Abstract: The Irrational Supreme Court

The pejorative “irrational” is used to describe many defects in legal reasoning, but is generally not meant to be understood as a literal lack of rational thinking. Similarly, the “rational basis test” is not meant to determine whether a legislature is “not endowed with reason or understanding,” but rather if it has acted with some hidden, invidious motive. Incredibly, though, the Supreme Court has frequently issued truly “irrational opinions,” simply due to the fundamental nature of group decision-making.

Much has been written about Nobel Prize winner Kenneth Arrow’s “Impossibility Theorem,” which proved that, when faced with more than two issues, group voting might result in “a lack of transitivity.” For example, given a choice between three beverages, group voting might indicate that the group prefers coffee over soda and prefers soda over tea, but also prefers tea over coffee. There is no principled way to determine the group preference with such a lack of transitivity. Despite frequent claims that this lack of transitivity affects the Supreme Court, no actual occurrences have previously been identified. In this Article, I display the first such example, but also show why Arrow’s theorem is not a significant cause for “irrational” Court opinions.

I will also analyze another, far more serious source of irrational decisions. Specifically, on numerous occasions, one party received the votes of a majority of the Justices on every relevant issue yet lost the case anyway. In this Article, I will prove what I term the “Irrationality Theorem,” the proposition that it is impossible to eliminate the possibility that the Supreme Court (or any other multi-member tribunal), will issue such an opinion. I will also show that there are several Supreme Court cases that unmistakably embody this irrationality, and discuss the unfortunate consequences of such decisions.
The Irrational Supreme Court

I. Introduction

The pejorative “irrational” is used to describe many different defects in legal reasoning. If taken literally, it is an accusation that the legislators who passed an irrational law or the judges who agreed to an irrational opinion were, “not endowed with reason or understanding,”¹ or were “void of reason or understanding; as, ‘brutes are irrational animals.’”²

When the Supreme Court strikes down a law using the “rational basis” test, the criticism of the legislature is neither that personal nor that extreme.³ In applying the requirement that a “classification drawn by the statute is rationally related to a legitimate state interest,” the concept of “rationality” is not meant to be taken literally.⁴

In reality, the conclusion of “irrationality” reflects a wide range of possible disagreements. It is not uncommon, for example, for a Supreme Court Justice to describe as “irrational” a situation where he or she believes that two actions cause the same problem, but only one is prohibited. Justice Stevens, for example, said it was "simply irrational" for a state to ban partial birth abortion procedures yet permit other forms of abortion which were "equally gruesome".⁵ Similarly, Justice
O’Connor termed the use of different standards of proof for committing the mentally ill than for committing the mentally retarded “irrational.”

Other times, Justices have used the word “irrational” to criticize decisions which they see as self-contradictory, such as permitting actions which cause the very harm sought to be prevented. Justice Scalia found it “irrational,” that “seeking to harm an abortion clinic's business through persuasion is indeed unlawful in South Carolina,” yet a court issued an injunction that would “permit such harm so long as it is inflicted at a distance of 12 feet from the driveway[.]”

Still another use of the word “irrational” is to describe situations where there is no reasoning at all to support a decision. Thus, the Court has stated that regulation of even non-fundamental rights can violate the Due Process Clause when the restrictions imposed are “undeniably irrational as unsupported by any imaginable rationale.”

Most people would agree that, absent some other facts, it is irrational to treat functionally similar cases different, or to permit the very harm you are trying to prevent, or to act without the slightest justification. While these principles may not be controversial, deciding when they have occurred will usually be contentious. What appears to be irrationally differential treatment to one person may well be viewed as a valid distinction to another. For example, in the 1996 case, Romer v.
Evans, the Supreme Court ruled that an amendment to the Colorado constitution which prohibited all state and local bans of discrimination against gays and lesbians violated the equal protection clause. Justice Anthony Kennedy, speaking for the Court found that the law’s, “sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.” By contrast, Justice Antonin Scalia argued in dissent that the law was indeed rational:
If it is *rational* to criminalize the conduct, surely it is *rational* to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct. Indeed, where criminal sanctions are not involved, homosexual "orientation" is an acceptable stand-in for homosexual conduct.\(^{11}\)

Justices frequently disagree over whether a decision is supported by a legitimate rationale or not. To term a decision “irrational” in this setting is really a subjective determination. It is more of a statement that “I disagree with the validity of your premise” or “I disagree with your belief that a given conclusion follows from a particular premise.” This is far less insulting, and more likely accurate, than a literal charge of irrationality, which implies “No logical person could agree with your reasoning process.”

Perhaps the most commonly accepted example of “irrationality” would be to declare simultaneously that something both did and did not exist, or that a proposition is simultaneously true and not true.\(^{12}\) Nonetheless, decision-makers sometimes will willfully create such contradictory decisions in order to avoid the consequences of consistency. Consider the case of a prohibition-era jury finding a defendant not guilty of unlawful possession a six particular glasses of bootleg liquor, but guilty of maintaining a nuisance by keeping those same six glasses of liquor for sale.\(^{13}\) According to Oliver Wendell Holmes, the verdicts were inconsistent, but could be explained on the theory that the jury was deliberately
voting so as to be lenient to a defendant they believed was guilty:

The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.14

The irrationality of inconsistent verdicts, then, was not a failure of logic, but a deliberate device to reach a desired end. Irrespective of the judge’s instructions and the obvious illogic, the jury basically manipulated the system so that a guilty party was punished, but not too severely. Such “illogic” can be avoided, at least theoretically, by special verdicts or requiring juries deciding multiple counts to only convict a defendant on a “compound crime” if it convicts on the predicate offense as well.15

Other times, irrationality occurs as the result of simple human error. The Supreme Court was probably guilty of this during its trilogy of cases considering the applicability of the First Amendment to private shopping centers. In 1968, in Amalgamated Food Employees Union v. Logan Valley Plaza,16 the Court ruled that a union had a first amendment right to picket within a large privately owned shopping center. Four years later, in Lloyd Corp. v. Tanner, the Court, without overruling Logan Valley, held that anti-war protesters did not have a first amendment right to distribute handbills in a private shopping center.17 Since the
First Amendment’s principle of content-neutrality would either permit both types of speech or neither, these cases contradict each other. Finally, in *Hudgens v. NLRB*, the Court admitted that the two cases were hopelessly inconsistent and formally overruled *Logan Valley*: “[T]he reasoning of the Court's opinion in *Lloyd* cannot be squared with the reasoning of the Court's opinion in *Logan Valley*....[W]e make clear now, if it was not clear before, that the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case.”

