

## The Mechanics of Judicial Vote Switching

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### ABSTRACT

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

### INTRODUCTION

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

The remaining decision-maker, Justice Stevens, found himself in a situation unusual for Supreme Court Justices.<sup>5</sup> Excluding his vote, there were four votes

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1. 539 U.S. 444 (2003).

2. *Green Tree*, 539 U.S. at 447; see *The Supreme Court, 2002 Term: Leading Cases: III. Federal Statutes and Regulations: C. Federal Arbitration Act*, 117 HARV. L. REV. 410, 410-20 (2003) (discussing *Green Tree* and class litigation related to Federal Arbitration Act). See generally Robert P. Davis et al., *Green Tree Financial Corp. v. Bazzle: The Uncertain Fate of Class Arbitration*, 3 MEALEY'S LITIG. REP. CLASS ACTIONS 29 (2003) (offering analysis of issues raised in *Green Tree*).

3. *Green Tree*, 539 U.S. at 455.

4. *Id.* at 460.

5. *Id.* at 453 (Stevens, J., concurring). Similar multidimensional, triple choice Supreme Court cases are of several types. The first group of cases involves Justices switching from affirming to remanding. See, e.g., *Chavez v. Martinez*, 538 U.S. 760, 777 (2003) (Kennedy, Stevens, and Ginsburg); *Olmstead v. Zimring*, 527 U.S. 581, 607 (1999) (Stevens); *Bragdon v. Abbott*, 524 U.S. 624, 655 (1998) (Stevens); *Turner Broad. Sys.*,

to remand, three votes to reverse, and one vote to uphold. Justice Stevens stated that he preferred to “simply affirm the judgment of the Supreme Court of South Carolina. Were I to adhere to my preferred disposition of the cases, however, there would be no controlling judgment of the Court.”<sup>6</sup> That is, if Justice Stevens had voted to affirm, the Court would have been deadlocked 3-4-2 in favor of overturning, remanding, and upholding, respectively.

In *Screws v. United States*,<sup>7</sup> a 1945 case, four Justices voted to remand the case, three Justices voted to reverse, and one Justice voted to affirm, leaving Justice Rutledge, who preferred to affirm the lower court’s decision.<sup>8</sup> Fearing a 3-4-2 deadlock, Justice Rutledge switched his vote to remand “in order that disposition may be made of this case.”<sup>9</sup> Following this precedent, Justice Stevens agreed to remand the case in *Green Tree* despite his stated preference to uphold.<sup>10</sup> Every time there has been no majority on the disposition of a case—whether a minor contract case like *Green Tree* or a landmark civil liberties case like *Hamdi v. Rumsfeld*,<sup>11</sup> at least one Justice switched his or her vote to achieve a majority disposition.

The reason for the rule in *Screws* remains a mystery. No United States Supreme Court Justice who switched his or her vote has offered justification for the rule in *Screws* requiring a majority. Lower courts have also failed to offer any rationale for the rule,<sup>12</sup> even though many are baffled by the practice.<sup>13</sup>

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Inc. v. FCC, 512 U.S. 622, 669 (1994) (Stevens); *Screws v. United States*, 325 U.S. 91, 113 (1945) (Rutledge). The second group involves Justices switching from overturning to remanding. *See, e.g.*, *Md. Cas. Co. v. Cushing*, 347 U.S. 409, 410 (1954) (Frankfurter, Reed, Jackson, and Burton); *Klapprott v. United States*, 335 U.S. 601, 616 (1949) (Rutledge) (judgment modified with different majority by *Klapprott v. United States*, 336 U.S. 942 (1949)); *Von Moltke v. Gillies*, 332 U.S. 708, 709 (1948) (Black, Douglas, Murphy, and Rutledge); *see also* *Action House, Inc. v. Koolik*, 54 F.3d 1009, 1014 (2d Cir. 1995) (Chief Judge Newman) (citing other cases). A third group of decisions, which appears in lower courts, involves judges switching from remanding to overturning. *See, e.g.*, *Riley v. Taylor*, 277 F.3d 261, 316 (2001) (3d Cir. 2001) (Justice Becker changing from remanding to overturning lower court decision and granting writ of habeas corpus); *People v. Harris*, 679 P.2d 433, 456 (Cal. 1984) (Grodin). Finally, the case of *Hamdi v. Rumsfeld* is slightly different because it involves Justices divided between four different positions: upholding, overturning, and two different remanding positions. 124 S. Ct. 2633, 2634-35 (2004). A group of Justices voting to remand with one instruction switched to remanding with a different instruction, thus achieving a majority. *Id.* It is worth noting that Professors Abramowicz and Stearns would add the case of *Bush v. Gore* as a multidimensional triple choice case. Michael Abramowicz & Maxwell L. Stearns, *Beyond Counting Votes: The Political Economy of Bush v. Gore*, 54 VAND. L. REV. 1849, 1921 (2001) (using term “multidimensional”). *See generally* *Bush v. Gore*, 531 U.S. 98 (2000). In contrast to the multidimensional cases discussed here, unidimensional cases are discussed in Part I.A.

6. *Green Tree*, 539 U.S. at 455.

7. 325 U.S. 91, 113 (1945).

8. *See id.* at 134 (Rutledge, J., concurring) (explaining preference to affirm Court of Appeals’ judgment).

9. *See id.* (reversing Court of Appeals to dispose of case).

10. *See Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 455 (Stevens, J., concurring) (remanding to avoid deadlock).

11. 124 S. Ct. 2633 (2004).

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

Only California Supreme Court Justice Grodin has offered a tautological and succinct justification, asserting that it would “obviously [be] intolerable” for a Justice not to switch his or her vote to achieve a majority.<sup>14</sup> Finally, commentators who touch on the rule tangentially do not fare much better than Justice Grodin in explaining the rule.<sup>15</sup> They call it “necessary”<sup>16</sup> and “appropriate”<sup>17</sup> to avoid “judgment impasse.”<sup>18</sup>

For the litigants in *Green Tree*, *Screws*, and other cases, these justifications from the bench and commentators are unconvincing. First, the *Screws* rule requiring a majority contradicts a long-established principle that no vote switching is necessary when the Court is tied 4-4. Second, because no majority is needed as to the reasoning of the Court, one could argue that a majority is not required for a case’s disposition either.<sup>19</sup> Third, no majority of any Court has ever accepted the rule in *Screws*, and those Justices who follow the rule cite no cases, traditions, or norms to support it.<sup>20</sup> For these reasons, the rule should not govern the wide-range of cases that it does.

This article examines the nuts and bolts of the *Screws* rule requiring a majority disposition. The first description of the mechanics of judicial vote switching focuses on the phenomenon of negotiating or contracting around the default rule. Specifically, without a vote switch, cases like *Green Tree* and *Screws* would be treated as an affirmation by a divided court.<sup>21</sup> For example, in *Green Tree*, the decision of the South Carolina Supreme Court would have been upheld because there was originally no majority voting to displace the state court decision.

Given the affirmation default rule, United States Supreme Court Justices have an incentive to find a more a desirable disposition of such cases. In *Green*

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13. *Colleman v. Jahncke Serv., Inc.*, 341 F.2d 956, 960 (5th Cir. 1965) (noting confusion); *see also* *Pedcor Mgmt. Co. Inc. Welfare Benefit Plan v. Nations Pers. of Tex., Inc.*, 343 F.3d 355, 360 (5th Cir. 2003) (observing confusion generated by *Green Tree*). In *Colleman*, the court references the confusion over how to interpret *Maryland Casualty Co. v. Cushing*, by stating “it is impossible to say what the *Cushing* case stands for. . . .” *Colleman*, 341 F.2d at 960 (discussing *Md. Cas. Co. v. Cushing*, 347 U.S. 409 (1954)).

14. *People v. Harris*, 679 P.2d 433, 456 (Cal. 1984) (switching from remand to overturn).

15. *See, e.g.*, Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2316 (1999) (describing vote switching practice as “play[ing] chicken” without further elaboration); Maxwell L. Stearns, *Should Justices Ever Switch Votes?: Miller v. Albright in Social Choice Perspective*, 7 SUP. CT. ECON. REV. 87, 109 (1999) (offering only cursory mention of vote switching practice). *But see* Saul Levmore, *Ruling Majorities and Reasoning Pluralities*, 3 THEORETICAL INQ. L. 87, 87-88 (2002) (directly questioning rationale of appellate courts’ insistence on majority disposition of cases). Dean Levmore’s argument is discussed in Part III.C.

16. John M. Rogers, *“I Vote This Way Because I’m Wrong”: The Supreme Court Justice as Epimenides*, 79 KY. L.J. 439, 458 (1991) [hereinafter Rogers, *I Vote*].

17. Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 WM. & MARY L. REV. 643, 672 (2002).

18. *Id.*

19. *See infra* Part III.C.

20. *See infra* Part III.B.

21. *See infra* Part II.A.

*Tree*, a majority of the Justices might have preferred remanding the case to upholding it. As a result, the Justices had an incentive to engage in vote switching to achieve the more favorable disposition. As discussed in more detail in Part II, this approach explains that the direction of the vote switches in all of the cases where it has occurred is a result of concealed negotiations with the aim of avoiding the affirmation default rule.

Some, however, do not agree that upholding is the default rule in cases like *Green Tree*. Judge Rogers argues that remanding is the default rule in practice, for reasons that are criticized below in Part II.B.<sup>22</sup> Professors Kornhauser and Sager argue that issue-by-issue voting should be the default rule, and the flaws with their approach are discussed in Part II.C.<sup>23</sup> Because language in the opinions supports these alternative default rules and there is no conclusive proof that the affirm default rule is correct,<sup>24</sup> a second and more complex reason for the *Screws* rule is negotiations *over* the default and not *around* it.

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

Before turning to the *Screws* rule complexities, it is worth noting that this article is entirely descriptive. Economics literature shows that strategic behavior is inevitable,<sup>25</sup> and any default rule will induce some Justices to switch his or

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22. Rogers, *I Vote*, *supra* note 16, at 460 (stating “[i]n these situations, it makes sense for the ‘middle’ position [namely remand] to obtain”).

23. See generally Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1 (1993) [hereinafter Kornhauser & Sager, *Collegial Courts*]; see also David Post & Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 GEO. L.J. 743, 744 (1992).

24. Specifically, if a court were to affirm a three-way deadlock without vote switching, such a decision would demonstrate that affirmation is the default rule and explicitly recognized by courts. The case most suggestive of this is *United States v. Jordan*, in which “[t]he judgment [was] affirmed by an equally divided Court.” 342 U.S. 911, 911 (1952). The exact make-up of this equal division remains unclear, for we only learn in a two-sentence opinion that Justice Frankfurter voted to dismiss the writ as improperly granted. *Id.* How the other Justices voted, and how many of them voted, remains unclear. See *id.* One reason why the Justices might keep the default rule concealed is to create artificial deadlocks. See *infra* Part I.C (discussing use of artificial deadlocks). Consequently, the lack of a clear explanation of the contours of the default rule in cases like *Jordan* is not surprising.

25. See generally Allan Gibbard, *Manipulation of Voting Schemes: A General Result*, 41 ECONOMETRICA 587 (1973) (proving lack of solution to inevitable nature of voting schemes); Matthew Satterthwaite, *Strategy-Proofness and Arrow's Conditions: Existence and Correspondence Theorems for Voting Procedures and*

her vote in some situations. No default rule is “strategy-proof.”<sup>26</sup> Furthermore, the problem of cycling is inescapable, as demonstrated by the famous work of Kenneth Arrow.<sup>27</sup> The goal here is not to suggest that one default rule or one strategy to avoid cycling is better than another, but rather to offer explanations for a phenomenon that has generated much confusion and little consensus.

### I. BACKGROUND OF THE SCREWS PROBLEM

To understand the nuts and bolts of the *Screws* rule, one must first understand the two situations in which the rule is applied. Cases in the first group are so-called “unidimensional triple choice cases”<sup>28</sup> because the Justices are confronted with one issue in which there are three different choices for the outcome. Cases in the second group, so-called “multidimensional triple choice cases,”<sup>29</sup> are more complex. Justices must make decisions on more than one issue, and these choices combine to determine how he or she votes as to the outcome of the case.

#### A. Unidimensional Triple Choice Cases

The case of *Gertz v. Robert Welch, Inc.*<sup>30</sup> represents one of the several unidimensional triple choice cases discussing freedom of the press.<sup>31</sup> Elmer Gertz, a member of the National Lawyers Guild for fifteen years, represented the family of a youth killed by a Chicago policeman in 1968.<sup>32</sup> *The American Opinion* printed articles about the civil rights case in which the paper called Gertz a “Leninist” and an official of the “Marxist League of Industrial Democracy.”<sup>33</sup> Gertz sued, and the jury awarded him \$50,000.<sup>34</sup> Under Illinois law, the jury was allowed to measure damages but not to assess the newspaper’s recklessness.<sup>35</sup>

Following the verdict, the federal trial judge entered a judgment notwith-

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*Social Welfare Functions*, 10 J. ECON. THEORY 187 (1975) (same); see also Allan Gibbard, *Manipulation of Schemes that Mix Voting with Chance*, 45 ECONOMETRICA 665, 665-67 (1977) [hereinafter Gibbard, *Manipulation of Schemes*] (discussing whether randomly picking winner prevents switching). *But cf.* Douglas H. Blair, *On the Ubiquity of Strategic Voting Opportunities*, 22 INT’L ECON. REV. 649 (1981) (listing possible exceptions inapplicable to inevitable nature of voting schemes). Strategic behavior could be limiting if each Justice were given a lottery ticket and the winner of the lottery would determine the case. See *infra* Conclusion. In addition, the lottery system would not necessarily be a Condorcet winner between various procedures.

26. See *supra* note 25 (collecting sources that discuss unavoidable nature of strategic voting behavior).

27. See generally KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963).

28. See Abramowicz & Stearns, *supra* note 5, at 1909.

29. See Abramowicz & Stearns, *supra* note 5, at 1921.

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

31. See *id.* at 325 (1974) (acknowledging conflict between law of defamation and freedom of speech).

32. *Id.*

33. *Id.* at 326.

34. *Gertz*, 418 U.S. at 329.

35. *Id.* at 328-29.

standing the verdict in favor of Robert Welsch, Inc., owner of *The American Opinion*.<sup>36</sup> The trial judge applied the leading freedom of the press case, *New York Times Co. v. Sullivan*,<sup>37</sup> and held that the First Amendment protects the press from libel suits by private individuals.<sup>38</sup> The Seventh Circuit Court of Appeals affirmed the trial court's decision.<sup>39</sup>

### 1. Reasons to Uphold the Lower Court Decision

The United States Supreme Court was divided over whether *New York Times* applies to suits filed by private individuals. On one end of the spectrum were those who believed in extending protections. Justice Douglas, who voted for absolute immunity in *New York Times*,<sup>40</sup> voted to uphold dismissal in *Gertz*.<sup>41</sup> According to Douglas, *The American Opinion* was entitled to absolute immunity in reporting issues of public concern, regardless of whether public or private individuals were involved.<sup>42</sup>

Justice Brennan agreed with dismissal but disagreed on the applicable legal standard.<sup>43</sup> He would apply a "knowledge of its falsity or . . . reckless disregard of the truth" standard instead of Justice Douglas' absolute immunity standard.<sup>44</sup> Because there was no evidence of such knowledge or recklessness, Justice Brennan also voted to dismiss the case against the paper.<sup>45</sup>

### 2. Reasons to Reverse the Lower Court Decision

Justice White voted to reinstate the jury verdict.<sup>46</sup> He believed that "those who wrote the First Amendment [did not] intend . . . to prohibit the . . . Government . . . from providing the private citizen a peaceful remedy from damaging falsehood."<sup>47</sup> *New York Times* carved out an exception for libel against public individuals because "[i]n a democratic society . . . the citizen has the privilege of criticizing his government and its officials."<sup>48</sup> Beyond this exception, "the First Amendment did not confer a 'license to defame the [private] citizen."<sup>49</sup>

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36. *Id.* at 329.

37. 376 U.S. 254 (1964) (holding public officials prohibited from obtaining defamation damages unless false statement made with actual malice).

38. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 329 (1974).

39. *Id.* at 328-29 (citing *New York Times*).

40. *New York Times*, 376 U.S. at 297.

41. *Gertz*, 418 U.S. at 355.

42. *See id.* at 359 (advocating immunity from prosecution for press).

43. *Id.* at 361.

44. *Id.*

45. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 369 n.3 (1974).

46. *Id.* at 404.

47. *Id.* at 380.

