lawyers for Green Tree argued that these terms unambiguously prevented class action arbitration and that plaintiffs like the Bazzles and Mr. Lackey would have to proceed in individualized arbitration proceedings (i.e. the contract meant "you, *and only you*").[52]

The Supreme Court of South Carolina rejected these arguments. It held that the contracts were ambiguous and that they should be construed against their drafters as a matter of state contract law. The state's highest court also stated that class action arbitration serves state policies by promoting efficiency. Green Tree appealed to the U.S. Supreme Court.[53]

Reasons to Uphold the State Court Decision

Justice Thomas voted to uphold the state's highest court decision. Citing two of his earlier dissents, he stated that that the FAA does not apply to the states and that the South Carolina Supreme Court's "interpretation of a private arbitration agreement" should be left "undisturbed."[54]

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[49] *Id*.
[50] 539 U.S. __ (2003).
[51] *Id*.
[52] *Id*.
[53] *Id*.
[54] *Id*.

Justice Stevens also voted (at first) to uphold the cases, but along different lines. While the FAA applies to the states, he felt "there is nothing in the Federal Arbitration Act that precludes [the] determinations [made by] the Supreme Court of South Carolina." As a matter of state contract law, the Supreme Court of South Carolina's treatment of the case was within the confines of the FAA.[55]

Reasons to Overturn the State Court Decision

Meanwhile, Chief Justice Rehnquist, joined by two other Justices, voted to overturn the South Carolina Supreme Court decision. These Justices believed that the state court's decision "contravenes the terms of the contract and is therefore pre-empted by the FAA." They agreed with Green Tree's arguments that "[e]ach contract *expressly* defines 'us' as [Green Tree], and 'you' as the . . . [individuals] named in that specific contract." Consequently, "[t]hese provisions ... make quite clear that [Green Tree] must select, and each buyer must agree to, a particular arbitrator for disputes between [Green Tree] and that specific buyer." According to this logic, the South Carolina Supreme Court's decision allowing class action arbitration was wrong and must be overturned; the contracts unambiguously prevented the procedure in both the *Bazzle* and *Lackey* cases.[56]

Reasons to Remand the Case to an Arbitrator

Justice Breyer, joined by three Justices, questioned whether "the contracts' language is as clear as the Chief Justice believes. The case arbitrator *was* 'selected by' Green Tree 'with consent of Green Tree's customers, [the Bazzles and Mr. Lackey]." Indeed, Justice Breyer reasoned, "class arbitration involves an arbitration," and an ambiguity existed.[57]

These four Justices, however, voted to remand the case because they believed an arbitrator, not a court, should resolve this ambiguity. "Whether the agreement forbids class arbitration," Justice Breyer wrote, "is for the arbitrator to decide." Although courts have important roles in "gateway matters, such as whether the parties have a valid arbitration agreement or whether a concededly binding arbitration clause applies to a certain type of controversy," an arbitrator is to decide "what kind of arbitration proceedings the parties agreed to." Consequently, the *Bazzle* case must be remanded to an arbitrator because the South Carolina Supreme Court, instead of the arbitrator, decided to proceed on a class-wide basis.[58]

In the *Lackey* proceedings, an arbitrator made an independent determination that the contract allowed arbitration. Nevertheless, by creative lawyering, Justice Breyer sidestepped this issue finding "there is at least a strong likelihood in *Lackey* as well as in *Bazzle* that the arbitrator's decision reflected a court's interpretation of the contracts rather than an arbitrator's [independent] interpretation."[59] Consequently, the *Lackey* proceedings, as well as the *Bazzle* proceedings, had to be remanded to the arbitrator.

The Chief Justice disagreed with Justice Breyer's decision to remand the cases to the arbitrator. The Chief Justice held that "the interpretation of [a] contract [and whether it allows class action arbitration] is for the court, not the arbitrator." Justice Stevens, who believed "[a]rguably the interpretation of the parties' agreement should have been made

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[55] *Id*.
[56] *Id*.
[57] *Id*.
[58] *Id*.
[59] Davidson, *et al.*, *supra* n 1, at 2 ("Justice Breyer neatly skirted one of the factual issues.").

in the first instance by the arbitrator, rather than the court," nevertheless stated, "there is no need to remand the case to correct that possible error."[60]

To summarize the issues that arose:

	Thomas	Stevens	Rehnquist +2	Breyer +3
FAA applies to states:	No	Yes	Yes	Yes
Ambiguous:		Yes	No	Yes
Remand:		No	No	Yes
	Uphold	**Uphold**	**Overturn**	**Remand**

Because there was no majority disposition, Justice Stevens switched from upholding to remanding the cases, believing Justice Breyer's opinion closer to his own that the Chief Justice's opinion. Other multidimensional triple choice cases follow the pattern of *Screws* and *Green Tree*.

Subsequent portions of this Article will return to the differences between uni- and multidimensional cases and discuss whether different rules should apply for each. Before turning to these differences, it is useful to consider a Legal Realist argument that *Screws* governs no cases at all.

C. *The*Screws *Rule Governs No Cases*

There is an argument that unidimensional and multidimensional triple choice cases are artificially created to serve the interests of the switching Justice.[61] To understand how, consider the case of *State v. Post*,[62] in which a majority of the Supreme Court of New Jersey voted to send an enslaved individual, Mr. Williams, back to his master.

Justice Randolf's concurring opinion deserves closer attention and offers guidance to the modern-day *Screws* rule. From the beginning of his opinion, Justice Randolf writes of the freedoms guaranteed by state constitutions across the country. In addition, he asserts, "The citizens of New Jersey are as devoted to freedom as those of any other state." From these statements, it seems as if Justice Randolf would release Mr. Williams from the shackles that bind him to – what Justice Randolf calls – "the evils of slavery."[63]

Nevertheless, Justice Randolf votes to send Mr. Williams back to his master because the people of New Jersey "are differently situated and have *unfortunately* imbibed from their settlement different principles [regarding freedom, and the constitution protects] the evils of slavery." For Justice Randolf, to release Mr. Williams would be "a wanton stretch of judicial power and a fraud upon those who framed, as well as on those who adopted [the state constitution]." He prayed, "Application should be made to the legislature and not the judiciary" to rectify the America's peculiar institution.[64]

At first glance, it seems Justice Randolf is quite the humanitarian, and his statements encouraging freedom and the end of slavery should be commended. Yet, it is his vote that sends Mr. Williams back to slavery. One could argue that Justice Randolf's opinion criticizing slavery was written to mask the Justice's true beliefs about the

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[60] 539 U.S. __ (2003).
[61] Whether this is normatively problematic, *see* Jonathan R. Nash, *A Context-Sensitive Voting Protocol Paradigm for Multimember Courts*, 56 Stan. L. Rev. 75, 85 (2003).
[62] 20 N.J.L. 368 (1845). I thank Anna Pervukin for the reference.
[63] *Id*.
[64] *Id*.

institution. That is, Justice Randolf might have sugarcoated his racist views on slavery by pretending to be against it, knowing that in the end, these hortatory statements will make no difference to individuals like Mr. Williams.

People v. Post teaches us of the need to look beyond the rhetoric of judicial opinions. Often a Justice's vote is more important than the language that accompanies it. Indeed, Justices might write their opinions with one audience in mind, while voting with a different mindset. To those reading his opinion, Justice Randolf was an anti-slavery crusader; to Mr. Williams, however, the New Jersey Justice was part of the white establishment perpetuating the crime.

Perhaps we can analogize from *People v. Post* to cases like *Screws* and *Gertz*. In *Screws*, Justice Rutledge appears to be the defender of civil rights. His preferred outcome of the case is to send Mr. Screws directly to prison, without the possibility for a new trial. For this, promoters of civil rights might commend him. However, his vote shows a different side of the race issue. Mr. Screws, a white police officer, is given a second chance to make his case to a jury. Should this new jury – which was probably all white – acquit Mr. Screws, Mr. Hall's murder would go unpunished. [Incidentally, the jury did acquit Mr. Screws, who later went on to serve in the Georgia Senate.[65]] For all his talk about sending Mr. Screws directly to jail, Justice Rutledge is part of the problem, interfering with the defense of civil rights.

Justice Rutledge, however, might want his cake and to eat it too. He might want to be part of the system that perpetuates racial discrimination, while being lauded as a defender of these rights. The lack of a majority on disposing the case provides Justice Rutledge with the perfect cover. "Please," he would say, "do not blame me if Mr. Screws goes free. I did all I could to ensure he would remain in jail." Meanwhile, all along he was voting to remand the case for a new trial, hoping the new jury would release Mr. Screws.

A similar attack can be made in *Gertz*, where Justice Blackmun switched his vote. Justice Blackmun stated that he preferred to defend the freedom of the press by adopting a recklessness standard. Consequently, newspapers across the country could call him a hero. On the other hand, his vote is what matters, and the freedom of the press is diluted in *Gertz*, since a majority – formed with Justice Blackmun – adopts a less protective standard. One can speculate whether Justice Blackmun always hoped for a lower standard and the lack of a majority to dispose the case gave him an opportunity to mask his true preferences.[66]

While *Screws* and *Gertz* can be viewed as self-serving "vote switches," it is harder to make the case in *Green Tree*.[67] Class action arbitration between financial lenders and banking institutions hardly raises an eyebrow in the popular press. Justice Stevens

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[65] Woodford Howard and Cornelius Bushoven, *The "Screws" Case Revisited*, 29 J. Politics 617, 633 (1967)

[66] The Justices who switched their vote in *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 410 (1954), were more creative than Justices Rutledge and Stevens. In the United States Reports, the opinion of Justices Frankfuter, Reed, Jackson, and Burton describes why these Justices prefer to affirm in the first person (e.g. "I would" and "we vote"). Because of a deadlock, however, these four Justices switch their votes to remand. The language of the opinion suddenly shifts from the first-person ("we") to third-person ("therefore Justices Frankfuter, Reed, Jackson, and Burton remand"). From the language of the opinion, it looks as if these Justices fought for the positions they believe in, yet someone else has switched their votes to achieve a majority. *See also Von Moltke v. Gillies*, 332 U.S. 708, 725 (1947) (use of the third person).

[67] Indeed, whether repeat players could systematically abuse the *Screws* rule remains uncertain. Because of the infrequent invocation of the rule, *see* note 5, the possibility remains.

probably did not gain much praise for his statements about his preferred disposition of the case, namely to affirm and allow class action arbitration. His vote switch probably did not make a difference; the *Bazzle* and *Lackey* proceedings were remanded to the same arbitrator who had already indicated a willingness to proceed on a class-wide basis. Consequently, it does not seem Justice Stevens had anything to gain by voting to remand, while claiming to prefer to uphold the state court decision.

Summary

To summarize briefly, the failure to achieve a majority on the disposition of a case occurs in two contexts: unidimensional triple choice cases and multidimensional triple choice cases. In some cases, however, Justices might claim a deadlock in order to mask their true preferences and to receive praise for a willingness to adopt positions they would not normally have adopted. While it is impossible to know when Justices are masking their true beliefs, it is still possible that honest voting will lead to a three-way deadlock between overturning, remanding, and upholding a lower court decision. Consequently, the *Screws* rule governs some cases, even if it was artificially invoked in *Screws* to make Justice Rutledge appear more of a defender of civil rights than he actually was.

There are, of course, more arguments that one could make about the differences between uni- and multidimensional triple choice cases. Part III, A. returns to the differences; however, before addressing these arguments, it is important to understand the alternatives to the *Screws* rule that have been suggested by commentators.

II. Alternatives to the *Screws* Rule

There are some alternatives to the *Screws* rule. One could treat 3-4-2 deadlocks like *Screws* as if they were 4-4 ties. When cases are tied, the decision below is affirmed by inaction by the court above. Alternatively, one could remand the deadlocked case since remanding is likely to be the middle position between upholding and overturning, particularly in unidimensional cases like *Gertz*. Finally, one could let lower courts discern, issue-by-issue, the holding of the court and to follow that holding when no majority on the outcome is formed. This solution makes the most sense in multidimensional cases like *Screws* and *Green Tree*.

Each of these alternatives is presented and critiqued against a standard of strategyproofness, a term from the Economics literature. A rule is strategyproof if it induces no members of the Court to change his or her votes. To understand the concept, it is best to consider the rule governing ties. In certain circumstances, the rule induces Justices to switch their vote to achieve a better outcome than they would have achieved had they voted honestly.

A. The Exception Proves the Rule: The Case for Affirmation

1. The Rule

It is well established that when there is a tie, no action is taken by the court.[68] The rule is as old as the Supreme Court itself, dating back the *Hayburn's Case*,[69] a 1793 decision, and made explicit in *The Antelope*[70] of 1825. In *Durant v. Essex, Co.*,[71] the Court held:

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[68] Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 Wm & Mary L. Rev. 643, & n14 (2002) (citing *Durant v. Essex, Co.*, 74 U.S. (7 Wall.) 107, 111 (1868)).

[69] 2 U.S. (2 Dall.) 419 (1793). *But see* note 74.

[70] 23 U.S. (10 Wheat.) 66 (1825).

[71] 73 U.S. (7 Wall.) 107, 111 (1868).

> 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 cause where the judges are equally divided in opinion as to the judgment to be rendered of order to be made . . .. 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.