In an idealized world, such inconsistencies could be avoided. If the Court could always be candid about what it was doing, it would dispense with inconsistent prior decisions by overruling them explicitly. Rational people should make rational decisions.

Unfortunately, even in an idealized world populated by perfectly rational people, not all causes of irrational decision-making can be avoided. The fundamental nature of group decision-making inevitably creates the possibility of certain kinds of irrationality. “Collective irrationality” is the term for the situation when a set of decisions, which are made by a group through some voting mechanism, would be regarded as irrational if made by a single individual. This can happen even though each individual participant is one hundred percent rational.
To understand how “collective irrationality” infects the Supreme Court, it is necessary to remember that when the Court hands down an opinion, it reflects the result of two different votes. One is the “outcome,” specifically, which party prevails. This vote takes place at the weekly conference of the Justices, with each Justice voting for a particular judgment, after a (usually) brief discussion of the merits of the case.21

The second “vote” is on the opinion explaining the reasoning that supports the judgment. The reasoning consists of the resolution of the relevant issues raised by each party as they argued why the judgment should go their way. The vote by the Court on the opinion is not a formal vote, but occurs after an opinion is drafted and circulated among the Justices.22 Each Justice decides, individually, whether to join that opinion, join only in the judgment and file a concurring opinion, or dissent from the judgment.23 If a majority of the voting Justices join an opinion, it becomes the opinion for the Supreme Court.

Because there are generally only two choices for a judgment -- either the plaintiff wins or the defendant wins -- the vote by the Justices as to the appropriate judgment in the case almost always results in a majority choice.24 By contrast, it is common for there to be multiple issues to be decided for any given case. It is this fact alone which will inevitably cause irrational decision-making.
The problem of creating a fool-proof system for selecting among multiple options is an intractable problem for any group, including the Supreme Court. If there are only two choices for a group decision, a majority vote can readily decide between those choices. If there are an odd number of voters, as with nine Justices, one of the two choices must receive more votes than the other, and that choice can rightfully be deemed the group’s choice. In the words of Thomas Jefferson, “Individuals exercise [their rights] by their single will: collections of men by that of their majority; for the law of the majority is the natural law of every society of men.”

If there are three choices, however, there is no guarantee that one choice will receive a majority of the votes cast. For centuries, theorists tried unsuccessfully to figure out the best way for treating a group decision where the votes are divided in such a way that no single choice captures more than half of the vote.

Nobel Prize winning economist Kenneth S. Arrow proved that no reasonable group voting system for resolving facing multiple choices could avoid all inconsistency. Specifically, he proved that under certain, relatively-modest conditions, there would always be the potential for what is known as “a lack of transitivity.” Transitivity requires that preferences between several choices be consistent, so that if I prefer coffee to soda, and soda to tea, then I would also
prefer coffee to tea. Given a choice of all three beverages, I would obviously choose my number one choice – coffee. Arrow’s theorem establishes that any group decision-making process may well result in a lack of transitivity: Given a similar choice of the three beverages, the group might prefer coffee to soda, and soda to tea, but also prefers tea to coffee. While the scholarly discussion of Arrow’s theorem is voluminous, until now no one has identified any actual instance of a lack of transitivity within the Supreme Court. In this Article, I will display the first such example, but will also show why Arrow’s theorem is not a significant cause for “irrational” Supreme Court opinions.

There is a second form of irrational group decision-making, though, that has occurred far more frequently and has only recently begun to receive significant scholarly attention. Specifically, on numerous occasions one party has received the votes of a majority of the Justices of the Court on every relevant issue yet lost the case anyway. In these cases:

1) The Court agrees that if all of the relevant issues are decided in the one side’s favor, that side will win;
2) At least five of the nine Justices rule in favor of the same party on all relevant issues;
3) The other party wins.\textsuperscript{29}

In this Article, I will prove what I have termed the “Irrationality Theorem,” the proposition that there is no way to eliminate the possibility that a majority of the Supreme Court, (or any other multi-member tribunal) will vote that one party should lose on all the relevant issues in a case yet win the case anyway. I will also show that there are several cases that unmistakably embody this irrationality.
II. A [blunt?] Arrow Aimed at the Heart of the Supreme Court

If a group votes on more than two choices, there is no guarantee that a majority will favor one position. More troublesome, the choice that gets the most votes, might actually be the choice most strongly opposed by a majority. Thus, an extremist candidate, with 40% of the vote, could defeat two moderate candidates who split the remaining vote, even though 60% of the electorate would greatly prefer either of the two losing candidates.

One solution to multi-choice elections was proposed by the 18th century French mathematician Marie-Jean-Antoine-Nicolas Caritat de Condorcet. Condorcet, who was a friend of both Thomas Jefferson and Benjamin Franklin. Condorcet dreamed of inventing a concept of "social mathematics" which would create a government and society ruled by reason.\textsuperscript{30} To say that Condorcet's mathematical writing was not initially well-received is a considerable understatement:

The obscurity and self-contradiction are without any parallel, so far as our experience of mathematical works extend...no amount of examples can convey an adequate impression of the evils. We believe that the work has been very little studied, for we have not observed any recognition of the repulsive peculiarities by which it is so undesirably distinguished.\textsuperscript{31}
Ultimately, though, the Condorcet plan became accepted as one of the more plausible attempts to deal with elections involving multiple choices. Basically, Condorcet’s proposal was to divide the vote on multiple options into a series of two-way, head-to-head battles. The “winner” would be the choice that obtains a simple majority over every other possibility in two-way competition. The winner of these head-to-head battles is generally called the "Condorcet winner."