48. *Id.* at 387.

49. *Gertz*, 418 U.S. at 387.

Chief Justice Burger, also dissenting, voted to reverse the dismissal and reinstate the jury verdict, but for reasons different from those offered by Justice White.<sup>50</sup> A standard of negligence, the Chief Justice argued, would force newspaper editors to reconsider what they published.<sup>51</sup> Nevertheless, Chief Justice Burger believed that private lawyers in Gertz's position should be allowed to sue for libel.<sup>52</sup> "The right to counsel would be gravely jeopardized if every lawyer who takes an 'unpopular' case, civil or criminal, would automatically become fair game for irresponsible reporters and editors."<sup>53</sup>

### 3. *Reasons to Remand the Lower Court Decision with a Recklessness Standard*

At this point, there were two groups of Justices: Justices Douglas and Brennan, who wanted to uphold; and Chief Justice Burger and Justice White, who wanted to reverse. A third group, composed of Justices Powell, Stewart, Marshall, and Rehnquist, ordered a new trial.<sup>54</sup> First, these Justices held that *New York Times* did not explicitly govern cases of libel against *private* individuals.<sup>55</sup> Nevertheless, they held that no jury could impose liability without first finding fault on the part of the publisher.<sup>56</sup> Because the trial court instructed the jury that it did not need to find fault pursuant to Illinois law, these four Justices ordered a new trial in which the jury would be properly instructed.<sup>57</sup>

Before turning to Justice Blackmun's crucial vote, it is useful to place the positions of the Justices along a spectrum. On one end, we have Justice Douglas with an absolute immunity standard and Justice Brennan with a recklessness standard. On the other end of the spectrum, Chief Justice Burger and Justice White are deferring to state law over what standard to impose in the case. Finally, Justice Powell occupied the center position, requiring proof of fault.

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

The final decision-maker, Justice Blackmun, agreed with Justice Brennan that *New York Times* applied and that a private litigant must prove either knowledge of falsehood or reckless disregard for the truth.<sup>58</sup> However, he noted that the Court appeared fractured and was concerned by the uncertainty

50. *Id.* at 355.

51. *Id.*

52. *Id.*

53. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 355 (1974).

54. *Id.* at 352.

55. *Id.* at 342-43.

56. *Id.* at 347.

57. *Gertz*, 418 U.S. at 352.

58. *Id.* at 353.

that division could create.

If my vote were not needed to create a majority, I would adhere to my prior view [and uphold]. . . . I feel that it is of profound importance for the Court to come to rest in the defamation area and to have a clearly defined majority position that eliminates the unsureness defined by . . . diversity.<sup>59</sup>

Because “[a] definitive ruling . . . is paramount,” he concurred in remanding the case for a new trial despite his preference for upholding the dismissal of the verdict.<sup>60</sup>

59. *Id.* at 354.

60. *Id.* *Gertz* is reflective of a series of cases in which the Justices were divided along a spectrum on the extension of *New York Times v. Sullivan* to private individuals. See generally *id.*; *Time, Inc. v. Hill*, 385 U.S. 374 (1967). In *Time*, you see at one end of the spectrum, Justices Black and Douglas who argued that the First Amendment creates an absolute immunity for the press. *Id.* at 398. Consequently, they voted to reverse a verdict against a publisher. *Id.* On the other end of the spectrum, one finds Justice Fortas, joined by Chief Justice Warren and Justice Clark. These Justices believed that a jury instruction requiring proof of “reckless or wanton disregard of the plaintiff’s rights” was sufficient and voted to uphold the New York court’s award of damages. *Id.* at 416.

Justice Brennan, joined by Justices Clark, Stewart, and White, believed that the New York jury instructions were insufficient and that the case should be remanded. *Id.* at 398. They said, the “trial judge [must] instruct the jury that a verdict of liability could be predicated only a finding of knowing or reckless falsity in the publication of the [ . . . ] article.” *Id.* at 397. Justice Harlan, while agreeing that the case should be remanded, dissented because he believed that the appropriate standard was negligence. *Id.* at 406. Conceptually, the Justices fall along the following spectrum:

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

Since there was no majority on the disposition of the case, Justices Black and Douglas shifted their position from reversing to remanding using the recklessness standard. *Id.* at 396. The Justices in *Rosenbloom v. Metromedia, Inc.* took positions along a similar spectrum. 403 U.S. 29 (1971). Justice Marshall, joined by Justice Stewart, held that the standard was low: anything above strict liability would be sufficient. *Id.* at 86-87. Justice Harlan argued that proof of negligence was required. *Id.* at 68. These Justices voted to overturn the Third Circuit Court of Appeal’s decision to dismiss the verdict. *Id.* at 62-87.

On the other end of the spectrum, Justice Black, concurring, reiterated his belief in an absolute immunity. *Id.* at 57. Justice White, concurring, required proof of actual malice. *Id.* at 62. Finally, Justice Brennan, joined by Chief Justice Burger and Justice Blackmun, required a “reasonable care” standard but noted that there was “no evidence in the record to support a conclusion that respondent ‘in fact entertained serious doubts as to the truth’ of its reports.” *Id.* at 57. Justice Douglas did not participate. Conceptually, we have the following spectrum:

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

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

### B. Multidimensional Triple Choice Cases

*Screws* and *Green Tree* differ from cases like *Gertz* in that the Justices were presented with more than one issue. *Screws*, a white police officer in Georgia, handcuffed, beat, and dragged Robert Hall, an African American, during the course of an arrest.<sup>61</sup> Hall later died, and the United States prosecuted *Screws* and his accomplices for acting “under color of any law” to deprive Hall’s “rights, privileges, or immunities secured or protected by the Constitution and laws of the United States.”<sup>62</sup> The jury convicted *Screws* without being instructed of any intent requirement under the statute and *Screws* appealed the case to the United States Supreme Court.<sup>63</sup> On appeal, the Court faced four questions.<sup>64</sup> Did the statute apply? If it did, was the statute unconstitutional? If it was unconstitutional, could the Court limit the statute to make it constitutional? Finally, if the Court could limit the statute, was a new trial necessary?

#### 1. Reasons to Overturn the Conviction

Justices Roberts, Frankfurter, and Jackson, dissenting, first addressed the question of whether the statute applied to police officers like *Screws*.<sup>65</sup> For liability to attach, the acts of the officers must have been committed “under color of any law.”<sup>66</sup> Since *Screws* acted outside of the scope of his duties as an agent of the state, these Justices believed that his acts were beyond the statute and that the charges should therefore have been dropped.<sup>67</sup>

Next, Justice Roberts argued that the act was unconstitutionally vague.<sup>68</sup> The statute’s domain, he contended, “is unbounded and therefore too indefinite. Criminal statutes must have more or less specific contours. This has none.”<sup>69</sup>

Third, these Justices felt “it was settled early in our history that prosecutions in the federal courts could not be founded on any undefined body of so-called common law.”<sup>70</sup> Consequently, the three Justices refused to limit the statute to make it constitutional.<sup>71</sup>

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positions of the Justices create the potential for deadlock in future cases. See *Curtis Publishing Publ’g Co. v. Butts*, 388 U.S. 130 (1967) (having potential for similar outcome). *United States v. Vuitch* is cited in these cases, but is best understood as a multidimensional triple choice case. 402 U.S. 62 (1971); see *infra* Part I.B.

61. See *Screws v. United States*, 325 U.S. 91, 92-93 (1945) (describing shocking episode forming basis for case).

62. See *id.* at 93 (reciting charges against defendant).

63. See *id.* at 106-07 (explaining insufficient jury instruction on intent requirement).

64. See *id.* at 94-95, 100-01, 113 (addressing constitutional issues).

65. See *Screws*, 325 U.S. at 149 (Roberts, J., Frankfurter, J., and Jackson, J., dissenting) (arguing *Screws* outside federal criminal code’s scope).

66. *Id.* at 148.

67. *Id.* at 150.

68. *Id.* at 150-57.

69. *Screws v. United States*, 325 U.S. 91, 150 (1945).

70. *Id.* at 152.

71. See *id.* (arguing statute not limited because liberty demands legislature define crimes).

## 2. *Reasons to Remand the Case for a New Trial*

Justice Douglas, joined by the Chief Justice, Justice Black, and Justice Reed, disagreed. First, they believed Screws had acted under the color of state law when he murdered Hall. Next, they found that the statute, as applied, was unconstitutional. However, if the statute were “confined more narrowly than the lower courts confined it, it [could] be preserved as one of the sanctions to the great rights which the Fourteenth Amendment was designed to secure.”<sup>72</sup> They discussed how an intent requirement would cure the constitutional deficiency.<sup>73</sup>

After limiting the scope of the statute, these Justices voted to remand.<sup>74</sup> “To convict it was necessary for [the jury] to find that petitioners had the purpose to deprive the prisoner of a constitutional right.”<sup>75</sup> A new trial would determine the willfulness of Screws’ actions.<sup>76</sup>

## 3. *Reasons to Uphold the Conviction*

Justice Murphy believed a new trial was not necessary and that the charges should have been upheld.<sup>77</sup> While it is true that a statute must “give . . . fair warning” to the accused, he believed there was no dispute that Screws intended to murder Hall.<sup>78</sup> “A new trial could hardly make [the] fact [that Screws acted willfully] more evident; the failure to charge the jury on willfulness was at most an inconsequential error.”<sup>79</sup>

This left one final decision-maker, Justice Rutledge. Excluding his vote, three Justices voted to reverse the charges, four voted to remand the case for a new trial, and one Justice voted to uphold the charges. Justice Rutledge agreed with the reasoning of Justice Murphy and wanted to uphold the charges.<sup>80</sup> He stated, “When, as here, a state official abuses his place consciously or grossly in abnegation of its rightful obligation, and thereby tramples underfoot the established constitutional rights of men or citizens, his conviction should stand when he has had a fair trial and full defense.”<sup>81</sup> Justice Rutledge, however, then offered support for a rule in favor of mandating a majority disposition:

My convictions are as I have stated them. Were it possible for me to adhere to them in my vote, and for the Court at the same time to dispose of the cause, I would act accordingly. The Court, however, is divided in opinion. If each

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72. *Id.* at 100.

73. *Screws*, 325 U.S. at 102-04.

74. *See id.* at 113 (reversing judgment and ordering new trial).

75. *Id.* at 107.

76. *Id.* at 113.

77. *See Screws v. United States*, 325 U.S. 91, 137 (1945) (arguing judge’s failure to charge willfulness inconsequential).

78. *See id.* at 136-37 (setting forth evidence officials acted willfully or wantonly).

79. *Id.* at 137.

80. *See id.* at 113 (concurring in result and with Justice Murphy’s reasoning).

81. *See Screws*, 325 U.S. at 131 (Rutledge, J., concurring) (stating reasons to uphold conviction).

member accords his vote to his belief, the case cannot have disposition. Stalemate should not prevail for any reason, however compelling, in a criminal cause or, if avoidable, in any other. My views concerning appropriate disposition are more nearly in accord with those stated by Mr. Justice Douglas, in which three other members of the Court concur, than they are with the views of my dissenting brethren who favor outright reversal. Accordingly, in order that disposition may be made of this case, my vote has been cast to reverse the decision of the Court of Appeals and remand the cause to the District Court for further proceedings in accordance with the disposition required by the opinion of Mr. Justice Douglas.<sup>82</sup>

This was the extent of the argument in favor of vote switching. It is important to note that Justice Roberts' opinion does not touch on the harmlessness of the error.<sup>83</sup>

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

	<u>Roberts + 2</u>	<u>Douglas + 3</u>	<u>Murphy/Rutledge</u>
Color of Law:	No	Yes	Yes
Unconstitutional:	Yes	Yes	Yes
Fixable:	No	Yes	Yes
Harmless Error:	No	No	Yes
	<i>Dismiss</i>	<i>Remand</i>	<i>Uphold</i>

*Green Tree* follows a similar pattern, but with a twist that is central to the analysis below: it is really two cases combined into one. The Bazzles and Lackey each entered into contracts with Green Tree Financial Corporation.<sup>84</sup> These contracts, which were nearly identical, stipulated that arbitration would settle any disputes.<sup>85</sup> The contract language did not, however, discuss whether the Bazzles or Lackey could proceed on a *class-wide* basis in arbitration.<sup>86</sup>

After disputes arose under the contracts, the lawyers for the Bazzles and Lackey sought class action arbitration.<sup>87</sup> In the Bazzle proceedings, a *court* certified a class of similarly situated plaintiffs and then sent that class to arbitration.<sup>88</sup> In the Lackey proceedings, however, an *arbitrator* certified the class and then proceeded with class-wide arbitration.<sup>89</sup>

Lawyers for Green Tree Financial Corporation argued that both the state trial court and the arbitrator had violated the Federal Arbitration Act (FAA), which

82. See *id.* at 134 (Rutledge, J., concurring) (casting original vote aside to achieve majority disposition).

83. See *id.* at 138-61 (Roberts, J., Frankfurter, J., and Jackson, J., dissenting) (omitting discussion regarding error's harmlessness).

84. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 448 (2003).

85. *Id.* at 448.

86. *Id.* at 450.

87. *Id.* at 449.

88. *Green Tree*, 539 U.S. at 449.

89. *Id.* at 449.

requires interpretation of arbitration agreements “according to their terms.”<sup>90</sup> The contract term at issue provided for arbitration between “us” and “you.”<sup>91</sup> The lawyers for Green Tree Financial Corporation argued that this term unambiguously prevented class action arbitration and that plaintiffs like the Bazzles and Mr. Lackey would have to proceed in individualized arbitration proceedings (that is, the contract meant “you, and *only you*”).<sup>92</sup>

The Supreme Court of South Carolina rejected these arguments, holding that the contracts were ambiguous and construing them against the drafter, Green Tree.<sup>93</sup> Moreover, the court stated that class action arbitration serves state policies by promoting efficiency.<sup>94</sup> Green Tree appealed to the United States Supreme Court.<sup>95</sup>

#### 4. *Reasons to Uphold the State Court Decision*

Justice Thomas voted to uphold the decision.<sup>96</sup> Citing two of his earlier dissents, he stated that the FAA does not apply to the states and that the South Carolina Supreme Court’s “interpretation of a private arbitration agreement” should be left “undisturbed.”<sup>97</sup>

Justice Stevens also voted (at first) to uphold the cases, but along different lines.<sup>98</sup> While the FAA applies to the states, he felt “there is nothing in the Federal Arbitration Act that precludes [the] determinations [made by] the Supreme Court of South Carolina.”<sup>99</sup> As a matter of state contract law, the Supreme Court of South Carolina’s treatment of the case was within the confines of the FAA.<sup>100</sup>

#### 5. *Reasons to Overturn the State Court Decision*

Chief Justice Rehnquist, joined by two other Justices, voted to overturn the court’s decision.<sup>101</sup> These Justices believed that the state court’s decision “contravenes the terms of the contract and is therefore preempted by the FAA.”<sup>102</sup> They agreed with Green Tree’s arguments that “[e]ach contract *expressly* defines ‘us’ as . . . [Green Tree], and ‘you’ as the . . . [individuals] named in that

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90. *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 355 (S.C. 2002), *vacated by* 539 U.S. 444 (2003).

91. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 458-59 (2003).

92. *Id.*

93. *Bazzle*, 569 S.E.2d at 359.

94. *Id.* at 360.

95. *Green Tree*, 539 U.S. at 447.

96. *See id.* at 460 (arguing FAA not grounds for preempting state court interpretation of private arbitration agreement).

97. *Id.*

98. *See id.* at 455 (asserting FAA does not preclude South Carolina Supreme Court determinations).

99. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 454-55 (2003).

100. *Id.*

101. *Id.* at 455-60.