This requirement makes sense if one analogizes a court case to a bill before the legislature.[72] Under the ancient rule, a motion requires a majority to pass.[73] Failure to achieve a majority in the legislature, like the Supreme Court, leads to no action by that branch of government.[74]

2. *Application to Triple Choice Cases*

At first glance, the *Durant* rule does not explicitly apply to cases like *Green Tree, Gertz,* and *Screws.* Unlike cases referred to in *Durant*, the Justices are divided into three or more camps, not two. Furthermore, the Justices were not *evenly* divided; there were more Justices who wanted to remand in *Green Tree*, for example, than there were who wanted to overturn or uphold.

Commentators who believe that cases like *Green Tree* should be treated as ties under the *Durant* rule[75] could point to the faulty logic in *Screws*. Recall that in *Screws*, Justice Rutledge justified switching his vote in order to achieve a majority disposition of the case.[76] In tie cases, however, no majority is required. Justices do not need to switch their votes to avoid a tie; consequently, there is no reason for them to switch their votes

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[72] Others have argued that this analogy is inappropriate and that "A tie should not go to the executioner." Raymond Bonner, *Three Abstain as Supreme Court Declines to Halt Texas Executions*, N.Y. Times, Aug. 14, 2001 at A1. If one believes that the prosecutor has the burden of convincing the adjudicator every step of the process, then this position seems sensible, although it is not the law.

[73] Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 Va. L. Rev. 971, 1010 (1989)

[74] Although a tied U.S. Supreme Court leads to no action, lower courts were once able to act instead. *See Ex Parte Holmes*. 12 Vt. 631 (1840). After a tie at the U.S. Supreme Court (which under today's default rule would mean an affirmation of the Vermont Supreme Court decision), the Supreme Court of Vermont reversed itself by a vote of 2-1. Chief Judge Williams began by pointing out that "I was detained from the [Vermont Supreme C]ourt by sickness and took no part in [the Supreme Court of Vermont's earlier] deliberations, nor heard the arguments." *Id.* at 634. Jumping in after much of the action, the Chief Judge began to analyze the opinions of the U.S. Supreme Court Justices. One U.S. Supreme Court Justices in particular, argued the Vermont Chief Justice, would have changed his mind. Consequently, "Had the return been as it now is, it is to be inferred, from [U.S. Supreme Court Justice Catron's] opinion, he would have concurred with the other justices, and the judgment of this court would have been reversed." *Id*. at 641. Consequently, "a majority of [the U.S. Supreme Court] would have decided that Holmes was entitled to his discharge, and that the opinion of a majority of the [S]upreme [C]ourt of the United States was also adverse to the exercise of the [Governor's] power in question." *Id*.
Vermont Supreme Court Judge Redfield, concurring in the result, surprisingly conceded that the 4-4 tie in the U.S. Supreme Court "virtually, although not formally, reversed" the earlier Supreme Court of Vermont decision. *Id.* at 642-645. Similarly, Judge Bennett, dissenting, also did not challenge the Vermont court's reading of the Supreme Court's tied vote. *Id.* at 647. The Vermont court, therefore, seemed to believe that a tie in the U.S. Supreme Court does not necessarily mean an affirmation of the decision below. Rather, the default rule from *Ex Parte Holmes* seems to suggest a re-trial rather than an affirmation.

[75] *See, e.g.*, Evan H. Caminker, "Sincere and Strategic Voting Norms on Multimember Courts," 97 Mich. L. Rev. 2297, 2313 n 51 (1999)

[76] See text accompanying note 59

to achieve a majority disposition in three-way deadlocks. The lack of a majority in *Green Tree*, *Gertz*, and *Screws* should also be treated as a deadlock and therefore an affirmation.

There is an additional Public Choice argument why 3-4-2 deadlocks like *Screws* should be treated the same way 4-4 ties are treated under *Durant*. To understand why, imagine a hypothetical court in which three judges are called Uphold, Overturn, Remand and vote as their names suggest.

Because there is a 1-1-1 split in this court, Justice Uphold can act strategically. By refusing to vote, she can change a 1-1-1 deadlock into a 1-1 tie between Justice Overturn and Justice Remand. When the court is evenly divided, it is deadlocked and the decision below is affirmed. Thus, Justice Uphold, by abstaining, will get the outcome she desires if lower courts interpret the tie pursuant to *Durant*.

Since we do not want Justices to abstain from participating in court proceedings for strategic purposes, we might want to treat deadlocks in the same way we treat ties. That is, in both situations, we need to uphold the decision below. If we do not, we will induce Justices to act strategically to achieve the outcome they desire. Thus, *Durant* either (1) mandates that deadlocks like *Green Tree* be treated like ties or (2) encourages abstentions.

3. Strategic Behavior

i. Steps Around the *Durant* Rule

The *Durant* tie rule encourages strategic behavior. Consider the Freedom of the Press case of *Gertz*, but instead imagine that the Justices were instead tied 4-4 between remanding the case (under a middle-of-the-road standard) and overturning the lower court decision (under an absolute freedom position).

Under *Durant*, this tie should lead to an affirmation of the lower court decision, despite the injustice of the situation. All eight Justices believed the press was entitled to more protection than it received at trial, yet a 4-4 tie would mean an affirmation of the state court's decision offering no protections. Thus *Durant* seems inappropriate when the tie is between Justices voting to overturn and Justices voting to remand.

In all likelihood, one Justice would switch his or her vote to avoid the injustice in this situation. Either a Justice who voted to overturn would vote to remand with a middle-of-the-road standard in the hypothetical *Gertz* tie, or a Justice who voted to remand would vote for a reversal under an absolute immunity standard. A tie would therefore be avoided.

There is evidence that judges actually bargain around the *Durant* rule. While one can find cases of 4-4 ties where the Court is divided between upholding and overturning, or between remanding and upholding, I have been unable to find a case of a 4-4 tie between judges who favor remanding and judges who favor overturning. Simply put, one of the Justices will switch his or her vote clandestinely to prevent the imposition of the *Durant* rule affirming the decision below.[77]

The same behavior can be seen in the three-way deadlock cases. Consider the case of *Maryland Casualty Co. v. Cushing*.[78] In *Cushing*, Justices Frankfuter, Reed, Jackson and Burton voted to overturn the judgment, while Justices Black, joined by the Chief Justice, Justices Douglas and Minton, voted to affirm. Justice Clark, however, voted to

[77] Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 Wm & Mary L. Rev. 643 (2002)
[78] 347 U.S. 409, 410 (1954)

remand the case to determine certain questions on liability. Thus, the Justices were divided 4-1-4 between overturning, remanding, and upholding, respectively.

Although the 4-1-4 deadlock in *Cushing* is different from the hypothetical 4-4 tie in *Gertz,* there is still an opportunity for strategic behavior. Justice Clark, voting to remand, and the four Justices who vote to overturn the case, have an incentive to negotiate around the default rule affirming the case. Instead of clandestinely changing their votes, however, Justices Frankfuter, Reed, Jackson and Burton explicitly switch from overturning and vote with Justice Clark to affirm "[i]n order to break the deadlock resulting from the differences of opinion within the Court and to enable a majority to dispose of this litigation." The majority prevents an affirmation by deadlock, which is what five Justice prefer. In *Cushing* and other cases, therefore, Justices who want to overturn the lower court decision switch to remand the case in order to avoid an affirmation.

In two lower court decisions, the switch operates in reverse. In *People v. Harris*[79] and *Riley v. Taylor*,[80] a California Supreme Court Justice and a Third Circuit Judge, respectively, both switched from remanding the case to overturning it. In both cases, the adjudicators may have acted to avoid an affirmation by deadlock. Thus *Harris* and *Riley* are similar to *Cushing* in that the adjudicator acted to avoid an affirmation by deadlock under *Durant*, but the direction of the switch was different.[81]

ii. Steps around the Steps around *Durant*

Screws and *Green Tree* differ from *Cushing*, *Harris*, and *Riley* in that the Justices who voted to *affirm* switched their vote to remand. At first, these cases seem to contradict the analysis above. There would be no reason for Justice Rutledge or Justice Stevens to switch their votes; had they stuck to their guns, the case would have been affirmed (which is the outcome they state they prefer).

The behavior in *Screws* and *Green Tree*, therefore, can be seen as a reaction to the potential behavior exhibited in *Harris* and *Riley*. Recall that in *Green Tree* Justice Stevens claimed that Justice Breyer's decision remanding the case was closer to his own views. Imagine for a moment that Justice Breyer had threatened to switch to overturning. Had he done so, he would have joined the adjudicators in *Harris* and *Riley* in switching from remanding to overturning.

Justice Stevens, however, did not want Justice Breyer to switch his vote to overturn. To avoid having a situation like *Harris* and *Riley*, Justice Stevens offers Justice Breyer a deal: if Justice Breyer agrees not to switch to overturning, Justice Stevens will agree to switch to remand. The same holds true in *Screws* and the other cases in which Justices switch from affirming to remanding.

To briefly summarize the seemingly complex interactions, the *Durant* tie rule:

(I) Induces those who want to affirm to abstain and force a tie, which in turn;
(II) Induces
  (a) Those who want to overturn to switch their votes to remand to avoid an affirmation (*Cushing*), or

[79] 26 Cal. 3d (1984).
[80] 277 F.3d 261 (2001).
[81] *Cf.* Edward A. Hartnett, "Ties in the Supreme Court of the United States," 44 Wm & Mary L. Rev. 643, 669 (2002) (suggesting that an "affirmed by a deadlocked Court" rule in triple choice cases and predicting that "Justices would rebel at its results and evade it").

(b) Those who want to remand to switch their vote to overturn to avoid an affirmation (*Harris* and *Riley*) which in turn;

(III) Induces those who want to affirm to switch their votes to avoid situations like *Harris* and *Riley* (*Screws* and *Green Tree*).[82]

To avoid explaining their strategic behavior, the Justices hide behind the need for a "controlling judgment." The great irony is that the lack of a controlling judgment under the *Durant* rule induces the vote switching, which leads to the claim that a controlling judgment is needed under *Screws*. Simply put, the initial reaction that cases like *Screws* should be treated the same way ties are treated puts the cart before the horse. The fact that ties are treated as affirmations induces Justices to switch their votes in the first place. Later, Justices justify their actions as necessary to achieve a majority. The cure – affirmation – is actually the disease.[83]

iii. Steps around the Steps around the Steps around *Durant*

The astute reader might anticipate further deals and other possible vote-swaps. To avoid a remand, for example, the Justices who want to overturn might switch their votes to upholding. Similarly, Justices who want to overturn might switch their vote to uphold to avoid remanding. These possibilities are discussed in Part III; C., which re-considers the argument that deadlocks, should be treated as ties. But before turning to that issue, one should consider other solutions offered by commentators to the rule.

B. Split the Difference: The Case for Remand

Judge John Roger, the first academic to systematically analyze vote switching at the Supreme Court level, succinctly noted that "[i]n these situations it makes sense for the 'middle' [namely remand] position to obtain." Indeed, in every case in which a U.S. Supreme Justice switched to achieve a majority, the switch was towards remand. Thus in practice, the *Screws* rule appears to be a rule in favor of remanding, at least at the Supreme Court level.

There is something very appealing about this argument. In the unidimensional cases, it seems to make sense to split the difference. Recall how the Justices in *Gertz* fell along a spectrum. Justice Douglas and Justice Brennan voted to uphold with protective standards of absolute immunity and recklessness, respectively. On the other end of the spectrum, Justices Burger and White voted to reverse, deferring to state law. Finally, Justice Powell and three other Justices were in the middle requiring proof of fault. These Justices voted to remand the case.

In this context, the "middle" decision requiring proof of fault is probably a good compromise position. If asked to decide between a rule requiring proof of fault or a less-

[82] To analogize to chess, Justice Uphold can put the Court in check by abstaining. In response, Justice Overturn could defend by moving to remand. Alternately, Justice Remand could defend Justice Overturn by switching to overturn. To counter this defense, Justice Uphold could neutralize Justice Remand by offering herself to remand. This analysis assumes that the Justices are aligned along a spectrum and that those who vote to uphold least prefer overturning and *vice versa*. This assumption is relaxed in Part III, C.

[83] Dean Saul Levmore predicts similar bargaining, however, around a "narrowest-majority" default rule instead of an affirmation default rule. Saul Levmore, *Ruling Majorities and Reasoning Pluralities*, 3 Theoretical Inq. L. 87, 105 (2002). The result is the same no matter which default rule one uses. For the purposes of this Article, the affirmation default rule discussed in Part II.A. is preferred because it is easier for the Supreme Court Justices to know which position is an affirmation (and thus the default to negotiate around) than it is for them to know which one is Dean Levmore's "narrowest-majority." For a further discussion of Dean Levmore's "narrowest-majority" approach, see Part III.C.

protective state law standard, Justices Douglas and Brennan would probably prefer the so-called "middle" position. Conversely, Justices Burger and White would also prefer the "middle" position, requiring fault, to either an absolute immunity standard or one that applied the standard of recklessness from *New York Times*.[84] The result makes sense.

The case of *Green Tree Fin. Corp. v. Bazzle*, however, demonstrates a fundamental weakness in Judge Roger's suggestion that remanding is a "middle" position.[85] Recall from above that the case of *Green Tree* involved two different proceedings: the *Bazzle* proceedings in which the state court certified the class, and the *Lackey* proceedings in which the arbitrator made an independent determination to proceed with class action arbitration.

To understand why remand is not a "middle" position in *Green Tree* imagine that two different states had heard the two cases. In South Carolina, only the case of *Green Tree Fin. Corp. v. Bazzle* is heard, and the state court certifies the class for arbitration. In a fictional state of East Carolina, however, the case of *Green Tree Fin. Corp. v. Lackey* is directly sent to an arbitrator. Assume that the East Carolina courts sent the case to arbitration believing that the Federal Arbitration Act applies to state court proceedings and pre-empts a state court's interpretation of a private arbitration agreement. Both cases are appealed to the U.S. Supreme Court.