For example, consider if nine voters list their preference between three candidates (A, B, and C) in the following way:

<table>
<thead>
<tr>
<th>Preference Order</th>
<th>2 voters</th>
<th>3 voters</th>
<th>4 voters</th>
</tr>
</thead>
<tbody>
<tr>
<td>FIRST</td>
<td>A</td>
<td>B</td>
<td>C</td>
</tr>
<tr>
<td>SECOND</td>
<td>B</td>
<td>A</td>
<td>B</td>
</tr>
<tr>
<td>THIRD</td>
<td>C</td>
<td>C</td>
<td>A</td>
</tr>
</tbody>
</table>

Since no candidate received a majority of the first-place votes, the Condorcet plan calls for a series of head-to-head matches. Among all the voters, Candidate B is preferred over Candidate A, by 7 votes (4+3) to 2. Candidate B is also preferred over Candidate C by 5 votes (3+2) to 4. Thus, Candidate B, having won all the head-to-head matches, would be declared the Condorcet winner.
Unfortunately, the Condorcet strategy of head-to-head competition is not without its problems. The most serious weakness is that it frequently will not produce a winner. This situation can be seen in the following simple story. Three people, Alice, Bob, and Charles, were trying to select which flavor ice cream to serve at a party. They ranked their preferences in the following order:

<table>
<thead>
<tr>
<th></th>
<th>Alice</th>
<th>Bob</th>
<th>Charles</th>
</tr>
</thead>
<tbody>
<tr>
<td>FIRST</td>
<td>Vanilla</td>
<td>Chocolate</td>
<td>Strawberry</td>
</tr>
<tr>
<td>SECOND</td>
<td>Strawberry</td>
<td>Vanilla</td>
<td>Chocolate</td>
</tr>
<tr>
<td>THIRD</td>
<td>Chocolate</td>
<td>Strawberry</td>
<td>Vanilla</td>
</tr>
</tbody>
</table>

Each of the three flavors receives one first place vote, so there is no simple majority winner. Unfortunately, the Condorcet criterion will not help either. In a head-to-head contest, Chocolate bests Vanilla 2-1. In a similar match-up, Vanilla bests Strawberry 2-1. The difficulty arises because Strawberry defeats Chocolate 2-1. No choice prevailed in all of its head-to-head matches.

This is an example of group irrationality. If I announce a preference for Chocolate over Vanilla, and for Vanilla over Strawberry, it would be considered irrational for me to then say that I also prefer Strawberry to Chocolate (If 3 is
greater than 2, and 2 is greater than 1, we naturally expect 3 to be greater than 1 also.) Yet this type of illogic, termed a lack of transitivity, is what has resulted from the group decision process utilizing the Condorcet criterion. It is also known as "cycling" because every winner also loses.33

The following chart shows the essence of the lack of transitivity:

<table>
<thead>
<tr>
<th>Contest</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chocolate vs Vanilla</td>
<td>Chocolate</td>
</tr>
<tr>
<td>Vanilla vs Strawberry</td>
<td>Vanilla</td>
</tr>
<tr>
<td>Strawberry vs Chocolate</td>
<td>Strawberry</td>
</tr>
</tbody>
</table>

The lack of transitivity creates a real danger for democracy. In particular, the person who sets the agenda can control the outcome of the voting.34 If the person in charge of voting procedures favored Chocolate in the ice cream example, she could stage the first head-to-head match between Vanilla and Strawberry, which Vanilla wins, and the second between Vanilla and Chocolate, which Chocolate wins [Agenda I]. A leader with a difference preference could start with Vanilla versus Chocolate, which Chocolate wins, followed by Strawberry versus Chocolate, with Strawberry prevailing [Agenda II]. Thus, the result of the election does not turn on the will of the group so much as the manipulation of those with
control over the agenda.

### Agenda I

<table>
<thead>
<tr>
<th>Contest</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td>Round 1 Vanilla vs Strawberry</td>
<td>Vanilla</td>
</tr>
<tr>
<td>Round 2 Vanilla vs Chocolate</td>
<td><strong>Chocolate</strong></td>
</tr>
</tbody>
</table>

### Agenda II

<table>
<thead>
<tr>
<th>Contest</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td>Round 1 Chocolate vs Vanilla</td>
<td>Chocolate</td>
</tr>
<tr>
<td>Round 2 Strawberry vs Chocolate</td>
<td><strong>Strawberry</strong></td>
</tr>
</tbody>
</table>

The Rev. Charles L. Dodgson, better known by his pen-name Lewis Carroll, wrote extensively about voting theory, and argued that cycling created a fatal flaw in Condorcet’s proposal. He mocked the defenders of the Condorcet criterion:

> I am quite prepared to be told... "Oh, *that* is an extreme case: it could never really happen!" Now I have observed that this answer is always given instantly, with perfect confidence, and without any examination of the proposed case. It must therefore rest on some general principle: the mental process being probably something like this –“I have formed a theory. This case contradicts my theory. Therefore this is an extreme case, and would never occur in practice.”

In 1951, economist and future Nobel Prize winner, Kenneth Arrow proved
that every possible voting scheme for choosing between more than two candidates can produce either a lack of transitivity or undemocratic results. Arrow's "General Possibility Theorem," which is more commonly called his "impossibility theorem," proves that no possible voting system can prevent cycling and simultaneously meet the following four, relatively simple goals:

(1) If every person in the group prefers one choice to another, so does the group. (Unanimity)

(2) No individual person is able to act as a dictator, whose vote determines the outcome regardless of the preferences of the other group members. (Nondictatorship)

(3) When comparing choices, individuals are free to prefer these choices in any order. (Range or “citizens’ sovereignty”)

(4) If an individual or group has a preference between two options, the preference between those two will not be affected by consideration of other options. (Independence of Irrelevant Alternatives)

Arrow's theorem has been summarized as follows: "No voting rule which allows voters to express their true preference and which treats each preference as equally decisive can assure us that it will produce a single preferred choice for three or more voters who have at least three alternatives." The implications of
this theorem are staggering. As economist Paul Samuelson wrote in 1952, "The search of the great minds of recorded history for the perfect democracy, it turns out, is the search for a chimera, for a logical self-contradiction.""39

Because Arrow’s Theorem applies to any group’s attempt to reach an aggregate decision, the theorem can also be applied to the Supreme Court.40 Judge (then-Professor) Easterbrook wrote that Arrow’s Theorem proved that the Court’s decisions would inevitably become inconsistent with one another: “At least some inconsistency, and probably a great deal of inconsistency, is inevitable.”41 While Arrow’s Theorem has much to say about group decisions, including those of the Supreme Court, one must be careful in drawing practical conclusions of “inevitability” from principles of axiomatic logic.

