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Ties in the Supreme Court of the United States

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TIES IN THE SUPREME COURT OF THE UNITED STATES

EDWARD A. HARTNETT*

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INTRODUCTION

In the summer of 2001, two high-profile murder cases, both involving defendants who were minors when they committed their crimes, produced tie votes of three-to-three in courts of last resort. One involved Samuel Manzie, who, at the age of fifteen, killed an eleven-year-old boy named Eddie Werner when he came to Manzie's door selling candy.¹ Against the advice of his lawyer and his family, Manzie, himself the victim of sexual abuse by a pedophile, pleaded guilty to murder.² He was sentenced to seventy years of imprisonment, with no eligibility for parole until he had served nearly sixty years.³ The Appellate Division of the New Jersey Superior Court affirmed the seventy-year sentence, but reduced the parole ineligibility period to thirty years, reasoning that New Jersey's No Early Release Act, upon which the trial court had relied in setting the parole ineligibility period, did not apply to murder.⁴ The Supreme Court of New Jersey affirmed by a vote of three-to-three.⁵

The second involved Napoleon Beazley, who, at the age of seventeen, stole a car by killing its driver, John Luttig.⁶ Beazley, the president of his senior class with no prior criminal record,⁷ was convicted of capital murder and sentenced to death.⁸ The Court of Appeals for the Fifth Circuit rejected Beazley's contention that the Eighth Amendment and the International Covenant on Civil and Political Rights bar the execution of someone who was a minor at

1. *New Jersey v. Manzie*, 762 A.2d 276 (N.J. Super. Ct. App. Div. 2000). For a more detailed factual account, see Laura Mansnerus, *Eddie Was Murdered. Sam's Doing 70 Years. But Who Is to Blame?*, N.Y. TIMES, Aug. 8, 1999, § 14 (New Jersey Weekly Desk), at 1.

2. Mansnerus, *supra* note 1.

3. *Manzie*, 762 A.2d at 277.

4. *Id.* at 282.

5. *State v. Manzie*, 773 A.2d 659, 659 (N.J. 2001) (per curiam). Justice Verniero recused himself.

6. *Beazley v. Johnson*, 242 F.3d 248, 253-55 (5th Cir. 2001) (describing the circumstances of the crime, including testimony that Beazley "wanted to see what it [was] like to kill somebody," and his unsuccessful attempt also to kill Mrs. Luttig).

7. See *Defy Death; In Appeals of Capital Cases, Judges Tie Votes Should Work in Favor of the Condemned*, NEWSDAY, Aug. 17, 2001, at A48 [hereinafter *Defy Death*].

8. *Beazley*, 242 F.3d at 253.

the time of the crime.⁹ Beazley's application for a stay of execution pending certiorari was denied on a tie vote by the Supreme Court of the United States.¹⁰

The New Jersey Supreme Court decision in *Manzie* has been criticized for failing to resolve the important legal issue involved.¹¹ The United States Supreme Court decision in *Beazley* has been assailed on the ground that "[a] tie shouldn't go to the executioner."¹²

In this Article, I defend the traditional practice of the Supreme Court of the United States and respond to various suggestions for avoiding or breaking ties in the Court, but recommend a statutory change dealing with stays of execution upon the grant of certiorari. In a companion article, I explore the state law provisions for

9. *Id.* at 263-69. Four Justices have recently urged the Court to revisit the Eighth Amendment question. *In re Stanford*, No. 01-10009 (Oct. 21, 2002) (Stevens, Souter, Ginsburg, Breyer, JJ., dissenting from denial of stay of execution).

10. *Beazley v. Johnson*, 533 U.S. 969 (2001). The application was made to Justice Scalia as Circuit Justice for the Fifth Circuit. He recused himself, resulting in the distribution of the application to Justice Kennedy, the next Justice in order of seniority. *See* SUP. CT. R. 22.3 (providing that when the appropriate Circuit Justice is unavailable for any reason, the application is distributed to the "Justice then available who is next junior to the Circuit Justice"). Justice Kennedy, as is common on an application to stay an execution, referred the application to the full Court. *See* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 17.20 (8th ed. 2002). The Court denied the application on a three-to-three vote, with Justices Stevens, Ginsburg, and Breyer voting to grant the application, and Justices Scalia, Souter, and Thomas recused. *Beazley*, 533 U.S. at 969. Evidently, Justices Scalia, Souter, and Thomas recused themselves because of their relationship with United States Circuit Judge J. Michael Luttig, the son of the murder victim. *See* Raymond Bonner, *Three Abstain as Supreme Court Declines to Halt Texas Execution*, N.Y. TIMES, Aug. 14, 2001, at A1. The petition for certiorari was later denied without recorded dissent. *Beazley v. Cockrell*, 533 U.S. 969 (2001).

11. Brief in Support of Motion for Rehearing at 3, *State v. Manzie* (June 15, 2001) (No. 50,608) (seeking rehearing and arguing that "litigants before this Court deserve no less" than a majority opinion "in a case of this magnitude"); *When Is "Necessary"?*, N.J. L.J., Aug. 20, 2001, at 18 (describing the concurring opinion issued by three justices in *Manzie* as "either the law to be followed or an interesting academic exercise" and calling for a full complement of justices to avoid an evenly divided court); *see also* Thomas E. Baker, *Why We Call the Supreme Court "Supreme,"* 4 GREEN BAG 2d 129 (2001) (criticizing equal divisions in the Supreme Court of the United States for the same reason).

12. Bonner, *supra* note 10 (quoting George Kendall of the NAACP Legal Defense and Education Fund, Inc.); *see also* *Defy Death*, *supra* note 7 (asserting that "under court rules, a tie is a win for the executioner," and arguing that "court officials should change the rule about ties in capital cases"); *Hanging Crimes? Teen Killer, Dozing Lawyer Try Texans on Death Penalty*, HOUSTON CHRON., Aug. 16, 2001, at A26 (stating that "[u]nder Supreme Court rules, a tie goes to the prosecution").

temporary assignments to the Supreme Court of New Jersey, a mechanism that has been suggested as a way to avoid or break ties, and argue as a matter of state constitutional law that such assignments should only be made when necessary to make a quorum.¹³

I. THE INABILITY TO REPLACE AN ABSENT OR RECUSED JUSTICE

The traditional practice of the Supreme Court of the United States is that "no affirmative action can be had in a cause where the judges are equally divided in opinion as to the judgment to be rendered or order to be made."¹⁴ Although equal divisions on today's nine-member Court result from recusals, absences, or vacancies, such equal divisions can result on a full bench if Congress sets the size of the Supreme Court at an even number, as it did from 1789 until 1807,¹⁵ and from 1863 until 1866.¹⁶

There is no provision in federal law for temporarily replacing a Supreme Court Justice, even if the result is the absence of a quorum of six Justices.¹⁷ While circuit and district judges may be

13. Edward A. Hartnett, *Ties in the Supreme Court of New Jersey*, 32 SETON HALL L. REV. (forthcoming 2002).

14. *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 111 (1868). The rule of four, a nonmajoritarian rule which empowers four Justices to grant certiorari, is an obvious exception to this majority rule-based principle. The rule of four is discussed below. See *infra* notes 31-35 and accompanying text.

15. Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73 (setting the number of Justices at six). It was increased to seven by the Act of Feb. 24, 1807, ch. 17, § 5, 2 Stat. 421. Compare Bonner, *supra* note 10 (stating that "[l]egal scholars said the court now found itself in a situation that the founding fathers hoped to avoid by creating a Supreme Court with an odd number of members"), with *Corrections*, N.Y. TIMES, Aug. 15, 2001, at A2 ("The number of justices is set by Congress. It was not specified as an odd number by the founders. The original court had six members."). The Judiciary Act of 1801, § 3, 2 Stat. 89, called for a reduction from six to five upon the next vacancy, but the Act was repealed before any such vacancy occurred. Act of Mar. 8, 1802, 2 Stat. 132.

16. Act of Mar. 3, 1863, ch. 100, § 1, 12 Stat. 794 (setting the number of Justices at ten). This number was decreased to seven by the Act of July 23, 1866, § 1, 14 Stat. 209 and increased to nine by the Act of Apr. 10, 1869, ch. 22, § 1, 16 Stat. 44. Although the decrease in 1866 was designed to deny President Andrew Johnson any appointments to the Court, one explanation offered at the time was to avoid tie votes that resulted from an even number. See William H. Rehnquist, Address, *The Supreme Court: The First Hundred Years Were the Hardest*, 42 U. MIAMI L. REV. 475, 486 (1988).

17. 28 U.S.C. § 1 (2000). In most cases, the absence of a quorum will result in an "order affirming the judgment with the same effect as upon affirmance by an equally divided

temporarily assigned to other circuits or districts, there is no authority for their temporary assignment to the Supreme Court.¹⁸ Indeed, the statute authorizing the assignment of retired district and circuit judges to judicial duties specifically excludes assignments to the Supreme Court.¹⁹

The closest thing to a temporary assignment to the Supreme Court is a recess appointment, whereby the President can "fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."²⁰ This, of course, is (at best) only available to deal with vacancies, and only when the Senate is in recess; it is not available to deal with recusals or other temporary absences.

Professor Steven Lubet, however, has asserted that "there would appear to be no statutory impediment to a Court rule (or practice) that calls upon retired Justices to participate in certain votes," because retired Justices "retain the office" upon retirement.²¹ Lubet overlooks that "[n]o retired Justice or judge shall perform judicial duties except when designated and assigned,"²² and that the tasks

Court." *Id.* § 2109. *See, e.g.,* *United States v. Hatter*, 519 U.S. 801 (1996) (affirming pursuant to § 2109).

The quorum statute is a neglected example of the breadth of congressional power to make all laws necessary and proper for carrying into execution the judicial power. *See* U.S. CONST. art. I, § 8, cl. 18. By setting a supermajority quorum requirement, Congress not only prevents binding precedent from being established by three Justices in a three to two decision, but also prevents even a unanimous majority of the Court from acting in a five to zero decision.

18. *See* 28 U.S.C. § 291 (2000) (authorizing the Chief Justice to temporarily assign circuit judges to another circuit and the chief judge of a circuit to assign a circuit judge to a district court within the circuit); *id.* § 292 (2000) (authorizing the chief judge of a circuit to temporarily assign district judges within the circuit to a court of appeals or to other districts in the circuit, and authorizing the Chief Justice to temporarily assign district judges for service in another circuit, either in a district court or a court of appeals).

19. *Id.* § 294(d) (2000) ("No such designation or assignment shall be made to the Supreme Court.").