In the East Carolina case of *Lackey*, Chief Justice Rehnquist would vote to overturn the decision of the state court. Like the contract in *Bazzle*, the contract in *Lackey* expressly precludes the availability of class arbitration procedures. As such, the decision to give the arbitrator the power to proceed on a class-wide basis was clearly erroneous. The state court should have prevented the class arbitration proceedings. Consequently, Chief Justice Rehnquist, joined by two other Justices, would dispose of *Lackey* the same way they disposed of *Bazzle*.

Justice Breyer would treat *Lackey* differently than he would treat *Bazzle*. The East Carolina courts in *Lackey* had done exactly what he wanted them to do by requiring that

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[84] Those familiar with Public Choice jargon will recognize that the "middle" position in these situations in the Condorcet winner. For more discussion on this issue, see Part III, C. *But see Riley v. Taylor*, 277 F.3d 261 (2001) (3rd Cir. 2001) (vote switching away from remand); *People v. Harris*, 36 Cal. 3d 36, 71 (1984) (same).

[85] There are two other problems. The first problem is evident from a closer reading of Justice Rehnquist's opinion in which he goes to great lengths to attack Justice Breyer's decision to remand the case. More than half of the opinion focuses on the question of whether remand is proper (an issue with which he disagrees with Justice Breyer), while less than half of the opinion is devoted to his disagreement with Justice Stevens' decision to uphold the South Carolina Supreme Court's decision.

While it is true that Justice Breyer's opinion came to command a majority and is thus more deserving of scrutiny, it seems strange to suggest that the Chief Justice prefers Justice Breyer's position to Justice Steven's position. It is possible that the Chief Justice, an advocate of state's rights, would prefer to uphold the state court's decision than to remand the case to an arbitrator.

A similar concern could be raised in *Time, Inc. v. Hill*, 385 U.S. 374 (1967). The dissenters criticize the decision to remand the case. *Id.* ("If he can stand the emotional and financial burden, there is reason to hope that he will recover damages for the reckless and irresponsible assault upon himself and his family which this article represents. But he has litigated this case for 11 years. He should not be subjected to the burden of a new trial without significant cause. This does not exist.").

There is a final problem. If the Justices prefer the "middle" position to be the default rule, there is no reason they should be switching *to* remand. In other words, if the default is always to remand, the Justices do not need to switch their votes to achieve it. The dissenters could simply say: "And since we are divided and the default rule is to remand, we agree that that the case should be remanded." Thus there is no need for the *Screws* rule if Justices just want to split the difference and remand.

an arbitrator decide the question of class action arbitration. Consequently, he and three other Justices would vote to uphold *Lackey* ,while remanding *Bazzle.*

Justice Thomas would also treat *Lackey* differently from *Bazzle*. According to Justice Thomas, "the Federal Arbitration Act does not apply to proceedings in state court" and it does not "pre-empt[ ] a state court's interpretation of a private arbitration agreement." The East Carolina Supreme Court, consequently, incorrectly held that the FAA mandates sending the case to an arbitrator. To determine what the state law is on this issue, Justice Thomas would remand the case to the state courts for further proceedings. While Justice Thomas would vote to remand the *Lackey* case, he would vote to uphold the *Bazzle* proceedings.

To summarize the distinction, if the *Bazzle* and *Lackey* cases arose independently, the Justices would have voted as follows:

	Green Tree v. Bazzle	*Green Tree v. Lackey*
	Court decision	Arbitrator decision
Rehnquist: No class arbitration	Overturn	Overturn
Breyer: Arbitrator must interpret	**Remand**	Uphold
Thomas: Court should interpret	Uphold	**Remand**

In the *Bazzle* case, Justice Breyer adopted the "middle" position of remand. Because the South Carolina Supreme Court decided to impose class arbitration procedures under state law, Justice Breyer – by sending the case to an arbitrator – was "in between" the Chief Justice voting to reverse, and Justice Thomas voting to affirm. However, in *Lackey*, Justice Thomas adopted the "middle" position of remand. Because the East Carolina Supreme Court decided to empower an arbitrator to decide whether to have class action arbitration, Justice Thomas – by sending the case back the Supreme Court to determine the issue under state law – was "in between" the Chief Justice voting to reverse, and Justice Breyer voting to affirm. This seems like an odd result.

Because of the arbitrariness of the distinction, courts and commentators should reconsider arguments that remand is the "middle" position that best splits the difference between affirming and overturning the lower court ruling. Compared to the rule affirming all cases, the "middle" position rule seems less satisfying since it will, as just demonstrated, sometimes mean the opposite of what the lower court had done.

It is worth pausing to note how this analysis helps resolve one of the peculiarities in the *Green Tree* cases. Recall that Justice Breyer went to great length to suggest that the arbitrator's decision was tainted by the South Carolina state court's decision and that the case must be remanded for an arbitrator's re-determination. The parties, however, did not litigate the independence of the arbitrator's decision, and courts generally do not upset arbitrator's determinations as easily as Justice Breyer upset the decision in *Lackey*.

One reason Justice Breyer may have acted as he did was to prevent the dichotomy discussed above. Had Justice Breyer remanded the *Bazzle* case but upheld the *Lackey* case, there would be a contradiction. Justice Thomas's position would be the "middle" position in *Lackey*, while Justice Breyer would be the "middle" position in *Bazzle*. The "middle" position in *Lackey* would require remanding the case to a court while the "middle" position in *Bazzle* would require remanding the case to an arbitrator.

The reasoning would be circular. Justice Breyer may have acted strategically to achieve the outcome he desired and to avoid the circularity.[86]

Thus, while Justice Breyer might have responded to Judge Rogers' intuition that remanding is the default rule, remanding deadlocks will lead to arbitrary results. The "middle" remand solution might be entirely based on the disposition of the case below. The astute reader might anticipate a way of avoiding this problem by seeking the "middle" position in unidimensional cases and going issue-by-issue in multi-dimensional cases. Part III, A. discusses the difficulties in differentiating the two types of cases, but first this Article comments on problems inherent in a system of issue-by-issue voting.

C. The Old Way: The Case for Issue-By-Issue

1. Origins and Example

In 1774, the House of Lords heard the case of *Donaldson v. Becket*,[87] a significant copyright case that is still cited as authority today. Thomas Becket, a Scottish bookseller, purchased the copyright to *The Seasons* after the death of the author. Alexander and John Donaldson, however, refused to recognize Becket's copyright and printed an unauthorized edition of *The Seasons*. Becket sued for an injunction, which was granted, and Donaldson appealed all the way to the House of Lords.[88]

The House of Lords, the highest court in the United Kingdom, asked a group of eleven distinguished judges from the King's Bench, Common Plea, and Exchequer to help resolve three central issues in the case. Specifically, the House of Lords was interested in: (I) whether the Common Law created copyright protections, (II) if such a right existed, whether the right continues after publication, and (III) whether the Statute of Anne "impeached, restrained, or [took] away" the Common Law protection. Becket's copyright depended on all three factors; the injunction required proof that a Common Law right existed, that it continued after publication, and that the Statute of Ann did not abridge copyrights.[89]

Confusion surrounds the holding of the court in *Donaldson*. First, American courts and commentators treat the opinions of the eleven judges as the holding of the decision. This is incorrect since the House of Lords, not the eleven judges, ultimately voted to lift the injunction against Donaldson. Next, four different reporters counted the votes of the eleven judges, and differences in the tallies exist between the four reporters. *Burrow's Reports* and *Brown's Parliamentary Cases*, the two most cited reports, both indicate that a six to five majority believed a perpetual copyright existed at Common Law, but that the Statute of Anne "impeached" these copyrights. *The Anonymous Report* and *The Gentleman's Report*, indicate a different tally.[90] The latter reporters expose another level of confusion in the opinion, never explored in the Copyright literature, and offer insight into the origins of the *Screws* rule and a plausible alternative to it.

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[86] Justice Thomas cannot remand the *Lackey* case to the South Carolina Supreme Court. In effect, the case was already decided by a court in *Bazzle*, so remanding *Lackey* to the state courts would serve no function. This procedural aspect of the case also helps avoid the contradiction – and perhaps the brevity of Justice Thomas' opinion.

[87] 4 Burr at 2408 (1774) [UK]. *See also*, Howard D. Abrams, "Historic Foundation of Copyright Law," 29 Wayne L. Rev. 1119 (1983) (discussing the case).

[88] *See, generally,* Abrams, "Historic Foundation of Copyright Law," 29 Wayne L. Rev. 1119 (1983).

[89] *Id*. at 1157 n 159 (discussing the five questions asked). I limit the discussion to the relevant three questions that illustrate my point.

[90] *Id*. at 1156-70.

According to *The Anonymous Report* and *The Gentleman's Report*, the eleven judges were divided over how to dispose the case. First, Judge Blackstone, along with four other judges, believed that Thomas Becket properly obtained an injunction. The Common Law gave him a copyright, which was not abrogated by publication or by the Statute of Anne.[91]

Judge Eyre, however, disagreed on all points. He voted that there was no Common Law protection, that publication would end such a protection (assuming, *arguendo*, it existed), and that the Statute of Anne limited the protection (again, assuming *arguendo* it existed).[92]

The two reporters, *The Anonymous Reports* and *The Gentleman's Reports*, show the remaining judges divided between Judge Blackstone and Judge Eyre's positions. Judges Aston and Smith are recorded as voting that a Common Law right existed, but that it ended after publication. Judges Gould and DeGray voted that the Statute of Anne abrogated the Common Law rights, which existed before the statute. Finally, Judge Prestoff agreed that the Statute of Anne abrogated the Common Law right, but voted that no Common Law right existed in the first place.[93]

2. Doctrinal Paradoxes

A chart best shows the positions of the judges according to *The Anonymous Report* and *The Gentleman's Report*:

	Common Law:	End by Publication:	Ended by Statute:	Outcome:
Blackstone +4	Yes	No	No	**Copyrights**
Eyre	No	Yes	Yes	**No rights**
Prestoff	No	No	Yes	**No rights**
Aston/Smith	Yes	Yes	No	**No rights**
Gould/DeGrey	Yes	No	Yes	**No rights**
	9-2 Yes	**8-3 No**	**7-4 No**	**6-5 No rights**[94]

An anomaly exists. Begin with the three issues presented. A majority of nine to two believes that the Common Law creates a protection. Similarly, a majority of eight to three believes that the copyright continues after publication, while a majority of seven to four believes that the Statute of Anne did not abrogate the Common Law. Looking issue-by-issue, one might expect the eleven judges to agree that the injunction should be sustained.

Now look at the outcomes for which the judges would vote. Only Judge Blackstone, joined by four other judges, believed that Donaldson's injunction should stand. Judges Eyre and Prestoff do not feel there was a Common Law copyright; Judges Aston and Smith believe that the right ends at publication; and Judges Gould and DeGrey believe that the Statute of Anne abrogated it. Consequently, these six judges would vote to overturn the injunction.

Because of this contradiction, a "doctrinal paradox" exists.[95] Voting issue-by-issue leads to a different result than voting based on outcome. One solution to the *Screws*

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[91] *Id.* at 1188-91.
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] Lewis A. Kornauser and Lawrence G. Sage, "The One and the Many: Adjudication in Collegial Courts," 81 Calif. L. Rev. 1, 10 (1993).

problem is to forget outcome voting (since it results in a three-way deadlock and no resolution) and to instead embrace issue-by-issue voting.

3. Issue-by-Issue Voting: Benefits & Drawbacks

i. Benefits of Issue-By-Issue Voting

Commentators who prefer issue-by-issue voting to outcome voting point to the serious flaws with outcome voting. First, outcome voting is susceptible to "path-dependence." Imagine that the House of Lords was asked to determine each question independently and asked the eleven judges for their opinions on each issue separately. For example, in the hypothetical case of *Abraham v. Becket*, the judges would be asked to determine whether a Common Law copyright exists (they would find that it does). In another hypothetical case of *Becker v. Becket*, the judges would be asked whether the right ends at publication (they would find that it does not). Finally, in *Chastleton v. Becket*, they would be asked whether the Statute of Anne ends the protection (they would find that it does not). If *Donaldson* were to arise after *Abraham* (Common Law rights), *Becker* (protections continue after publication), and *Chastleton* (protections not abrogated by Statute of Anne), *Donaldson* would come out differently by way of *stare decisis*. The judges, following precedence, would vote to uphold the injunction. But because *Donaldson* arose before *Abraham*, *Becker*, and *Chastleton*, the outcome was different. Issue-by-issue voting avoids this problem.[96]

Next, issue-by-issue voting gives guidance to lower courts. American courts, interpreting *Donaldson*, now know the positions of each judge on the three issues. By tallying the judge's votes, a lower court can determine from *Donaldson* how *Abraham* (Common Law), *Becker* (affect of publishing), and *Chastleton* (abrogation of Statute of Anne) should be decided. *Donaldson* would not be able to govern these cases under an outcome based voting system.[97]

The final, and perhaps most obvious reason, to resort to issue-by-issue voting in the *Screws* context is that outcome voting has failed to achieve a result. Going through the opinions in *Screws* and *Green Tree* might help lower courts figure out what the holding of the Court is in these cases.

ii. Problems with Issue-By-Issue Voting

There are many problems with issue-by-issue voting, only several of which I will discuss here.

a. Inapplicability to Unidimensional Case

First, issue-by-issue fails to resolve unidimensional cases. In *Gertz*, the Justices were asked to resolve *one* issue, and were divided three ways on the disposition of the case because of that single issue. Issue-by-issue voting does not help resolve these cases. As mentioned briefly above, one could imagine treating unidimensional cases differently from multidimensional cases; Part III, A. shows why this is not a viable option.