102. *Id.* at 455.

specific contract.”<sup>103</sup> Consequently, “[t]hese provisions . . . make quite clear that [Green Tree] must select, and each buyer must agree to, a particular arbitrator for disputes between . . . [Green Tree] and that specific buyer.”<sup>104</sup> According to this logic, the state court was wrong to allow class action arbitration. The contracts unambiguously prevented the procedure Green Tree followed in both the *Bazzle* and *Lackey* cases.<sup>105</sup>

#### 6. Reasons to Remand the Case to an Arbitrator

Justice Breyer, joined by three Justices, questioned whether “the contracts’ language is as clear as the Chief Justice believes. The case arbitrator was ‘selected by’ Green Tree ‘with consent of Green Tree’s customers, . . . [the *Bazzles* and *Lackey*].”<sup>106</sup> Justice Breyer reasoned that “class arbitration involves an arbitration,” and that an ambiguity existed.<sup>107</sup>

These four Justices voted to remand the case because they believed an arbitrator, not a court, should resolve this ambiguity.<sup>108</sup> “Whether the agreement forbids class arbitration,” Justice Breyer wrote, “is for the arbitrator to decide.”<sup>109</sup> Although courts have important roles in “gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy,” an arbitrator is required to decide “what kind of arbitration proceeding the parties agreed to.”<sup>110</sup> Consequently, these Justices wanted to remand the *Bazzle* case to an arbitrator because the South Carolina Supreme Court, instead of the arbitrator, had decided to proceed on a class-wide basis.<sup>111</sup>

In the *Lackey* proceedings, an arbitrator made an independent determination that the contract allowed arbitration.<sup>112</sup> Nevertheless, Justice Breyer creatively sidestepped this issue, holding “there is at least a strong likelihood in *Lackey* as well as in *Bazzle* that the arbitrator’s decision reflected a court’s interpretation of the contracts rather than an arbitrator’s [independent] interpretation.”<sup>113</sup> Consequently, the *Lackey* proceedings, as well as the *Bazzle* proceedings, were remanded to the arbitrator.<sup>114</sup>

The Chief Justice disagreed with Justice Breyer’s decision to remand the

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103. *Green Tree*, 539 U.S. at 458-59.

104. *Id.* at 459.

105. *Id.* at 459-60.

106. *Id.* at 459.

107. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 450-51 (2003).

108. *Id.* at 452.

109. *Id.* at 451.

110. *Id.* at 452.

111. *Green Tree*, 539 U.S. at 454.

112. *Id.* at 453.

113. *Id.* at 454; *see also* Davis, *supra* note 2, at 2 (observing “Justice Breyer neatly skirted one of the factual issues”).

114. *Green Tree*, 539 U.S. at 454.

cases to the arbitrator, opining that “the interpretation of [a] contract [and whether it allows class action arbitration] is for the court, not for the arbitrator.”<sup>115</sup> Justice Stevens, while believing that “[a]rguably the interpretation of the parties’ agreement should have been made in the first instance by the arbitrator, rather than the court,” nevertheless stated, “there is no need to remand the case to correct that possible error.”<sup>116</sup>

To summarize the issues that arose:

	<u>Thomas</u>	<u>Stevens</u>	<u>Rehnquist + 2</u>	<u>Breyer + 3</u>
FAA Applies				
to States:	No	Yes	Yes	Yes
Ambiguous:		Yes	No	Yes
Remand:		No	No	Yes
	<i>Uphold</i>	<i>Uphold</i>	<i>Overturn</i>	<i>Remand</i>

Because there was no majority disposition, Justice Stevens switched from upholding to remanding the cases, believing Justice Breyer’s opinion was closer to his own than that of the Chief Justice.<sup>117</sup> Other multidimensional triple choice cases follow the pattern of *Screws* and *Green Tree*.

### C. *The Screws Rule Governs No Outcomes*

There is an argument that unidimensional and multidimensional triple choice cases are artificially created to serve the interests of the switching Justice.<sup>118</sup> To understand how, consider the case of *State v. Post*,<sup>119</sup> in which a majority of the Supreme Court of New Jersey voted to send an enslaved individual, Williams, back to his master.

Justice Randolph’s concurring opinion deserves close attention and offers guidance to the modern-day *Screws* rule. Justice Randolph writes of the freedoms guaranteed by state constitutions across the country and asserts that “[t]he citizens of New Jersey are as devoted to freedom as those of any other state.”<sup>120</sup> From these statements it seems as though Justice Randolph was prepared to release Williams from the shackles that bound him to what Justice Randolph called “the evils of slavery.”<sup>121</sup>

Nevertheless, Justice Randolph voted to send Williams back to his master because the people of New Jersey “are differently situated and have *unfortunately*

115. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 456 (2003).

116. *Id.* at 455.

117. *Id.*

118. See Jonathan R. Nash, *A Context-Sensitive Voting Protocol Paradigm for Multimember Courts*, 56 STAN. L. REV. 75, 85 (2003) (discussing judicial voting practices and protocol).

119. 20 N.J.L. 368 (N.J. 1845). The author thanks Anna Pervukhin for the reference.

120. *Id.* at 384.

121. *Id.*

imbibed from their settlement different principles [regarding freedom, and the constitution protects] the evils of slavery.”<sup>122</sup> For Justice Randolph, to release Williams would be “a wanton stretch of judicial power and a fraud upon those who framed, as well as on those who adopted [the state constitution].”<sup>123</sup> “Application should be made to the legislature and not the judiciary” to rectify slavery’s wrongs.<sup>124</sup>

At first glance, Justice Randolph’s humanitarian statements encouraging freedom and the end of slavery are commendable. Yet, it is his vote that sends Williams back to slavery.<sup>125</sup> One could argue that Justice Randolph’s opinion criticizing slavery was written to mask the Justice’s true beliefs about the institution. That is, Justice Randolph might have concealed racist views knowing that, in the end, these hortatory statements would make no difference.

*Post* teaches us the need to look beyond the rhetoric of judicial opinions. Often a Justice’s vote is more important than the language that accompanies it. Indeed, Justices might write their opinions with a particular audience in mind, while voting with a different mindset. To those reading his opinion, Justice Randolph was an anti-slavery crusader. To Williams, however, the Justice became part of the white establishment perpetuating the institution.

Perhaps we can analogize *Post* to cases like *Screws* and *Gertz*. In *Screws*, Justice Rutledge appears to defend civil rights.<sup>126</sup> His preferred outcome of the case is to send Screws directly to prison, without the possibility for a new trial.<sup>127</sup> His vote, however, suggests that he takes a different side on the race issue. Screws, a white police officer, was given a second chance to make his case to a jury.<sup>128</sup> This new jury acquitted Screws, allowing the murder to go unpunished, and Screws went on to serve in the Georgia Senate.<sup>129</sup> For all his talk about sending Screws directly to jail, Justice Rutledge wound up interfering with the defense of civil rights.

Although we have no way of knowing for sure, Justice Rutledge may have wanted to uphold the system that perpetuates racial discrimination, while at the same time being lauded as a defender of these rights. The lack of a majority to dispose of the case provided Justice Rutledge with the perfect cover. All along he may have wanted to remand the case for a new trial, hoping the new jury would release Screws. Regardless of Justice Rutledge’s personal views on this matter, the potential existed for this type of manipulation.

A similar attack can be made in *Gertz*, where Justice Blackmun switched his

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122. *Id.* at 384-85.

123. *Post*, 20 N.J.L. at 384.

124. *Id.* at 386.

125. *Id.* at 378.

126. *Screws v. United States*, 325 U.S. 91, 124 (2003) (Rutledge, J., concurring).

127. *Id.* at 131.

128. *Id.* at 94.

129. Woodford Howard & Cornelius Bushoven, *The Screws Case Revisited*, 29 J. POL. 617, 633 (1967) (discussing Screws’ trial).

vote. Justice Blackmun stated that he preferred to defend the freedom of the press by adopting a recklessness standard.<sup>130</sup> Consequently, newspapers across the country could call him a hero. On the other hand, it was because of his vote switch that the freedom of the press was actually diluted in *Gertz*, since Justice Blackmun's majority adopted a less protective standard.<sup>131</sup> One can speculate whether Justice Blackmun had wanted a lower standard and whether the lack of a majority to dispose of the case gave him an opportunity to mask his true preference.

While it is possible to view *Screws* and *Gertz* as self-serving "vote switches," it is harder to make that case in *Green Tree*.<sup>132</sup> Because class action arbitration between financial lenders and banking institutions seldom attracts attention in the popular press, Justice Stevens probably did not gain much praise for his statements about his preferred disposition of the case, namely to affirm and allow class action arbitration. His vote switch also did not make much difference, as the *Bazzle* and *Lackey* proceedings were remanded to the same arbitrator who had already indicated a willingness to proceed on a class-wide basis.<sup>133</sup> Consequently, it does not seem Justice Stevens had anything to gain by voting to remand, while claiming to prefer to uphold the state court decision.

To summarize, the failure to achieve a majority on the disposition of a case occurs in two contexts: unidimensional triple choice cases and multidimensional triple choice cases. In some cases, however, Justices might claim a deadlock in order to mask their true preferences and receive praise for a willingness to adopt positions they do not truly believe in. The *Screws* rule thus governs some cases, despite the possibility, however remote, that it was artificially invoked in *Screws* to make Justice Rutledge appear more of a defender of civil rights than he actually was.

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

## II. ALTERNATIVES TO THE *SCREWS* RULE

There are some alternatives to the *Screws* rule. One could treat 3-4-2 deadlocks like *Screws* as if they were 4-4 ties. When cases are tied, the decision be-

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130. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 353-54 (1974).

131. *Id.* at 352.

132. Indeed, whether repeat players could systematically abuse the *Screws* rule remains uncertain. Because of the infrequent invocation of the rule, the possibility remains. See *supra* note 5 and accompanying text (listing vote switching cases).

133. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 449, 454 (2003).

low is affirmed by the inaction of the court above. Alternatively, one could remand the deadlocked case because remanding is likely the middle position between upholding and overturning, particularly in unidimensional cases like *Gertz*. Finally, the lower courts could discern, issue-by-issue, the holding of the court and follow that holding when no majority on the outcome is formed. This solution makes the most sense in multidimensional cases like *Screws* and *Green Tree*.

Each of these alternatives is presented and critiqued against a standard of strategy-proofness, a term from economics literature. A rule is strategy-proof if it fails to induce a member of the Court to change his or her vote. To understand the concept, it is best to consider the rule governing ties. In certain circumstances, the rule induces Justices to switch their vote to achieve a better outcome than they would have achieved had they voted honestly.

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

##### 1. *The Rule*

It is well established that no action is taken by the court when there is a tie.<sup>134</sup> The rule is as old as the Supreme Court itself, dating back to the *Hayburn's Case*,<sup>135</sup> a 1792 decision, and made explicit in *The Antelope*<sup>136</sup> in 1825. In *Durant v. Essex Co.*,<sup>137</sup> the Court held:

It has long been the doctrine in this country and in England, where courts consist of several members, that no affirmative action can be had in cause where the judges are equally divided in opinion as to the judgment to be rendered of order to be made . . . If the affirmative action sought is to set aside or modify an existing judgment or order, the division operates as a denial of the application, and the judgment or order, stands in full force, to be carried into effect by the ordinary means.<sup>138</sup>

This requirement makes sense if one analogizes a court case to a bill before the legislature.<sup>139</sup> Under the ancient rule, a motion requires a majority to pass.<sup>140</sup> As in the United States Supreme Court, failure to achieve a majority in

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134. Hartnett, *supra* note 17, at 645 n.14 (citing *Durant v. Essex Co.*, 74 U.S. 107, 111 (1868)).

135. 2 U.S. (2 Dall.) 409 (1792).

136. 23 U.S. (10 Wheat.) 66 (1825).

137. 74 U.S. (7 Wall.) 107, 110 (1868).

138. *Id.*

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

140. Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971, 1010 (1989).

the legislature results in that branch of government taking no action.<sup>141</sup>

## 2. Application to Triple Choice Cases

At first glance, the *Durant* rule does not explicitly apply to cases like *Green Tree*, *Gertz*, and *Screws*.<sup>142</sup> Unlike cases referred to in *Durant*, the Justices were divided into three or more camps rather than two and they were not *evenly* divided.<sup>143</sup> In *Green Tree*, for example, more Justices wanted to remand than to overturn or uphold.<sup>144</sup>

Commentators who believe the courts should treat cases like *Green Tree* as ties under the *Durant* rule<sup>145</sup> could point to the faulty logic in *Screws*. Recall that in *Screws*, Justice Rutledge justified switching his vote in order to achieve a majority.<sup>146</sup> In tie cases, however, no majority is required. Consequently, there is no reason for Justices to switch their votes to achieve a majority in three-way deadlocks. The lack of a majority in *Green Tree*, *Gertz*, and *Screws* should also be treated as a deadlock and therefore an affirmation.

There is an additional public choice argument for treating 3-4-2 deadlocks like *Screws* the same way 4-4 ties are treated under *Durant*. To understand this argument, imagine a hypothetical court with three judges called Uphold, Overturn, Remand who vote as their names suggest.

Because there is a 1-1-1 split in this court, Justice Uphold can act strategi-

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141. Although a tied United States Supreme Court leads to no action, lower courts were once able to act instead. See generally *Ex parte* Holmes, 12 Vt. 631 (1840) (demonstrating lower courts' ability to act in tie). After a tie at the United States Supreme Court (which under today's default rule would mean an affirmation of the Vermont Supreme Court decision), the Supreme Court of Vermont reversed itself by a vote of 2-1. *Id.* at 642. Chief Justice Williams began by pointing out that "I was detained from the [Vermont Supreme Court] by sickness and took no part in [the Supreme Court of Vermont's earlier] deliberations, nor heard the arguments." *Id.* at 634. Jumping in after much of the action, Vermont's Chief Justice began to analyze the opinions of the United States Supreme Court Justices. *Id.* at 640-42. The Vermont Chief Justice argued, in particular, that one United States Supreme Court Justice would have changed his mind. *Id.* at 641. Consequently, "[h]ad the return been as it now is, it is to be inferred, from [United States Supreme Court Justice Catron's] opinion, he would have concurred with the other Justices, and the judgment of this court would have been reversed." *Id.* at 642. Consequently, "a majority of [the United States Supreme Court] would have decided that Holmes was entitled to his discharge, and that the opinion of a majority of the [S]upreme [C]ourt of the United States was also adverse to the exercise of the [Governor's] power in question." *Id.* Vermont Supreme Court Justice Redfield, concurring in the result, surprisingly conceded that the 4-4 tie in the United States Supreme Court "virtually, although not formally, reversed" the earlier Supreme Court of Vermont decision. *Id.* at 643. Similarly, Justice Bennett, dissenting, also did not challenge the Vermont court's reading of the Supreme Court's tied vote. *Id.* at 647. The Vermont court, therefore, seemed to believe that a tie in the United States Supreme Court does not necessarily mean an affirmation of the decision below. Rather, the default rule from *Holmes* seems to suggest a retrial rather than affirmation.

142. *Durant v. Essex Co.*, 74 U.S. 107, 111-13 (1868).

143. Compare *id.* at 109-13, with *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 447, 454-55, 460 (2003), *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 325, 353-55, 361, 369 (1974), and *Screws v. United States*, 325 U.S. 91, 92, 113, 134, 138 (1945).

144. *Green Tree*, 539 U.S. at 454.

145. See *Durant*, 74 U.S. at 112 (requiring moving party to receive majority for success).

146. *Screws*, 325 U.S. at 113 (Rutledge, J., concurring).

cally. By refusing to vote, she can change a 1-1-1 deadlock into a 1-1 tie between Justice Overturn and Justice Remand. When the court is evenly divided, it is deadlocked and the decision below is affirmed. Justice Uphold's abstention results in the outcome she desires if lower courts follow *Durant*.

To avoid Justices abstaining for strategic purposes, deadlocks should be treated like ties. In both situations, the court should uphold the decision below. If not, Justices could act strategically to achieve a desired outcome. Thus, *Durant* either mandates that deadlocks like *Green Tree* be treated like ties or it encourages abstentions.

### 3. Strategic Behavior

#### a. Steps Around the *Durant* Rule

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

Under *Durant*, this tie would lead to an affirmation, despite its injustice. All eight Justices believed the press was entitled to more protection than it received at trial, yet a tie would affirm the state court's decision offering no protections. Thus, applying *Durant* seems inappropriate when the tie is between votes to overturn and votes to remand. In all likelihood, one Justice would switch his or her vote to avoid such an injustice. Either a vote to overturn would become a vote to remand following the middle-of-the-road standard from the hypothetical *Gertz* tie, or a vote to remand would become a vote for reversal under an absolute immunity standard.

There is evidence that judges do bargain around the *Durant* rule. While one can find cases of 4-4 ties where the Court is divided between upholding and overturning, or between remanding and upholding, there has been no evidence of a case of a 4-4 tie between judges who favor remanding and judges who favor overturning. Simply put, it appears one Justice will switch his or her vote clandestinely to prevent the imposition of the *Durant* rule affirming the decision below.<sup>147</sup>

The same behavior is seen in three-way deadlock cases. Consider the case of *Maryland Casualty Co. v. Cushing*.<sup>148</sup> In *Cushing*, Justices Frankfurter, Reed, Jackson, and Burton voted to overturn the judgment, while Justice Black, joined by Chief Justice Warren, Justice Douglas, and Justice Minton, voted to affirm.<sup>149</sup> Justice Clark, however, voted to remand the case to determine cer-

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147. Hartnett, *supra* note 17, at 661-61.