20. U.S. CONST. art. II, § 2, cl. 3.

21. Steven Lubet, *Disqualification of Supreme Court Justices: The Certiorari Conundrum*, 80 MINN. L. REV. 657, 675 n.82 (1996) (quoting 28 U.S.C. § 371(b)(1) (Supp. V 1993)). Lubet's specific proposal is for retired Justices to participate in certiorari decisions to replace recused Justices. *Id.* at 675-76.

22. 28 U.S.C. § 294(e) (2000); *see* *Steckel v. Lurie*, 185 F.2d 921, 923 (6th Cir. 1950) (holding that a retired judge of a district court needed a designation and assignment to perform judicial duties even in his district of appointment, because of this "plain and unambiguous language"); *cf.* *Booth v. United States*, 291 U.S. 339, 351 (1934) (stating that, under then-existing judicial retirement law, a district judge did not need an assignment to

to which a retired Justice may be assigned are limited to "judicial duties in any circuit, including those of a circuit justice."²³ When Congress in 1937 extended the judicial retirement statute to Supreme Court Justices, both proponents and opponents made clear that this provision was designed to prohibit retired Justices from participating in Supreme Court cases. The Report of the House Judiciary Committee could not be clearer: "Under the terms of this bill a retired Justice would be relieved from regular active service. He would no longer sit in the Supreme Court, by assignment or otherwise, and a successor to him on that Court would be appointed."²⁴

The same understanding was manifest in the Senate. As Senator McCarran explained in presenting the bill:

What would be the status of a Justice of the Supreme Court who might take advantage of this law if it should be enacted? The status would be that he would have retired from the Supreme Bench but would still retain his status as an inactive judge,

hold court in his own district) (citing *Maxwell v. United States*, 3 F.2d 906 (4th Cir. 1925), *aff'd* 271 U.S. 647 (1925)); Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service and Disservice—1789-1992*, 142 U. PA. L. REV. 333, 398 (1993) ("In 1937, Supreme Court justices were given the same choice between retiring or resigning that other life-term judges had been given in 1919").

23. 28 U.S.C. § 294(a) (2000). The original Act provided:

Be it enacted ... That Justices of the Supreme Court are hereby granted the same rights and privileges with regard to retiring, instead of resigning, granted to judges other than Justices of the Supreme Court ... and the President shall be authorized to appoint a successor to any such Justice of the Supreme Court so retiring from regular active service on the bench, but such Justice of the Supreme Court so retired may nevertheless be called upon by the Chief Justice and be by him authorized to perform such judicial duties, in any judicial circuit, including those of a circuit justice in such circuit, as such retired Justice may be willing to undertake.

Act of Mar. 1, 1937, ch. 21, 50 Stat. 24. The House had rejected such a bill in 1935, but Congress passed it in 1937 within five days after President Roosevelt announced his court-packing plan. See Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 214-15 (1994).

24. H.R. REP. NO. 176, at 1 (1937). This statement was not buried by some staff member in some long-winded report that no one in Congress would read. The entire report is but a single page. It consists of three paragraphs, including the formulaic paragraph reciting that the bill was referred, considered, and is being reported with a recommendation that it pass. *Id.*; see also H.R. REP. NO. 212, at 1 (1935) ("When retired, they remain eligible to discharge such casual duties in any circuit as they may be assigned by the Chief Justice and be willing to undertake. They could not sit in the Supreme Court.").

subject to call which he himself might accept or not accept into the circuits or other courts lower than the Supreme Court.²⁵

In opposing the bill, Senator Burke stated that it was “not quite accurate” to say that the bill merely extended to the Supreme Court Justices the retirement provisions already in effect for circuit and district judges.²⁶ He noted that retired judges may continue to sit in their court of appointment, but that

[the] bill before us provides, distinct from that, that any member of the Supreme Court who should retire under this provision of the law could under no circumstances be recalled for duty on the Supreme Court, but would be subject to call—true, at his own will—only in a different orbit altogether, in the lower courts. So I think there is a vital distinction between the pending bill and the existing statute.²⁷

25. 81 CONG. REC. 1645 (1937) (statement of Sen. McCarran).

26. *Id.* at 1646 (statement of Sen. Burke).

27. *Id.* Justice Van Devanter quickly took advantage of this statute and retired in June of 1937. Indeed, if Supreme Court Justices had been able, like lower court judges, to retire with a guaranteed income rather than simply resign and face the risk that Congress would cut their pension, Justice Van Devanter might have retired earlier and the Court-packing crisis may have never materialized. See Cushman, *supra* note 23, at 214 (noting that it was widely rumored that Justices Van Devanter and Sutherland had wanted to retire but were discouraged because Congress had reduced Justice Holmes' pension after he resigned); Paul Freund, *Charles Evans Hughes as Chief Justice*, 81 HARV. L. REV. 4, 23 n.64 (1967) (same); Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891, 1899 n.26 (1994). According to Friedman:

[N]ot until 1937 were Justices given the privilege of retiring and retaining their salaries, and the consequent financial pressure kept Justice Van Devanter on the Court longer than he would otherwise have been. Van Devanter's retirement in 1937 greatly contributed to the defeat of Roosevelt's Court-packing plan.... An earlier retirement might have averted the crisis altogether.

Id.

When President Roosevelt nominated Senator Hugo Black to the Supreme Court, the Senate revisited the meaning of the retirement statute in the course of debating whether Black was eligible for the appointment. See John F. O'Connor, *The Emoluments Clause: An Anti-Federalist Intruder in a Federalist Constitution*, 24 HOFSTRA L. REV. 89, 112 (1995) (recounting the Senate debate and noting that the 1937 statute “permitted a retired Justice to hear cases within a judicial circuit, but did not permit retirees to hear cases before the Supreme Court”); see also 81 CONG. REC. 9076 (1937) (statement of Sen. Burke) (remarking that retired Justice Van Devanter gave up “his active duties on the Supreme Court altogether, and on the inferior courts serving only to the extent to which he elects”); *id.* at 9078 (statement of Sen. McGill) (stating that retired Justice Van Devanter “cannot exercise

II. THE WIDESPREAD AND LONGSTANDING PRACTICE OF AFFIRMANCE BY AN EQUALLY DIVIDED COURT HAS BEEN ENDORSED BY CONGRESS

Professor Thomas Baker has explicitly criticized the Court's practice of affirmance by an equally divided Court, using the case of *Free v. Abbott Laboratories, Inc.*,²⁸ as his target. Indeed, although there was nothing the Supreme Court could have done to replace the recused Justice O'Connor in *Free*, Baker has written that he "would give the Justices a 'C-' for their effort, or lack of effort" in that case.²⁹ In his view, the rule of affirmance by an equally divided Court is "an internal procedural finesse ... not required by the Constitution or by any statute."³⁰ He contrasts the rule of affirmance by an equally divided Court with the rule of four, pursuant to which a petition for certiorari is granted if four Justices vote to grant. He describes the rule of four as part of the mutual understanding between Congress and the Justices, but claims "the rule of affirmance by an equally divided Court has not been blessed by Congress," and therefore, the Court is free to "ignore" it.³¹ Although he contends that the Court could adopt the contrary rule of reversal by an equally divided Court, his preferred alternative is that "[s]omeone on the Court [be] willing to compromise and change his or her vote to settle an important issue and to move the policy question back to Congress."³²

any of the functions of Justice of the Supreme Court of the United States"); *id.* at 9082 (statement of Sen. Barkley) (arguing that retired Justice Van Devanter "cannot voluntarily go back and sit on the Supreme Court in any case"); *id.* (statement of Sen. Connally) (stating that "[u]nder the express terms of this statute, Mr. Justice Van Devanter cannot go back on the Supreme Court Bench").

28. 529 U.S. 333 (2000) (*per curiam*).

29. Baker, *supra* note 11, at 129. For a very different criticism of *Free*, see John B. Oakley, *Joinder and Jurisdiction in the Federal District Courts: The State of the Union of Rules and Statutes*, 69 TENN. L. REV. 35, 50 n.80 (2001) (expressing distress that four members of the Court were evidently willing to affirm notwithstanding that the court of appeals had resolved an issue not properly before it).

30. Baker, *supra* note 11, at 130.

31. *Id.* at 130-31.

32. *Id.* Although his suggestion of a rule of reversal by an equally divided Court may be tongue-in-cheek, it is fair to observe that the rule of affirmance by an equally divided Court may rest in part on an assumption that a lower court's decision is more likely to be correct than incorrect. The empirical evidence for this proposition, at least in the context of

Baker is wrong to assert that Congress has not endorsed the rule of affirmance by an equally divided Court. Indeed, its endorsement of that rule is clearer than its endorsement of the rule of four. The rule of four appears in no statute, but rather was one of the methods of handling petitions for certiorari that the Justices, when they lobbied Congress to give the Justices greater discretionary control over their docket, assured Congress they would continue to use.³³ Although I am pleased that the Court has kept its promise regarding the rule of four, it has not kept the other promises given to Congress at the time,³⁴ and at least one Justice has suggested abandoning even the rule of four.³⁵

In contrast, the rule of affirmance by an equally divided Court *does* appear in the federal judicial code:

If a case brought to the Supreme Court by direct appeal from a district court cannot be heard and determined because of the absence of a quorum of qualified justices, the Chief Justice of the

mandatory appellate jurisdiction, is overwhelming. For example, the courts of appeals, on average, reversed 9.5% of the decisions they reviewed in the twelve-month period ending September 30, 2000. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2000, Table B-5 (2000), available at <http://www.uscourts.gov/judbus2000/appendices/b05sep00.pdf> (last visited Aug. 28, 2002); see also Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 235 (2001) (noting that the reversal rate "for all matters in the federal courts is probably somewhere between fourteen and twenty percent"). Indeed, it would be rather distressing to learn that lower courts were wrong more often than they were right. Cf. James S. Leibman et al., *Capital Attrition: Error Rates in Capital Cases 1973-1995*, 78 TEX. L. REV. 1839, 1850 (2000) (reporting that in capital cases between 1973 and 1995, sixty-eight percent of death sentences were reversed on either direct review, state habeas, or federal habeas). A court with the discretionary power to control its own jurisdiction is, of course, likely to produce a higher reversal rate. Moreover, in many cases a rule of reversal by an equally divided Court would be completely indeterminate: the reversed court would frequently have no idea what it should do after the reversal.

33. See Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1674-90 (2000). For a judicial opinion stating the rule of four, see *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955) (noting that "certiorari was granted, according to our practice, because at least four members of the Court" viewed certiorari as warranted).