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[96] *See, e.g.* Lewis A. Kornhauser and Lawrence G. Sager, "Unpacking the Court," 96 Yale L. J. 82, 115 (1982) ("One may then prefer issue-by-issue decisionmaking because it advances coherence."). Post and Salop, 80 Geo. L. J. at 762 ("Outcome-voting leads to just this kind of fundamental path dependence.").

[97] David Post and Steven C. Salop, *Rowing against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 Geo. L. J. 743, 763 (1992); Lewis A. Kornhauser and Lawrence G. Sage, "The One and the Many: Adjudication in Collegial Courts," 81 Calif. L. Rev. 1, 40 (1993).

b. Issue Avoidance

The second problem is that issue-by-issue voting encourages Justices to avoid voting on certain issues.[98] Take the case of *Green Tree*. While a majority of the Justices (1) believed the FAA applies to the states, a different majority (2) believed the contract was ambiguous, and a third majority (3) agreed that the case should not be remanded, we do not know whether there was a majority on a fourth question: did the South Carolina courts get the contract interpretation correct. Justice Breyer simply does not get to that issue, thus preventing issue-by-issue determination of the case.[99]

The same result is seen in *Screws*. A majority of the Justices believed that Mr. Screws had acted under the color of state law; a different majority agreed that the statute's unconstitutional aspects could be resolved by judicial modification of the statute. On the third issue, whether the error was harmless, Justice Roberts, joined by two other Justices, simply do not cast a vote. Similar problems emerge in the recording of the votes in *Donaldson*.

The Justices in many cases realize that they are denying a majority on the final question. In *Screws*, for example, Justice Roberts decided to discuss the second issue raised by the case because a majority disagreed with his position on the first issue. He stops, however, after the second issue. Justice Roberts should have, along similar lines, moved to the third issue of the case (whether the error was harmless) instead of remaining silent. Yet he did not.

Perhaps the Justices are acting strategically.[100] Assume in *Screws* that Justice Roberts believed the error was *not* harmless and that he would add his votes and achieve a majority finding the error did affect Mr. Screws' rights. As a result, although Justice Roberts prefers *overturning* Mr. Screw's conviction, his votes on the final issue in the case would lead to *upholding* the conviction using issue-by-issue voting! By failing to reach the harmlessness of the error, therefore, Justice Roberts prevents a majority from forming to uphold the case.

The same might be true in *Green Tree*. Justice Breyer believes the case should be remanded to an arbitrator, although a majority of the Court disagrees with this position. The next issue to naturally arise would be whether the courts in South Carolina properly interpreted the contract. By not voting on this last issue, Justice Breyer denies the Chief Justice, and the three Justices joining his opinion; and Justice Stevens and Thomas and opportunity to claim victory using issue-by-issue voting. Had Justice Breyer voted that the South Carolina Supreme Court got the contract interpretation incorrect (which is what I understand Justice Breyer to believe),[101] a majority would favor applying the FAA

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[98] Post and Salop, 80 Geo. L. J. at 756 ("Outcome-voting, it is argued, best serves the interest of judicial economy by allowing judges to avoid reaching, and analyzing, certain issues once they have resolved one of the dispositive issues in a particular way.").

[99] *Supra* Part I. B.

[100] Perhaps an explicit issue-by-issue rule would force the Justices to reveal their positions. Were the merits of such a rule to be debated, those Justices who have been hiding their positions on particular issues would have an incentive to prevent the issue-by-issue rule from becoming the default rule. As discussed below in Part II.B., any submajority could thwart deliberation over the default rule.

[101] I believe so for two reasons. First, Justice Breyer distanced himself from the South Carolina decision allowing class arbitration. He wrote, "we cannot accept the South Carolina Supreme Court decision in its entirety." *Id*. Next, Justice Breyer's treatment of the *Lackey* proceedings suggests he dislikes imposing class arbitration when the contract is ambiguous. Recall that in *Lackey* the arbitrator determined that there should

to the states, a different majority would find that the contract was ambiguous, and a third majority would find that there is no need to remand the case. On the final question, Justice Breyer would provide the Chief Justice with a majority in favor of overturning the decision below. Conversely, had Justice Breyer believed that the contract interpretation was correct, he would provide Justices Stevens and Thomas a majority in favor of upholding, using issue-by-issue voting.[102]

c. Vote Switching within Issues

The final problem raised in this Part of the Article involves the strategic behavior issue-by-issue voting creates *vis-à-vis* the substantive issues raised in the case. Recall from above the breakdown in the *Donaldson* case:

Common Law:	End by Publication:	Ended by Statute:	Outcome

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be class action arbitration. For this reason, Justice Breyer should have voted to affirm the arbitrator's decision.

Why, then, did Justice Breyer remand the *Lackey* decision back to the arbitrator? One argument is that Justice Breyer did not like the outcome reached by the arbitrator, and his creative lawyering on this issue gives the arbitrator a second chance to come to the right conclusion. That is, Justice Breyer is telling the arbitrator not to be influence by the South Carolina Supreme Court decision (which allowed class action arbitration), and the arbitrator might interpret the instruction to re-interpret the contract as an indication that Justice Breyer disproves of the earlier result.

[102] There are several ways to resolve the difficulty of Justices not voting on issues to prevent an outcome they do not desire, although no solution satisfactory addresses all cases. First, one might suggest that if there is no majority on a particular issue (e.g. Justice Breyer remains silent), the position of the lower court should be affirmed. The problem with affirming if there is no majority on any *particular* issue is that often the lower court does not reach the issues raised on appeal. In *Screws*, for example, the lower courts did not have to reach the harmlessness of the error. Affirmation of a lower court's decision on an issue might be impossible. The next solution would involve predicting how the Justices would have voted on the remaining issue. That is, one could force a "yes" or "no" into every column even though the adjudicator did not reach that issue. *See supra* n 101. *Donaldson* demonstrates the problem with making such predictions. The four reporters of the case all tried to figure out how judges would have voted on issues that the judges did not reach in their opinions. Contradictions resulted, and modern American Copyright law might have been very different had a different reporter been used to interpret the effects of the Statute of Anne on Common Law copyrights.

A third solution to the non-voting Justices phenomenon is to apply *Durant*'s requirement that a moving party must achieve a majority to be successful. Thus, if there were no majority in *Green Tree* over whether the state court's interpretation of the contract was correct, the case should be affirmed since Green Tree Financial Corp. had the burden of convincing a majority of the Justices on each issue.

The first problem with this argument is that Green Tree might have successfully convinced a majority of the Justices on this point. Recall from above that Justice Breyer might have disagreed with the South Carolina Supreme Court's interpretation of the contract. *Supra* n 101. If so, Green Tree should be successful because it achieved a majority, yet Justice Breyer's silence (to avoid overturning the decision according to issue-by-issue voting) leads to an affirmation (which also is not what Justice Breyer wants). Consequently, the rule would corner Justices into making decisions they would rather not make.

In addition, sometimes requiring a majority on every issue would lead to difficulties in determining who has a burden on particular issues. Take *Screws* as an example. In *Screws*, a majority held that the statute was unconstitutional, a victory for Mr. Screws. The Court, however, then went on to hold that the unconstitutionality could be rectified by judicial intervention, a victory for the prosecution. The final issue raised was whether the error in not using the new standard was harmless; if it were, the conviction could be upheld, if it were not, there would have to be a new trial. It is unclear in this context which party has the burden of convincing a majority on the final issue.

Finally, just as issues can be avoided, other issues can be added to change the outcome of a case. John M. Rogers, *Appellate Court Voting Rights: "Issue Voting" by Multimember Appellate Courts: A Response to Some Radical Proposals*, 49 Vand. L. Rev. 997 (1996) (lists about 15 issues that came up in *Tidewater* and shows how outcome depends on which questions you ask). Part III, A. discusses this phenomenon in more detail by showing how unidimensional cases can be transformed into multidimensional cases.

Blackstone +4	Yes	No	No	**Copyrights**
Eyre	No	Yes	Yes	**No rights**
Prestoff	No	No	Yes	**No rights**
Aston/Smith	Yes	Yes	No	**No rights**
Gould/DeGrey	Yes	No	Yes	**No rights**
	9-2 Yes	**8-3 No**	**7-4 No**	**6-5 No rights**

If the outcome of the case were determined issue-by-issue, Judges Prestoff, Gould, DeGrey, Aston and Smith would have an incentive to switch their votes. Recall (from the right-most column) that all of these judges prefer to prevent recovery for a copyright in this case. Issue-by-issue voting, however, would lead to a recovery.

Judges Prestoff, Gould and DeGrey can prevent recovery by switching their votes on whether or not publication ends the Common Law copyright. Should they switch their vote, the current 8-3 majority protecting copyrights would turn into a 6-5 majority ending them. Similarly, if Judges Aston and Smith were to change their vote on the effects of the Statute of Anne, a 7-4 majority finding the Statute had no effect on copyright protections would become a 6-5 majority staying that it did.

If judges are more concerned about the outcome of a case than any particular issue that affects the outcome, issue-by-issue voting will encourage judges to clandestinely change their votes on particular issues to reach the outcomes they desire. The *Screws* rule might be preferable because it encourages the changes to take place openly instead of clandestinely as occurs under issue-by-issue voting.

Summary

This Part of the Article identified three alternatives to the *Screws* rule requiring a majority disposition of cases. The first alternative, treating three-way deadlocks as affirmations, generates multiple problems. Justices who do not want the case to be upheld will negotiate around the default rule; either Justices who want to overturn will switch to remand or Justices who want to remand will switch to overturn. Similarly, it may induce Justices who want to uphold the lower court's decision to switch to remand to prevent an overturning. Consequently, it is more useful to consider the affirmation solution as the source of the problem in *Screws*.

The next solution involves remanding every case as the "middle" position between upholding and overturning. While this makes the most sense in unidimensional cases, it is not clear that remand is always the "middle" position in multidimensional cases. *Green Tree* demonstrates that Justices will engage in "creative lawyering" (that is, strategic behavior) to ensure that their decisions are the "middle" position of the Justices.

Finally, commentators have argued that in cases like *Screws* courts should look issue-by-issue to determine whether a majority exists. This solution induces Justices to (1) avoid issues or (2) switch their votes on particular issues to achieve desired outcomes.

Consequently, none of the three solutions offered in Part II are stradegyproof.[103] Each induces Justices to switch their votes or engage in conduct that masks their true preferences.

[103] It might be worth mentioning another alternative. In 3-4-2, the plurality opinion with the greatest number of votes might become the holding of the Court. The obvious problem with this solution is that it does not resolve 4-4-1, 1-4-4, or 4-1-4 or 3-3-3 splits.

III. A Meta-Analysis of the *Screws* Rule

If the analysis in Part II is correct, and (A) affirming all *Screws*-like cases, (B) remanding them, and (C) engaging in issue-by-issue voting all induce the strategic behavior and vote switching seen in *Screws*, one might wonder why the *Screws* rule exists instead of one of the equally problematic alternatives offered in Part II. This Part of the Article discusses the reasons why *Screws* arises.

The meta-analysis in this Part proceeds in three parts: First, it discusses whether uni- and multidimensional cases should be treated differently. Specifically, unidimensional cases could be solved using the "always affirm" or "always remand" solutions discussed in Part II, while multidimensional cases could be resolved using issue-by-issue voting. This solution, unfortunately, encourages *additional* strategic behavior as Justices will try to squeeze multidimensional cases into a unidimensional framework or will try to expand unidimensional cases into multidimensional cases.

Next, this Part of the Article addresses arguments that the Court should engage in a "meta-vote" to determine which of the three standards discussed in Part II to apply. That is, after *Screws* and *Green Tree* are decided with *no vote switching*, a subsequent U.S. Supreme Court could determine whether to apply the "always affirm," "always remand" or issue-by-issue solution discussed above. Ironically, this solution to the *Screws* problem actually demonstrates why *Screws* is a good rule. The *Screws* rule, requiring a majority to dispose of the case when it is first adjudicated, prevents a meta-vote, which may result in chaotic reasoning in subsequent cases. Indeed, a submajority of the Court can prevent a "meta-vote" by engaging in a vote switch.

Finally, lower courts could apply a modified version of the *Marks* rule to find the "narrowest holding necessary to achieve a majority." While there is no majority in 3-4-2 deadlocks like *Screws* (when there is no vote switching), a court still might be tempted to try to find the "narrowest holding" that would have achieved a majority. This proposed solution raises new concerns and demonstrate that the *Screws* rule cannot overcome Arrow's Impossibility Theorem.[104] This portion of the Article will draw from arguments made throughout this Article, but again, the focus is entirely descriptive and no solution is necessarily better than the others.

A. Are Multidimensional Cases Just Unidimensional Cases in Sheep's Skins?

By now, the reader might feel confident in at least one solution to the problem identified above. Specifically, a court could use issue-by-issue adjudication *only* for multidimensional cases. This limitation, while not perfect, resolves the problems posed by unidimensional cases like *Gertz*. Meanwhile, the court could use a different standard for unidimensional cases. For example, if a court applied the "always affirm" rule in unidimensional cases, it could avoid problems posed by cases like *Green Tree*. Recall from above that remanding the case to an arbitrator was only the "middle" position because of procedural luck; had the *Lackey* proceedings came up independently, the "middle" position would have involved remanding the case to a court.