148. 347 U.S. 409, 410 (1954).

149. *Cushing*, 347 U.S. at 410, 427.

tain questions on liability.<sup>150</sup> Thus, the Justices were divided 4-1-4 between overturning, remanding, and upholding, respectively.

Although the 4-1-4 deadlock in *Cushing* is different from the hypothetical 4-4 tie in *Gertz*, there was still an opportunity for strategic behavior. Justice Clark, voting to remand, and the four Justices who voted to overturn the case, had an incentive to negotiate around the default rule affirming the case. Instead of changing their votes clandestinely, however, Justices Frankfurter, Reed, Jackson, and Burton explicitly switched from overturning, voting with Justice Clark to affirm “[i]n order to break the deadlock resulting from the differences of opinion within the Court and to enable a majority to dispose of this litigation.”<sup>151</sup> In *Cushing* and other cases, therefore, Justices who want to overturn the lower court decision switch to remand in order to avoid an affirmation.

In two lower court decisions, the switch operated in reverse. In *People v. Harris*<sup>152</sup> and *Riley v. Taylor*,<sup>153</sup> a California Supreme Court Justice and a Third Circuit Judge, respectively, both switched from remanding the case to overturning it. In each case, the adjudicators may have acted to avoid an affirmation by deadlock. Thus, *Harris* and *Riley* are similar to *Cushing* in that the adjudicator acted to avoid an affirmation by deadlock under *Durant*, but the direction of the switch was different.<sup>154</sup>

*b. Steps around the Steps around Durant*

*Screws* and *Green Tree* differ from *Cushing*, *Harris*, and *Riley* because the Justices who voted to *affirm* switched their vote to remand. At first, these cases seem to contradict the analysis above because there is no reason for Justice Rutledge or Justice Stevens to switch their votes. Had they stuck to their guns, each case would have been affirmed (which is the outcome they stated they preferred).

The Justices’ behavior in *Screws* and *Green Tree* can be seen as a reaction to the behavior exhibited in *Harris* and *Riley*. Recall that in *Green Tree*, Justice Stevens claimed that Justice Breyer’s decision remanding the case was closer to his own views.<sup>155</sup> Imagine for a moment that Justice Breyer had threatened to switch to overturning. Had he done so, he would have joined the adjudicators in *Harris* and *Riley* in switching from remanding to overturning.

Justice Stevens, however, did not want Justice Breyer to switch his vote to overturn. To avoid having a situation like *Harris* and *Riley*, Justice Stevens may have offered Justice Breyer a deal: if Justice Breyer would agree not to

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150. *Id.* at 423.

151. *Id.*

152. 679 P.2d 433 (Cal. 1984).

153. 277 F.3d 261 (2001).

154. *Cf.* Hartnett, *supra* note 17, at 669 (suggesting possibility of “affirmed by a deadlocked Court” rule in triple choice cases). Hartnett predicts that “Justices would rebel at its results and evade it.” *Id.* at 671.

155. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 455 (2003).

switch to overturning, Justice Stevens would agree to switch to remand. The same scenario could have happened in *Screws* and the other cases in which Justices switched from affirming to remanding.

To summarize the seemingly complex interactions, the *Durant* tie rule: induces those who want to affirm to abstain and force a tie; which in turn, induces those who want to overturn to switch their votes to remand to avoid an affirmation (as in *Cushing*). Alternately, the tie might induce those who want to remand to switch their vote to overturn to avoid an affirmation (like *Harris* and *Riley*); which in turn, induces those who want to affirm to switch their votes to avoid situations like *Harris* and *Riley* (such as in *Screws* and *Green Tree*).<sup>156</sup>

To avoid explaining their strategic behavior, the Justices hide behind the need for a “controlling judgment.”<sup>157</sup> The great irony is that the lack of a controlling judgment under the *Durant* rule induces the vote switching, which leads to the claim that a controlling judgment is needed under *Screws*. Simply put, the initial reaction to treat cases like *Screws* the same way ties are treated puts the cart before the horse. The fact that ties are treated as affirmations induces Justices to switch their votes in the first place. Later, Justices justify their actions as necessary to achieve a majority. The cure—affirmation—is actually the disease.

*c. Steps around the Steps around the Steps around Durant*

An astute reader might anticipate further deals and other possible vote-swaps. To avoid a remand, for example, the Justices who want to overturn might switch their votes to upholding. Similarly, Justices who want to overturn might switch their vote to uphold to avoid remanding. These possibilities are discussed in Part III.C, which reconsiders the argument to treat deadlocks as ties.

*B. Split the Difference: The Case for Remand*

Judge John Rogers, the first academic to systematically analyze vote switching at the Supreme Court level, succinctly noted that “[i]n these situations it makes sense for the ‘middle’ [namely remand] position to obtain.”<sup>158</sup> Indeed, in every case in which a United States Supreme Court Justice switched to achieve a majority, the switch was made to remand. Thus, in practice, the

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

157. *Screws v. United States*, 325 U.S. 91, 157 (1945).

158. Rogers, *I Vote*, *supra* note 16, at 460.

*Screws* rule appears to favor remanding, at least at the Supreme Court level.

In the unidimensional cases, it makes sense to split the difference. Recall how the Justices in *Gertz* fell along a spectrum.<sup>159</sup> Justice Douglas and Justice Brennan voted to uphold with protective standards of absolute immunity<sup>160</sup> and recklessness, respectively.<sup>161</sup> On the other end of the spectrum, Justices Burger and White voted to reverse, deferring to state law.<sup>162</sup> Finally, Justice Powell and three other Justices were in the middle requiring proof of fault.<sup>163</sup> These Justices voted to remand the case.<sup>164</sup>

In this context, the “middle” decision, requiring proof of fault, was probably a good compromise position. Between a rule requiring proof of fault or a less-protective state law standard, Justices Douglas and Brennan probably preferred the so-called “middle” position. Conversely, Justices Burger and White would also prefer the “middle” position, requiring fault, to either an absolute immunity standard or one that applied the standard of recklessness from *New York Times*.<sup>165</sup> Again, the result makes sense.

*Green Tree*, however, demonstrates a fundamental weakness in Judge Rogers’ suggestion that remanding is a “middle” position. Recall that *Green Tree* involved two different proceedings: the *Bazzle* proceedings in which the state court certified the class, and the *Lackey* proceedings in which the arbitrator made an independent determination to proceed with class action arbitration.<sup>166</sup>

To understand why remand is not a “middle” position in *Green Tree*, imagine that two different states had heard the two cases. In South Carolina, only the *Bazzle* case is heard and the state court certifies the class for arbitration. In a fictional state of East Carolina, however, the *Lackey* case is sent directly to an arbitrator. Assume that the East Carolina courts sent the case to arbitration believing that the FAA applies to state court proceedings and preempts a state court’s interpretation of a private arbitration agreement. Both cases are appealed to the United States Supreme Court.

In the East Carolina case of *Lackey*, Chief Justice Rehnquist would vote to overturn the decision of the state court. Like the contract in *Bazzle*, the contract in *Lackey* expressly precluded the availability of class arbitration procedures.

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159. See generally *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (returning 4-1-4 split).

160. *Id.* at 359-60 (Douglas, J., dissenting) (arguing state abridgment of free speech and press entitled to highest immunity).

161. *Id.* at 369 (Brennan, J., dissenting) (asserting reckless falsity standard).

162. *Id.* at 354, 369-404 (White, J. and Burger, J., dissenting).

163. *Gertz*, 418 U.S. at 325.

164. *Id.* at 352 (reversing and remanding).

165. Those familiar with Public Choice jargon will recognize that the “middle” position in these situations is the Condorcet winner. See *infra* Part III.C (elaborating on discussion of “middle” position). But see *Riley v. Taylor*, 277 F.3d 261 (2001) (3d Cir. 2001) (vote switching away from remand); *People v. Harris*, 679 P.2d 433, 454-55 (Cal. 1984) (same).

166. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 447 (2003).

As such, the decision to give the arbitrator the power to proceed on a class-wide basis was clearly erroneous. The state court should have prevented the class arbitration proceedings. Consequently, Chief Justice Rehnquist, joined by two other Justices, would dispose of *Lackey* the same way they disposed of *Bazzle*.

Justice Breyer would treat *Lackey* differently than he would treat *Bazzle*. The East Carolina courts in *Lackey* did exactly what he would have wanted them to do by requiring that an arbitrator decide the question of class action arbitration. Consequently, he and three other Justices would vote to uphold *Lackey*, while remanding *Bazzle*.

Justice Thomas would also treat *Lackey* differently from *Bazzle*. According to Justice Thomas, “the Federal Arbitration Act does not apply to proceedings in state court,” nor does it “pre-empt[ ] a state court’s interpretation of a private arbitration agreement.”<sup>167</sup> The East Carolina Supreme Court, consequently, incorrectly held that the FAA mandates sending the case to an arbitrator. To determine what the state law is on this issue, Justice Thomas would remand the case to the state courts for further proceedings. While Justice Thomas would vote to remand the *Lackey* case, he would vote to uphold the *Bazzle* proceedings.

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

	<i>Green Tree v. Bazzle</i> <u>Court Decision</u>	<i>Green Tree v. Lackey</i> <u>Arbitrator Decision</u>
<i>Rehnquist</i> : No class arbitration	Overturn	Overturn
<i>Breyer</i> : Arbitrator must interpret	<i>Remand</i>	Uphold
<i>Thomas</i> : Court should Interpret	Uphold	<i>Remand</i>

In the *Bazzle* case, Justice Breyer adopted the “middle” position of remand. Because the South Carolina Supreme Court decided to impose class arbitration procedures under state law, Justice Breyer—by sending the case to an arbitrator—was “in between” the Chief Justice voting to reverse, and Justice Thomas voting to affirm. In *Lackey*, however, Justice Thomas would adopt the “middle” position of remand. Because the East Carolina Supreme Court decided to empower an arbitrator to decide whether to have class action arbitration, Justice Thomas—by sending the case back to the state supreme court to determine the

167. *Id.* at 460 (Thomas, J., dissenting).

issue under state law—is “in between” the Chief Justice voting to reverse, and Justice Breyer voting to affirm. This seems like an odd result.

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

It is worth pausing to note how this analysis helps resolve one of the peculiarities in the *Green Tree* cases. Recall that Justice Breyer went to great length to suggest that the arbitrator’s decision was tainted by the South Carolina state court’s decision and that the Court should remand the case for an arbitrator’s redetermination.<sup>168</sup> The parties, however, did not litigate the independence of the arbitrator’s decision, and courts generally do not upset arbitrator’s determinations as easily as Justice Breyer upset the decision in *Lackey*.

One reason Justice Breyer may have acted as he did was to prevent the dichotomy discussed above. Had Justice Breyer remanded the *Bazzle* case but upheld the *Lackey* case, there would have been a contradiction. Justice Thomas’s position would be the “middle” position in *Lackey*, while Justice Breyer would be the “middle” position in *Bazzle*. The “middle” position in *Lackey* would require remanding the case to a court while the “middle” position in *Bazzle* would require remanding the case to an arbitrator. The reasoning would be circular. Justice Breyer may have acted strategically to achieve the outcome he desired and to avoid the circularity.<sup>169</sup>

Thus, while Justice Breyer might have responded to Judge Rogers’ intuition that remanding is the default rule, remanding deadlocks will lead to arbitrary results. The “middle” remand solution is based entirely on the disposition of the case below. A way of avoiding this problem is to seek the “middle” position in unidimensional cases and go issue-by-issue in multidimensional cases. Part III.A discusses the difficulties in differentiating the two types of cases, but first this article comments on problems inherent in a system of issue-by-issue voting.

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

#### 1. *Origins and Examples*

In 1774, the House of Lords heard the case of *Donaldson v. Becket*,<sup>170</sup> a sig-

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168. *Id.* at 447.

169. Justice Thomas could not remand the *Lackey* case to the South Carolina Supreme Court because the case was essentially decided in *Bazzle*. Therefore, remanding *Lackey* to the state court would have been pointless.

170. 98 Eng. Rep. 257 (1774); see also Howard D. Abrams, *The Historic Foundation of American*

nificant copyright case still cited today. Thomas Becket, a Scottish bookseller, purchased the copyright to *The Seasons* after the death of the author. Alexander and John Donaldson, however, refused to recognize Becket's copyright and printed an unauthorized edition of *The Seasons*. Becket sued for an injunction, which was granted, and Donaldson appealed all the way to the House of Lords.<sup>171</sup>

The House of Lords, the highest court in the United Kingdom, asked a group of eleven distinguished judges from the King's Bench, Common Plea, and Exchequer to help resolve three central issues in the case. Specifically, the House of Lords was interested in: whether the Common Law created copyright protections; if such a right existed, whether the right continued after publication; and whether the Statute of Anne "impeached, restrained, or [took] away" the Common Law protection.<sup>172</sup> Becket's copyright depended on all three factors.<sup>173</sup>

Confusion surrounds the holding of the court in *Donaldson*. American courts and commentators treat the opinions of the eleven judges as the holding of the decision.<sup>174</sup> The House of Lords, however, despite the judges' ruling, ultimately voted to lift the injunction against Donaldson.<sup>175</sup> Even how the judges' voted is the subject of confusion, with four different reporters counting the votes of the eleven judges and arriving different results. *Burrow's Reports* and *Brown's Parliamentary Cases*, the two most cited reports, both indicate that a six-to-five majority believed a perpetual copyright existed at Common Law, but that the Statute of Anne "impeached" these copyrights.<sup>176</sup> *The Anonymous Report* and *The Gentleman's Report*, indicate a different tally.<sup>177</sup> These latter reporters expose another level of confusion in the opinion, never explored in the copyright literature, and offer insight into the origins of the *Screws* rule and a plausible alternative to it.

According to *The Anonymous Report* and *The Gentleman's Report*, the eleven judges were divided over how to dispose the case. First, Judge Blackstone, along with four other judges, believed that Thomas Becket properly obtained an injunction.<sup>178</sup> The Common Law gave him a copyright, which was not abrogated by publication or by the Statute of Anne.<sup>179</sup>

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*Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1143-44 (1983) (discussing *Donaldson*).

171. See generally Abrams, *supra* note 170.

172. Abrams, *supra* note 170, at 1157 n. 159.

173. See Abrams, *supra* note 170, at 1157 (discussing five questions raised in *Donaldson*). Although *Donaldson* discusses five separate issues, only three are relevant to the discussion in this article.

174. Abrams, *supra* note 170, at 1165-67.

175. Abrams, *supra* note 170, at 1159.

176. Abrams, *supra* note 170, at 1165-66.

177. Abrams, *supra* note 170, at 1156-70.

178. Abrams, *supra* note 170, at 1188-91.

179. Abrams, *supra* note 170, at 1188-91.

Judge Eyre, however, disagreed on all points.<sup>180</sup> He voted that there was no Common Law protection, that publication would end such a protection (assuming, *arguendo*, it existed), and that the Statute of Anne limited the protection (again, assuming, *arguendo*, it existed).<sup>181</sup>

*The Anonymous Reports* and *The Gentleman's Reports* show the remaining judges divided between Judge Blackstone and Judge Eyre's positions.<sup>182</sup> Judges Aston and Smith are recorded as voting that a Common Law right existed, but that it ended after publication.<sup>183</sup> Judges Gould and DeGray voted that the Statute of Anne abrogated a Common Law right that existed before the statute.<sup>184</sup> Finally, Judge Prestoff agreed that the Statute of Anne abrogated the Common Law right, but voted that it never existed in the first place.<sup>185</sup>

## 2. Doctrinal Paradoxes

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

	<u>Common Law</u>	<u>End by Publication</u>	<u>Ended by Statute</u>	<u>Outcome</u>
Blackstone + 4	Yes	No	No	<i>Copyrights</i>
Eyre	No	Yes	Yes	<i>No rights</i>
Prestoff	No	No	Yes	<i>No rights</i>
Aston/ Smith	Yes	Yes	No	<i>No rights</i>
Gould/ DeGrey	Yes	No	Yes	<i>No rights</i>
	9-2 <i>Yes</i>	8-3 <i>No</i>	7-4 <i>No</i>	6-5 <i>No rights</i> <sup>186</sup>

An anomaly appears when examining the three issues presented. A nine-to-two majority believed that the Common Law creates a protection. An eight-to-three majority believed that the copyright continues after publication, while a seven-to-four majority believed that the Statute of Anne did not abrogate the

180. Abrams, *supra* note 170, at 1188.

181. Abrams, *supra* note 170, at 1188-91.

182. Abrams, *supra* note 170, at 1188-91.

183. Abrams, *supra* note 170, at 1188-91.

184. Abrams, *supra* note 170, at 1190-91.

185. Abrams, *supra* note 170, at 1188-91.

186. Abrams, *supra* note 170, at 1188-91.

Common Law. Looking issue-by-issue, one might expect the eleven judges to have agreed to sustain the injunction.