34. Hartnett, *supra* note 33, at 1705 (noting that "the Justices assured Congress that certiorari is always granted when there is a conflict between courts of appeals and would always be granted when there was an arguable constitutional claim"); John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 10-14 (1983) (describing the changes in certiorari practice).

35. Stevens, *supra* note 34, at 14.

United States may order it remitted to the court of appeals for the circuit including the district in which the case arose

In any other case brought to the Supreme Court for review, which cannot be heard and determined because of the absence of a quorum of qualified justices, if a majority of the qualified justices shall be of opinion that the case cannot be heard and determined at the next ensuing term, the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided Court.³⁶

Although it is true that it is not an explicit congressional requirement that the Supreme Court utilize the rule of affirmance by an equally divided Court, it clearly represents Congress' awareness and endorsement of that rule. Indeed, by requiring that an affirmance for lack of a quorum have the "same effect" as an "affirmance by an equally divided court,"³⁷ Congress presupposed the existence of the rule of affirmance by an equally divided Court.

Congress was wise to presuppose the existence of the rule of affirmance by an equally divided Court. The rule is not some idiosyncratic practice of the Supreme Court of the United States, but an application of a broader principle that applies generally in multimember bodies governed by majority rule: the body cannot take any affirmative action based on a tie.³⁸ As Justice Field

36. 28 U.S.C. § 2109 (2000). If a case is remitted to the court of appeals, that court will either sit in banc or be "specially constituted and composed of the three circuit judges senior in commission who are able to sit," and its decision "shall be final and conclusive." *Id.* Judith Resnik has referred to this as a method of "reconstituting the United States Supreme Court." Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1892 n.53 (1988). This statement, however, is inaccurate. The circuit judges who decide such a case do not sit temporarily on the Supreme Court or issue judgments or opinions in the name of that Court. Instead, the statute creates an exception to an exception: In the vast majority of cases, appeals from district courts are heard by regional courts of appeals; in some exceptional cases, appeals are routed directly to the Supreme Court, but if the Supreme Court cannot hear such an exceptional case, the case is routed back to the regional court of appeals, with statutory direction as to the composition of any panel.

37. 28 U.S.C. § 2109.

38. There is even a Latin maxim, *semper praesumitur pro negante*, that is, it is always to be presumed in favor of the negative. See Horace Binney Wallace, note, following *Krebs v. Carlisle Bank*, 14 F. Cas. 856, 862, 2 Wall. Jr. 33 (C.C.E.D. Pa. 1850) (No. 7,932) (Grier, Circuit Justice) (quoting *Queens v. Millis*, 10 Clark & F. 534) [hereinafter Wallace, *Krebs* note]. At the argument of *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 111 (1868), the leading

explained in the 1868 case of *Durant v. Essex Co.*: "It has long been the doctrine in this country and in England, where courts consist of several members, that no affirmative action can be had in a cause where the judges are equally divided in opinion as to the judgment to be rendered or order to be made."³⁹

The Supreme Court applied this broader principle from the very beginning. In 1792, the Attorney General made a motion in the Supreme Court for a writ of mandamus to the Circuit Court for the District of Pennsylvania commanding that court to hear and decide a petition filed by William Hayburn. The Supreme Court divided evenly on the question whether the Attorney General had the authority to make such a motion *ex officio*, and accordingly denied the motion.⁴⁰ *Hayburn's Case* is sometimes cited as the first instance in the Supreme Court of an affirmance by an equally divided Court,⁴¹ but this description is somewhat anachronistic. The Court did not purport to review and affirm a judgment, it simply denied a motion. *Hayburn's Case* was decided a decade before *Marbury v. Madison*,⁴² and the Court in *Hayburn's Case* did not pause to ask whether the Attorney General's motion called for an exercise of original or appellate jurisdiction; the basic principle that an evenly divided Court could not take affirmative action applied regardless.⁴³

Supreme Court case regarding affirmance by an equally divided Court, Justice Grier interrupted the argument to refer counsel to the Wallace note, describing the note as "clear and satisfactory." See generally THE LAW DICTIONARY 363 (7th ed. 1997) (translating the maxim as "the presumption is always in favor of the negative").

39. *Durant*, 74 U.S. at 110; see also *Bridges v. Tunnel*, 2 Del. Cas. 451 (1818) (affirming, by an equally divided Court, judgment of freedom for a slave who was sold with intent to export).

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

41. See, e.g., *Baker*, *supra* note 11, at 130.

42. 5 U.S. (1 Cranch) 137 (1803) (holding that mandamus to an executive official would constitute an exercise of original jurisdiction and that Section 13 of the Judiciary Act of 1789 was an unconstitutional attempt to add to the Court's original jurisdiction). Post-*Marbury*, mandamus to an inferior court is conceptualized as an exercise of appellate jurisdiction. See *Ex parte Peru*, 318 U.S. 578 (1943); James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1440-93 (2000); James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1591-92 (2001).

43. See, e.g., *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 538 (1837) (noting that the state trial court was equally divided and dismissing the bill seeking an injunction).

It is this broader principle that the Supreme Court applied in the *Beazley* case: Once Justice Kennedy referred the application for a stay to the full Court, the Court could not take affirmative action on a tie vote.⁴⁴ Because granting the application for a stay would constitute affirmative action, the tie resulted in a denial of the application. Contrary to the claims of some critics, a tie does not go to the executioner. Instead, a tie goes to whoever does not need affirmative Court action. In particular, if a lower court issues a stay of execution, and the state applies to vacate the stay, a tie vote would result in the application being denied and the stay remaining in place.⁴⁵ Indeed, if a Circuit Justice were to grant a stay of execution himself, the full Court could not vacate that stay on a tie vote.⁴⁶

The broader principle applies in legislative bodies as well as courts. In Professor Saul Levmore's description of parliamentary law, he notes that a tie "will defeat the motion because of the ancient rule that a motion needs a majority to pass."⁴⁷ Congress is

44. See *Beazley*, 533 U.S. at 969; see also *Buckley v. Valeo*, 423 U.S. 1040, 1040 (1975) (denying injunction pending appeal by a four-to-four vote); *Byrne v. PBIC, Inc.*, 398 U.S. 916, 916 (1970) (denying stay by a four-to-four vote).

45. In the past, the Court might have been more deferential to lower court decisions granting stays of execution than to decisions denying stays of execution, but in recent years the Court has certainly been willing to vacate a lower court's stay of execution. See, e.g., *Snyder v. Weeks*, 531 U.S. 1003, 1003 (2000); *Lewis v. Harding*, 503 U.S. 967, 967-68 (1992); *Delo v. Stokes*, 495 U.S. 320, 322 (1990) (per curiam). See generally STERN ET AL., *supra* note 10, § 17.20.

46. See STERN ET AL., *supra* note 10, §§ 17.16, 17.18.

47. Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971, 1010 (1989). It is possible that the principle can be traced as far back as the scene in Aeschylus' *Eumenides*, a scene "plainly meant to signal the beginning of both democracy and the reign of law," where Athena's vote to acquit might have created a tie, and hence an acquittal. *Id.* at 974; see 2 THE ORESTEIA OF AESCHYLUS 228 (George Thomson ed., 1966); Wallace, *Krebs note*, *supra* note 38, at 862 ("An equal division of a court of error, on a question of reversing a judgment, is like a tie vote in a legislative assembly on a question of enacting or repealing a law."). See generally *United States v. Ballin*, 144 U.S. 1, 6 (1892) (stating "the general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority ... is the act of the body"); Brett W. King, *Deconstructing Gordon and Contingent Legislative Authority: The Constitutionality of Supermajority Rules*, 6 U. CHI. L. SCH. ROUNDTABLE 133, 182 n.224 (1999) (citing Blackstone, Locke, Jefferson, and others for the proposition that "[u]nder well established Common Law rules, majority rule (as to both quorum and voting) is the default rule of decision and procedure in all legislative bodies"). Indeed, the default rule of majority rule in legislative bodies is so powerful that there is considerable debate concerning the constitutionality of imposing supermajority requirements by rule in either the House or the Senate. See, e.g., *id.* at 136 n.14 (citing

well aware of this rule because it governs Congress itself. A tie in the House of Representatives means that the bill or motion is defeated.⁴⁸ The same is true in the Senate⁴⁹ if the Vice President does not cast a tie-breaking vote.⁵⁰ It applies in state legislatures as well: Indeed, the very premise of *Coleman v. Miller* was that if the Lieutenant Governor of Kansas were not authorized to cast a tie-breaking vote in favor of ratification of an amendment to the United States Constitution then the tie would result in the defeat of that state's ratification.⁵¹

In parliamentary bodies, the principle can have the unfortunate result of making the outcome depend on how the question is framed.⁵² A similar problem can sometimes arise in courts

contributions on both sides of the debate).

48. See John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673, 1681 (2000) (noting that the House "rejected, by a tie 213 to 213 vote, the March 23 Senate resolution authorizing the use of force" in Yugoslavia).

49. See, e.g., Proceedings of the 46th Jud. Conf. of the D.C. Circuit, 111 F.R.D. 91, 150 (1985) (reporting the rejection of a budget resolution "by a 49/49 tie vote"); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 393 n.188 (1991) (stating that the "Senate defeated the floor amendment upon a tie vote") (citing 118 CONG. REC. 3373, 3965 (1972)); Aaron F. Marcus, Note, *Evidence—Diggs v. Lyons: The Use of Prior Criminal Convictions to Impeach Credibility in Civil Actions Under Rule 609(A)*, 60 TUL. L. REV. 863, 866 n.16 (1986) (stating that the "Senate rejected the amendment by a tie vote and then passed it upon reconsideration"); Brett McDonnell, Comment, *Dynamic Statutory Interpretations and Sluggish Social Movements*, 85 CAL. L. REV. 919, 930 (1997) (noting that an "amendment passed in the House, failed on a tie vote in the Senate, and was not adopted in the Conference Committee").

50. See U.S. CONST. art. I, § 3, cl. 4 (providing that the "Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided").

51. 307 U.S. 433, 446 (1939) (holding that "the twenty senators whose votes, if their contention were sustained, would have been sufficient to defeat the resolution ratifying the proposed constitutional amendment, have an interest in the controversy which ... is sufficient to give the Court jurisdiction"); see Edward J. Larson, *"In the Finest, Most Womanly Way:" Women in the Southern Eugenics Movement*, 39 AM. J. LEGAL HIST. 119, 137 (1995) (noting that a bill "lost without debate on a tie vote" in the Louisiana state Senate); see also Lynn Smith, *An Equality Approach to Reproductive Choice: R. v. Sullivan*, 4 YALE J.L. & FEMINISM 93, 99 n.31 (1991) (noting that in the Canadian Senate a bill to recriminalize abortion "was defeated by a tie vote").