The confidence in this solution is derived from the unnecessary reliance on an artificial division between uni- and multidimensional cases in the literature. At first glance, there are significant differences between the unidimensional triple choice cases, which involve only one issue, and multidimensional cases, which involve more than

[104] Kenneth J. Arrow, *Social Choice and Individual Values* (2d Ed. 1963).

one. Commentators have treated the two cases differently, listing cases separately and perpetuating the confusion.[105]

Unfortunately, the differences are artificial. Multidimensional cases are just unidimensional cases in sheep's skins and *vice-versa*.[106] Begin with the unidimensional case of *Gertz*. Recall that the Justices fell along the following spectrum:

Absolute Immunity	Recklessness	Proof of Fault	State Law
<----------			---------->
Douglas	Brennan/Blackmun	Powell +3	Burger + White
Uphold	Uphold	Remand	Reverse

Justice Blackmun switched his vote to remand, the "middle" position.

This is not the only way to approach the case. Indeed, Justice Brennan can engage in creative lawyering to transform *Gertz* from a unidimensional case to a multidimensional case. To understand how, consider the following steps:

(1) First, Justice Brennan could propose the following vote: "Does a 'proof of fault' standard have any Constitutional basis?" Only Justice Powell, joined by three Justices, believed that it did.

(2) Next, Justice Brennan can ask: "Should the Constitution provide absolute rules to govern freedom of the press cases?" Clearly, Justice Douglas believes that it does, but so do Chief Justice Burger and Justice White. The last two adjudicators believed that the Constitution provides one bright-line rule: state law applies.

(3) Finally, Justice Brennan could ask the other Justices to vote on whether there exists *any* protection of newspapers in the private litigant context. Only the Chief Justice and Justice White believe that it does not.

Consequently, *Gertz* could be transformed into a multidimensional case with the following breakdown:

	Douglas	Brennan/Blackmun	Powell +3	Burger/White
(1) "Proof of Fault"	No basis	No Basis	Constitutional	No basis
(2) Absolute rule?	Yes	No	No	Yes
(3) Any protection?	Yes	Yes	Yes	No

First, the Justices vote by a margin of 5-4 that the "proof of fault" standard has no Constitutional basis. Next, by a margin of 7-2, they vote that the Constitution does not require any absolute rules. Finally, the Justices vote by a margin of 7-2 that the Constitution provides protections to the press.

The position of Justices Brennan and Blackmun is consistent with these votes. Their position (requiring malice) is not an absolute rule, yet it provides some Constitutional protections. Finally, it is not the "proof of fault" standard suggested by Justice Powell.

My goal here is not to demonstrate that this creative lawyering is an appropriate way to address the issues raised in *Gertz*. Rather my point is that treating

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[105] Michael Abramowicz and Maxwell L. Stearns, *Beyond Counting Votes: The Political Economy of* Bush v. Gore, 54 Vand. L. Rev. 1849, (2001).

[106] *See* Richard H. Pildes and Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 Colum. L. Rev. 2121, 2163 (1990); Michael Abramowicz and Maxwell L. Stearns, *Beyond Counting Votes: The Political Economy of*Bush v. Gore, 54 Vand. L. Rev. 1849 (2001) (demonstrating that *Bush v. Gore* can be viewed both as a unidimensional and multidimensional issue).

unidimensional cases as remands while treating multidimensional cases under an issue-by-issue rule encourages additional strategic behavior. Justice Powell will insist that *Gertz* only raises one issue. If *Gertz* is unidimensional, the case will be remanded and Justice Powell's position will prevail. However, if multidimensional cases are treated issue-by-issue, Justices Brennan and Blackmun will have an incentive to argue that *Gertz* raises multiple issues.[107].

On the other hand, multidimensional cases could be narrowed into a unidimensional framework. *Green Tree* can serve as an example. Recall from above that many issues were raised in the case. Justices Thomas and Stevens would uphold the entire South Carolina Supreme Court decision. Justice Breyer, joined by three Justices, however, disagreed with the state court's determination of whether an arbitrator or a court should construe arbitration contracts under the Federal Arbitration Act. The Chief Justice, joined by two Justices, voted to overturn the South Carolina Supreme Court's determination of state contract law. Consider the following representation of the various opinions:

Complete Agreement	Disagreement on Federal Issue	Disagreement on State Issue
<----------	----------	---------->
Stevens/Thomas	Breyer+3	Rehnquist+2
Uphold	Remand	Overturn

Placed along this unidimensional spectrum, Chief Justice Rehnquist's opinion seems extreme. It overturns a state court determination of state contract law. Justice Breyer's opinion, which focuses on whether the Federal Arbitration Act requires certain procedures, is more moderate in its reach. It only reviews the South Carolina Supreme Court's decision of federal law. Finally, Justices Thomas and Stevens are at the other extreme, giving the state court the most leeway. Viewed in this manner, *Green Tree* is just a run-of-the-mill unidimensional case that should be treated like *Gertz*.

Because of the potential to make *Green Tree* – a seemingly multidimensional case – into a unidimensional case, strategic behavior exists. Recall from above that issue-by-issue voting would probably result in overturning the state court decision (or alternatively, in the affirmation of the state court holding). Justice Breyer wants neither of these outcomes and may feel compelled to cast *Green Tree* as a unidimensional case. Alternatively, the Chief Justice has an incentive to write his opinion as if it raises multiple questions that have to be resolved. If the case were multidimensional, issue-by-issue voting would probably lead to an outcome he desires.

To summarize, the differences between uni- and multidimensional cases are only skin deep. Unidimensional cases like *Gertz* can be written in a way to suggest multiple issues are involved. Conversely, multidimensional cases like *Green Tree* can be collapsed to suggest that only one issue was present. Treating uni- and multidimensional cases differently will induce Justices to draft their opinions to avoid – or invoke – a particular outcome. Thus the solution only induces additional strategic behavior.

At this point, the reader might be frustrated. A rule requiring affirmation has been shown to lead to strategic behavior. An "always remand" solution faces difficulties

[107] Indeed, in a very well thought article, Professor Kalven demonstrates that *Gertz* is simply one piece of a larger puzzle over the freedom of the press. Professor Kalven, *The Reasonable Man and the First Amendment,* Hill, Butts, *and* Walker, 1967 Sup. Ct. Rev. 267 (demonstrating how multiple issues are involved). While it is true that remanding the case to determine whether there was proof of fault appears to be the middle position in this particular case, such a myopic view misses the broader ideologies of the Justices

in the multidimensional context, while an issue-by-issue solution cannot govern unidimensional cases. Now the reader learns that cases can be artificially transformed from uni- to multidimensional and *vice-versa*. Frustrated, one might be tempted just to throw one's hands up and ask the Court to decide which rule to adopt. This is exactly the next suggestion.

B. Engage in Meta-Voting

In their discussion of issue-by-issue voting and outcome-based voting, Professors Kornhauser and Sage argued that a court should engage in a "meta-vote" to determine when cases should be interpreted issue-by-issue and when cases should be interpreted based on the votes of the Justices.[108] Although their analysis does not deal with the question of uni- or multidimensional triple choice cases like *Gertz* and *Screws per se*, it might be helpful to consider their suggestion.

One of the problems with the *Screws* rule is that no majority of any Court has ever adopted it. Indeed, it almost impossible for a majority of a Court to agree to the vote-switch arrangement. Five Justices (a majority) will never face the need to switch their votes to achieve a majority. Consequently, the *Screws* rule will be voted on by at most four Justices of any Court.

The meta-vote would overcome this problem. In *Green Tree I*, for example, the Justices could be asked to vote according to their preferences. Justice Stevens would not have to switch his vote to achieve a majority disposition. Later, the case would be re-litigated. First, a South Carolina trial court might interpret the 3-4-2 deadlock in *Green Tree I* as an affirmation. The state Court of Appeals might reverse and treat the remand position in *Green Tree I* as the holding. Finally, the South Carolina Supreme Court might reverse the state Court of Appeals and decide that *Green Tree I* should be interpreted using an issue-by-issue approach.

Assuming the U.S. Supreme Court grants a writ of certiorari in *Green Tree II*, it will be asked to determine how to interpret the deadlock in *Green Tree I*. Thus, a meta-vote will be taken. The result might be easy. A majority of the Justices might agree with the state trial court that the deadlock is an affirmation. Alternatively, a majority might agree that the deadlock should be treated as a remand. Finally, the Justices might agree that the case should be determined issue-by-issue.

But of course, that would be too easy. As hinted in scholarship by Judge Rogers,[109] there might not be a majority in *Green Tree II* on how *Green Tree I* should be interpreted. For example, the Justices in *Green Tree II* might adopt the *same* the positions they adopted in *Green Tree I*. Justices Stevens and Thomas might vote that *Green Tree I* should be treated as an affirmation. Justice Breyer, however, might disagree. He and three Justices might vote in *Green Tree II* that *Green Tree I* be treated as a remand. Finally, the Chief Justice, joined by two Justices, might engage in issue-by-issue voting and will find – as discussed above – that Justice Breyer provided a majority in favor of overturning the South Carolina Supreme Court decision in *Green Tree I*.[110]

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[108] *See* Lewis A. Kornhauser and Lawrence G. Sage, *The One and the Many: Adjudication in Collegial Courts*, 81 Calif. L. Rev. 1 (1993) (saying metavote should happen)

[109] See John M. Rogers, *Appellate Court Voting Rights: "Issue Voting" by Multimember Appellate Courts: A Response to Some Radical Proposals*, 49 Vand. L. Rev. 997 (1996) ("Should there be issue voting or outcome voting on the metavote? ... Nightmares of infinite regression are conceivable.").

[110] Thus, *Green Tree II* might suffer from the same 3-4-2 deadlock exhibited in *Green Tree I*. Of course, the Justices might be switched around a little. Justice O'Connor might vote one way in *Green Tree I*, yet join a

Should there be a deadlock in *Green Tree II*, the Justices appear stuck. *Green Tree II* was supposed to resolve how cases like *Green Tree I* (and, now, also *Green Tree II*) are to be interpreted. *Green Tree II*, consequently, exhibits an element of self-reflection; it was meant to decide how to treat itself, but is unable to do so. Furthermore, litigation could continue indefinitely. The meaning of *Green Tree II* (and therefore *Green Tree I*) might be re-litigated until *Green Tree III* arises. However, there are no assurances that *Green Tree III* will provide a majority disposition, *et cetera*.[111]

To prevent this chain of events, one Justice in *Green Tree I*, Justice Stevens, switched his vote. In a sense, Justice Stevens has a judicial veto that prevents *Green Tree II* from arising out of the deadlock of *Green Tree I*. And at most, only two Justices are needed to prevent *Green Tree I* from being re-litigated in *Green Tree II*. Thus, a submajority of the Court can prevent subsequent litigation of *Green Tree I*.[112]

Consequently, the argument that a meta-vote should occur actually offers a justification for the *Screws* rule instead of one of the alternatives discussed in Part II. The existence of alternative ways to treat cases like *Screws* might induce discussion of a meta-vote. The possibility that the Court would be deadlocked in the meta-vote (just as it was deadlocked in the original case), however, might induce Justices to switch their votes earlier rather than later.

C. *The* Marks *Rule and the Holding of the Court*

Although vote switching prevents problems caused by a subsequent meta-vote between the three alternatives discussed in Part II, other problems still remain in determining the holding and legal significance of cases like *Gertz*, and *Green Tree*.

1. *The Effects of the* Marks *Rule on Triple Choice Cases*

a. The Easy Cases

No Court has faced difficulties in interpreting the holding of *Screws*. Recall that the Justices determined four issues: (1) whether Mr. Screws' acts fit within the statute, (2) whether the act was unconstitutional, (3) whether the unconstitutionality could be fixed, and (4) whether the errors in the case as to the third issue were harmless. A majority voted on every issue, except for the final issue on whether a new trial was necessary to fix the error. Justice Roberts, joined by two other Justices, refused to vote on the fourth issue.[113]

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different coalition in *Green Tree II*. However, so long as there is no majority for a particular position, the same problems emerge.

[111] *Cf.* Saul Levmore, *Ruling Majorities and Reasoning Pluralities*, 3 Theoretical Inq. L. 87, 123 n. 41 (2002) (mentioning "the uncertainty imposed by a practice allowing the first court to announce its split and offer no majority disposition"). There are also some theoretical difficulties with the meta-vote. The Justices who voted to affirm the lower court decision in *Green Tree II* will be referring to a lower court decision in their opinion. That is, Justice Thomas – for example – in *Green Tree II*, might hold that when a Court is deadlock, the lower court decision governs. In *Green Tree I*, this means the South Carolina Supreme Court decision is affirmed. In *Green Tree II*, which suffers the same deadlock as *Green Tree I*, however, this would mean the case should be determined according to the state's highest court's opinion in *Green Tree II*. In this hypothetical, the state Supreme Court adopted an issue-by-issue position, and it would appear that the South Carolina Supreme Court's decision should govern *Green Tree II*. The logic becomes untenable and circular.

[112] The notion of submajority rules will be developed in a work by Professor Adrian Vermeule. *Submajority Rules (in Legislatures and Elsewhere)*, (January 2004) U. of Chicago, Public Law Working Paper No. 54, www.papers.ssrn.com/sol3/papers.cfm?abstract_id=495569

[113] *See* Part I.B.