The judges' collective views of the issues, however, did not correspond with their individual votes. Only Judge Blackstone, joined by four other judges, believed that Donaldson's injunction should stand.<sup>187</sup> Judges Eyre and Prestoff did not feel there was a Common Law copyright, Judges Aston and Smith believed that the right ended at publication, and Judges Gould and DeGrey believed that the Statute of Anne abrogated it. Consequently, these six judges voted to overturn the injunction.

This contradiction creates a "doctrinal paradox."<sup>188</sup> Voting issue-by-issue leads to a different result than voting for an outcome. One solution to the *Screws* problem is to abandon outcome voting (since it results in a three-way deadlock and no resolution) in favor of issue-by-issue voting.

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

#### a. Benefits of Issue-By-Issue Voting

Commentators who prefer issue-by-issue voting point to the serious flaws with outcome voting. First, outcome voting is susceptible to "path-dependence."<sup>189</sup> Imagine that the House of Lords asked the eleven judges to provide separate opinions for each issue. For example, in the hypothetical case of *Abraham v. Becket*, the judges would be asked to determine whether a Common Law copyright exists (they would find that it does). In another hypothetical case of *Becker v. Becket*, the judges would be asked whether the right ends at publication (they would find that it does not). Finally, in *Chastleton v. Becket*, they would be asked whether the Statute of Anne ends the protection (they would find that it does not). If *Donaldson* were to arise after *Abraham* (Common Law rights), *Becker* (protections continue after publication), and *Chastleton* (protections not abrogated by Statute of Anne), *Donaldson* would come out differently due to *stare decisis*. The judges, following precedent, would vote to uphold the injunction. But because *Donaldson* arose before *Abraham*, *Becker*, and *Chastleton*, the outcome was different. Issue-by-issue voting avoids this problem.<sup>190</sup>

Next, issue-by-issue voting gives guidance to lower courts. American courts, interpreting *Donaldson*, now know the positions of each judge on the

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187. Abrams, *supra* note 170, at 1188-91.

188. Kornhauser & Sager, *Collegial Courts*, *supra* note 23, at 10.

189. See Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 115 (1986) [hereinafter Kornhauser & Sager, *Unpacking*] (defining path independence).

190. See Kornhauser & Sager, *Unpacking*, *supra* note 189, at 115 ("One may then prefer issue-by-issue decisionmaking because it advances coherence"); Post & Salop, *supra* note 23, at 762 (explaining "[o]utcome-voting leads to just this kind of fundamental path dependence").

three issues. By tallying the judge's votes, a lower court can determine from *Donaldson* how to decide *Abraham* (Common Law), *Becker* (effect of publishing), and *Chastleton* (abrogation of Statute of Anne). *Donaldson* would not govern these cases under an outcome based voting system.<sup>191</sup>

The final, and perhaps most obvious reason, to resort to issue-by-issue voting in the *Screws* context is that outcome voting has failed to achieve a result.

*b. Problems with Issue-By-Issue Voting*

There are many problems with issue-by-issue voting, some of which are discussed below.

*i. Inapplicability to Unidimensional Case*

First, an issue-by-issue approach fails to resolve unidimensional cases. In *Gertz*, the Justices were asked to resolve *one* issue and were divided three ways on the disposition of the case because of that single issue.<sup>192</sup> As mentioned briefly above, one could imagine treating unidimensional cases differently from multidimensional cases. Part III.A shows why this is not a viable option.

*ii. Issue Avoidance*

The second problem is that issue-by-issue voting encourages Justices to avoid voting on certain issues.<sup>193</sup> While a majority of the Justices in *Green Tree* believed the FAA applies to the states, a different majority believed the contract was ambiguous, and yet a third majority agreed that the case should not be remanded. It is unknown whether there was a majority on whether the South Carolina courts correctly interpreted the contracts.<sup>194</sup> Justice Breyer simply did not get to this final issue, thus preventing issue-by-issue determination of the case.<sup>195</sup>

The same result is seen in *Screws*. A majority of the Justices believed that *Screws* had acted under the color of state law, while a different majority agreed to resolve the statute's unconstitutional aspects through judicial modification of the statute.<sup>196</sup> On the third issue, whether the error was harmless, Justice Roberts, joined by two other Justices, did not cast a vote.<sup>197</sup> Similar problems emerge in the recording of the votes in *Donaldson*.

In many cases, the Justices realize that they have denied a majority on the fi-

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191. Kornhauser & Sager, *Collegial Courts*, *supra* note 23, at 40; Post & Salop, *supra* note 23, at 763.

192. *See generally* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

193. *See* Post & Salop, *supra* note 23, at 758 (describing rationale for outcome voting). "Outcome-voting, it is argued, best serves the interest of judicial economy by allowing judges to avoid reaching, and analyzing, certain issues once they have resolved one of the dispositive issues in a particular way." *Id.*

194. *See generally* *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

195. *See supra* Part I.B (discussing *Green Tree* holding).

196. *See generally* *Screws v. United States*, 325 U.S. 91 (1945).

197. *Id.* at 138-61.

nal question. In *Screws*, for example, Justice Roberts decided to discuss the second issue raised by the case because a majority disagreed with his position on the first issue.<sup>198</sup> Justice Roberts should have, along similar lines, moved to the third issue of the case (whether the error was harmless) instead of remaining silent.<sup>199</sup>

Perhaps the Justices acted strategically.<sup>200</sup> Assume in *Screws* that Justice Roberts believed the error was *not* harmless and that he would add his votes and achieve a majority finding the error did affect *Screws*' rights. Although in this scenario Justice Roberts prefers *overturning* *Screws*' conviction, his votes on the final issue in the case would have led to *upholding* the conviction using issue-by-issue voting. By failing to reach the harmlessness of the error, therefore, Justice Roberts prevents a majority from forming to uphold the case.

The same might be true in *Green Tree*. Justice Breyer believed the case should have been remanded to an arbitrator, although a majority of the Court disagreed with this position.<sup>201</sup> The next issue to naturally arise would be whether the courts in South Carolina properly interpreted the contract. By not voting on this last issue, Justice Breyer denies the Chief Justice, and the three Justices joining his opinion, and Justices Stevens and Thomas an opportunity to claim victory using issue-by-issue voting.<sup>202</sup> Had Justice Breyer voted that the South Carolina Supreme Court's contract interpretation was incorrect (which is what it appears he believed),<sup>203</sup> a majority would have favored applying the FAA to the states, a different majority would have found that the contract was ambiguous, and a third majority would have found that there was no need to remand the case. On the final question, Justice Breyer would have provided the Chief Justice with a majority in favor of overturning the decision below. Conversely, had Justice Breyer held that the contract interpretation was correct, he would have provided Justices Stevens and Thomas a majority in favor of upholding, using issue-by-issue voting.<sup>204</sup>

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198. *Id.*

199. *Id.*

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

201. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 454 (2003).

202. *See id.* at 453 (stating arbitrator's role, not court's, to interpret contract).

203. Justice Breyer's treatment of the *Lackey* proceedings suggests he dislikes imposing class arbitration when the contract is ambiguous. Recall that in *Lackey* the arbitrator determined that there should be class action arbitration. For this reason, Justice Breyer should have voted to affirm the arbitrator's decision. Why, then, did Justice Breyer remand the *Lackey* decision back to the arbitrator? One possibility is that Justice Breyer did not like the outcome reached by the arbitrator and wanted to give the arbitrator a second chance to come to the right conclusion. That is, Justice Breyer was telling the arbitrator not to be influenced by the South Carolina Supreme Court's decision, which allowed class arbitration.

204. There are several ways to resolve the difficulty of Justices not voting on issues to prevent an outcome they do not desire, although no solution satisfactorily addresses all cases. First, one might suggest that if there is no majority on a particular issue (for example, Justice Breyer remains silent), the position of the lower court

*iii. Vote Switching Within Issues*

The final problem raised in this Part of the article involves the strategic behavior issue-by-issue voting creates *vis-à-vis* the substantive issues raised in the case. Recall from above the breakdown in the *Donaldson* case.<sup>205</sup> If the outcome of the case had been determined issue-by-issue, Judges Prestoff, Gould, DeGrey, Aston and Smith would have had an incentive to switch their votes. Observe in the right-most column that all of these judges prefer to prevent recovery for copyright infringement in this case. Issue-by-issue voting, however, would have led to a recovery.

Judges Prestoff, Gould and DeGrey could have prevented recovery by switching their votes on whether or not publication ends the Common Law copyright. If they had switched their votes, the 8-3 majority protecting copyrights would have turned into a 6-5 majority ending them. Similarly, if Judges

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should be affirmed. The problem with affirming when there is no majority on any *particular* issue is that often the lower court does not reach the issues raised on appeal. In *Screws*, for example, the lower courts never addressed the harmless-error issue. In such cases, affirmation of a lower court's decision on an issue may be impossible.

Another solution would involve predicting how the Justices would have voted on the remaining issue. That is, one could force a "yes" or "no" into every column even though the adjudicator did not reach that issue. *Donaldson* demonstrates the problem with making such predictions. *Donaldson v. Becket*, 98 Eng. Rep. 257 (1774). The four reporters of the case all tried to figure out how judges would have voted on issues that the judges did not reach in their opinions. Contradictions resulted, and modern American Copyright law may have been very different if different reporters had interpreted the effects of the Statute of Anne on Common Law copyrights.

A third solution to the non-voting Justices phenomenon is to apply *Durant's* requirement that a moving party must achieve a majority to be successful. See *Durant v. Essex Co.*, 74 U.S. 107, 112 (1868). Thus, if the *Green Tree* Court never reached a majority on whether the state court's interpretation of the contract was correct, the case would have been affirmed because Green Tree Financial Corporation, as the moving party, would have failed to meet its burden of convincing a majority of the Justices on each issue. The first problem with this argument is that Green Tree Financial Corporation might have successfully convinced a majority of the Justices on this point. Recall that Justice Breyer may have disagreed with the South Carolina Supreme Court's interpretation of the contract. *Supra*. If so, Green Tree Financial Corporation should be successful because it achieved a majority, yet Justice Breyer's silence led to affirmation rather than overturning the decision based on issue-by-issue voting. See *Green Tree*, 539 U.S. at 447-54. Consequently, the rule would corner Justices into making decisions they would rather not make. In addition, sometimes requiring a majority on every issue would lead to difficulties in determining who has a burden on particular issues. In *Screws* for example, *Screws* was victorious because a majority of the Justices held that the statute was unconstitutional. *Screws v. United States*, 325 U.S. 91, 98-100 (1945). The Court, however, then went on to hold that the unconstitutionality could be rectified by judicial intervention, a victory for the prosecution because it would lead to a conviction. *Id.* at 100, 103. The final issue raised was whether the error in not using the new standard was harmless. *Id.* at 107. If so, the conviction could be upheld, but otherwise there would have to be a new trial. *Id.* It is unclear in this context which party has the burden of convincing a majority on the final issue. Finally, just as Justices can avoid certain issues, other issues can be added to change the outcome of a case. See John M. Rogers, "Issue Voting" by Multimember Appellate Courts: A Response to Some Radical Proposals, 49 VAND. L. REV. 997, 1002-05 (1996) [hereinafter Rogers, *Issue Voting*] (listing approximately fifteen issues present in *Tidewater* and showing how outcome depends on issues raised); *infra* Part III.A (detailing choice-of-issues phenomenon and showing how unidimensional cases transformed into multidimensional cases).

205. *Supra* p. 42 table (showing judges' positions in *Donaldson*).

Aston and Smith had changed their votes on the effects of the Statute of Anne, a 7-4 majority finding that the Statute had no effect on copyright protections would have become a 6-5 majority holding that it did.

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

*iv. Summary*

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

The next alternative involves remanding every case as the "middle" position between upholding and overturning. While this makes the most sense in unidimensional cases, it is not clear that remand is always the "middle" position in multidimensional cases. *Green Tree* demonstrates that Justices will engage in "creative lawyering" (that is, strategic behavior) to ensure that their opinions occupy the "middle" position.<sup>206</sup>

Finally, commentators have argued that in cases like *Screws* courts should look issue-by-issue to determine whether a majority exists.<sup>207</sup> This solution induces Justices to either avoid issues or switch their votes on particular issues to achieve desired outcomes.

Consequently, none of the three solutions offered in Part II are strategy-proof.<sup>208</sup> Each induces Justices to switch their votes or engage in conduct that masks their true preferences.

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206. See generally *Green Tree*, 539 U.S. at 444.

207. See generally Kornhauser & Sager, *Collegial Courts*, *supra* note 23 (describing reasons for issue-by-issue voting).

208. A fourth alternative is worth mentioning. In a 3-4-2 decision, the plurality opinion with the greatest number of votes could become the holding of the Court. The obvious problem with this solution is that it does not resolve 4-4-1, 1-4-4, 4-1-4, or 3-3-3 splits.

### III. A META-ANALYSIS OF THE *SCREWS* RULE

If affirming all *Screws*-like cases, remanding them, or engaging in issue-by-issue voting will induce strategic behavior and vote switching, one might wonder why the *Screws* rule exists instead of one of the equally problematic alternatives offered in Part II. This part of the article discusses the reasons why *Screws* arises.

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

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

Finally, the third part argues that lower courts could apply a modified version of the rule established in *Marks v. United States*<sup>209</sup> to find the narrowest holding necessary to achieve a majority. While without vote switching there is no majority in 3-4-2 deadlocks like *Screws*, a court still might try to find the narrowest holding that would have achieved a majority. This proposed solution raises new concerns and demonstrates that the *Screws* rule cannot overcome Arrow’s Impossibility Theorem.<sup>210</sup>

#### A. *Are Multidimensional Cases Just Unidimensional Cases in Sheep’s Clothing?*

There is some confidence that one solution to the problem identified above exists. Specifically, a court could use issue-by-issue adjudication *only* for mul-

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209. 430 U.S. 188 (1977).

210. See generally ARROW, *supra* note 27. According to Arrow’s Impossibility Theorem, if a system has at least two members and three options, it is impossible to design a voting methodology that satisfies the following five conditions: universality, non-imposition, non-dictatorship, monotonicity, and independence of irrelevant alternatives. See generally *id.* No voting system is perfect.

tidimensional cases. Meanwhile, the court could use a different standard for unidimensional cases. For example, if a court applied the “always affirm” rule in unidimensional cases, it could avoid problems posed by cases like *Green Tree*.<sup>211</sup> Recall from above that remanding the case to an arbitrator was only the “middle” position because of procedural luck. Had the *Lackey* proceedings come up independently, the “middle” position would have involved remanding the case to a court.<sup>212</sup>

The confidence in this solution is derived from an unnecessary reliance on an artificial division between uni- and multidimensional cases. At first glance, there are significant differences between the unidimensional triple choice cases, which involve only one issue, and multidimensional cases, which involve more than one. Commentators have treated the two cases differently, listing cases separately and perpetuating the confusion.<sup>213</sup>

The differences, however, are artificial. Multidimensional cases are just unidimensional cases in sheep’s clothing and *vice-versa*.<sup>214</sup> Recall that the Justices in the unidimensional case of *Gertz* fell along the following spectrum:

<u>Absolute Immunity</u>	<u>Recklessness</u>	<u>Proof of Fault</u>	<u>State Law</u>
Douglas	Brennan/Blackmun	Powell + 3	Burger + White
Uphold	Uphold	Remand	Reverse <sup>215</sup>

Justice Blackmun switched his vote to remand, the “middle” position.<sup>216</sup>

This is not the only way to approach the case. Indeed, Justice Brennan could have engaged in creative lawyering to transform *Gertz* from a unidimensional case to a multidimensional case. First, Justice Brennan could have proposed the following vote: “Does a ‘proof of fault’ standard have any Constitutional basis?” Only Justice Powell, joined by three Justices, believed that it did.<sup>217</sup> Next, Justice Brennan could have asked: “Should the Constitution provide absolute rules to govern freedom of the press cases?” Clearly, Justice Douglas believed that it does, but so did Chief Justice Burger and Justice White.<sup>218</sup> The last two adjudicators believed that the Constitution provides one bright-line rule—state law applies.<sup>219</sup> Finally, Justice Brennan could have asked the other

211. See generally *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

212. See generally *id.*

213. *Abramowicz & Stearns*, *supra* note 5, at 1909, 1921.