52. Levmore, *supra* note 47, at 1010 (noting that if the chair is given a "deliberative" vote, like any other member, then the "motion's defeat by way of a tie vote is unattractive, in part, because the defeat hinges on a procedural point (that the chair might control); a conversely framed motion might also have failed"). Levmore also observes that ties can be avoided by giving the chair a casting vote, but that this often gives the chair less power than desired; or by giving the chair both a deliberative vote and a casting vote, but that this often gives the chair more power than desired; so the "standard rule ... gives the chair only a deliberative

exercising original jurisdiction, where the result of an equal division depends on what is understood to constitute affirmative action, or, put slightly differently, which judicial procedures are understood to happen as a matter of course and which are not. A dramatic example of this occurred in an 1896 Delaware murder trial conducted with four judges and a jury.⁵³ Three workers at the state insane asylum were prosecuted for their roles in the death of an inmate at the asylum. The judges divided evenly on a defense objection to the competency of another inmate to testify as a witness and denied the objection.⁵⁴ The jury convicted two of the defendants, who moved for a new trial and an arrest of judgment. Once again, the judges divided equally, and both motions were denied.⁵⁵ In an evident attempt to frame the question so that an even division would benefit the defendants, defense counsel contended that "it was necessary for the attorney general to make a motion that sentence be passed," but the court unanimously overruled this point.⁵⁶ Finally, defense counsel argued that because the motion in arrest of judgment raised the question of jurisdiction, and the court divided equally, "no judgment could be pronounced," but this motion did not prevail either and the defendants were sentenced.⁵⁷ If a motion *were* required to admit testimony, or to pass sentence, then the equal divisions would have produced the contrary result.

vote, thus creating some unresolved ties and making the form of the original motion matter." *Id.* at 1011. In practice, most chairs with a deliberative vote refrain from exercising them to create ties, thus "suppress[ing] the fact that the form of the original motion matters." *Id.*

53. *State v. Brown*, 36 A. 458 (Del. Ct. of Oyer & Terminer 1896).

54. *Id.* at 463 ("The court being equally divided, the witness, of course, is admitted.").

55. *Id.* at 465-66, 469.

56. *Id.* at 471.

57. *Id.* In passing sentence, the judge took the time to explain to the defendants how these equal divisions resulted in the admission of the contested testimony and the overruling of the defendants' post-verdict motions, noting "[t]hat a divided court should produce this result is not new or surprising, in this state or elsewhere." *Id.* at 471-72. A similar analysis may explain the willingness of Justice Chase to pronounce sentence for a common law crime in *United States v. Worrall*, 2 U.S. 384 (1798), despite his view that there is no federal common law of crimes, for in that case the jury had convicted and the Court divided evenly on the defendant's motion in arrest of judgment. *Cf. WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC 147* (1995) (quoting a letter from District Judge Peters claiming that he "deluded" Chase by suggesting a mild sentence and that Chase "did not see, 'till too late, that he had pronounced judgment with a divided court").

On occasion, this difficulty arises in the exercise of the original jurisdiction of the Supreme Court of the United States. For example, in 1952, the Court issued a rule to show cause why Abraham Isserman should not be disbarred, pursuant to its rule that a member of its bar who is disbarred in another court "will be disbarred" from the Supreme Court unless "he shows good cause to the contrary."⁵⁸ The Court divided equally regarding whether Isserman had met his burden of showing good cause, and, lacking a majority conclusion that he had met his burden, disbarred him in accordance with the terms of its prior order.⁵⁹ To conclude, as the Court did without apparent dissent, that the equal division resulted in Isserman's disbarment depended on an understanding that affirmative action would be required to displace the prior order. The Supreme Court later flipped the default position by amending its rules to provide that "no order of disbarment will be entered except with the concurrence of a majority of the justices participating," granted Isserman's petition for rehearing, set aside the disbarment, and discharged the rule to show cause.⁶⁰

Fortunately, the difficulty of framing the question and deciding what constitutes affirmative judicial action are readily avoided when exercising appellate jurisdiction. As Justice Field explained:

In cases of appeal or writ of error in this court, the appellant or plaintiff in error is always the moving party. It is affirmative action which he asks. The question presented is, shall the

58. *In re Isserman*, 345 U.S. 286, 287 (1953). The vote was four-to-four, with Justice Clark not participating, and Chief Justice Vinson supporting disbarment. *Id.* at 286, 290.

59. *Id.* at 290.

60. *In re Isserman*, 348 U.S. 1, 1 (1954). The vote was four-to-three, with neither Justice Clark, nor the new Chief Justice, Earl Warren, participating. *Id.* at 1-2. Sometimes, the legislature provides an alternative procedure for handling equal divisions in courts exercising original jurisdiction. In 1793, Congress reduced the burden of circuit riding on the Justices by permitting circuit courts (which at that time were mostly trial courts) to include one rather than two Justices. Act of Mar. 7, 1793 § 1, 1 Stat. 333. Since the circuit court would then generally consist of two judges (a Justice and the local district judge), Congress provided that if the local district judge and the Justice disagreed upon final hearing or on a plea to the court's jurisdiction, the case would be continued until the next term of the circuit court. If the district judge persisted in his view, and a different Justice agreed with the first Justice, judgment would be entered in accordance with the view of the Justices. *Id.* § 2. In effect, the two Supreme Court Justices, sitting at different times, were empowered to outvote the local district judge. In 1802, Congress provided for a divided circuit court to certify the question to the Supreme Court. Act of Apr. 29, 1802, § 6, 2 Stat. 156.

judgment, or decree, be reversed? If the judges are divided, the reversal cannot be had, for no order can be made. The judgment of the court below, therefore, stands in full force. It is, indeed, the settled practice in such case to enter a judgment of affirmance; but this is only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity with the action ... below, and that that court can proceed to enforce its judgment. The legal effect would be the same if the appeal, or writ of error, were dismissed.⁶¹

61. *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 112 (1868). It might be objected that issuing a judgment of affirmance is itself an affirmative act and that the only thing an equally divided Court should do is hold the case indefinitely. Indeed, prior to the Judiciary Act of 1925, the Supreme Court routinely carried cases over from one term to the next, and the practice of the Marshall Court was to carry constitutional cases from term to term ("except in cases of absolute necessity") unless "a majority of the whole court" concurred in opinion. *Briscoe v. Commonwealth Bank of Kentucky*, 33 U.S. (8 Pet.) 118, 121 (1834); see David P. Currie, *The Constitution in the Supreme Court: Contracts and Commerce, 1836-1864*, 1983 DUKE L.J. 471, 473 (noting that as "the absences of Justices Gabriel Duvall and William Johnson increased, three major constitutional cases were deferred due to inability to muster a majority of the full Court"); see also Charles Warren, *The Charles River Bridge Case*, 3 GREEN BAG 2D 78, 88-91 (1999), reprint from 20 GREEN BAG 284 (1908) (noting the way in which absences repeatedly delayed resolution of the case).

Since the Judiciary Act of 1925, the Supreme Court has prided itself on not carrying cases from one term to the next. Indeed, its boast in this regard may have played a role in defeating Roosevelt's Court-packing plan. See Hartnett, *supra* note 33, at 1731 n.489 (discussing a letter from Charles Evans Hughes to Burton K. Wheeler from Mar. 21, 1937, which noted that the "Supreme Court is fully abreast of its work," and has "been able for several terms to adjourn after disposing of all the cases which are ready to be heard"). Moreover, Congress has plainly indicated that the Court should affirm by an equally divided Court rather than hold a case indefinitely. It has provided that if any case before the Supreme Court, other than a direct appeal

cannot be heard and determined because of the absence of a quorum of qualified justices, if a majority of the qualified justices shall be of opinion that the case cannot be heard and determined at the next ensuing term the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court.

28 U.S.C. § 2109 (2000). Perhaps this statute suggests that the Court should hold a case if the equal division is caused by a vacancy that will be filled or an absence that will be remedied at the next term, but it strongly suggests that the Court should not hold a case upon equal division beyond the next ensuing term.

III. THE UNNECESSARY CONFUSION THAT WOULD RESULT FROM ALTERNATIVE RULES FOR HANDLING AN EQUAL DIVISION

Professors Reynolds and Young nevertheless used the *Isserman* case as the lynchpin of a proposal to develop alternatives to the rule of affirmance by an equally divided Court.⁶² They viewed *Isserman* as illustrating that a court "can ... [choose] to accord affirmative significance to an equal division," and that it should do so by considering "the wealth of ... policies that bear on a principled choice of rules for dealing with equal division."⁶³ They argued that, in the appellate context, sometimes "[the] policies supporting reversal may outweigh those supporting affirmance."⁶⁴ In particular, they suggested that where a lower court held a federal statute unconstitutional, an evenly divided Supreme Court should reverse, due to the presumption of constitutionality,⁶⁵ and that an equal division in a criminal case should result in reversal of a conviction.⁶⁶

Reynolds and Young's proposal is based on a misunderstanding of *Isserman*. *Isserman* is not a case in which a court gave "affirmative action to [an] equal division."⁶⁷ Instead, it is a case in which the equal division prevented the Court from taking the "affirmative action" of displacing its prior order. This may seem excessively formalistic, and indeed it illustrates the difficulty of framing the question and deciding what constitutes affirmative judicial action. Yet Reynolds and Young's proposal perversely seeks to introduce those difficulties into appellate jurisdiction where they can, and long have been, successfully avoided.

The needless complexities of their proposal are perhaps best illustrated by their treatment of conflicts between their proposed rules; that is, "What should be done when the Court divides on the

62. William L. Reynolds & Gordon G. Young, *Equal Divisions in the Supreme Court: History, Problems, and Proposals*, 62 N.C. L. REV. 29, 44-46 (1983).

63. *Id.* at 45.

64. *Id.* at 46.

65. *Id.* at 50. If state, rather than federal, action were involved, they favored the existing rule of affirmance, reasoning that the presumption of constitutionality and the principles of federalism cancel each other out. *Id.* at 51. If federal executive action were involved, they called on the Supreme Court "to work out a useful set of presumptions ... on a case by case basis." *Id.* at 50.

66. *Id.* at 51-52.