First of all, it is not necessary for members of the Court to decide on a complete preference order ranking before reaching a decision. In reality, all a Justice need do is decide his or her favored option for all the issues. If there is no majority support for a particular set of conclusions, the Justices decide whether they prefer some alternate choice [which creates a majority] to their individual top choice [with no majority opinion for the Court]. This might occur if a Justice either wanted an issue settled or preferred creating a somewhat-desirable precedent to holding out for his or her most desired position.42 Significantly, even these
circumstances do not require that any Justice make a complete ranking of all voting permutations.

Moreover, even were a Justice to make such a complete ranking order, it will rarely be disclosed. While Justices often will discuss their position on various issues in the same case, according to the best of my research, there is no case in which all of the Justices have detailed a preference order for every permutation of issues involved.\textsuperscript{43} Without such a total ranking, it is impossible for anyone to determine the aggregated preference order for the Court.

Even with a complete preference ranking of all the Justices, the nature of Supreme Court voting minimizes the significance of a lack of transitivity. To see why, consider a variation of the Pentagon Papers case, where President Nixon acted on his own authority to enjoin a newspaper from publishing information on the grounds of national security.\textsuperscript{44} Assume that, as in the real case, there were two issues: 1) Did the President’s unilateral action violate the Separations of Power; and 2) Did the enjoining of the newspaper violate the First Amendment? If the newspaper prevailed on either or both of these issues, the injunction would be lifted.

Assume that, unlike the real case, all of the Justices wanted the injunction lifted.\textsuperscript{45} Thus, the choice of “no violation of either Separation of Powers or First
Amendment” would be everyone’s least preferred option. Next, assume that the group of Justices Brennan, White, Stewart, and Marshall, was so anxious to show its disapproval of the President, that their strongest preference was to have the injunction lifted on both Separation of Powers and the First Amendment grounds. Their next preference was for Separation of Powers grounds alone, with their third preference being relying on only the First Amendment.

Further, imagine that Justices Douglas and Black were First Amendment fanatics, and that their strongest preference was to have the injunction lifted on First Amendment grounds alone, with their next preference being relying on both the First Amendment and Separation of Powers. Thus, their third preference was relying on only the Separation of Powers.

Finally, imagine that Justices Harlan, Burger, and Blackmun, were most concerned with Separation of Powers but believed that finding both a Separation of Powers and the First Amendment violation would be an unnecessary insult to the President. Thus, their first preference was to have the injunction lifted on Separation of Powers grounds alone, their second preference was to have the injunction lifted on First Amendment grounds alone, with their third preference relying on both.

The Justices’ preference order would then appear as follows:
Head-to-head voting results in an unbreakable cycle among the top three choices: “Violates Both” defeats “Only Violates Sep of Powers” by a 6-3 vote [with the Marshall and Douglas groups prevailing]; “Only Violates Sep of Powers” defeats “Only Violates 1st Amendment” by a 6-3 vote [with the Marshall and Harlan groups prevailing]; and “Only Violates 1st Amendment” defeats “Violates Both” by a 6-3 vote [with the Douglas and Harlan groups prevailing]. Thus, there is no Condorcet winner and no transitivity.

The Court’s decision, however, would in all likelihood not reveal the full preference rankings, so that no one, not even the Justices themselves, would know about the cycling. In fact, the Court might issue a unanimous judgment supporting the newspaper with three separate opinions expressing a different set of issue

<table>
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<tbody>
<tr>
<td>1</td>
<td>Violates Both</td>
<td>Only Violates 1st Amendment</td>
<td>Only Violates Sep of Powers</td>
</tr>
<tr>
<td>2</td>
<td>Only Violates Sep of Powers</td>
<td>Violates Both</td>
<td>Only Violates 1st Amendment</td>
</tr>
<tr>
<td>3</td>
<td>Only Violates 1st Amendment</td>
<td>Only Violates Sep of Powers</td>
<td>Violates Both</td>
</tr>
<tr>
<td>4</td>
<td>Not Violate Either</td>
<td>Not Violate Either</td>
<td>Not Violate Either</td>
</tr>
</tbody>
</table>
resolutions. It is also possible, though, that the Court would end with an opinion with “shifting majorities,” holding that the President violated both the Separation of Powers and the First Amendment. Justice Marshall would write such an opinion which he and his three supporters would embrace completely. The other groups would sign onto to only the part with which they agreed. That way each group obtained what it wanted most: Douglas’s group would get the First Amendment decision they wanted, Harlan’s would get their preferred Separation of Powers decision, and Marshall’s would get their preferred outcome.

Thus, the lack of transitivity does not prevent the Court from resolving the dispute before it. Moreover, the process of Supreme Court voting will be able to mask the very existence of such cycling, were it to occur.

It is not even clear that all of conditions necessary for Arrow’s theorem relate to Supreme Court decision-making. Professor Maxwell Stearns argues convincingly that the Supreme Court does not fulfill Arrow’s requirement of unlimited “range” in voting. Stearns points to two aspects of Supreme Court decision-making which prevent the Justices from “ranking the underlying rationales offered in the various opinions in a given case in any conceivable order.” First, every case is decided by outcome-voting, the dichotomous choice of which party wins. Second, majority opinions are often created only by
deferring to the Justice who holds the “narrowest” grounds for supporting the winning side. These two factors reduce the sovereignty of the Justices because they, “significantly limit strategic interactions among the justices....” Thus, the condition of “range” may not apply to the Supreme Court.