214. See *Abramowicz & Stearns*, *supra* note 5, at 1909-13 (demonstrating *Bush v. Gore* can be viewed as both unidimensional and multidimensional issue); Richard H. Pildes & Elizabeth S. Anderson, *Slings Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2163 (1990) (noting individual experiences often result in lack of consensus).

215. See generally *Gertz*, 418 U.S. at 323.

216. *Id.* at 354.

217. See *id.* at 347 (noting states may only impose liability when person at fault).

218. *Id.* at 354-55, 360, 370-76.

219. *Gertz*, 418 U.S. at 360, 370-76.

Justices to vote on whether *any* protection exists for newspapers in the private litigant context. Only the Chief Justice and Justice White believed that no protection existed.<sup>220</sup>

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

	<u>Douglas</u>	<u>Brennan/Blackmun</u>	<u>Powell + 3</u>	<u>Burger/White</u>
(1) "Proof of Fault?"	No basis	No basis	Constitutional	No basis
(2) Absolute Rule?	Yes	No	No	Yes
(3) Any Protection?	Yes	Yes	Yes	No

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

The position of Justices Brennan and Blackmun is consistent with these votes. Their position, requiring malice, is not an absolute rule, yet it provides some Constitutional protections.<sup>221</sup> Finally, it is not the "proof of fault" standard Justice Powell suggested.<sup>222</sup>

This demonstrates that treating unidimensional cases as remands while treating multidimensional cases under an issue-by-issue rule encourages additional strategic behavior. Justice Powell will insist that *Gertz* raises only one issue. If *Gertz* is unidimensional, the case is remanded and Justice Powell's position will prevail. However, if multidimensional cases are treated issue-by-issue, Justices Brennan and Blackmun have an incentive to argue that *Gertz* raises multiple issues.<sup>223</sup>

On the other hand, it is possible to narrow multidimensional cases into a unidimensional framework. Recall, for example, that many issues were raised

220. *Id.* at 354, 370.

221. *See id.* at 369 (Brennan, J., dissenting) (noting petitioner failed to prove respondent knowingly published false article). Justice Blackmun noted the Court's departure from requiring "willful or reckless disregard" in a private party libel action. *Id.* at 353-54 (Blackmun, J., concurring).

222. *Id.* at 352 (noting failure to find fault in libel action).

223. *See generally* Harry Kalven, Jr., *The Reasonable Man and the First Amendment*: Hill, Butts, and Walker, 1967 SUP. CT. REV. 267 (1967) (demonstrating multiplicity of issues). Professor Kalven demonstrates that *Gertz* is simply one piece of a larger puzzle over the freedom of the press. *See generally id.* While it is true that remanding the case to determine whether there was proof of fault appears to be the middle position in this particular case, such a myopic view misses the broader ideologies of the Justices.

in *Green Tree*.<sup>224</sup> Justices Thomas and Stevens wanted to uphold the entire South Carolina Supreme Court decision.<sup>225</sup> Justice Breyer, however, joined by three other Justices, disagreed with the state court's decision on whether an arbitrator or a court should construe arbitration contracts under the FAA.<sup>226</sup> The Chief Justice, joined by two Justices, voted to overturn the South Carolina Supreme Court's interpretation of state contract law.<sup>227</sup> Consider the following representation of the various opinions:

<u>Complete Agreement</u>	<u>Disagreement on Federal Issue</u>	<u>Disagreement on State Issue</u>
Stevens/Thomas Uphold	Breyer + 3 Remand	Rehnquist +2 Overturn <sup>228</sup>

When viewed from this unidimensional perspective, Chief Justice Rehnquist's opinion seems extreme. It overturns a state court determination of state contract law.<sup>229</sup> Justice Breyer's more moderate opinion, which focuses on whether the FAA requires certain procedures, only reviews the South Carolina Supreme Court's decision of federal law.<sup>230</sup> Finally, Justices Thomas and Stevens are at the other extreme, giving the state court the most leeway.<sup>231</sup> Viewed in this manner, *Green Tree* is just a run-of-the-mill unidimensional case that should be treated like *Gertz*.

Because of the potential to make *Green Tree*—a seemingly multidimensional case—into a unidimensional case, strategic behavior existed. Recall from above that issue-by-issue voting would probably have resulted in overturning the state court decision (or alternatively, in the affirmation of the state court holding). Justice Breyer wanted neither of these outcomes and may have felt compelled to cast *Green Tree* as a unidimensional case.<sup>232</sup> Alternatively, the Chief Justice had an incentive to write his opinion as if the case raised multiple questions. If the case were multidimensional, issue-by-issue voting would probably have led to an outcome he desired.

To summarize, the differences between uni- and multidimensional cases are only skin deep. Unidimensional cases like *Gertz* can be written in a way to suggest multiple issues are involved. Conversely, multidimensional cases like *Green Tree* can be collapsed into a single issue. Treating uni- and multidimen-

224. See generally *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

225. *Id.* at 455, 460.

226. *Id.* at 454.

227. *Id.* at 455.

228. *Green Tree*, 539 U.S. at 444.

229. *Id.* at 455.

230. *Id.* at 447.

231. *Id.* at 454-55.

232. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 447-54 (2003).

sional cases differently will induce Justices to draft their opinions to either avoid or invoke a particular outcome. Thus, the solution actually induces additional strategic behavior.

A rule requiring affirmation leads to strategic behavior. An “always remand” solution faces difficulties in the multidimensional context, while an issue-by-issue solution cannot govern unidimensional cases. It is possible to artificially transform cases from uni- to multidimensional and vice-versa. Consequently, this article proceeds to propose that the Court adopt one rule—meta-voting.

### *B. Engage in Meta-Voting*

In their discussion of issue-by-issue voting and outcome-based voting, Professors Kornhauser and Sager argue that a court should engage in a “meta-vote” to determine when the Court should interpret cases issue-by-issue and when it should decide cases based on the votes of the Justices.<sup>233</sup> Although their analysis does not deal with the question of uni- or multidimensional triple choice cases like *Gertz* and *Screws* per se, it is helpful to consider their suggestion of having a vote on how its previous vote on the merits is to be interpreted. This is known as a “meta-vote.”

One of the problems with the *Screws* rule is that no majority has ever adopted it. Indeed, it appears impossible for a majority to agree to the vote switching arrangement because five Justices will never jointly face the need to switch their votes to achieve a majority. Consequently, at most only four Justices will vote on the *Screws* rule in any one case.

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

Assuming the United States Supreme Court were to grant a writ of certiorari in *Green Tree II*, it would need to determine how to interpret the deadlock in *Green Tree I*. Thus, the Court would take a meta-vote. A majority of the Justices might agree with the state trial court that the deadlock is an affirmation. Alternatively, a majority might agree to treat the deadlock as a remand. Finally, the Justices might agree to determine the case issue-by-issue.

As Judge Rogers hints,<sup>234</sup> however, a majority might not exist in *Green Tree*

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233. See Kornhauser & Sager, *Collegial Courts*, *supra* note 23, at 30 (advocating use of meta-vote procedure).

234. See Rogers, *Issue Voting*, *supra* note 204, at 1025 (“Should there be issue voting or outcome voting

*II* on how to interpret *Green Tree I*. For example, the Justices in *Green Tree II* might adopt the *same* positions they adopted in *Green Tree I*. Justices Stevens and Thomas might vote to treat *Green Tree I* as an affirmation. Justice Breyer, however, might disagree and vote with three other Justices to treat *Green Tree I* as a remand. Finally, the Chief Justice, joined by two other Justices, might engage in issue-by-issue voting and find that Justice Breyer provided a majority in favor of overturning the South Carolina Supreme Court decision in *Green Tree I*.<sup>235</sup>

If there were a deadlock in *Green Tree II*, the Justices appear stuck. *Green Tree II* was supposed to resolve how cases like *Green Tree I* (and, now, also *Green Tree II*) are interpreted. *Green Tree II*, consequently, exhibits an element of self-reflection; it was meant to decide how to treat itself, but is unable to do so. Furthermore, litigation could continue indefinitely. The meaning of *Green Tree II* (and therefore *Green Tree I*) might be relitigated until *Green Tree III* arises. However, there are still no assurances that *Green Tree III* will provide a majority disposition.<sup>236</sup>

To prevent this sequence of events, one Justice in *Green Tree I*, Justice Stevens, switched his vote.<sup>237</sup> In a sense, Justice Stevens exercised a judicial veto that prevents a *Green Tree II* from arising out of the deadlock of *Green Tree I*. At most, only two Justices are needed to prevent *Green Tree I* from being relitigated in *Green Tree II*. Thus, a submajority of the Court can prevent subsequent litigation of *Green Tree I*.<sup>238</sup>

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

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on the metavote [sic]? . . . Nightmares of infinite regression are conceivable”).

235. Thus, *Green Tree II* might suffer from the same 3-4-2 deadlock exhibited in *Green Tree I*. Of course, the Justices' positions might differ a bit from their original positions. Justice O'Connor could vote one way in *Green Tree I*, yet join a different coalition in *Green Tree II*. So long as there is no majority for a particular position, the same problems emerge.

236. Cf. Levmore, *supra* note 15, at 123 n.41 (mentioning “the uncertainty imposed by a practice allowing the first court to announce its split and offer no majority disposition”). There are also some theoretical difficulties with the meta-vote. The Justices who voted to affirm the lower court decision in *Green Tree II* will be referring to a lower court decision in their opinion. For example, in *Green Tree II* Justice Thomas might hold that when the Court is deadlocked, the lower court decision governs. This practice would have affirmed the South Carolina Supreme Court's decision in *Green Tree I*. In *Green Tree II*, which suffers the same deadlock as *Green Tree I*, however, this would mean that the state's highest court's opinion determines the outcome in *Green Tree II*. In this hypothetical, the state Supreme Court adopted an issue-by-issue position, and it would appear that the lower court's decision should govern *Green Tree II*. The logic becomes untenable and circular.

237. *Green Tree*, 539 U.S. at 455 (Stevens, J., concurring).

238. Adrian Vermeule, *Submajority Rules: Forcing Accountability Upon Majorities*, U. of Chicago, Public Law Working Paper No. 54 (forthcoming publication), available at <http://ssrn.com/abstract=495569> (last visited Sept. 22, 2004) (exploring notion of submajority rules).

rather than later.

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

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

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

##### a. *The Easy Cases*

No Court has faced difficulties in interpreting the holding in *Screws*. Recall that the Justices determined four issues: whether *Screws*' acts fit within the statute; whether the act was unconstitutional; whether it was possible to remedy the unconstitutionality; and whether the errors in the case as to the third issue were harmless.<sup>239</sup> A majority voted on every issue, except for the final issue on whether a new trial was necessary to fix the error.<sup>240</sup> Justice Roberts, joined by two other Justices, refused to vote on the fourth issue.<sup>241</sup>

Fortunately, *Screws* is cited as authority on multiple points of law. Regarding the first three issues, one can find a clear majority in favor of a particular position.<sup>242</sup> The final question of law, while it garnered no majority, is unlikely to have much bearing on future cases.<sup>243</sup> After *Screws*, lower courts know which standard to apply and it is difficult to find cases in which the same exact error was committed.

Consequently, *Screws* represents an easy case. The holding is discernable by issue-by-issue voting and the final issue, which caused the triple choice problem in the first place, is unlikely to reappear in future cases.<sup>244</sup>

##### b. *The Pre-Marks Hard Cases*

Unfortunately, this is not true in the unidimensional triple choice freedom of the press cases discussed above. Prior to 1977, when the Justices fell along a spectrum as they did in *Gertz*, there was no holding of the Court. That is, while a majority was able to dispose of *Gertz*, courts could not cite the holding in *Gertz* because there was no majority on any particular position.<sup>245</sup> For this rea-

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239. See generally *Screws v. United States*, 325 U.S. 91 (1945).

240. *Id.* at 113.

241. *Id.* at 138-61 (Roberts, J., Frankfurter, J., and Jackson, J., dissenting).

242. *Id.* at 94-112.

243. *Screws*, 325 U.S. at 113.

244. See generally *id.*

245. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

son, the 1967 freedom of the press case of *Time, Inc. v. Hill*<sup>246</sup> had no holding that would have affected the outcome of the 1971 case of *Rosenbloom v. Metromedia*,<sup>247</sup> which, in turn, had no holding that affected *Gertz* in 1974. The unidimensional triple choice freedom-of-the-press cases were all treated as having no holding. Consequently, the issue was relitigated and returned to the United States Supreme Court, where again the Court was unable to agree and no holding resulted.<sup>248</sup>

Multidimensional triple choice cases before 1977 were all treated the same way. In 1953, *Maryland Casualty Co. v. Cushing* reached the United States Supreme Court.<sup>249</sup> To dispose of the case, Justices Frankfurter, Reed, Jackson, and Burton all switched from upholding to remanding to achieve a majority.<sup>250</sup> In 1965, the Fifth Circuit was asked to determine the holding of *Cushing*, a case it called “a grisly spectre of undefined size and shape.”<sup>251</sup> The appeals court “circumnavigated” *Cushing*, stating that “[b]ecause of the Court’s extraordinary division, it is impossible to say what the *Cushing* case stands for.”<sup>252</sup> Thus, as with *Gertz*, multidimensional triple choice cases like *Cushing* were treated as having no holding.

### c. The Marks Rule

The law changed in 1977 with the handing down of *Marks v. United States*. In *Marks*, the United States Supreme Court set out the following two-part test to determine the holding of a case where there is no majority agreeing to any particular position. First, the court is to look only at the decisions composing the majority on the disposition. Next, of those opinions, it is to pick the “narrowest” decision (that concurs on the narrowest grounds), which then becomes the holding of the Court.

This two-part test is applied in the triple choice case of *Pedcor Management Co., Inc. v. Nations Personnel of Texas, Inc.*<sup>253</sup> In *Pedcor*, the Fifth Circuit applied the *Marks* rule to determine the holding of *Green Tree*.<sup>254</sup>

The Fifth Circuit in *Pedcor* began by noting how a majority was achieved in *Green Tree* only after Justice Stevens provided a fifth vote.<sup>255</sup> Thus, the majority on the disposition had two camps: Justice Breyer, with three other Justices,

246. 385 U.S. 374 (1966).

247. 403 U.S. 29 (1971).

248. See *Robert Welch, Inc. v. Gertz*, 459 U.S. 1226 (1983) (denying writ of certiorari).

249. 347 U.S. 409 (1954) (argued April 27-28, 1953).

250. *Id.* at 423.

251. *Colleman v. Jahncke Serv. Inc.*, 341 F.2d 956, 959 (5th Cir. 1965).

252. *Id.* at 960.

253. 343 F.3d 355 (5th Cir. 2003).

254. *Id.* at 358. The court began, somewhat awkwardly, by stating the *Marks* rule: “It is well established that when we are confronted with a plurality opinion, we look to that position taken by those Members who concurred in the judgments on the narrowest grounds.” *Id.* (internal quotation omitted).

255. *Id.*

and Justice Stevens, who joined grudgingly.<sup>256</sup> The Fifth Circuit only considered these two opinions, consistent with the first step in *Marks*.

Next, it tried to determine which opinion was “narrower.”<sup>257</sup> The Fifth Circuit picked Justice Breyer’s opinion, as consistency dictated.<sup>258</sup> Recall that the proceedings in *Green Tree* were remanded to an arbitrator pursuant to Justice Breyer’s instructions.<sup>259</sup> Had the Fifth Circuit instead found that Justice Stevens’ opinion was the narrowest holding and picked that opinion, a different test would have governed *Pedcor* than the one applied in *Green Tree*. This result seems insensible, and perhaps explains why lower courts are unlikely to find that the Justice vote switching had the narrowest holding of the Court.<sup>260</sup>

Consequently, the *Marks* rule’s narrowest holding requirement does not seem applicable in cases where a vote switch has occurred. The opinion that led to the majority disposition in cases like *Screws* must be the “narrowest” holding under the *Marks* rule for consistency purposes. It is wrong, however, to disregard the *Marks* rule entirely.