67. *Id.* at 45.

constitutionality of a federal statute challenged on constitutional grounds by a criminal defendant?"⁶⁸ Here, in trying to establish a meta-rule for deciding between their two proposed rules about how to resolve ties, they themselves divide equally, with one thinking that the presumption of constitutionality should outweigh the presumption in favor of criminal defendants and the other thinking that the balance comes out the other way.⁶⁹ It is not hard to imagine that Justices adopting their proposal would sometimes be similarly divided. One might think that Reynolds and Young would then articulate a meta-meta-rule to resolve ties about how to resolve conflicts about how to resolve ties. But they don't. Instead, they revert to the academic version of the no affirmative action doctrine: "The authors, being divided evenly here, cannot make a recommendation on this issue."⁷⁰

Admittedly, conflicts between different tie-breaking rules could be avoided if only a single exception were made to the rule of affirmance by an equally divided Court. Perhaps the best candidate for such a single exception would, in accordance with the "death is different" jurisprudence, be an exception for death penalty cases.⁷¹ Congress, utilizing its power to make "regulations" regarding the Supreme Court's appellate jurisdiction,⁷² or the Court, utilizing its rule-making power,⁷³ might provide that a tie vote on the merits of a death penalty case results in either a reversal or affirmance, depending on which outcome benefits the convict. As unseemly as an execution based on a tie vote in the Supreme Court may be, however, our capital punishment regime tolerates more unseemly results, such as permitting a single judge to override the unanimous recommendation of a twelve-member jury and impose a sentence of

68. *Id.* at 52.

69. *Id.* at 52-53.

70. *Id.* at 53 n.105.

71. See Note, *The Rhetoric of Difference and the Legitimacy of Capital Punishment*, 114 HARV. L. REV. 1599, 1599, 1601, 1619-22 (2001) (tracing the history of "death is different" and questioning both its correctness and wisdom); see also Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 436 (1995) (suggesting that increased procedural protections in death penalty cases may result in increased public acceptance of the death penalty).

72. U.S. CONST. art. III, § 2, cl. 2.

73. 28 U.S.C. § 2071 (2000).

death.⁷⁴ Moreover, a special rule for tie votes in capital cases may invite others to seek similar rules for their favored cases, whether involving the power of the national government, state sovereign immunity, deportation, termination of parental rights, or affirmative action.

IV. THE FOLLY OF SWITCHING VOTES TO AVOID AN EQUAL DIVISION

Professor Baker, as a solo author, does not confront the equal division faced by Professors Reynolds and Young. Nor does he suggest such a complex scheme. Instead, he takes a different tack. He proposes that one Justice should simply change his or her vote, noting that Justices have “not infrequently sublimated their judicial egos, suppressed their individual voices, [and] voted against themselves ... in particular cases, out of respect for the Court as an institution.”⁷⁵ It is certainly true, as Baker notes, that Justices have frequently suppressed dissents or separate concurrences and acquiesced in the Court’s opinion and judgment.⁷⁶ But Baker’s suggestion elides several important distinctions. To evaluate his suggestion, I believe it is important to analyze separately several different situations in which Justices might suppress their individual voices. In doing so, it is also important to bear in mind the difference between judgments and opinions.

The fundamental job of a court is to decide cases by issuing judgments; the fundamental job of a judge on a multimember court is to vote on the judgment to be entered by that court. Opinions are simply explanations of those judgments or those votes on judgments. Indeed, cases are frequently decided without any opinion at all.⁷⁷

74. *Spaziano v. Florida*, 468 U.S. 447, 457-65 (1984); cf. *Ring v. Arizona*, 122 S. Ct. 2428 (2002) (holding that a jury must make all findings necessary to expose a defendant to a death sentence).

75. Baker, *supra* note 11, at 136.

76. *See id.* at 136-37.

77. *See* Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123 (1999). Although it is appropriate for the Supreme Court to decline, as it usually does, to issue any opinion when affirming by an equally divided Court, there is no obligation to so decline. *See id.* at 133 n.55; *see also* *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 113 (1868) (observing that the notation of equal division “serves to explain the absence of any opinion in the cause”). A judgment of affirmance is, after all, a judgment, and an opinion

Consider a case in which all of the Justices agree on the judgment. They might simply enter that judgment without opinion. Alternatively, they might each deliver individual opinions explaining their votes for that judgment. Since John Marshall's day, however, the tradition in the Supreme Court of the United States has been to attempt to forge an Opinion of the Court, a single opinion explaining the Court's judgment.

Some measure of compromise, accommodation, and suppression of individual voices is inherent in the creation of an Opinion of the Court, but it is compromise, accommodation, and suppression of individual voices regarding the reasons for the judgment, not regarding the judgment itself. Of course, sometimes the attempt fails, and the Justices deliver multiple opinions providing different explanations for the judgment. Whether the attempt to forge an Opinion of the Court succeeds or fails, however, the judgment entered by the Court is the same.

Next, consider a case in which a majority of Justices, but not all, agree on the judgment and can forge an Opinion of the Court. The Justices in the majority are in the same position as the Justices in first case just discussed, attempting to reach, if possible, an Opinion of the Court. A justice who is outvoted can choose to deliver a dissenting opinion explaining her vote, or she can publicly note her dissent without opinion. She can also choose to do neither of these, deciding instead to accept the majority's decision without dissent.

Such suppression of dissent used to be common in the Supreme Court of the United States.⁷⁸ Chief Justice Marshall stated, "[it is] my custom, when I have the misfortune to differ from this Court,

explaining that judgment, or one's vote on that judgment, is therefore not a forbidden advisory opinion. *See, e.g., Biggers v. Tennessee*, 390 U.S. 404, 404 n.1 (1968) (Douglas, J., dissenting) (noting cases regarding "the practice of Justices setting forth their views in a case where the judgment is affirmed by an equally divided Court"). The dominant practice of declining to issue opinions in such cases may be designed to avoid having the opinion supporting the judgment of affirmance treated as precedent, *see Durant*, 74 U.S. at 113 (observing that the notation of equal division "prevents the decision from becoming an authority for other cases of like character"), especially considering that the doctrine refusing to give precedential effect to judgments affirmed by equally divided courts was a departure from the common law of England. *See Wallace, Krebs note, supra* note 38, at 862.

78. *See John P. Kelsh, The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, 77 WASH. U. L.Q. 137 (1999) (tracing the evolution of judicial attitudes toward writing separately from the Opinion of the Court).

[to] acquiesce silently in its opinion."⁷⁹ Justice Story similarly noted that "the course which I have generally pursued, when I have had the misfortune to differ from my brethren" is to "maintain[] silence."⁸⁰ Although expressions of dissent on the Court became more common as time passed,⁸¹ Professor Robert Post's recent study makes clear that a norm of acquiescence persisted until the time of the Taft Court. Justices who were outvoted would routinely defer to the majority's judgment and keep their contrary view quiet from the public.⁸² Post points to numerous internal documents in which Justices indicated that they continued to disagree with the majority but would nevertheless "in silence acquiesce,"⁸³ "acquiesce for the sake of harmony,"⁸⁴ "shut up,"⁸⁵ stay "mum,"⁸⁶ or "have nothing to say."⁸⁷

Notice that these remarks suggest a distinction between concurring with or joining the majority, on the one hand, and silently acquiescing on the other. As Justice Sutherland once said in response to a draft of an opinion by Justice Holmes, "I regret that I cannot concur but shall not dissent."⁸⁸ The norm of acquiescence seems to have vanished, and taken that distinction along with it. Indeed, under current practice, a Justice who is inclined to suppress

79. *Bank of the United States v. Dandridge*, 25 U.S. (12 Wheat.) 64, 90 (1827) (Marshall, C.J., dissenting).

80. *Briscoe v. Bank of Kentucky*, 36 U.S. (11 Pet.) 257, 328 (1837) (Story, J., dissenting) (noting, however, that this practice did not apply to constitutional questions).

81. See Kelsh, *supra* note 78, at 138-39.

82. See Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1344 (2001) ("What is fascinating about these various [internal Court] communications is that they do not so much express a 'norm of consensus,' as a norm of acquiescence.") (footnote omitted).

83. *Id.* at 1340 (quoting Stone Papers, referring to *France v. French Overseas Corp.*, 277 U.S. 323 (1928)).

84. *Id.* at 1341 (quoting Stone Papers, referring to *Standard Oil Co. v. Marysville*, 279 U.S. 582 (1929)).

85. *Id.* (quoting Holmes Papers, referring to *Atl. Coast Line R.R. Co. v. Southwell*, 275 U.S. 64 (1927)).

86. *Id.* at 1343 (quoting Holmes Papers, referring to *Jackman v. Rosenbaum Co.*, 260 U.S. 22 (1922)).

87. *Id.* (quoting Holmes Papers, referring to *Gardner v. Chi. Title & Trust Co.*, 261 U.S. 453 (1923)).

88. *Id.* at 1342-43 (quoting Holmes Papers, referring to *Am. Ry. Express Co. v. Levee*, 263 U.S. 19 (1923)); cf. *United States v. Vallejo*, 66 U.S. (1 Black) 541, 555 (1861) (Grier, J., dissenting) ("I cannot consent, by my silence, that an inference should be drawn that I concur in the opinion just delivered.").

a dissent cannot simply acquiesce silently, but instead is described as formally "joining" the Opinion of the Court.⁸⁹

Yet even if the difference between changing one's vote to publicly join the majority and simply acquiescing in silence is regarded as too subtle, and all suppressed dissent treated as if an outvoted Justice switched her vote regarding the judgment, the switch does not change the judgment.⁹⁰

Notice that sometimes a majority of Justices agree on the judgment but cannot forge an Opinion for the Court, and dissenting opinions, rather than being suppressed, reveal that the separate rationales supporting the majority judgment are each rejected by a majority of the Court. In a reflection of the primacy of judgments over opinions, the traditional and still general practice is simply to tolerate the seeming paradox and enter the judgment on which a majority agrees.⁹¹ However, on rare occasions—two have been identified in the Supreme Court's history, and one of the two has been overruled⁹²—a Justice switched his vote on the judgment in an

89. Rory K. Little, *Reading Justice Brennan: Is There a "Right" to Dissent?*, 50 HASTINGS L.J. 683, 696 n.52 (1999) (noting that "prior to the 1970 Term, the official U.S. reports did not list who 'joined' in the majority opinion," and that while "our shared understanding of the meaning of judicial silence [may have] changed over time," "today, not dissenting is generally perceived as 'joining'"). The practice of formally "joining" an opinion has also spawned a troubling practice whereby dissenting Justices join, but only in part, an opinion supporting the Court's judgment that would not otherwise be an "Opinion of the Court," and thereby purport to make that opinion an "Opinion of the Court." See, e.g., *Williams v. Taylor*, 529 U.S. 362 (2000) (denominating Justice O'Connor's opinion in relevant part as the "Opinion of the Court" even though it achieved majority status only by counting dissenting Justices who joined these parts); see also MARTIN H. REDISH & SUZANNA SHERRY, *FEDERAL COURTS: CASES, COMMENTS AND QUESTIONS* 713 (5th ed. 2002) (asking whether "dissenting Justices [should] be able to cast the deciding votes in a dispute among the majority in this way"); B. Rudolph Delson, Note, *Typography in the U.S. Reports and Supreme Court Voting Protocols*, 76 N.Y.U. L. REV. 1203 (2001) (examining the influence of "outline-style formatting" of opinions on Justices' strategic behavior).