Fortunately, *Screws* can – and is – cited as authority on multiple points of law. Regarding the first three issues, one can find a clear majority in favor of a particular position. The final question of law, however, has no majority, but it is unlikely to have much bearing on future cases. After *Screws*, lower courts know which standard to apply and it would be difficult to find cases in which the same exact error was committed.

Consequently, *Screws* represents an easy case. The holding is discernable by issue-by-issue voting and the final issue – which caused the triple choice problem in the first place – is unlikely to re-appear in future cases.

b. The Pre-*Marks* Hard Cases

Alas, this is not true in the unidimensional triple choice freedom of the press cases discussed above. Prior to 1977, when the Justices fell along a spectrum, as they did in *Gertz*, there was no holding of the Court. That is, while a majority was able to dispose of *Gertz,* courts could not cite the holding *Gertz* because there was no majority on any particular position. For this reason, the 1967 Freedom of the Press case of *Time, Inc. v. Hill*[114] had no holding that would affect the outcome of the 1971 case of *Rosenbloom v. Metromedia*,[115] which, in turn, had no holding that affected *Gertz* in 1974.[116] The unidimensional triple choice freedom-of-the-press cases were all treated as having no holding. As such, the issue was re-litigated and returned to the U.S. Supreme Court, where again the Court was unable to agree and no holding resulted.

Multidimensional triple choice cases before 1977 were all treated the same way. In 1953, *Maryland Casualty Co. v. Cushing* reach the U.S. Supreme Court;[117] to dispose of the case Justices Frankfuter, Reed, Jackson, and Burton all switched from upholding to remanding to achieve a majority.[118] In 1965, the Fifth Circuit was asked to determine the holding of *Cushing* – what it called "a grisly spectre of undefined size and shape."[119] The appeals court "circumnavigated" *Cushing* stating, "Because of the Court's extraordinary division, it is impossible to say what the *Cushing* case stands for."[120] That is, multidimensional triple choice cases like *Cushing* were treated as having no holding like *Gertz*.

c. The *Marks* Rule

The law changed in 1977 with the handing down of *Marks v. United States*.[121] In *Marks*, the U.S. Supreme Court set out the following two-part test to determine the holding of case where there is no majority agreeing to any particular position.

(1) First, the court is to look only at the decisions composing the majority on disposition;

(2) Next, of those opinions, it is to pick the "narrowest" of them. The "narrowest" opinion of those in the majority becomes the holding of the Court.

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[114] 385 U.S. 374 (1966).
[115] 403 U.S. 29 (1971).
[116] 418 U.S. 323 (1974).
[117] 347 U.S. 409 (1954) (argued April 27-28, 1953).
[118] *Id*. at 423.
[119] *Colleman v. Jahncke Serv. Inc.*, 341 F.2d 956, 959 (1965).
[120] *Id*.
[121] 430 U.S. 188 (1977).

Pedcor Magm't Co. v. North American Indemnity, NV[122] shows how the *Marks* rule operates in triple choice cases. In *Pedcor*, the Fifth Circuit applied the *Marks* rule to determine the holding of *Green Tree*.[123]

The Fifth Circuit began by noting how a majority was achieved in *Green Tree* only after Justice Stevens provided a fifth vote.[124] Thus, the majority on the disposition had two camps: (1) Justice Breyer, with three other Justices; and (2) Justice Stevens, who grudgingly joined. The Fifth Circuit only considered these two opinions, consistent with the first step in *Marks*.

Next, it tried to determine which opinion was "narrower," a task that is normally daunting.[125] Fortunately, the Fifth Circuit picked Justice Breyer's opinion. Although the court does not go into much analysis on this point, consistency required it to pick Justice Breyer's opinion as the holding. Here is why:

Remember that the proceedings in *Green Tree* were remanded to an arbitrator pursuant to Justice Breyer's instructions. Had the Fifth Circuit instead found Justice Stevens' opinion to be the "narrowest" holding, *Pedcor* would be governed by a different test than the one applied in *Green Tree*. That is, the proceedings in *Green Tree* would be governed by Justice Breyer's opinion, while the *Pedcor* proceedings and subsequent cases would be governed by Justice Stevens' "narrowest" opinion. This result seems insensible, and perhaps explains why lower courts are unlikely to find that the vote-switcher had the "narrowest" holding of the Court.[126]

Consequently, the *Marks* rule's narrowest holding requirement does not seem applicable in cases where a vote-switch has occurred. The opinion that led to the majority disposition in cases like *Screws* must be the "narrowest" holding under the *Marks* rule for consistency purposes. It would be wrong, however, to disregard the *Marks* rule in its entirety.

2. *The Modified* Marks *Rule*

Recall that the *Marks* rule requires lower courts to (1) limit themselves to the opinions that form the majority on the disposition and *then* to (2) pick the "narrowest" holding. In cases like *Screws*, however, there is no majority on the disposition of the case (assuming no vote switch). Perhaps, under a Modified *Marks* rule, the lower courts should skip directly to the second step and pick the "narrowest" holding if the Court is deadlock and no vote switch has occurred. It could then work backwards and adopt the opinion *most likely to have achieved* a majority in cases like *Screws* for the first step in the *Marks* rule.

Gertz is a good starting point on how a court would go about predicting the preferences of the Justices under a Modified *Marks* rule. Recall that the Justices fell along a spectrum. On one end, Justice Blackmun and two others voted to uphold the case and to establish high protections for the press. On the other end, Chief Justice Burger and

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[122] 343 F.3d 355 (2003)

[123] It began, somewhat awkwardly, by stating the *Marks* rule: "It is well established that when we are confronted with a plurality opinion, we look to that position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* at 358.

[124] *Id.*

[125] *Cf.* Saul Levmore, *Ruling Majorities and Reasoning Pluralities*, 3 Theoretical Inq. L. 87, 101 (2002) ("A narrowest-majority rule is not always easy to apply."); Lewis A. Kornhauser and Lawrence G. Sage, "The One and the Many: Adjudication in Collegial Courts," 81 Calif. L. Rev. 1, 46 (1993).

[126] Indeed, any other solution would induce all the Justices to switch in the hopes of their opinion becoming the narrowest holding.

one other Justice, voted to overturn the case and to defer to state law. Finally, Justice Powell was in the middle requiring proof of fault. Joined by three other Justices, he voted to remand the case.

Although Justice Blackmun switched from upholding to remanding to achieve a majority disposition, the Modified *Marks* rule would make that switch unnecessary. We know for sure that the Justices had the following as their first preferences:

	Blackmun +2	Powell +3	Burger +1
First Preference:	Uphold	Remand	Overturn

In addition, we now know that Justice Blackmun preferred remanding the case to overturning it. Similarly, the opinion of Chief Justice Burger suggests that he prefers remanding the case to upholding it. Consequently, we can complete a table as follows:

	Blackmun +2	Powell +3	Burger +1
First Preference:	Uphold	**Remand**	Overturn
Second Preference:	**Remand**		**Remand**
Third Preference:	Overturn		Uphold

Given this composition of preferences, a lower court could apply a Modified *Marks* rule and determine that remanding was the preferred position of the Justices. It was the position that was most likely to have achieved a majority of the Court. Consequently, Justice Powell's opinion would become the holding, even though no majority voted for it using the new rule.

In this situation, Justice Powell's opinion would be – what is commonly called – a Condorcet winner, since it would beat *all* alternative outcomes in head -to-head competition. First, the remand outcome would beat an uphold outcome by a margin of 6-3. Justices Powell, joined by three Justices; and Chief Justice Burger, joined by one Justice, prefer remanding the case to upholding it. Similarly, remanding the case beats overturning by a 7-2 margin. Justice Powell, joined by three Justices; and Justice Blackmun, joined by two Justices, would chose remanding the case over overturning it. Perhaps this outcome helps explain our intuition that remand is an appropriate "middle" position.

3. *Problems with the Modified* Marks *Rule*

Green Tree, however, raises questions about this methodology. Justice Stevens stated that he preferred to uphold the South Carolina Supreme Court decision. Similarly, because Justice Breyer's opinion "was closer" to his, we can deduce his second and third preference:

	Rehnquist +2	Breyer+3	Stevens+1
First Preference:	Overturn	Remand	Uphold
Second Preference:			Remand
Third Preference:			Overturn

The remaining boxes in the chart above are not so clearly ascertained from the opinions. As discussed above, a lower court is likely to find that Justice Breyer prefers overturning the Supreme Court of South Carolina's decision to upholding it. Recall, that he remanded the *Lackey* proceedings back to the arbitrator despite the fact that the arbitrator had independently approved class action arbitration. This decision might have been motivated to give the arbitrator a second opportunity to avoid class action arbitration, something Justice Breyer might dislike.

As for the Chief Justice's preferences, there are two reasons to suspect that he prefers upholding the case to remanding it. First, the Chief Justice Rehnquist devotes

over half of his opinion to attacking Justice Breyer's decision to remand the case. In addition, the Chief Justice is usually perceived as a supporter of states' rights. Deferring to a state court's interpretation of state law is probably preferable to removing from the state court all power to adjudicate these claims.

While these predictions are by no means perfect, they do help illustrate a peculiarity about the *Screws* rule. Consider the breakdown of preferences given the assumptions about the preferences of the Justices:

	Rehnquist +2	Breyer+3	Stevens+1
First Preference:	Overturn	**Remand**	Uphold
Second Preference:	Uphold	Overturn	**Remand**
Third Preference:	**Remand**	Uphold	Overturn

Remand no longer seems like a "narrowest" position. While Justices Stevens and Breyer form a majority preferring remand to overturn, Justice Stevens and the Chief Justice prefer upholding to remanding. Thus, if given a choice between remanding and upholding, a majority of the Justices would uphold.

Upholding, however, is not a Condorcet winner either. Chief Justice Rehnquist and Justice Breyer would prefer the case be overturned to it being upheld.

Those familiar with seventeenth century French philosophers will be well aware of an odd phenomenon in the preferences of the Justices. Condorcet cycling exists since (I) overturning is preferred to upholding, (II) upholding is preferred to remanding, and (III) remanding is preferred to overturning. The preferences seem to go in a circle.[127]

If the preferences of the Justices are as indicated in the chart above, a lower court will be helpless to determine what position would most likely have achieved a majority of the Court. While upholding beats remanding, remanding beats overturning, and overturning beats upholding. There is no stable solution. The Modified *Marks* rule has no solution stable enough to be called a solution that a majority would have accepted. The lower court would be confused.

a. The Effects of *Screws* on the Problem

The Modified *Marks* rule could do more damage than just implied. Assume *Green Tree* (with no vote switching) is re-litigated with the hope that lower courts would find the narrowest holding. The parties would return to the South Carolina state courts, where the plaintiff would argue that the divided Court in *Green Tree* upheld the South Carolina Supreme Court decision. The defendant, however, would correctly counter that more Justices prefer overturning the decision to upholding it.

The South Carolina trial court might accept the defendant's argument that the Chief Justice's opinion in *Green Tree* is the "narrowest holding" of the various positions. Contrasted with the plaintiff's position that an affirmation is the "narrowest holding," the defendant's arguments in favor of overturning would have generated more votes at the U.S. Supreme Court. By a vote of seven-to-two, the Justices would have overturned the state's highest court to affirming it.

The plaintiffs would then appeal the trial court's determination all the way to the South Carolina Supreme Court. At the appellate level, plaintiff's lawyers would argue that remanding the case to an arbitrator is a better "narrowest holding" than

[127] *Cf. Essai sur l'Application de l'Analyse a la Probabilite des Decisions Rendues a la Pluralite des Voix*, in Condorcet: Selected Writings 22 (K. Baker ed. & trans. 1976); Kenneth Arrow, *Social Choice and Individual Values* (2d ed. 1963); Frank Easterbrook, "Ways of Criticizing the Court," 95 Harv. L. Rev. 802, 815 (1982)

overturning the South Carolina's highest court decision because more Justices prefer remanding the case to an arbitrator than prefer overturning the state court's decision. Thus, the trial court incorrectly picked the narrowest holding.

Given the chart above, the South Carolina Supreme Court would probably agree with the plaintiff. Justice Beyer's position remanding the case to an arbitrator generates more votes than the Chief Justice's opinion overturning it. Consequently, remanding is more of a "narrowest holding" than overturning and the trial court's determination should be overturned.

The reader will not be surprised to learn that *Green Tree I* could be re-litigated all the way back to the U.S. Supreme Court. In *Green Tree II*, the Justices would be asked to determine the narrowest holding in *Green Tree I* (and whether the *Marks* rule applies at all under the meta-vote from above). Needless to say, the Court could be divided again and a cycle of litigation could continue indefinitely.

Thus, the *Screws* rule works in conjunction with the *Marks* rule to solve the problem of re-litigation and confusion. First, the *Screws* rule limits cycling by forcing the Court to narrow the outcomes on the table.[128] The remaining positions are narrowed further by the *Marks* rule after the case is handed down. Thus, *Screws* limits the need for lower courts (and later the U.S. Supreme Court) to interpret between three different outcomes.[129] After *Screws*, there are only two positions that form the majority; after *Marks*, there is only one holding.

b. The Persistence of the Problem Despite *Screws*

While the *Screws* rule coupled with the *Marks* rule solves the problem of *subsequent* litigation, it does not answer the question of who switches their position in the *original* case. To understand why problems remain, imagine that the preferences of the Justices in *Green Tree* are arranged in such a way to induce cycling between remanding, overturning, and upholding:

	Rehnquist +2	Breyer+3	Stevens+1
First Preference:	Overturn	**Remand**	Uphold
Second Preference:	Uphold	Overturn	**Remand**
Third Preference:	**Remand**	Uphold	Overturn

Begin, as in Part II, A., with the default rule affirming when no majority is achieved. Justices Stevens and Thomas are the only Justices who place affirming as their first choice. Both the Chief Justice and Justice Breyer, however, prefer to overturn the case.