## 2. The Modified Marks Rule

The *Marks* rule requires lower courts to limit themselves to the opinions that form the majority on the disposition and *then* to pick the narrowest holding.<sup>261</sup> In cases like *Screws*, however, without a vote switch there is no majority on the disposition of the case.<sup>262</sup> Perhaps, under a modified *Marks* rule, the lower courts could skip directly to the second step and pick the “narrowest” holding if the Court is deadlock and no vote switch has occurred. It could then work backwards and adopt the opinion *most likely to have achieved* a majority in cases like *Screws* in order to satisfy the first step in the *Marks* rule.

*Gertz* is a good starting point on how a court would go about predicting the preferences of the Justices under a modified *Marks* rule. Recall that the Justices fell along a spectrum. On one end, Justice Blackmun and two others voted to uphold the case and to establish high protections for the press.<sup>263</sup> On the other end, Chief Justice Burger and one other Justice voted to overturn the case and to defer to state law.<sup>264</sup> Finally, Justice Powell occupied the middle position requiring proof of fault.<sup>265</sup> Joined by three other Justices, he voted to

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256. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 455 (2003) (Stevens, J., concurring).

257. Levmore, *supra* note 15, at 103 (observing “narrowest-majority rule is not always easy to apply”).

258. *Pedcor Mgmt. Co., Inc. Welfare Benefit Plan v. Nations Pers. of Texas, Inc.*, 343 F.3d 355, 359 (5th Cir. 2003).

259. *Green Tree*, 539 U.S. at 454.

260. Without this approach, Justices would have an incentive to alter their positions so that their opinion becomes the narrowest holding.

261. *Marks v. United States*, 430 U.S. 188, 193 (1977).

262. *See Screws v. United States*, 325 U.S. 91, 113 (1945) (reversing lower court decision).

263. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 354 (1974).

264. *Id.* at 355.

265. *Id.* at 342.

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remand the case.<sup>266</sup>

The modified *Marks* rule would make Justice Blackmun's switch from upholding to remanding in order to achieve a majority disposition unnecessary. The Justices' initial preferences were as follows:

	<u>Blackmun + 2</u>	<u>Powell + 3</u>	<u>Burger + 1</u>
First Preference:	Uphold	Remand	Overturn <sup>267</sup>

In addition, we now know that Justice Blackmun preferred remanding the case to overturning it.<sup>268</sup> Similarly, the opinion of Chief Justice Burger suggests that he actually preferred remanding the case to upholding it.<sup>269</sup> Consequently, we can complete a table as follows:

	<u>Blackmun + 2</u>	<u>Powell + 3</u>	<u>Burger + 1</u>
First Preference:	Uphold	<i>Remand</i>	Overturn
Second Preference:	<i>Remand</i>		<i>Remand</i>
Third Preference:	Overturn		Uphold

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

In this situation, Justice Powell's opinion would be what is commonly called a Condorcet winner—it would beat *all* alternative outcomes in head-to-head competition. First, the remand outcome would beat an uphold outcome by a margin of 6-3. Justices Powell, joined by three Justices, and Chief Justice Burger, joined by one Justice, preferred remanding the case to upholding it.<sup>270</sup> Similarly, remanding the case beats overturning it by a 7-2 margin. Justice Powell, joined by three Justices, and Justice Blackmun, joined by two Justices, favored remanding the case to overturning it.<sup>271</sup> Perhaps this outcome helps explain our intuition that remand is an appropriate “middle” position.

### 3. Problems with the Modified Marks Rule

*Green Tree*, however, raises questions about this methodology. Justice Stevens stated that he preferred to uphold the South Carolina Supreme Court deci-

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266. *Id.* at 352.

267. *See generally Gertz*, 418 U.S. at 323.

268. *Id.* at 354.

269. *Id.* at 355.

270. *Id.* at 342, 352, 355.

271. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 352, 354 (1974).

sion.<sup>272</sup> Because Justice Breyer's opinion was closer to Stevens' than Rehnquist's was, we can deduce his second and third preference:

	<u>Rehnquist + 2</u>	<u>Breyer + 3</u>	<u>Stevens + 1</u>
First Preference:	Overturn	Remand	Uphold
Second Preference:			Remand
Third Preference:			Overturn

The remaining boxes in the chart above are not easily ascertained from the opinions. As discussed above, a lower court is likely to find that Justice Breyer preferred overturning the Supreme Court of South Carolina's decision to upholding it. Recall that he remanded the *Lackey* proceedings back to the arbitrator despite the fact that the arbitrator had independently approved class action arbitration.<sup>273</sup> This decision might have been motivated by a desire to give the arbitrator a second opportunity to avoid class action arbitration, something Justice Breyer may dislike.

As for the Chief Justice's preferences, there are two reasons to suspect that he prefers upholding the case to remanding it. First, Chief Justice Rehnquist devotes over half of his opinion to attacking Justice Breyer's decision to remand the case.<sup>274</sup> In addition, the Chief Justice is usually perceived as a supporter of states' rights. To Rehnquist, deferring to a state court's interpretation of state law is probably preferable to removing from the state court all power to adjudicate the contract claims at issue.

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

	<u>Rehnquist + 2</u>	<u>Breyer + 3</u>	<u>Stevens + 1</u>
First Preference:	Overturn	<i>Remand</i>	Uphold
Second Preference:	Uphold	Overturn	<i>Remand</i>
Third Preference:	<i>Remand</i>	Uphold	Overturn

Remand no longer seems like the narrowest position. While Justices Stevens and Breyer form a majority preferring remand to overturn, Justice Stevens and the Chief Justice prefer upholding to remanding. Thus, if given a choice between remanding and upholding, a majority of the Justices would uphold. Upholding, however, is not a Condorcet winner either because Chief Justice Rehnquist and Justice Breyer would prefer overturning the case to upholding it.

Those familiar with seventeenth century French philosophers are well aware

272. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 455 (2003) (Stevens, J., concurring).

273. *Id.* at 454.

274. *Id.* at 455-49 (Rehnquist, J., dissenting).

of an odd phenomenon in the preferences of the Justices. Condorcet cycling exists because overturning is preferred to upholding, upholding is preferred to remanding, and remanding is preferred to overturning. The preferences seem to go in a circle.<sup>275</sup>

If the preferences of the Justices are as indicated in the chart above, a lower court is helpless in determining what position would most likely have achieved a majority of the Court. While upholding beats remanding, remanding beats overturning and overturning beats upholding. The modified *Marks* rule does not provide a solution stable enough for the majority to accept.

*a. The Effects of Screws on the Problem*

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

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

The plaintiffs would then appeal the trial court's determination all the way to the South Carolina Supreme Court. At the appellate level, the plaintiff's lawyers would argue that remanding the case to an arbitrator is a better "narrowest holding" than overturning the South Carolina's highest court decision because more Justices prefer remanding the case to an arbitrator to overturning the state court's decision. Thus, the trial court would have picked the narrowest holding incorrectly.

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

*Green Tree I* could be relitigated all the way back to the United States Supreme Court. In *Green Tree II*, the Justices would be asked to determine the

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275. Cf. *Essay on the Application of Mathematics to the Theory of Decision-Making*, in CONDORCET: SELECTED WRITINGS 33 (K. Baker ed. & trans., 1976); Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 815 (1982).

narrowest holding in *Green Tree I* (and whether the *Marks* rule applies at all under the meta-vote from above). Needless to say, the Court could be divided again and a cycle of litigation could continue indefinitely.

Thus, the *Screws* rule works in conjunction with the *Marks* rule to solve the problem of relitigation and confusion. First, the *Screws* rule limits cycling by forcing the Court to reduce the number of possible outcomes.<sup>276</sup> The remaining positions are narrowed further by the *Marks* rule after the decision is handed down. Thus, *Screws* limits the need for lower courts (and later the United States Supreme Court) to decide between three different outcomes.<sup>277</sup> After *Screws*, there are only two positions that form the majority; after *Marks*, there is only one holding.

*b. The Persistence of the Problem Despite Screws*

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

	<u>Rehnquist + 2</u>	<u>Breyer + 3</u>	<u>Stevens + 1</u>
First Preference:	Overturn	<i>Remand</i>	Uphold
Second Preference:	Uphold	Overturn	<i>Remand</i>
Third Preference:	<i>Remand</i>	Uphold	Overturn

Begin, as in Part II.A, with the default rule affirming when no majority is achieved. Justices Stevens and Thomas are the only Justices whose first choice is affirming. Both the Chief Justice and Justice Breyer, however, prefer to overturn the case. Consequently, with these preferences, Justice Breyer will indicate to the Chief Justice that he wants to join in overturning the case so as to avoid an affirmation by a deadlock. The Chief Justice will be glad to accept Justice Breyer's vote.

Justice Stevens prefers remanding the case to having it overturned. Consequently, he will switch to remanding the case, the outcome Justice Breyer prefers as well.

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

Thus, a complete cycle has occurred. Justice Breyer switches to join the Chief Justice, which induces Justice Stevens to join Justice Breyer, which induces the Chief Justice to switch to join Justice Stevens. The cycle could con-

276. Levmore, *supra* note 15, at 95-96 (discussing two-step process to arrive at holding).

277. Levmore, *supra* note 15, at 95-96 (discussing how holding determined after two-step process).

tinue indefinitely. While joining the *Marks* rule with the *Screws* rule saves lower courts from trying to figure out the outcome when cycling exists, the rule does not help the Justices figure out how to avoid the cycling in the first place.

*c. Alternative Solutions to the Problem*

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

*d. Rehearing as a Solution to the Cycling*

The Justices in *Time, Inc. v. Hill* may have thought they found a way to avoid a potential cycle. In the end, however, their hopes were shattered. *Time*, like *Gertz*, involved the protections offered to media outlets for libel against private individuals.<sup>278</sup> In conference after the case was first heard, the Justices were divided into three camps: Chief Justice Warren and Justice Fortas voted to uphold the state law as constitutional, while Justices Black, Douglas, and Clark voted to overturn the state law as being a violation of the First Amendment.<sup>279</sup> Uncertain as to the constitutionality of the statute and thus unable to rule on the law's merits, Justices Harlan, Brennan, Stewart, and White voted to remand the case for further clarification by the state's highest court.<sup>280</sup> Thus, a three-way deadlock occurred.<sup>281</sup>

The Justices in *Time* tried to achieve a majority by rehearing the case to determine the scope of the state law.<sup>282</sup> At first glance, rehearing the case could expose the Court to cycling, rather than save it from the problem. Consider the following hypothetical ordering of the preferences of the Justices in *Time*:

	<u>Warren + 1</u>	<u>Harlan + 3</u>	<u>Black + 2</u>
First Preference:	Uphold	Remand	Overturn
Second Preference:	<i>Re-hear</i>	Uphold	<i>Re-hear</i>
Third Preference:	Overturn	<i>Re-hear</i>	Remand
Fourth Preference:	Remand	Overturn	Uphold

Adding the option of rehearing the case might create cycling, because re-

278. *Time, Inc. v. Hill*, 385 U.S. 374, 376-78 (1966).

279. DEL DICKSON, SUPREME COURT IN CONFERENCE (1940-1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 386-89 (2001).

280. *Id.*

281. *Id.*

282. *Time*, 385 U.S. at 380.

hearing beats remanding and remanding beats upholding the decision, but upholding beats rehearing.

Despite the possibility that adding a rehearing option would induce cycling, the Justices agreed to allow additional briefs as to the scope of the state laws.<sup>283</sup> The Justices believed that additional information would help the four Justices voting to remand decide between upholding the law and overturning it as unconstitutional.<sup>284</sup>

Subsequently, *Time* was added to the list of triple-choice deadlocks along with *Gertz* and *Screws*.<sup>285</sup> Justice Harlan and Justice Brennan continued to insist that the Court remand the case, but for a different reason.<sup>286</sup> After the first hearing of *Time*, these Justices voted to remand for further clarification of the law. After the second hearing of the case, however, these Justices voted to remand for a middle-of-the-road freedom-of-the-press standard. Thus, the three-way deadlock recurred, even though the rehearing was supposed to solve the deadlock problem.

*e. Dismissing the Writ as a Solution to the Cycle*

In addition to rehearing the case, the Justices have an additional option to dismiss a writ as improperly granted.<sup>287</sup> After the Court reheard *Time* and a three-way deadlock re-emerged, the Court could have dismissed the writ of certiorari. This would have removed the problem by cutting it off at its source.

While the Justices did not resort to this solution in *Time*, it is possible that the Court has dismissed the writ of certiorari in other cases to avoid cycling.<sup>288</sup> In *Burrell v. McCray*,<sup>289</sup> the United States Supreme Court granted a writ of certiorari to review a lower court's determination. After deliberation, however, one Justice who voted to grant the writ of certiorari changed his mind and voted

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283. DICKSON, *supra* note 279, at 388.

284. DICKSON, *supra* note 279 at 387-89.

285. *Time, Inc. v. Hill*, 385 U.S. 374, 398 (1966).

286. *Id.* at 394-98, 401-11.

287. See, e.g., *New York v. Uplinger*, 467 U.S. 246, 248 (1984) (discussing Rule of Four); *Rosenblatt v. Baer*, 383 U.S. 75, 94-96 (1966) (Justice Douglas, although wanting to dismiss writ of certiorari, turns to merits and overturns lower court decision). The question of whether a writ was properly granted is usually a preliminary issue, and therefore it does not affect the analysis in this article. See *Donnelly v. DeChristoforo*, 416 U.S. 637, 648 (1974) (Justices Stewart and White, although wanting to dismiss writ of certiorari, turn to merits); *Connecticut v. Johnson*, 460 U.S. 73, 89-90 (1983) (Justice Stevens, although wanting to dismiss writ of certiorari, turns to merits); *Udall v. Wisconsin*, 306 F.2d 790 (D.C. Cir. 1962) (Judge Washington, although wanting to dismiss the writ of mandamus, turns to the merits). See generally, Ira P. Robbins, *Justice by the Numbers: The Supreme Court and the Rule of Four—Or Is It Five?*, 36 SUFFOLK U. L. REV. 1 (2002).

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

289. 426 U.S. 471 (1976).

to dismiss the writ as improperly granted.<sup>290</sup> A similar result was seen in *Wainwright v. City of New Orleans*.<sup>291</sup>

Because the inner-workings of the Court remain secret, we can only speculate that the Justices may have been divided over the disposition of the case in a way that would lead to cycling. For example, when the Justices discussed the case, one group might have wanted to affirm, a second group to remand, and a third to overturn. Realizing the deadlock, perhaps the Justices who wanted to remand expressed an interest in overturning. This would induce the Justices who wanted to uphold to switch to remand, which in turn induces the Justices who want to reverse to switch to upholding the case. After multiple rounds of trying to reach an agreement, the Justices might have become frustrated, and one Justice who voted to grant the writ switched to save the Court from the problems posed. Thus, the debilitating cycling could come to an end through a decision on whether to grant a writ of certiorari.

*f. Alternative Grounds as a Solution to the Cycling*

If rehearing the case and dismissing the writ of certiorari are not viable options, the Court could use other tools for removing cases from its jurisdiction. Specifically, the Political Question Doctrine, standing, mootness, ripeness, and abstention are a few ways for the Court to remove problematic cases from the its docket.<sup>292</sup> When the Justices are divided over the outcome of the case on the merits, they may nonetheless be united in their willingness to forgo differences and decide the case on procedural grounds. Thus three-way deadlocks and cycles are hidden when Justices turn their attention to procedural issues upon which they are more likely to agree.

To summarize, the three sources of external salvation just discussed (rehearing the case, dismissing the writ as improperly granted, and resorting to judicially-created procedural rules) are all means by which the Court breaks potential three-way deadlocks. These three Court-made solutions, however, are not always available. For example, in *Green Tree*, a rehearing would have served no purpose. South Carolina law was clearly established.<sup>293</sup> Because the writ of certiorari in *Green Tree* was properly granted, the Justices would have had to bend over backwards to find ways to dismiss it. Moreover, the contract dispute in *Green Tree* was procedurally pure, and doctrines like mootness, ripeness, or abstention did not apply.<sup>294</sup> Indeed, avoiding the case on procedural grounds would require further “creative lawyering,” sparking criticism from a range of sources. Thus, the solutions relied upon by Supreme Court Justices are not per-

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290. *Id.* at 471-73.

291. 392 U.S. 598 (1968).

292. See generally DAVID P. CURRIE, FEDERAL JURISDICTION IN A NUTSHELL (1999) (summarizing federal court rules).

293. *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 355 (S.C. 2002), vacated by 539 U.S. 444 (2003).

294. See generally *id.*

fect and the Justices must search for other ways to avoid a cycle.