There are two remnants of silent acquiescence. First, Justices rarely make public note of disagreement with a decision to grant or deny certiorari. Second, when the court issues an opinion per curiam, the Justices who constitute the majority are not separately listed. See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000).

90. It is consistent, then, with what Evan Caminker calls the "hard disposition constraint" on strategic voting. Evan Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2336 (1999).

91. See Hartnett, *supra* note 77, at 134-36.

92. *Arizona v. Fulminante*, 499 U.S. 279, 313-14 (1991); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 56-57 (1989), *overruled by Seminole Tribe v. Florida*, 517 U.S. 44 (1996). *Fulminante* was a death penalty case, and Justice Kennedy's decision to switch his vote in

attempt to avoid the paradox. Although some scholars have praised these decisions and called for the Justices to engage more frequently in what has become known as issue-voting,⁹³ others have defended the traditional practice.⁹⁴ I am among the latter group, having previously argued that these two cases are unwise anomalies and that the traditional practice of outcome-voting on the judgment better accords with the fundamental role of courts to decide cases by issuing judgments.⁹⁵ Although it may, of course, be mere coincidence, there has not been a vote switch in the Supreme Court since the scholarly commentary on those two cases.⁹⁶

that case may have been influenced by that fact. In explaining his decision, Justice Kennedy wrote:

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

Fulminante, 499 U.S. at 313-14 (Kennedy, J., concurring). Although Mr. Fulminante obviously benefitted from Justice Kennedy's vote switch, it is far from clear that capital defendants more generally did, since the *Fulminante* case thereby produced a majority opinion stating that a coerced confession could be harmless. See Hartnett, *supra* note 77, at 145 (discussing *Fulminante*).

93. See, e.g., Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 30-31 (1993); David Post & Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 GEO. L.J. 743, 745 (1992).

94. See, e.g., John M. Rogers, "I Vote This Way Because I'm Wrong": *The Supreme Court Justice as Epimenides*, 79 KY. L.J. 439, 442 (1991).

95. Hartnett, *supra* note 77, at 142.

96. *Miller v. Albright*, 523 U.S. 420 (1998), seemed to present such a paradox. Although a majority of the Court rejected the separate rationales supporting a majority judgment, no Justice switched a vote. See Maxwell L. Stearns, *Should Justices Ever Switch Votes?: Miller v. Albright in Social Choice Perspective*, 7 SUP. CT. ECON. REV. 87, 155 (1999) (suggesting the possibility that Justices O'Connor and Kennedy viewed the overruling of *Union Gas* "as a criticism of the practice of vote switching"). *Miller* may represent another example of the wisdom of the traditional rule: The majority in *Nguyen v. INS*, 533 U.S. 53 (2001), adopted the rationale that appeared to be rejected by a majority in *Miller*. Therefore, even if a Justice had switched votes in order to avoid the paradox, the decision in *Miller* might have met the same fate as *Union Gas*. Cf. Michael Abramowicz & Maxwell L. Stearns, *Beyond Counting Votes: The Political Economy of Bush v. Gore*, 54 VAND. L. REV. 1849, 1883-84 (2001) (suggesting that in *Bush v. Gore*, 531 U.S. 98 (2000), Chief Justice Rehnquist, and Justices Scalia and Thomas accepted Bush's equal protection argument and Justices O'Connor and Kennedy did not reach Bush's Article II argument, in order to avoid revealing the paradox of Bush winning the judgment even though he lost each issue).

Sometimes, however, there will simply not be a majority favoring any judgment. This can happen either (1) because the Court is split into three (or more) factions regarding the judgment, none of which commands a majority, or (2) because there are an even number of Justices who divide evenly. Longstanding Supreme Court practice has treated these two situations differently. In the case of a three-way split, a Justice switches her vote on the judgment in order to create a majority disposition. In the case of an even division, on the other hand, the judgment is affirmed by an equally divided Court.

Professor Baker effectively seeks to have the two situations treated the same way, arguing that a Justice on the equally divided Court should switch her vote just as a Justice in the three-way split switches her vote. He does not, however, provide any criteria for deciding *which* side of the court should yield, and no good answer is apparent. Although there is no explicit doctrine governing the situation of a three-way split, there is at least some clear pattern:

- (1) a faction that sincerely believes the Court lacks jurisdiction switches to a merits-based disposition; or
- (2) a faction that sincerely believes the judgment ought to be affirmed or reversed switches to a disposition calling for some sort of remand. In no case did a faction switch to a jurisdictional dismissal or switch away from a remand to an outright affirmance or reversal.⁹⁷

Neither of these principles would be of any help to a Court that is equally divided between affirmance and reversal.

Consider the target of Professor Baker's criticism, the *Free* case itself.⁹⁸ Assume that the four Justices who supported affirmance of the judgment were Justices Stevens, Souter, Breyer, and Ginsburg and the four favoring reversal were Chief Justice Rehnquist and Justices Scalia, Thomas, and Kennedy. Which of these Justices should change their vote, and on what basis?

Suppose Justice Breyer had switched in *Free*, thus establishing a five-to-three precedent—let's call it *Free*¹. Suppose further that the Court, without any change in membership, thereafter confronts a petition for certiorari presenting the same issue, but in a case in

97. Caminker, *supra* note 90, at 2316 n.52.

98. See *supra* notes 28-32 and accompanying text.

which Justice O'Connor is not recused. At conference, Justice O'Connor votes to grant certiorari, saying that she thinks *Free*¹ was wrongly decided and would have voted with Justices Stevens, Souter, and Ginsburg in that case were she not recused. Chief Justice Rehnquist, and Justices Scalia, Thomas, and Kennedy might say that this issue is settled, should not be revisited, and vote to deny certiorari. Baker presumably would think this is the right result; the Court should treat the matter as settled, even if settled wrongly.⁹⁹

Justices Stevens, Souter, and Ginsburg, however, might respond that this is not an ordinary situation in which a Justice should adhere to precedent with which he or she disagrees, because to deny certiorari would be to leave in place a decision that they now know not only lacks majority support today, but lacked majority support in the Court as a whole on the day it was written. Suppose they vote to grant certiorari, so that under the rule of four, certiorari is granted, regardless of Justice Breyer's vote on the certiorari petition.

At conference after oral argument, Chief Justice Rehnquist, and Justices Scalia, Thomas, and Kennedy vote to affirm on the authority of *Free*¹, whereas Justices Stevens, Souter, Ginsburg, and O'Connor vote to reverse, contending that *Free*¹ was wrongly decided. Now what is Justice Breyer to do? Should he adhere to his vote switch in *Free*¹, or should he switch back to his original position in *Free*? Neither choice seems terribly attractive. Justice Breyer now knows, not only that a majority at T2 thinks the decision made by a majority at T1 got the law wrong, but also that a majority of the members of the Court at T1 thought that the decision at T1 got the law wrong, although this information was hidden from the Justices because one of them was recused. If he adheres to his vote switch in *Free*¹, he casts the deciding vote in a five-to-four decision against the party who should win under (1) his

99. The epigraph of Baker's article is: "It is usually more important that a rule of law be settled, than that it be settled right." Baker, *supra* note 11 at 129 (quoting *DiSanto v. Pennsylvania*, 273 U.S. 34, 42 (1927) (Brandeis, J., dissenting)). Indeed, this comment by Justice Brandeis concerned the importance of adhering to precedent already established, not the importance of establishing precedent in the first place. It should also be noted, however, that Brandeis was dissenting from a judgment that relied on precedent; he urged the rejection of that precedent as a guide. *Disanto*, 273 U.S. at 42 (Brandeis, J., dissenting).

independent view of the law; (2) the majority view of the law at T2; and (3) the (unrevealed) majority view of the law at T1. Yet if he instead returns to his independent view of the law, the result is a five-to-four overruling of a five-to-three decision, with a loss of whatever certainty his original switch was supposed to provide. Worse, he created this dilemma for himself by switching his vote in the first place. Might he not find himself thinking, "I would never have switched my vote had I known that Sandra would vote our way?"

Now rewind to the point when Justice Breyer is contemplating whether to switch his vote in the first place. He is considering switching his vote in order to resolve the issue definitively, but then starts to contemplate the scenario sketched out above. He may hope that his colleagues would not put him in that position, but he cannot be sure. Is there any way he could avoid it? Sure there is: by knowing how Justice O'Connor would decide the issue.

This, then, suggests one possible criterion for deciding which side of the Court should yield in order to avoid an equal division: the side that predicts it would lose if the missing Justice were present should yield. In some instances, of course, such a prediction will be nearly impossible, as when a vacant seat on the Court has not yet been filled. This is not a sufficient objection, however, because in other instances, as when a Justice is recused, there may well be a fairly reliable basis for making such a prediction. Even apart from any informal discussions with each other, Justices learn a lot about how the other Justices think. They not only read each other's published opinions, they read each other's draft opinions and memos about those draft opinions. They also hear each other speak in conference, both regarding petitions for certiorari and on the merits. Indeed, in their role as Circuit Justices, they are frequently called upon to predict how other Justices would vote on both petitions for certiorari and on the merits. As then-Associate Justice Rehnquist once put it:

[A]s has been noted before in many Circuit Justices' opinions, the Circuit Justice faces a difficult problem in acting on a stay. The Justice is not to determine how he would vote on the merits, but rather forecast whether four Justices would vote to grant certiorari when the petition is presented, predict the probable

outcome of the case if certiorari were granted, and balance the traditional stay equities. All of this requires that a Justice cultivate some skill in the reading of tea leaves as well as in the process of legal reasoning.¹⁰⁰

Such skills could serve them well if they were to contemplate switching votes in order to avoid an equally divided Court by predicting the likely vote of their missing colleague.

The obvious problem with this approach, however, is that in the cases where it could be most useful—that is, where a Justice is recused—it would go a long way toward undermining the recusal itself. Perhaps it would not completely undermine the recusal, because the sitting Justices could base their prediction of their absent colleague's views on what she had written and said outside the context of the case in which her impartiality might reasonably be questioned. But it would nevertheless give rise to the temptation to obtain, directly or indirectly, the missing Justice's views of the case.