Even if one concludes that all four of Arrow’s conditions do apply to the Supreme Court, there remains the question of what exactly is proven about the Court’s decision-making. According to Easterbrook, “as time goes on and the stock of precedent grows .... [t]he availability of inconsistent precedents allows the Justices to ‘prove’ anything they want, without fear of contradiction.” If precedent is viewed narrowly, however, Arrow’s Theorem does not create a serious a problem of inconsistent Supreme Court constitutional decisions. If “precedent” is limited to the circumscribed question of whether a particular Constitutional provision is violated by a particular type of situation, there is little problem with a lack of transitivity because a Court faced with a [narrowly-defined] precedent it dislikes, is free to vote to overturn it. Since each vote on overruling is dichotomous, there is no danger of cycling. Thus, while the Court will be “inconsistent” in its decisions made at different times, it will not face a stable of inconsistent precedents.

“Precedent” may be considered more broadly, however. If the precedent

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from a particular constitutional decision is not merely whether or not a particular clause is violated, but also includes the “values or principles” which can be extracted for that case.\textsuperscript{57} Arrow’s theorem may conceivably create a problem. There are countless different precedential “values or principles” that can be found in the Court’s decisions. In weighing the importance of each “value or principle,” each of the nine Justices would undoubtedly present a different preference order. According to Arrow’s Theorem, in attempting to aggregate the individual preferences into a complete ranking order, the Court will inevitably stumble into cycling problems.

As we saw with the ice cream paradox described earlier, consider three values (A, B, and C)\textsuperscript{58} preferred by the Justices (1-9) in the following order:

<table>
<thead>
<tr>
<th>PREFERENCE ORDER</th>
<th>Justices 1,2,3</th>
<th>Justices 4,5,6</th>
<th>Justices 7,8,9</th>
</tr>
</thead>
<tbody>
<tr>
<td>FIRST</td>
<td>Value A</td>
<td>Value B</td>
<td>Value C</td>
</tr>
<tr>
<td>SECOND</td>
<td>Value B</td>
<td>Value C</td>
<td>Value A</td>
</tr>
<tr>
<td>THIRD</td>
<td>Value C</td>
<td>Value A</td>
<td>Value B</td>
</tr>
</tbody>
</table>

Each of the values receives three first place votes, so there is no simple majority winner. In a head-to-head contest, value A beats B 6-3. In a similar
match-up, value B defeats C 6-3, but value C also defeats A, 6-3. The value preferences are not transitive.

The inconsistency predicted by Arrow might be manifested in two ways. If all three values were implicated by the same case, the Court might be unable to reach a majority opinion. Each group of three Justices would join one of three different opinion arguing that a different value should determine the case. The judgment of the split Court would depend on which party was favored by at least two of the competing values. This would not pose problem of collective irrationality; it would merely be an example of collective disagreement. Indeed, if the values supporting the prevailing judgment are not mutually exclusive, it is likely that a majority opinion could be written incorporating the multiple values supporting it.59

A different, and more troubling, type of inconsistency could arise over several cases if only two values are considered at a time. In the first case, for example, a majority of the Court would vote that Value A is more important than Value B. In the next case, a majority of the Court could rationally vote that Value B is more important than Value C. Finally, this Court would face a new case and, a different majority of rational Justices, could conclude that Value C is more important than Value A. Thus, those trying to reconcile the Court’s precedent
would perceive, correctly, that a Court consisting of perfectly logical individuals had created an irrational precedential preference order.

Using Arrow’s Theorem to explain specific Court decisions, though, requires great caution. Most of the inconsistency that can be found in the Supreme Court’s decisions are attributable to other factors than the inevitability of cycling.

First, Arrow’s Theorem only speaks to cycling among the same group of voters. Arrow’s proof was motivated by, and limited to, an exploration of the, “methods of aggregating individual tastes which imply rational behavior on the part of the community....” For the Supreme Court, that “community” consists of the nine Justices hearing a particular case at a particular time. It does not take a mathematical proof to establish that different “communities” can reach decisions which are inconsistent with one another or which rely on inconsistent values and principles.

In *U.S. v. Morrison*, the Supreme Court, by a 5-4 vote, ruled that the provision of the Violence Against Women Act which provided a federal civil remedy for the victims of gender-motivated violence exceeded Congress’s power under the Commerce Clause. The Court held that Congress may not “regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce.” According to the Chief Justice Rehnquist’s
opinion for the Court: “In recognizing this fact we preserve one of the few
principles that has been consistent since the Clause was adopted.”

The four-Justice dissenting opinion authored by Justice Souter, disagreed.
He argued that, “Our cases... stand for the following [proposition]. Congress has
the power to legislate with regard to activity that, in the aggregate, has a substantial
effect on interstate commerce.”

If Chief Justice Rehnquist is correct, the earlier cases, such as those
upholding federal laws protecting civil rights and outlawing loan sharking, are
not inconsistent with *Morrison*; they simply presented an issue different from a law
banning violent, non-economic conduct. Even if Justice Souter is correct, the
“inconsistency” between *Morrison* and the earlier cases would not have been
caused by a lack of transitivity. Rather, a majority of the Court in the year 2000
merely had a different set of values (preserving a sphere of regulation for the
States) than those on earlier Courts (deferring to Congress’s view of the national
economic welfare). Similarly the “inconsistency” between the Court of the 1960's
and the 1990's, can be more readily attributed to a change in values of the voting
Justices, rather than to the inevitable cycling of values.