Consequently, with these preferences, Justice Breyer will indicate to the Chief Justice that he wants to join in overturning the case so as to avoid an affirmation by a deadlock. The Chief Justice will be glad to accept Justice Breyer's vote.

The reader should be able to anticipate what happens next. Justice Stevens prefers remanding the case to having it overturned. Consequently, he will switch to remanding the case. Both Justice Breyer and Justice Stevens prefer this outcome.

The next step will lead to a cycle: The Chief Justice prefers upholding the case to having it remanded. Consequently, he will switch to upholding the case so as to avoid remanding. Justice Stevens would gladly accept the switch.

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[128] Saul Levmore, *Ruling Majorities and Reasoning Pluralities*, 3 Theoretical Inq. L. 87 (2002).
[129] *Id.*

Thus a complete cycle has occurred. Justice Breyer switches to join the Chief Justice, which induces Justice Stevens to join Justice Breyer, which induces the Chief Justice to switch to join Justice Stevens. The cycle could continue indefinitely. While the *Marks* rule joined by the *Screws* rule saves lower courts from getting stuck trying to figure out the outcome when cycling exists, the rule does not help the Justices figure out how to avoid the cycling themselves in the first place.

c. Alternative Solutions to the Problem

There are three solutions to the problem of cycling over the outcome of a case. Deliberating in conference, Justices of the U.S. Supreme Court may have developed the first group of solutions, while Dean Saul Levmore developed a second theoretical solution. This Article critiques these two groups of solutions to the cycling problem, and offers a third solution. It is worth noting in advance that no solution is iron-proof.

i. External Salvation

When faced with cycling over the outcome of the case, U.S. Supreme Court Justices might try to think outside of the box and turn to external procedural sources of salvation. Specifically, the Court could (1) agree to re-hear the case, (2) seek other options, namely dismissing the writ of certiorari, or (3) decide the case on an unrelated ground, for example, on standing.

a. Re-hearing as a Solution to the Cycling

The Justices in *Time Inc. v. Hill*[130] may have thought they found a way to avoid a potential cycle, although – in the end – their hopes were shattered. *Time Inc.*, like *Gertz*, involved the protections offered to media outlets for libel against private individuals. In conference after the case was first heard, the Justices were divided into three camps: Chief Justice Warren and Justice Fortas voted to uphold the state law as constitutional, while Justices Black, Douglas, and Clark voted to overturn the state law as being a violation of the First Amendment. Justices Harlan, Brennan, Steward, and White remained uncertain as to the constitutionality of the statute. They voted to remand the case for further clarification by the state's highest court because they were unable to rule on the law's merits. Thus a three-way deadlock occurred.[131]

The Justices in *Time Inc.* tried to achieve a majority by re-hearing the case to determine the scope of the state law. At first glance, re-hearing the case could expose the Court to cycling, not save it from the problem. Consider the following hypothetical ordering of the preferences of the Justices in *Time Inc.*:

	Warren +1	Harlan+3	Black+2
First Preference:	Uphold	Remand	Overturn
Second Preference:	**Re-hear**	Uphold	**Re-hear**
Third Preference:	Overturn	**Re-hear**	Remand
Fourth Preference:	Remand	Overturn	Uphold

Adding the option of re-hearing the case might create cycling, since re-hearing beats remanding, remanding beats upholding the decision, but upholding beats re-hearing.

Despite the possibility that adding a re-hearing option would induce cycling, the Justices agreed to allow additional briefs as to the scope of the state laws.[132] It was

[130] 385 U.S. 374 (1966).
[131] Del Dickson, ed., *The Supreme Court in Conference (1940-1985*) 388-39 (Oxford 2001).
[132] *Id.*

believed that additional information would help the four Justices voting to remand decide between upholding the law and overturning it as unconstitutional. Disaster was supposed to be avoided.

But disaster hit again, and *Time Inc.* was added to the list of triple-choice deadlocks like *Gertz* and *Screws*.[133] Justice Harlan and Justice Brennan both continued to insist that the case be remanded, but for a different reason. After the first hearing of *Time Inc.*, these Justices voted to remand for further clarification of the law. After the second hearing of the case, however, these Justices voted to remand for a middle-of-the-road freedom-of-the-press standard. Thus, the three-way deadlock re-occurred after the re-hearing, even though the re-hearing was supposed to solve deadlock problem.

b. Dismissing the Writ as a Solution to the Cycle

In addition to re-hearing the case, the Justices have an additional option of dismissing a writ as improperly granted.[134] After the Court re-heard *Time Inc.* and after a three-way deadlock re-emerged, the Court could have dismissed the writ of certiorari, thus removing the problem by cutting it off at its source.

While the Justices did not resort to this solution in *Time Inc.*, it is possible they dismissed the writ of certiorari in other cases to avoid cycling.[135] Two cases look suspicious enough to justify closer examination. In *Burrell v. McCray*,[136] the U.S. Supreme Court granted a writ of certiorari to review the lower court determination. After deliberation, however, one Justice who voted to grant the writ of certiorari switched his mind and voted to dismiss the writ as improperly granted. A similar result was seen in *Wainwright v. City of New Orleans*.[137]

Because the inner-workings of the Court remain secret, we can only speculate that the Justices may have been divided over the disposition of the case in a way that indicated cycling. For example, when the Justices discussed the case, one group might have wanted to affirm, a second group to remand, and a third to overturn. Realizing the deadlock, perhaps the Justices who wanted to remand expressed an interest in overturning. This would induce the Justices who wanted to uphold to switch to remand, which in turns induces the Justices who want to reverse to switch to upholding the case. After multiple rounds of trying to reach an agreement, the Justices might have become

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[133] 385 U.S. at 398.

[134] *See, e.g., Rosenblatt v. Baer*, 383 U.S. 75 (1966) (Justice Douglas, although wanting to dismiss writ of certiorari, turns to merits and overturns lower court decision); *New York v. Uplinger*, 467 U.S. 246, 248 (1984) (discussion of the Rule of Four).

Usually, the question of whether a writ was properly granted is considered a preliminary issue, which does not affect the analysis in this Article. *See Connecticut v. Johnson*, 460 U.S. 73 (1983) (Justice Stevens, although wanting to dismiss writ of certiorari, turns to merits); *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974) (Justices Stewart and White, although wanting to dismiss writ of certiorari, turn to merits); *Udall v. Wisconsin*, 306 F.2d 790 (D.C. Cir. 1962) (Judge Washington, although wanting to dismiss the writ of mandamus, turns to the merits). See, *generally,* Ira P. Robbins, *Justice by the Numbers: The Supreme Court and the Rule of Four – Or Is It Five?*, 36 Suffolk U. L. Rev. 1 (2002).

[135] One caveat: It is difficult to know in how many cases the Justices suffer from cycling on the disposition of a case and rely on alternative solutions. The Justices have an incentive to keep their cycling to themselves and conference notes are not readily available. As demonstrated above, Justice engage in strategic behavior, masking their opinions and writing them in such a way to maximize their effectiveness. Consequently, even if the Justices knew a cycle existed, they would have an incentive not to memorialize the problem or to mention it to outsiders.

[136] 426 U.S. 471 (1976)

[137] 392 U.S. 598 (1968)

frustrated, and one Justice who voted to grant the writ switched to save the Court from the problems posed. Thus, the debilitating cycling could come to an end by the method by which it arose: the decision to grant a writ of certiorari.

c. Alternative Grounds as a Solution to the Cycling

If re-hearing the case and dismissing the writ of certiorari are not viable options, the Court could use other tools for removing cases from its jurisdiction. Specifically, the Political Question Doctrine, standing, mootness, ripeness, and abstention are a few doctrines that the Court has developed to remove problematic cases from the Court's docket.[138] When the Justices are divided over the outcome of the case on the merits, they might be united in willing to forgo differences and decide the case on procedural grounds. Thus three-way deadlock and cycles are hidden when Justices turn their attention to procedural issues upon which they are more likely to be able to agree.

To summarize briefly, the three sources of external salvation just discussed (re-hearing the case, dismissing the writ as improperly granted, and resorting to judicially-created procedural rules) are all defenses the Court has developed to break potential three-way deadlocks. Nevertheless, these three Court-made solutions are not always available. Consider the case of *Green Tree*, in which a rehearing would serve no purpose (South Carolina law was clearly established). Next, the writ of certiorari in *Green Tree* was properly granted, and the Justices would have had to bend over backwards to find ways to dismiss it. Finally, the contract dispute in *Green Tree* was procedurally pure, and doctrines like mootness, ripeness, or abstention could not apply. Indeed, avoiding the case on procedural grounds would involve further "creative lawyering," sparking criticism from a range of sources. Thus, the solutions relied upon by Supreme Court Justices are not perfect, and the Justices must search for other ways to avoid a cycle.

ii. Randomization

Dean Saul Levmore, the only scholar to discuss directly the problem of cycling on the outcome of a case, suggests that the Court solves the cycling problem by delegating the decision to a "randomizing agent," namely a subsequent lower court.[139] From his arguments, we can infer that if the Justices find themselves stuck in a cycle, they have two options:

First, the Justices could write a one-sentence per curium opinion saying, "The case is remanded for a disposition not inconsistent with the Court's opinion" and then attach three concurrences. In *Green Tree*, the Chief Justice would concur with the one-sentence per curium opinion and would suggest that the case should be overturned for the reasons stated in his opinion. Justice Breyer, on the other hand, would write his concurring opinion in such a way to suggest the opinion should be remanded to an arbitrator. Finally, Justices Stevens and Thomas would add their concurring opinions suggesting the case should be upheld. The Justices would wait and see which concurring opinion lower courts adopt as the holding of the case.

Alternatively, the Court could write a long, confusing, and cryptic opinion. For example, in *Green Tree*, all the Justices would have agreed with the following holding: "A contract must be enforced according to its terms, not inconsistent with federal law or

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[138] *Cf* David P. Currie, *Federal Jurisdiction In a Nutshell*(1999).

[139] Saul Levmore, *Ruling Majorities and Reasoning Pluralities*, 3 Theoretical Inq. L. 87, 110 (2002) ("[W]e allow a future interpreter to do the work for us... An optimist might say that a future court, or other interpreter, is something of a randomizing agent with some possibility of using the advantage of time gone by to see arguments or applications no apparent to the first panel.").

state law." Of course, while agreement is achieved, a lower court would have no guidance as to the ultimate merits on the interpretation of the *Green Tree* contracts. Again, all the Justices would wait and see how lower courts would interpret the cryptic opinion.

An element of randomness has been added to the process. Perhaps, the lower court would read the per curium opinion or the ambiguous opinion as suggesting an overturning of the South Carolina Supreme Court decision. Alternately, a lower court might send the case to an arbitrator, believing that an arbitrator decision is "not inconsistent with ... state law" and that the cryptic opinion so required. Finally, and perhaps most plausibly in the *Green Tree* context, a South Carolina state court would find that the U.S. Supreme Court upheld the South Carolina Supreme Court decision in *Green Tree*. Thus, the die has been cast and the U.S. Supreme Court Justices wait for subsequent lower court decisions to solve the intractable dilemma. A lower court, according to Dean Levmore, would serve as a "randomizing agent," selecting between the three opinions.

Dean Levmore's theory of a "future interpreter" randomly picking between the three competing positions is both novel and problematic. It is ingenious because Dean Levmore has independently reached the only solution Economists have been able to devise to overcome strategic behavior. If each Justice were given a lottery ticket and the winner of the lottery had his or her opinion serve as the opinion of the Court, all Justices would vote sincerely. It is notable that Dean Levmore devised his "randomizing agent" solution without consulting (or at least citing) the Economics literature of the 1970s reaching the same conclusion.

While theoretically pleasing, the "future interpreter" solution is perplexing and inappropriate in the U.S. Supreme Court context. First, the "randomizing agent" theory assumes a willingness on the part of the Supreme Court to relinquish power to a lower court. While divided over the outcome of a case, the Justices might be united in opposing having a state trial judge in rural South Carolina determine the outcome of *Green Tree*. Indeed, the "randomizing agent" solution might not be a Condorcet winner; all Justices would prefer having their decision serve as the holding of the Court to having an uncouth state court judge make determinations for it.

Dean Levmore's "future interpreter" solution is, however, is more problematic because, as the saying goes, "The future is now." Several months after *Green Tree* was decided, the Fifth Circuit had to interpret the case's holding in *Pedcor Magm't Co. v. North American Indemnity, NV*.[140] If the U.S. Supreme Court did not like the holding of the "future interpreter" (i.e. the Fifth Circuit), the highest court would grant a writ of certiorari to re-hear the case. Thus, Dean Levmore's "future interpreter" is just a lower court – subject to Supreme Court review – that hears a subsequent case several months after the initial division. The "randomizing agent" solution pre-supposes that the Court would not re-hear the case, a bold assumption.

iii. Intensity Preferences

It is always easier to shoot down a theory than to build one up. Having exposed flaws in the solutions identified by the Court and by Dean Levmore, I am tempted to conclude by saying that the Justices are – pardon my French pun – *Screw*ed in this context. Nevertheless, I feel compelled to offer a solution to the intractable problem that

[140] 343 F.3d 355 (2003)

focuses on three different types of intensities: as to judicial philosophies, as to the merits of the case, and as to the Court as a political institution.

a. Intensities over Vote Switching as a Proper Act for Judges

The first form of intensity involves the judicial philosophies of the Justices. Reviewing the cases, one will find that certain Justices never engage in vote switching, while others engage in it frequently.[141] Justices Stevens and Rutledge have engaged in more vote switches than any other members of the Court. Perhaps the answer to the cycling problem lies in these statistics.