Far better, it seems to me, is to adhere to the longstanding practice of affirmance by an equally divided Court and to wait for another case to present the issue for resolution.

Recall that an equal division is not the only instance in which there is lack of a majority favoring any judgment. Sometimes the Court is split into three (or more) factions regarding the judgment, none of which commands a majority, and in these situations, a Justice *does* switch her vote on the judgment in order to break the impasse and create a majority disposition.¹⁰¹ While Baker has argued for treating equal divisions the way judgment impasses are treated, Professor Evan Caminker has observed that perhaps judgment impasses should be treated the way equal divisions are treated, by creating a rule of “affirmed by a deadlocked Court.”¹⁰²

100. *Bd. of Educ. v. Supreme Court*, 448 U.S. 1343, 1347 (Rehnquist, Circuit Justice 1980).

101. See *supra* note 97 and accompanying text.

102. Caminker, *supra* note 90, at 2315 n.51. Although noting the possibility, Caminker also explicitly states that he is not addressing whether this would be a “wise procedural innovation.” *Id.*; see also Saul Levmore, *Ruling Majorities and Reasoning Pluralities*, 3 THEORETICAL INQUIRIES L. 87, 95-96 (2002) (describing the “formal rule in federal courts in the United States” as requiring that “a majority must agree on the *disposition* of the instant case (so that on a three-judge appellate panel, the judges cannot split 1-1-1 as to affirming, reversing, and remanding the decision below)”; cf. *id.* at 95 & n.14 (stating that the “general

In evaluating the possibility of creating such a rule, it is worthwhile to consider separately its strong version and its weak version. Consider, first, the strong version of such a rule: Just as I have argued that a Justice should not switch votes in order to avoid an equally divided Court, but instead should simply accept the equal division and the resulting affirmance, an advocate of the strong version of an "affirmed by a deadlocked Court" rule would argue that Justices should not switch votes to avoid a judgment impasse, but instead should simply accept the impasse and the resulting affirmance.

*Bush v. Gore*¹⁰³ illustrates the mischief that such an innovation could cause. Professors Michael Abramowicz and Maxwell Stearns have persuasively argued that the Justices in *Bush v. Gore* may have faced a judgment impasse, with two Justices favoring affirmance, three favoring reversal, and four favoring remand.¹⁰⁴ To complicate matters still further, the four favoring a remand disagreed about the appropriate nature of the remand, with two supporting an empty remand and two supporting a meaningful remand.¹⁰⁵ In order to decide the case under current practice, someone had to switch in order to create a majority. As noted earlier,¹⁰⁶ the clear pattern in such situations is that a faction that sincerely believes that the judgment ought to be affirmed or reversed switches to some sort of remand.

The two possibilities, then, were for those favoring reversal to switch to a remand, or for those favoring affirmance to switch to a remand. Moreover, since there were two different possible remands in play, either those favoring reversal were going to switch to the empty remand, or those favoring affirmance were going to switch to

practice is to regard such a divided vote as no decision at all" and noting the possibility of imagining, at "the risk of slight confusion or inaccuracy ... that a 1-1-1 vote will leave things as they are, in effect affirming the lower court").

103. 531 U.S. 98 (2000).

104. Abramowicz & Stearns, *supra* note 96, at 1942-43.

105. The terms "empty" and "meaningful" are used in an attempt to express concisely the difference between the remand favored by Justices O'Connor and Kennedy, pursuant to which the Florida Supreme Court was given no choice but to end the recount, *Bush*, 531 U.S. at 98, and the remand favored by Justices Souter and Breyer, pursuant to which the Florida Supreme Court would have been permitted to continue the recount under uniform standards, if it concluded that Florida law privileged a more accurate vote count over meeting the safe harbor date. *Id.* at 144-45 (Breyer, J., dissenting).

106. See *supra* text accompanying note 97.

the meaningful remand. With only two favoring affirmance, however, the only hope for a majority in favor of a meaningful remand was to convince not only those two to switch from affirmance to meaningful remand, but also to convince at least one of the two favoring an empty remand to switch to a meaningful remand. Following this speculative line of thought to its conclusion, it would seem that when Justices Souter and Breyer failed to convince either Justice Kennedy or Justice O'Connor to switch to a meaningful remand, that possibility collapsed, and the majority was formed by the three favoring reversal switching to the empty remand.¹⁰⁷

Notice what would have happened if the Court operated under the strong version of the "affirmed by a deadlocked Court" rule: Even though only two of the nine Justices favored affirming the judgment of the Florida Supreme Court, they would have prevailed. As hard as it has been for many to accept the Supreme Court's decision in *Bush v. Gore*, imagine the difficulty people would have faced accepting the idea that the Florida judgment was affirmed even though seven of the nine Justices thought it should not be.

As a second example, imagine another case like *Beazley*, in which a defendant who was a minor at the time of the crime was sentenced to death. Suppose that three Justices conclude that the Eighth Amendment bars any such executions and therefore vote to reverse. Suppose further that four Justices conclude that the Eighth Amendment does not create a categorical rule barring any such execution, but that the jury instructions at the defendant's trial did not adequately permit the jury to take the defendant's age into account and therefore vote to remand for a new trial. Finally, suppose that two Justices conclude that the Eighth Amendment imposes no relevant limit and therefore vote to affirm. A strong version of an "affirmed by a deadlocked Court" rule would require that no Justice switch his or her vote to avoid the judgment impasse, but instead simply accept the affirmance of the death sentence. This result is so misguided that it is not only hard to see why anyone would advocate the strong version of the suggested rule, but it is also easy to predict that even if it were somehow adopted, Justices would rebel at its results and evade it.

107. See Abramowicz & Stearns, *supra* note 96, at 1947-50.

Consider, next, the weak version: Justices should switch votes to avoid a judgment impasse, but if they fail to do so, the result should be "affirmed by a deadlocked Court." This is certainly better than the strong version, and something approaching it may have been utilized in one case where there were four votes to affirm, four to reverse, and one to dismiss the writ of certiorari as improvidently granted. In *United States v. Jordan*,¹⁰⁸ the Court "affirmed by an equally divided Court" of nine Justices, with Justice Frankfurter evidently refusing to reach the merits because of his view that the writ of certiorari should have been dismissed as improvidently granted. Perhaps this case should be viewed, despite the Court's choice of language, as a judgment "affirmed by a deadlocked Court."¹⁰⁹ By using the language of equal division, however, it seems that the *Jordan* Court (rightly or wrongly) did not view the case as one of a judgment impasse, but instead as a four-to-four tie, with Justice Frankfurter's intransigence treated, in effect, as an abstention. Moreover, several years later, when the same situation recurred, Justice Frankfurter, without objection, characterized the situation as an equally divided Court.¹¹⁰ This time, however, he switched his vote from "dismiss certiorari" to "affirm," concluding that this was not an "undue compromise with principle."¹¹¹

Faced with the same situation more than two decades later, Justice Stevens viewed it as a judgment impasse. In accordance with the usual practice of switching votes to avoid a judgment impasse, he switched his vote, explaining that although he preferred to dismiss certiorari, he voted to affirm "[b]ecause a fifth vote is necessary to authorize the entry of a Court judgment."¹¹² In my view, Justice Stevens has the better of Justice Frankfurter here. The situation is better understood as presenting a judgment impasse, and a vote switch is therefore appropriate. More significant than the characterization, however, is that both Justices ultimately reached the conclusion that a vote switch was the appropriate way to handle the situation.

108. 342 U.S. 911 (1952).

109. Professor Evan Caminker suggested this point in commenting on a draft of this Article.

110. *Inman v. Balt. & Ohio R.R. Co.*, 361 U.S. 138, 141 (1959) (Frankfurter, J.).

111. *Id.*

112. *Connecticut v. Johnson*, 460 U.S. 73, 89-90 (1983) (Stevens, J., concurring).

Even if *Jordan* is viewed as a singular example of “affirmed by a deadlocked Court,” it should also be viewed as a mistake that Justice Frankfurter wisely abandoned. Justices should not be so intransigent that they refuse to switch votes when necessary to avoid a judgment impasse. Although any encouragement to such intransigence that the weak version of the “affirmed by a deadlocked Court” gives is, concededly, rather modest, I see no good reason to give any encouragement to, or build on, the shaky reed of *Jordan* that even Justice Frankfurter abandoned.

V. THE SPECIAL CASE OF STAYS PENDING CERTIORARI IN CAPITAL CASES

There is one other situation in which Justices have switched their votes. Justice Brennan once explained: “[W]hen four vote to grant certiorari in a capital case, but there is not a fifth vote to stay the scheduled execution, one of the five Justices who does not believe the case worthy of granting certiorari will nonetheless vote to stay.”¹¹³ This is not the Supreme Court’s current practice.¹¹⁴ Indeed, the contrary practice, which permits a stay of execution to be denied despite a grant of certiorari, now seems sufficiently embedded that in some recent cases, four Justices voted to grant a stay of execution, but did not all vote for certiorari.¹¹⁵ The result was that

113. *Straight v. Wainwright*, 476 U.S. 1132, 1134-35 (1986) (Brennan, J., dissenting from denial of a stay); *see also* *Darden v. Wainwright*, 473 U.S. 928, 928-29 (1985) (Powell, J., concurring in the granting of the application for a stay) (explaining why he was providing the fifth vote to grant a stay of execution); *Autry v. Estelle*, 464 U.S. 1, 2 (1983) (per curiam) (stating that had the applicant for a stay “convinced four Members of the Court that certiorari would be granted on any of his claims, a stay would issue”).

114. *See, e.g.,* *Herrera v. Collins*, 502 U.S. 1085, 1085 (1992) (granting certiorari but denying a stay of execution by a five-to-four vote); Michael Mello, *In the Years When Murder Wore the Mask of Law: Diary of a Capital Appeals Lawyer (1983-1986)*, 24 VT. L. REV. 583, 601 n.75 (2000) (describing Herrera’s failure to get a stay from the Supreme Court but obtaining one from a Texas state judge). In *Hamilton v. Texas*, 498 U.S. 908 (1990), Justice Stevens explained: “Four Members of the Court voted to grant certiorari and to stay the execution. Nevertheless, the stay application was denied, and Smith was executed on schedule. Smith’s execution obviously mooted this case. The Court has therefore properly denied the petition for a writ of certiorari.” *Id.* at 911 (Stevens, J., concurring in denial of certiorari).