A second caution about using Arrow’s Theorem to explain Supreme Court
decision-making is that, because the Supreme Court does not vote by ranking
individual preferences, plurality opinions are generally not caused by cycling. Take the case of *Barnes v. Glen Theatre, Inc.*, holding that a law banning public nudity, including nude dancing, did not violate the First Amendment.\(^6^7\) Chief Justice Rehnquist wrote for three Justices that the statute was justified by the state's interest in protecting societal order and morality.\(^6^8\) Justice Scalia wrote that because the statute was a law of general applicability, it could not violate the First Amendment.\(^6^9\) Justice Souter wrote that the law as applied did not violate the First Amendment because of the State’s interest in combating the “secondary effects of adult establishments.”\(^7^0\)

A lower court, attempting to ascertain the meaning of *Barnes*, blamed the confusion on Arrow’s Theorem:

> In any case in which the Court does not produce a majority opinion, and there are several different issues on which the members of the Court disagree, it may follow that no single line of reasoning can be described that is both internally consistent and is subscribed to by a majority with respect to each premise and conclusion. *See generally* Kenneth Arrow, *Social Choice and Individual Values* (2d ed. 1963).\(^7^1\)

This is an example of a little knowledge being a dangerous thing. The problem in *Barnes* is not explained by Arrow’s Theorem. Since the Supreme Court does not engage in “head-to-head” voting between pairs of “several different issues,” there is no lack of transitivity in this case. There is no internal
inconsistency that becomes apparent when a different result is achieved by altering the order in which the Court voted. As with virtually all cases involving plurality decisions, it is simply the result of the Justices, faced with more than two options, dividing so that there is no majority. This is not Arrow’s Theorem but grade school arithmetic.

A final serious limitation on the applicability of Arrow’s Theorem to Supreme Court decision-making is that, for cycling actually to cause the Court to create conflicting precedents, the conflicting values could not all be raised initially in the same case. If forced to confront a conflicting preference order of principles at the same time, the lack of transitivity would create a split Court, unable to reach any majority opinion, and unable to create any precedent at all. Thus, the lack of transitivity will create a pool of inconsistent precedents only where different pairs of principles arise in separate cases raising unrelated issues. The lack of transitivity would then only cause a problem if those principles subsequently arise together in a case where somehow they are all relevant to deciding the same issue.

This requirement further reduces the likelihood that Arrow’s Theorem will actually be the cause of Court being able to “prove” anything it wants, “without fear of contradiction.”72 One commentator stated that looking for actual real-world examples of the problems caused by cycling was akin to “hunting for the Loch
Ness monster: appearances are few and far between, and some of the sightings are suspect. While no one has previously attributed any particular Court decisions to Arrow’s Theorem, I believe I have spotted the tell-tale footprints of the creature.

A rare example of a lack of transitivity can be seen in a trio of cases involving the following question: When multiple issues are presented to the Court, in what priority order should the issues be addressed? In a 1974 case, *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, the Supreme Court was faced with a challenge to the discontinuance of train service by a group of passengers. There were two primary issues: 1) Whether the Amtrak Act created a private cause of action; and 2) Whether the plaintiffs had standing under the Act. The Court stated that the first issue to be addressed was whether there was a private cause of action because, “[s]ince we hold that no right of action exists, questions of standing and jurisdiction become immaterial.”

In the 1984 case, *Block v. Community Nutrition Institute*, consumers challenged a milk market order of the Secretary of Agriculture. The Court of Appeals found that the consumers had constitutional standing but lacked standing under the relevant statute. The Supreme Court addressed the statutory standing issue first, and, finding that Congress did not intend to grant standing to consumers, declared there was no reason to decide the constitutional standing
Finally, in 1998, in *Steel Company v. Citizens for a Better Environment*, the Court decided an environmental case with two issues: 1) whether the relevant law created a private cause of action for “purely past violations”; and 2) whether the plaintiffs had constitutional standing. The Court ruled that the constitutional standing must be decided first, because, “Article III jurisdiction is always an antecedent question....”

We are thus left with a true lack of transitivity. When the issues were “private cause of action” and “statutory standing,” cause of action was decided first. When the issues were “statutory standing,” and “constitutional standing,” statutory standing was decided first. When the issues are “constitutional standing,” and “cause of action,” however, constitutional standing was decided first. The following chart reveals that this is the same cycling as in the ice cream scenario:

<table>
<thead>
<tr>
<th>Choice of Issues</th>
<th>Which Is Decided First?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cause of Action vs Statutory Standing</td>
<td>Cause of Action</td>
</tr>
<tr>
<td>Statutory Standing vs Constitutional Standing</td>
<td>Statutory Standing</td>
</tr>
<tr>
<td>Cause of Action vs Constitutional Standing</td>
<td>Constitutional Standing</td>
</tr>
</tbody>
</table>

The illogic of these results can be seen by considering a case which raises all
three issues: cause of action, statutory standing, and constitutional standing. Based on the three cases, how could a court know where to begin? For any issue you choose, there is another which has been found to be “antecedent”.

The fact that a true example of cycling has been identified does not mean that it is commonplace. In fact, the creation of this lack of transitivity required an extremely unusual situation where three related issues arose in separate pairings in different cases. Further, for lack of transitivity to be a problem, the three issues must finally arise in the same case. If only two of these issues recur, the Court will simply reach the same conclusion it did the first time that pairing occurred. Only if the Court is required to resolve the three issues in the same case will it be thwarted by the lack of transitivity. Since the above trio of cases were decided, however, no Supreme Court case has presented all three issues simultaneously. Arrow’s theorem stays in its quiver.

Significantly, however, the nature of Supreme Court decision-making can create a true type of irrationality, one quite distinct from the cycling described by Condorcet and Arrow. The next section provides a proof that irrationality is possible in any case with two distinct issues, and that such irrationality has occurred many times.
III. The Irrationality Theorem

Suppose I were to say, “I will take an umbrella either if it is raining now or the forecast calls for rain. It is both raining and the forecast says ‘rain today.’ Therefore, I won’t take my umbrella.” Such a decision would be considered irrational, because every condition for taking my umbrella was met yet I reached the opposite conclusion. Assuming there is no other reason for not taking my umbrella (i.e., I want to get wet or you are taking an umbrella for both of us), a rational person should not reach such a conclusion.