*g. Randomization*

Dean Saul Levmore, the only scholar to directly address the problem of cycling, suggests that the Court solves the cycling problem by delegating the decision to a “randomizing agent,” namely a subsequent lower court.<sup>295</sup> Levmore argues that if the Justices find themselves stuck in a cycle, they have two options.

First, the Justices could write a one-sentence per curium opinion stating “the case is remanded for a disposition not inconsistent with the Court’s opinion” and then attach three concurrences. In *Green Tree*, the Chief Justice would concur with the one-sentence per curium opinion and recommend overturning the case. Justice Breyer, on the other hand, would suggest remanding the case to an arbitrator. Justices Stevens and Thomas would recommend upholding the case. The Justices would then wait and see which concurring opinion lower courts adopt as the holding of the case.

Alternatively, the Court could write a long, confusing, and cryptic opinion. For example, in *Green Tree*, all the Justices would have agreed with the following holding: “A contract must be enforced according to its terms, not inconsistent with federal law or state law.” Of course, while agreement is achieved, a lower court would have no guidance as to the ultimate interpretation of the *Green Tree* contracts. Again, the Justices would wait and see how lower courts would interpret the cryptic opinion.

An element of randomness has been added to the process. Perhaps, the lower court would read the per curium opinion or the ambiguous opinion as suggesting an overturning of the South Carolina Supreme Court decision. Alternately, a lower court might send the case to an arbitrator, believing that an arbitration decision is “not inconsistent with . . . state law” and that the cryptic opinion so required. Finally, and perhaps most plausibly in the *Green Tree* context, a South Carolina state court would find that the United States Supreme Court upheld the South Carolina Supreme Court decision in *Green Tree*. The United States Supreme Court Justices wait for subsequent lower court decisions to solve the intractable dilemma. A lower court, according to Dean Levmore, would serve as a “randomizing agent,” selecting between the three opinions.<sup>296</sup>

Dean Levmore’s theory of a “future interpreter” randomly picking between the three competing positions is both novel and problematic.<sup>297</sup> It is ingenious

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295. Levmore, *supra* note 15, at 110 (describing remand as means of achieving decision).

[W]e allow a future interpreter to do the work for us . . . . An optimist might say that a future court, or other interpreter, is something of a randomizing agent with some possibility of using the advantage of time gone by to see arguments or applications not apparent to the first panel.

*Id.* at 111.

296. Levmore, *supra* note 15, at 111.

297. Levmore, *supra* note 15, at 111.

because Dean Levmore has independently reached the only solution economists have devised to overcome strategic behavior. If each Justice received a lottery ticket and the winner of the lottery had his or her opinion serve as the opinion of the Court, all Justices would vote sincerely. Notably, Dean Levmore devised his “randomizing agent” solution without consulting (or at least without citing) the economics literature of the 1970s that reached the same conclusion.

While theoretically pleasing, the “future interpreter” solution is perplexing and inappropriate in the United States Supreme Court context. First, the “randomizing agent” theory assumes a willingness on the part of the Supreme Court to relinquish power to a lower court. While divided over the outcome of a case, the Justices could unite in opposition to a state trial judge in rural South Carolina determining the outcome of *Green Tree*. The “randomizing agent” solution might not be a Condorcet winner. No doubt all Justices would prefer having their decision serve as the holding of the Court to having a state court judge make determinations for it.

Dean Levmore’s “future interpreter” solution is also problematic because, as the saying goes, “the future is now.” Several months after *Green Tree* was decided, the Fifth Circuit had to interpret its holding to be able to decide *Pedcor Management Co. Welfare Benefit Plan v. Nations Personnel of Texas, Inc.* If the United States Supreme Court did not like the holding of the “future interpreter” (*i.e.*, the Fifth Circuit), the highest court would grant a writ of certiorari to rehear the case. Thus, Dean Levmore’s “future interpreter” is just a lower court that hears a subsequent case several months after the initial division, subject to Supreme Court review. The “randomizing agent” solution makes a bold assumption that presupposes that the Court would not rehear the case.

#### *h. Intensity Preferences*

Judicial “intensity preferences” offers a solution to the cycling problem. This solution focuses on three different types of intensities—intensities as to judicial philosophies, as to the merits of the case, and as to the Court as a political institution. The value a Justice places on each one of these factors and the strength of his or her conviction (that is, the Justice’s “intensities”) will determine the outcome of the case.

#### *i. Intensities over Vote Switching as a Proper Act for Judges*

The first form of intensity involves the judicial philosophies of the Justices. Reviewing the cases, certain Justices never engage in vote switching, while others engage in it frequently.<sup>298</sup> Justices Stevens and Rutledge have engaged in more vote switches than any other members of the Court.<sup>299</sup> Perhaps, the an-

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298. See *supra* note 5 (identifying examples of vote switching and Justices respective positions).

299. See *supra* note 5 and accompanying text (listing vote switching cases).

swer to the cycling problem lies in these statistics.

Individual Justices are likely to develop personal beliefs about their roles on the Court. Vote switching is not something a Justice wants to do frequently, and certain Justices might develop internal beliefs that such vote switching is wrong. Consider the case of *Von Moltke v. Gillies*.<sup>300</sup> In *Von Moltke*, Justices Black, Douglas, Murphy, and Rutledge all engaged in vote switching. The language in the case suggests possible discomfort with the act.<sup>301</sup> While Justice Black's opinion is written in the first person, the act of vote switching is written in the third person, suggesting someone else had done the switching for these four Justices.<sup>302</sup> *Von Moltke* may reflect a reluctance by some Justices to deviate from their preferred position. While vote switching in *Screws* was necessary to achieve a majority disposition, the strategic behavior that coincides is less acceptable. Some Justices may either prefer not to engage in such conduct, or, when they do, to attribute the act of vote switching to a third party.

Thus, in *Green Tree*, although Chief Justice Rehnquist has the ability to perpetuate the cycle by switching to affirming, he likely believes doing so is beyond his power, or at least he prefers not to do so publicly. Thus, the cycle ends with Justice Stevens' switch to remand.

*j. Intensities as to the Merits of the Case*

Justice Stevens' opinion in *Green Tree* suggests a second type of intensity—intensity over the merits of the case.<sup>303</sup> Although Justice Stevens preferred to uphold the South Carolina Supreme Court decision, he switched to remand. One reason Justice Stevens switched, as opposed to any other Justice, was that he was not particularly beholden to his position.<sup>304</sup> He wrote, “because petitioner has *merely* challenged the merits of the decision without claiming that it was made by the wrong decision maker, there is no need to remand the case to correct that *possible* error.”<sup>305</sup> That is, he preferred to uphold the case on a minute procedural ground.<sup>306</sup> As to the more important question of whether to have class action arbitration, he agrees with his colleagues (with some reservation) that “[a]rguably the interpretation of the parties' agreement should have been made in the first instance by the arbitrator, rather than the court.”<sup>307</sup> Therefore, in situations like *Green Tree*, one Justice cares less about his or her preferred outcome than the others do. As a result, this Justice is more likely to

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300. 332 U.S. 708 (1948).

301. *See id.* at 326-27 (transitioning awkwardly from analysis Justices believed in to court's holding).

302. *Id.*

303. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 354-55 (2003) (Stevens, J., concurring in part and dissenting in part).

304. *See id.* (explaining adhering to preferred disposition would result in lack of controlling judgment).

305. *Id.* (emphasis added).

306. *Id.*

307. *Green Tree*, 539 U.S. at 454-55 (Stevens, J., concurring in part and dissenting in part).

change his or her vote on the merits if it is necessary to achieve a majority.<sup>308</sup>

*k. Intensities as to the Court as a Political Institution*

Finally, as Professor Caminker argues, members of the Court may place a different “value . . . on constructing a majority-disposition coalition such that the Court can issue a judgment in the [i]nstant [c]ase.”<sup>309</sup> That is, some Justices are not concerned with whether cases like *Green Tree* remain deadlocked, while others feel that the Court as an institution is harmed when uncertainty as to the meaning of decisions like *Green Tree* remains. In this sense, the Justices are “playing chicken,” waiting to see who will flinch first, and a Justice changes his or her vote to ensure that there is no *Green Tree II*. Phrased differently, each Justice will assess his or her own risk tolerance before making a decision whether to sacrifice in the immediate case to help the Court survive as a political institution in the future.

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

Two other economic tools, the free-rider problem and the Prisoner’s Dilemma, come into play.<sup>310</sup> Consider the free-rider problem first. In general, vote switching is not the preferred activity of Justices. Nevertheless, in some

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308. See Caminker, *supra* note 15, at 2313-16. Caminker writes:

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

*Id.* at 2316-17. Professor Caminker, however, seems to miss the negotiation around the default rule phenomenon when he argues, “[t]here is . . . no articulated rationale for [the patterns of vote switching] in any of the cases.” *Id.* at 2317 n.52. Caminker then recovers, however, when he writes, “It appears that the choice whether to stand firm or switch (and to what) is left up to the strategic judgment of each faction.” *Id.* Caminker’s succinct treatment of the triple choice cases is reflective of other scholarship that tangentially deals with this issue.

309. See Caminker, *supra* note 15, at 2316 (illustrating variables that influence vote switching).

310. See DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 48-49, 176, 189, 203, 308, 312-13 (1994) (outlining strategies and economic theories as they apply to law).

cases, someone must do the dirty work and switch to help the Court achieve a majority and prevent relitigation and embarrassment. Consequently, Justices have an incentive to overstate their reluctance to switch votes, hoping that another Justice will switch first. The Justices that overstate their intensity will enjoy the benefit of another Justice's vote switch without ever having to engage in a vote switch of his or her own.

Should every Justice overstate their intensity and should every Justice refuse to sacrifice for the Court, the institution itself will suffer. In the earliest days of the Republic, Justices of the United States Supreme Court each wrote an opinion on every case, leading to confusion.<sup>311</sup> While each Justice benefited by having his personal views articulated in full, the Court failed to provide guidance to future litigants. After John Marshall's ascension to the position of Chief Justice, there was a clear majority for every case, enhancing the Court's reputation.<sup>312</sup> Concurring and dissenting opinions remained rare until a recent explosion of plurality decisions and deadlocks like *Green Tree*. Today, cases demonstrate increasing confusion over how to treat the Court's holdings, indicating that the Court has discounted or forgotten the harm caused by the pre-Marshall system. As a result, the institution's reputation for providing clear guidance to the legal community has suffered.

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

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

Although this model over-simplifies by ignoring both the benefits to the institution derived from dissenting and concurring opinions and the fact that some Justices are possibly happy to vote switch to achieve a majority, it does offer insight into one interesting fact about vote switching. If vote switching is considered something to avoid, why do Justices engage in it publicly? Hiding the vote switch would achieve the same beneficial effects for the institution while minimizing the negative effects to the individual Justice who actually switches. The Prisoner's Dilemma model offers a solution.

311. See MELVIN UROFSKY AND PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 162 (2002) (noting early Court followed English practice).

312. UROFSKY & FINKELMAN, *supra* note 311, at 214, 227.

As repeat players, the Justices have an incentive to maximize their collective take-away from the matrix above. Alternately allowing some Justices to dissent or concur gives Justices a chance to make their mark without harming the institution. Similarly, distributing the burden of vote switching in the cases that are most likely to harm the Court helps avoid the bottom right section of the matrix. Consistent with the work of Robert Axelrod,<sup>313</sup> a public system keeping track of votes would enhance the effectiveness of this wealth-maximizing system. The Court should record concurring opinions, dissents, and *vote switches* in cases like *Green Tree* in order to prevent subsequent disputes over who did the dirty work and to make future members of the Court aware of previous switches. The public vote switch, therefore, serves as a reminder that the switching Justice has done his or her job to save the collective institution. The next time such a switch is necessary to dispose of a case, another Justice will engage in the dirty—yet essential—work of the Court. Although Justices Stevens and Rutledge have assumed a disproportionate share of these chores, other Justices help out as well, sustaining the system and protecting the Judiciary's reputation.<sup>314</sup> Thus, an informal wealth-maximizing, intensity-aggregating recording system helps avoid the problem of overstating intensities.<sup>315</sup>

### *1. Summary*

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

Finally, the three solutions identified, namely external procedural salvation, randomization, and intensity preferences, all fit within Kenneth Arrow's seminal work on cycling. According to the Nobel Prize winning Impossibility Theorem, cycling can be avoided by reference to "irrelevant alternatives."<sup>316</sup> The three procedural sources of salvation, for example, are "irrelevant" to the initial three-way deadlock on the merits, and they therefore can save the Justices. Dean Levmore's "randomizing agent" is also external to the original deadlock and is therefore "irrelevant" according to Arrow's work.<sup>317</sup> Finally,

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313. See generally ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984) (examining implementation of cooperative strategies).

314. See *supra* note 5 and accompanying text (listing vote switching cases).

315. See generally ARROW, *supra* note 27.

316. See generally ARROW, *supra* note 27.

317. See generally ARROW, *supra* note 27.

judicial intensities are “irrelevant” to the merits of each position in the three-way deadlock. Arrow’s work, thus, predicted our intuition to look outside the box to solve the deadlock.<sup>318</sup>

It is worth noting, however, how all three solutions are, nevertheless, “irrelevant.” In order to remove cycling, the Justices must resort to some external principle. The Court might be predisposed to look to “irrelevant” procedural rules external to the merits of the case. While Dean Levmore relies on the “irrelevant” opinion of a lowly state trial court, I look to a Justice’s “irrelevant” beliefs about their functions on the Court and other preferences. Following a lawyerly intuition, the reader might try to determine which solution is less “irrelevant.” This exercise is likely futile, however, because, according to Arrow, there are no good answers to the problem.<sup>319</sup>

### CONCLUSION

Analyzing the vote switching problem is both frustrating and invigorating. Justices engage in vote switching by citing a rule without authority. Suggestions intended to prevent vote switching, however, expose additional strategic behavior hidden by the *Screws* rule. Indeed, the best reasons for the *Screws* rule are that it gives Justices an opportunity to state a willingness to take a certain position and subsequently to back down to achieve a majority,<sup>320</sup> it helps Justices avoid applying the *Durant* affirmation default rule,<sup>321</sup> and it prevents future litigation that can induce additional, more embarrassing deadlocks.<sup>322</sup>

Economics literature has demonstrated that strategic behavior is inevitable.<sup>323</sup> The only solution in the literature is in a 1977 article by Professor Gibbard in which he suggests inducing randomness.<sup>324</sup> If we were to give every Justice a lottery ticket and assigned the winner of the lottery the ability to write an opinion for the Court, we would ensure that Justices voted sincerely. This solution is obviously inappropriate in the context of the United States Supreme Court, where cases or controversies, and not lotteries, are decided.<sup>325</sup>

318. See generally ARROW, *supra* note 27.

319. See generally ARROW, *supra* note 27.

320. See *infra* Part I.C.

321. See *infra* Part II.A.

322. See *infra* Part III.B. This article itself is intended to exhibit a form of cycling. Justifications for the *Screws* rule are in Parts I.C, II.A, and III.B. Replacing letters for the Roman numerals and filling in the remaining slot, one finds the following pattern: Reason 1 (in Part I.C): A, C, B; Reason 2 (in Part II.A): B, A, C; and Reason 3 (in Part III.B): C, B, A. Thus, an article on Condorcet cycling itself shows elements of Condorcet cycling through its structure. See generally DOUGLAS R. HOFSTADTER, GÖDEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID (1999); John M. Rogers & Robert E. Molzon, *Some Lessons about the Law from Self-Referential Problems in Mathematics*, 90 MICH. L. REV. 992, 997 (1992) (discussing Hofstadter’s work).

323. See Douglas H. Blair, *On the Ubiquity of Strategic Voting Opportunities*, 22 INT’L ECON. REV. 649, 649 (1981).

324. Gibbard, *Manipulation of Schemes*, *supra* note 25, at 666-68.

325. U.S. CONST. art. III.

In conclusion, the best justification for the *Screws* rule is that it forces a closer examination of its own existence.<sup>326</sup> While this examination is unlikely to help the parties in *Screws* and *Green Tree*, it does offer insight into the adjudication process and the issues facing Justices today. Furthermore, the secrets of *Screws* teach us not only about the Justices and their behavior, but also about our own Sisyphean attempts to overcome strategic behavior and cycling.

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326. H. Ron Davidson, *Sweeny's Prayers: Organized Religion and Organized Labor* 58 (1999) (unpublished B.S. thesis, Cornell University) (on file with author) ("[The] gift in this situation may be the question itself, and not the answer").