115. *See, e.g.,* *Goodwin v. Johnson*, 531 U.S. 1120 (2001) (denying a stay of execution over four dissents; certiorari denied without indication of any dissent); *Flores v. Johnson*, 531 U.S. 987 (2000) (denying a stay of execution over four dissents; certiorari denied with three of the

certiorari was denied and the embarrassment of granting certiorari but denying a stay of execution was avoided.

Note that the difficulty here is not so much a difficulty produced by an equally divided Court—it occurs even when there are an odd number of Justices participating—but rather a difficulty produced by the rule of four. This is hardly surprising, considering that the principle that an evenly divided Court cannot take affirmative action is premised on majority rule, whereas the rule of four, of course, is a nonmajority rule.¹¹⁶

Professors Revesz and Karlan have argued that the Supreme Court should, through the rulemaking process, address whether the nonmajoritarian rule of four obligates the Court, once it grants certiorari, to preserve its jurisdiction.¹¹⁷ They contend that this question should be addressed “divorced from the divisive influence of an unrelated issue—the constitutionality of the death penalty.”¹¹⁸

The difficulty with their argument is that there are myriad equitable considerations that inform the decision to grant or withhold a stay. Applications for stays are submitted to individual Circuit Justices, who apply the following criteria:

First, it must be established that there is a “reasonable probability” that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. Second, the applicant must persuade [the Circuit Justice] that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous.... Third, there must be a demonstration that irreparable harm is likely to result from the denial of a stay. And fourth, in a close case it may be appropriate to “balance the equities”—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.¹¹⁹

four indicating that they would grant certiorari, but the fourth not formally stating a vote on certiorari); see also STERN ET AL., *supra* note 10, § 17.20.

116. See Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1068 (1988).

117. *Id.* at 1074-81, 1133. They also acknowledge that although statutory action would be permissible, judicial rulemaking would be preferable because of the Justices' familiarity with the issues. *Id.* at 1133 n.241.

118. *Id.* at 1133.

119. *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (Brennan, Circuit Justice 1980) (footnotes omitted); see also *Rubin v. United States*, 524 U.S. 1301, 1301-02 (Rehnquist, Circuit Justice

The Circuit Justice may refer the application to the full Court, or the full Court may review the action taken by the Circuit Justice.¹²⁰

In light of these criteria, a blanket rule obliging the Court to preserve its jurisdiction is difficult to justify. This is particularly true once one acknowledges that such a blanket rule might require the Court to deny a stay or to vacate a stay already granted.

Consider, for example, *DeFunis v. Odegaard*,¹²¹ the less famous dry run of the famous *Bakke* case.¹²² DeFunis prevailed in the state trial court, which ordered him admitted to the University of Washington Law School. While he was a second-year student at the law school, the Washington Supreme Court reversed. At that point, nothing would have prevented the school from refusing to allow DeFunis to continue his studies. Faced with this possibility, DeFunis applied for a stay of the Washington Supreme Court's judgment. Justice Douglas, as Circuit Justice, granted this application for a stay pending certiorari, thereby leaving the state trial court's order in force.¹²³ The Supreme Court granted certiorari, but by the time the case was argued, DeFunis was in his last quarter in law school and the Court concluded that the case was moot.¹²⁴

1998); *Edwards v. Hope Med. Group for Women*, 512 U.S. 1301, 1302 (Scalia, Circuit Justice 1994) (referring to all but the fourth criterion); *Planned Parenthood v. Casey*, 510 U.S. 1309, 1310 (Souter, Circuit Justice 1994); *California v. Am. Stores Co.*, 492 U.S. 1301, 1304 (O'Connor, Circuit Justice 1989); *Lucas v. Townsend*, 486 U.S. 1301, 1304 (Kennedy, Circuit Justice 1988). For the relevant statute, see 28 U.S.C. § 2101(f) (2000), which provides:

In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court

Id.; see also 28 U.S.C. § 1651 (2000) (“(a) The Supreme Court ... may issue all writs necessary or appropriate in aid of [its] jurisdiction[] and agreeable to the usages and principles of law. (b) An alternative writ ... may be issued by a justice ... of a court which has jurisdiction.”).

120. See STERN ET AL., *supra* note 10, §§ 17.15, 17.18.

121. 416 U.S. 312 (1974).

122. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); see also Jim Chen, *DeFunis, Defunct*, 16 CONST. COMMENT. 91, 92-95 (1999) (discussing how *DeFunis* “has gotten lost in the constitutional cascade of *Bakke*”).

123. *DeFunis*, 416 U.S. at 315.

124. *Id.* at 317-19.

If the Court were obligated, once it granted certiorari, to preserve its jurisdiction, it would have been obligated to *vacate* the stay issued by Justice Douglas. Without the stay, the law school could have prevented DeFunis from continuing his studies, thereby saving the case from mootness. But is preserving the Court's jurisdiction really so important that it should override the equities that otherwise called for permitting DeFunis to continue to attend law school?¹²⁵

In the death penalty context, however, Congress could, and should, determine that if the Supreme Court grants certiorari, a stay of execution is always appropriate. Everyone agrees that death constitutes irreparable harm, and it is not unusual to impose a blanket rule requiring a stay in death penalty cases rather than leave the matter to case-by-case equitable balancing. For example, Federal Rule of Criminal Procedure 38 provides: "A sentence of death shall be stayed if an appeal is taken from the conviction or sentence."¹²⁶ In a similar vein, Justice Scalia has stated:

I will in this case, and in every capital case on direct review, grant a stay of execution pending disposition by this Court of the petition for certiorari. While I will not extend the time for filing a petition beyond an established execution date, neither will I permit the State's execution date to interfere with the orderly processing of a petition on direct review by this Court.¹²⁷

Of course, stays of execution are not automatic on collateral review. Neither a district court nor a court of appeals, however, may deny a stay of execution on a first habeas petition unless it can deny the petition on the merits before the scheduled execution.¹²⁸

125. Cf. *Garrison v. Hudson*, 468 U.S. 1301, 1302 (Burger, Circuit Justice 1984) (issuing a stay in order to avoid mootng an appeal, reasoning that the harm to the state done by mootness outweighed a six week delay of the scheduled retrial of a prisoner "who has remained in confinement under a life sentence" for seven years).

126. FED. R. CRIM. P. 38(a).

127. *Cole v. Texas*, 499 U.S. 1301, 1301 (1991) (Scalia, Circuit Justice) (citation omitted); see also *Williams v. Missouri*, 463 U.S. 1301, 1301-02 (Blackmun, Circuit Justice 1983). Justice Scalia has also stated that if the Court is likely to decide whether to grant certiorari before the scheduled execution, he will deny the stay without prejudice. *Rodriguez v. Texas*, 515 U.S. 1307, 1307-08 (Scalia, Circuit Justice 1995).

128. *Lonchar v. Thomas*, 517 U.S. 314, 320 (1996) ("If the district court cannot dismiss the petition on the merits before the scheduled execution, it is obligated to address the merits

Yet even the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)¹²⁹ contains an automatic stay provision, applicable in those states that provide adequate counsel in state postconviction proceedings. Under this provision, once counsel is appointed for the state post conviction proceedings, execution "shall be stayed upon application" to a federal court that would ultimately have habeas jurisdiction.¹³⁰

Admittedly, the AEDPA also has an automatic termination provision,¹³¹ but one aspect of that provision plainly cries out for repair. The automatic stay expires if (1) the prisoner fails to file a timely federal habeas petition; (2) the prisoner formally waives the right to pursue a federal habeas petition; or (3) a federal habeas petition, once filed, "fails to make a substantial showing of the denial of a Federal right or is denied relief in the district court or at any subsequent stage of review."¹³² Once one of these conditions occurs, "no Federal court thereafter shall have the authority to enter a stay of execution in the case, unless the court of appeals approves the filing of a second or successive application under section 2244(b)."¹³³

Commentators have already noted that this bar on issuance of stays of execution "seems to suggest that even were the Supreme Court to grant certiorari, neither it nor any other federal court could stay an impending execution."¹³⁴ Although the AEDPA is aimed at preventing death row inmates from abusing the judicial process and obtaining stays of execution by repeatedly filing

and must issue a stay to prevent the case from becoming moot."); *Clark v. Collins*, 502 U.S. 1052, 1052 (1992) (Stevens, J., dissenting) (criticizing the denial of stay of execution where the district court and the court of appeals both denied the petition on the merits within a day of its filing); *Barefoot v. Estelle*, 463 U.S. 880, 889 (1983) ("[I]f a court of appeals is unable to resolve the merits of an appeal before the scheduled date of execution, the petitioner is entitled to a stay of execution to permit due consideration of the merits.").

129. Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 8, 15, 18, 19, 22, 28, 42, 49, and 50 U.S.C.).

130. 28 U.S.C. § 2262(a) (2000).

131. *Id.* § 2262(b).

132. *Id.*

133. *Id.* § 2262(c).

134. RICHARD H. FALLON ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 223 n.14 (Supp. 2002); see Michael MacManus, *Section 2262(c) of the Antiterrorism and Effective Death Penalty Act of 1996: Towards the Precipice of Unconstitutionality?*, 7 SETON HALL CONST. L.J. 879, 882-83, 892, 902-03 (1997).

meritless habeas petitions, should a single district judge, by denying habeas relief, foreclose the power of the Supreme Court to stay the execution? Surely, if the Supreme Court grants certiorari, the case should not be considered so abusive that the Court is prohibited from staying the execution.

Of course, this aspect of the AEDPA could be fixed simply by exempting the Supreme Court from its requirements. Happily, however, a single, simple provision would fix both that narrow problem with the AEDPA and the broader problem of stays of execution when certiorari is granted. Congress should add the following to 28 U.S.C. § 2101(f): "Notwithstanding any other provision of law, a sentence of death shall be stayed if the Supreme Court grants a petition for certiorari."

CONCLUSION

In the end, then, there is good reason to retain the clear and long-established practice of the Supreme Court of the United States to affirm when, in the exercise of its appellate jurisdiction, it finds itself evenly divided as to the judgment. Likewise, there is good reason for the practice of switching votes to avoid a judgment impasse, but not switching votes to avoid an equal division. Finally, although there is good reason generally to leave the issuance of stays pending certiorari to case-by-case equitable discretion, Congress should provide that a sentence of death shall be stayed if certiorari is granted.

For some who think that courts of last resort exist to answer legal questions, the practices I defend appear burdensome. However, the burden of occasionally waiting for another case when a full bench is available to decide the issue is modest. But for those who believe that even courts of *last resort* should first be *courts*, the traditional practice of the Supreme Court of the United States serves as a healthy reminder that the primary job of a court is to decide cases. A court can do that job even if there are some empty seats on the bench and even if it is evenly divided.