Unfortunately, though, groups like the Supreme Court can, and sometimes do, reach similar irrational conclusions. In several cases, one party garnered the support of a majority of the Justices on every relevant issue, and still lost the case. This irrationality is not merely aesthetically unpleasing. It creates an unworkable situation for lower courts attempting to apply Supreme Court precedent faithfully, and creates the real possibility of unfairness that disputes raising similar issues will be resolved differently. One recent case, Miller v. Albright, reveals both the structure of institutional irrationality and the confusion which inevitably follows.
A. *Miller* and Sex Discrimination

The primary claim in *Miller* was that a provision of the federal naturalization law amounted to unconstitutional sex discrimination. When only one parent of an illegitimate child is an American citizen, federal law creates different rules for obtaining citizenship for that child, depending on the sex of the citizen parent. Children born abroad and out of wedlock to citizen fathers, but not to citizen mothers, must obtain formal proof of a biological connection with the citizen parent by age 18. Lorelyn Penero Miller, who was born to an unmarried couple (her mother was a Filipino national and her father was an American citizen), was denied an American passport and filed suit in federal court.

There were three main issues in the case. First, did the federal courts have the power to grant the relief sought, a judgment declaring her a citizen of the United States? Second, since Miller was not treated differently because of her own sex, did she have standing to raise the claim of gender discrimination on behalf of her father? Third, did the law unconstitutionally discriminate on the basis of sex? For Miller to win the case, she needed to prevail on all three issues.

A badly fractured Court issued four major different opinions. Writing only for himself and Chief Justice Rehnquist, Justice Stevens ruled for the Government.
He stated that the Court had the power to declare Miller a citizen, and that she had standing to raise the sex discrimination issue. Nonetheless, he wrote that the law did not violate equal protection because it was based on real differences between male and female parents in “ensuring reliable proof of a biological relationship,” and not on the “accidental byproduct of a traditional way of thinking about the members of either sex.”

Justice Scalia, writing for himself and Justice Thomas, did not address whether the law violated the equal protection clause, but did find that Miller had standing to raise the sex discrimination claim for her father. Justice Scalia found for the Government, though, on the grounds that the Court had no power to issue the requested remedy, “conferral of citizenship on a basis other than that prescribed by Congress.”

Justice O’Connor, writing for herself and Justice Kennedy, also ruled for the Government. She wrote that in light of the “presumption against third-party standing,” Miller did not have standing to raise the claim that her father received differential treatment due to his sex. While not addressing the issue of whether the Court would have had the power to issue the requested remedy, O’Connor stated that the law could not pass the constitutional standard for sex discrimination: “Although I do not share Justice Stevens’ assessment that the provision withstands
heightened scrutiny, I believe it passes rational scrutiny for the reasons he gives for sustaining it under the higher standard.”

Justice Breyer wrote a dissenting opinion in which Justices Ginsburg and Souter joined. He wrote that Miller should win the case. First, because of her close relationship with her father, and the fact that the Government had successfully convinced the district court to dismiss her father from the suit, Miller had standing to raise his sex discrimination claim. Second, the Court had the power to grant the desired remedy, since the statute would automatically confer citizenship with the offending section removed. Finally, Breyer wrote that the law unconstitutionally discriminated based on sex.

Thus, the Court ruled that one party [the Government] should win the case even though a majority of the Justices apparently believed that the winning party was wrong on every relevant constitutional issue. By putting the votes of the different Justices in chart form, we can see this astounding result.
Had the same five Justices voted a) that Miller had standing to raise the sex discrimination claim; b) that the law unconstitutionally discriminated based on sex; and c) that the Court had the power to issue the requested remedy, Miller obviously would have won the case. It would be irrational for any individual Justice to have voted for Miller on all three issues, yet vote that she should lose the case. Yet that is precisely what the Court in its collective decision-making concluded.

The consequences flowing from the irrationality of a decision like *Miller* are more than intellectually unappealing. They create insurmountable difficulties for those wish to understand the law, especially those who are duty-bound to follow the Court’s interpretation of the Law of the Land.

Lower courts attempting to interpret *Miller* were unable to agree on how to
overcome its confusing outcome. Some courts described *Miller* as declaring that gender discrimination will likely never be constitutional. For example, in *Rainey v. Chever*, the Georgia Supreme Court struck down an inheritance law which prevented fathers from inheriting from illegitimate child if they had failed to provide support for the child. The Georgia court, in finding the differential treatment of fathers and mothers violative of equal protection, relied on the following characterization of *Miller*: “[The Supreme] Court agreed it would be unlikely that any gender classification based on stereotypes could survive heightened scrutiny.”

Other courts extracted the precisely opposite holding from *Miller*. In the words of one judge, “the [*Miller*] Court held that it is not an equal protection violation to impose certain requirements on children claiming citizenship through their fathers while not imposing those same requirements on children claiming citizenship through their mothers.”

Three years after *Miller*, the issue of the constitutionality of the naturalization law again reached in the Supreme Court. Unlike in *Miller*, though, the Court in *Nguyen v. INS*, was able to reach a majority decision. Because the father brought the suit in *Nguyen*, there was no issue as to standing to raise the claim of gender discrimination. The two Justices who had found no standing in
Miller, Justices O'Connor and Kennedy, parted ways in Nguyen, with Kennedy writing the majority opinion finding that the naturalization law did not constitute unconstitutional sex discrimination. Joining him were the only two Justices who had voiced that view in Miller [Stevens and Rehnquist], as well as the two Justices [Scalia and Thomas] who had based their votes on their conclusion that the federal courts lacked the remedial power to confer citizenship on a basis other than that contained in a statutory mandate.97

When Justice Kennedy in Nguyen described the votes of the various Justices in Miller he made an interesting omission. He described that splintered Miller vote as follows:

Four Justices, in two different opinions, rejected the challenge to the gender-based distinction, rejected the challenge to the gender-based distinction, two finding the statute consistent with the Fifth Amendment, (opinion of STEVENS, J., joined by REHNQUIST, C. J.), and two concluding that the court could not confer citizenship as a remedy even if the statute violated equal protection, (SCALIA, J., joined by THOMAS, J., concurring in judgment). Three Justices reached a contrary result, and would have found the statute violative of equal protection. (GINSBURG J., joined by SOUTER and BREYER, JJ., dissenting); (BREYER, J., joined by SOUTER and GINSBURG, JJ., dissenting). Finally, two Justices did not reach the issue as to the father, having determined that the child, the only petitioner in Miller, lacked standing to raise the equal protection rights of his father. (O'CONNOR, J., joined by KENNEDY, J., concurring in judgment).98
Amazingly, he did not mention that the opinion of “O'CONNOR, J., joined by KENNEDY, J.”, also contained the following statement which indicated that the law could not survive an equal protection challenge: “Although I do not share JUSTICE STEVENS' assessment that the provision withstands heightened scrutiny....”