Individual Justices are likely to develop personal beliefs about their roles on the Court. Vote switching is not something a Justice hopes to have to do frequently, and certain Justices might have developed internal beliefs that such vote switching is wrong. Consider again the case of *Maryland Casualty Co. v. Cushing*,[142] in which Justices Frankfuter, Reed, Jackson, and Burton all engaged in vote switching.

The language in *Cushing* suggests a possible discomfort in the act. While Justice Frankfuter's opinion is written in the first person, the act of vote switching is written in the third person, suggesting someone else had done the switching for these four Justices. Again, I am speculating, but *Cushing* may reflect a discomfort by some Justices to deviate from their preferred position. While vote switching in *Screws* is cited as necessary to achieve a majority disposition, the strategic behavior that actually occurs is perceived as less acceptable. Perhaps, some Justices either prefer not to engage in such conduct, or – when they do – to attribute the act of vote switching to a third party.

Thus, in *Green Tree*, although Chief Justice Rehnquist has the ability to perpetuate the cycle by switching to affirming, he believes doing so is beyond his power – or at least he prefers not to do so publicly. This ends the cycle with Justice Stevens' switch to remand. There is no cycling because the Chief Justice, like Herman Melville's Bartleby, "prefers not to" switch.

b. Intensities as to the Merits of the Case

Justice Stevens' opinion in *Green Tree Financial Corp. v. Bazzle*, suggests a second type of intensity: namely over the merits of the case. Recall from above that Justice Stevens preferred to uphold the South Carolina Supreme Court decision but switched to remand. One reason he, as opposed to any one else, switched was that he was not particularly beholden to his position. He wrote, "because petitioner has *merely* challenged the merits of the decision without claiming that it was made by the wrong decisionmaker, there is no need to remand the case to correct that *possible* error." That is, he preferred to uphold the case on a minute procedural ground, which future lawyers will be more careful to correct. As to the more important question of whether to have class-action arbitration, he agrees with his colleagues (with some reservation) that "[a]rguably the interpretation of the parties' agreement should have been made in the first instance by the arbitrator, rather than the court."

In situations like *Green Tree*, one Justice cares less about his or her preferred outcome than the others do. Should someone have to change his or her vote on the merits, it is more likely that this person would be the one to do so.[143]

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[141] *Supra* n 5.

[142] 347 U.S. 409, 410 (1954)

[143] *See* Evan Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 Mich. L. Rev. 2297, 2313-16 (1999). He writes: "A Justice's willingness to switch from his sincere to second-best disposition should

c. Intensities as to the Court as a Political Institution

Finally, as Professor Caminker argued, members of the Court might place a different "value ... on constructing a majority-disposition coalition such that the Court can issue a judgment in the Instant Case."[144] That is, some Justices will not be concerned with whether cases like *Green Tree* remain as deadlocks, while others will feel that the Court as an institution will be harmed should there remain uncertainty with the meaning of cases like *Green Tree*. In this sense, the Justices are "playing chicken" waiting to see who will flinch first, and a Justice changes his or her vote to ensure that there is no *Green Tree II*. Phrased differently, each Justice will assess his or her own risk tolerance before making a decision whether to sacrifice in the immediate case to help the Court survive as a political institution in the future.

Weighing all three intensities, the Court engages in a multivariate balancing. Justices whose judicial philosophies prevent them from engaging in vote-switching, who have strong preferences as to the merits of the case before them, and who are not particularly concerned about whether the Court as an institution suffers will wait until another Justice – one whose judicial philosophy is more forgiving of public switches, who is not beholden to a particular position on the merits, and who is more concerned about the Court as an institution – switches his or her vote (with some Justices in between these two extremes). In each case, the intensities are varied, explaining why it is not always the same Justice who switches. The adjudicator with the lowest combined intensities against vote switching will be the one to engage in the vote switch. And because the institution is small enough, the Justices can informally figure out, and keep track of, which Justice is the least adverse to changing his or her vote.

Two other Economic tools, the free-rider problem and the Prisoner's Dilemma, come into play at this point.[145] Consider the free-rider problem first. In general, vote switching is not the preferred activities of Justices (were it a benefit, more would do so even after a majority were formed). Nevertheless, in some cases, someone must engage in the dirty work and switch to help the Court achieve a majority and prevent re-litigation and embarrassment. Consequently, Justices have an incentive to over-state their incentives against vote switching, hoping that someone else will cave first. The intensity-over-stator would enjoy the benefit of another Justice's vote switch without ever having to engage in a vote switch of his or her own.

Should every Justice be an intensity-over-stator and should every Justice refuse to sacrifice for the Court, the institution itself will suffer. In the earliest days of the Republic, Justices of the U.S. Supreme Court each wrote their own opinions, leading to confusion. While each Justice benefited by having his personal views articulated in full,

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depend on both institutional and substantive variables. First, how much value does he place on constructing a majority-disposition coalition such that the Court can issue a judgment in the Instant Case? Second, based on the magnitude of perceived error assessment how strong is his preferences for his top-ranked disposition (D1) over his second (D2), and his second-ranked over the third (D3)?" Professor Caminker, however, seems to miss the negotiation around the default rule phenomenon when he argues, "There is[] no articulated rationale for [the] patterns [of vote switching] in any of the cases." *Id*. at n 52. He, however, then recovers when he writes, "It appears that the choice whether to stand firm or switch (and to what) is left up to the strategic judgment of each faction." *Id.* His succinct treatment of the triple-choice cases is reflective of other scholarship that deals with this issue tangentially.

[144] *Id*.

[145] *See, e.g.,* Douglas G. Baird, *et al*., *Game Theory and the Law* 48-49, 176, 189, 203, 308, 312-13 (1994).

the Court failed to provide any guidance to litigants. After John Marshall's ascension to the position of Chief Justice, there was a clear majority for every case, and the Court's reputation was enhanced. Concurrences and dissenting opinions remained rare until a recent explosion of plurality decisions and deadlocks like *Green Tree*. Today, cases like *Tidewater* demonstrate increasing confusion over how to treat the Court's holdings (indicating the Court has discounted or forgotten the harm caused by the pre-Marshall system), and the institution's reputation for providing clear guidance to the legal community has suffered.

Modeled in term of the Prisoner's Dilemma, one finds:

	Compromise for the sake of the Court's reputation (and correctly state intensities)	**Refuse to compromise and increase personal benefits (by lying about intensities)**
Compromise for the sake of the Court's reputation (and correctly state intensities)	Enhanced reputation of the Court with lack of individuality (Marshall Era)	Free-rider problem benefiting those who refuse to compromise
Refuse to compromise and increase personal benefits (by lying about intensities)	Free-rider problem benefiting those who refuse to compromise	Confusion over holdings, while individually Justices benefit (pre-Marshall)

Although this model is an over-simplification, for example by ignoring benefits to the institution from dissenting and concurring opinions and the fact that some Justices might be happy that vote switching is the cross they are forced to bare, it does offer insight into one interesting fact about vote switching. One could ask why, if vote switching is considered something to avoid, Justices engage in vote switching publicly. Hiding the vote switch would achieve the same beneficial effects for the institution while minimizing the negative effects to the individual Justice who actually switches. The Prisoner's Dilemma model offers a solution.

As repeat and mostly agreeable players, the Justices have an incentive to maximize the their collective take-away from the matrix above. Alternately allowing some Justices to dissent or concur would give Justices a chance to make their mark without harming the institution by doing so. Similarly, distributing the burden of vote switching in the cases that are most likely to harm the Court would help avoid the bottom right section of the matrix. Consistent with the work of Robert Axelrod,[146] a public system keeping track of who voted when would enhance the effectiveness of this wealth-maximizing system, and concurrences, dissents, *and vote switches* in cases like *Green Tree* must be recorded for the benefit of members of the Court (e.g. from new members who were unaware of previous switches or from subsequent disputes over who did the dirty work in the past).The public vote switch, therefore, is a reminder by the switching Justice that he or she has done his or her job in saving the collective institution and that next time, his or her colleagues will be responsible for the dirty – yet essential – work of the Court. Although Stevens and Rutledge assumed a disproportionate share of these chores, other Justices help out too, sustaining the system and protecting the Judiciary's reputation. Thus, an informal wealth-maximizing,

[146] *The Evolution of Cooperation* (Reprint 1985).

intensity-aggregating system seems to offer a solution to the problems posed by Arrow's Impossibility Theorem, discussed above.

Summary

A meta-analysis of the *Screws* problem identifies more instances of strategic behavior. A rule that would treat uni- and multidimensional cases differently will only induce Justices to write their opinions strategically. Next, a proposal to conduct a meta-vote could induce Justices to switch their votes earlier to prevent such a meta-vote from ever occurring. Finally, given lower courts powers to predict the outcome that would be agreeable to a majority of the Court exposes the problem of cycling. When cycling occurs, the Justices find alternative ways to prevent it, for example, by dismissing the writ as improperly granted, or arbitrarily moving onto different issues.

Finally, no solution to the cycling problem was able to solve all of the conditions identified in Arrow's Impossibility Theorem. The three solutions identified, namely external procedural salvation, randomization, and intensity preferences, all fit within Kenneth Arrow's seminal work on cycling. According to the Nobel Prize winning Arrow's Impossibility Theorem, cycling can be avoided by reference to "irrelevant alternatives." The three procedural sources of salvation are all "irrelevant" to the initial three-way deadlock on the merits, and they therefore can save the Justices. Dean Levmore's "randomizing agent" is also external to the original deadlock and therefore "irrelevant" according to Arrow's work. Finally, judicial intensities are "irrelevant" to the merits of each position in the three-way deadlock. Our intuition to look outside the box to solve the deadlock within the box was predicted by Arrow's work, and it is not surprising to see the suggestions contained in this Article.

But it is worth noting how all three solutions are, nevertheless, "irrelevant." In order to remove cycling, the Justices must resort to some external principle. The Court might be pre-disposed to look to "irrelevant" procedural rules external to the merits of the case. Dean Levmore looks to the "irrelevant" opinion of a lowly state trial court, while I, instead, look to a Justice's "irrelevant" beliefs about their functions on the Court and other preferences. Following a lawyerly intuition, the reader might try to figure out which solution is less "irrelevant" than the other. I leave this for another day, and simply note that they are all bad answers because, according to Arrow, there are no good answers to the problem.

Conclusion

At this point, the reader might be frustrated, yet invigorated. Justices are engaging in vote switching, citing a rule with no authority. Suggestions of ways to prevent the vote switching, however, begin to expose additional strategic behavior that is hidden by the *Screws* rule. Indeed, the best reasons for the *Screws* rule seem to be that (1) it gives Justices an opportunity to say they are willing to take a certain position and then back down to achieve a majority,[147] (2) it helps Justices avoid applying *Durant* and an affirmation,[148] and (3) it prevents future litigation that can induce additional more embarrassing deadlocks.[149] None of these nuts and bolts is likely to appear in a case reporter in the near future.

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[147] Part I. C.

[148] Part II. A.

[149] Part III. B. The Article was intended to itself exhibit a form of cycling. Justifications for the *Screws* rule are in Parts I. C.; II. A.; and III. B. Replacing letters for the Roman numerals and filling in the remaining slot, one finds the following pattern:

This frustration was to be expected. The Economics literature has demonstrated that strategic behavior is inevitable.[150] The only solution in the literature is in a 1977 article by Professor Gibbard in which he suggests inducing randomness.[151] If we were to give every Justice a lottery ticket and assigned the winner of the lottery the ability to write an opinion for the Court, we would ensure that Justices voted sincerely. Alas, this solution seems inappropriate in the context of the U.S. Supreme Court, where "case or controversies," and not lotteries, are to be decided.[152]

I submit, in conclusion, that the best justification for the *Screws* rule is that it forces a closer examination of its own existence, as done in this Article.[153] While this examination is unlikely to help the parties in *Screws* and *Green Tree*, it does offer insight into the adjudication process and the issues facing Justices today. Furthermore, the secrets of *Screws* teach us not only about the Justices and their behavior, but about our own Sisyphus-like attempts to overcome the strategic behavior and cycling we will never be able to overcome.

Reason 1 (in Part I. C.): A, C, B
Reason 2 (in Part II. A.): B, A, C
Reason 3 (in Part III. B.): C, B, A.
Thus, an Article on Condorcet cycling itself shows elements of Condorcet cycling through its structure. *Cf*, John M. Rogers & Robert E. Molzon, *Some Lessons about the Law from Self-Referential Problems in Mathematics*, 90 Mich. L. Rev. 992 (1992); Douglas R. Hofstadter, *Gödel, Escher, Bach: An Eternal Golden Braid* (1999).

[150] *See* Douglas H. Blair, *On the Ubiquity of Strategic Voting Opportunities*, 22 Int'l Econ. Rev. 649, 649 (1981)

[151] Allan Gibbard, *Manipulation of Schemes that Mix Voting with Chance*, 45 Econometrica 665 (1977).

[152] U.S. Const. Art. III.

[153] H. Ron Davidson, *Sweeny's Prayers: Organized Religion and Organized Labor* 58, (Unpublished Bachelor Thesis 1999) ("[The] gift in this situation may be the question itself, and not the answer.").