Freed from that earlier conclusion, Justice Kennedy proceeded to find that the naturalization law did indeed meet the “mid-level” scrutiny test for sex discrimination. He found that the law was substantially related to the two important goals of 1) “assuring that a biological parent-child relationship exists” between the citizen parent and child, and 2) “ensur[ing] that the child and the citizen parent have some demonstrated opportunity or potential to develop ... a relationship that ... consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States.” According to Kennedy, insisting on gender-neutral rules for accomplishing these purposes would be, “[t]o fail to acknowledge even our most basic biological differences ....The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.”

Justice O’Connor authored an angry dissent. Speaking for four justices, she
derided Justice Kennedy’s opinion as relying on an anachronistic, “stereotype, to say that fathers who are present at birth lack an opportunity for a relationship on similar terms [with mothers.]”\textsuperscript{102}. She concluded her attack by focusing on the majority’s opinion sloppy use of precedent:

No one should mistake the majority's analysis for a careful application of this Court's equal protection jurisprudence concerning sex-based classifications. Today's decision instead represents a deviation from a line of cases in which we have vigilantly applied heightened scrutiny to such classifications to determine whether a constitutional violation has occurred.\textsuperscript{103}

Irrational decisions such as \textit{Miller} are not only confusing and potentially misleading, they are an inevitable result of collective decision-making. Even when each individual Justice is acting rationally, the nature of the Supreme Court’s decision-making will always create the possibility of irrationality. In the next section, I offer a formal, rigorous proof of the Irrationality Theorem.

B. PROOF OF THE IRRATIONALITY THEOREM

As with all proofs, it is necessary to begin by defining critical terms.

An “\textit{outcome}” is the ultimate determination as to which of two parties prevails. There are, of course, more than two possible dispositions of a case by the
Supreme Court. A lower court ruling can be “affirmed,” it can be “reversed and remanded,” or the case can be “dismissed.” In simple terms, however, a “dismissal” will favor one party or the other [usually the defendant in the original law suit]. Thus, if the defendant prevailed in the Court of Appeals, both a “dismissal” and an “affirmance” can be regarded as a victory. This can also be termed “winning the case.”

An “issue” is a question before the Court whose resolution can determine directly the outcome of a case. 104

Two issues are sequential if a) one of the issues (which can be termed the preliminary issue) must be resolved in order for the Court to reach the other issue (which can be termed the secondary issue); b) if one party prevails on the preliminary issue the Court reaches the secondary issue, but if the other party prevails on the preliminary issue, it wins the case; and c) whenever the secondary issue is reached by the Court, whoever prevails on that issue wins the case. 105

For example, a plaintiff must prevail on jurisdiction, the preliminary issue, before reaching the merits of the claim, the secondary issue. If the defendant wins on jurisdiction, the defendant wins without the need to discuss the merits. If the plaintiff wins on jurisdiction, the court will decide the merits, and whoever prevails on the merits wins the case. 106
Two issues are independent if they are not sequential. For example, if a law prohibiting unmarried people from using birth control is challenged on both equal protection and due process grounds, a finding of either violation results in the law being struck down.

If there are two issues, there are precisely four possible ways any individual Justice can vote on the issues [assuming a vote on both issues]. If we term the parties “Plaintiff” and “Defendant,” either the Plaintiff would win both issues; the Defendant would win both issues; the Plaintiff would win the first but lose the second; or the Plaintiff would win the second but loses the first. The latter two scenarios, where a different party prevails on one of the two issues, can be termed split votes. A “unified vote” occurs if there are at least two issues, and the same party prevailing on all of them.

Two issues are “distinct” if a) they are either sequential or independent, and b) for all possible combination of votes on the two issues, none would be irrational.107

A particular issue or outcome is a “loser” if its negation receives the votes of a majority of the Court. “Negation” means the logical dichotomous inverse: one party either wins or loses; a particular clause either applies or does not apply. Thus, if a majority of Justices vote that the Court had the power to declare
someone a citizen, the proposition that the Court does not have such power is a “loser.” 108

The “result” of the case is the resolution of the outcome and the relevant issues.

“Rational” means logically consistent.

“Irrational” means logically inconsistent.

An “irrational result” occurs if one party is a loser on every issue in a case and wins the case anyway. Obviously, if there were only one issue in a case, it would be irrational for one side to prevail on that issue and lose on the ultimate outcome. Similarly, if there were multiple issues, it would be irrational if one side prevailed on all of the issues and lost on the ultimate outcome. 109

We are now ready to state the Irrationality Theorem:

In a Court with at least three members, for any case with at least two distinct issues, there will always be the possibility that the result will be irrational, even when the vote of each individual Justice is acting in a rational manner.

The proof of the Irrationality Theorem is straight-forward:
We can begin with the simplest situation. Assume that there are two parties and two distinct issues. The two issues are either sequential or independent.

Assume first, that the issues are sequential, and that the preliminary issue (for example, jurisdiction), must be won by one party (the Plaintiff) in order to get the Court to consider the secondary issue (i.e. the merits). Therefore, if the Plaintiff loses on jurisdiction, the Defendant wins, even if the Plaintiff would have won a majority on the merits.

The only way for the Plaintiff to win the case is to win on both jurisdiction and the merits. If the Plaintiff wins on jurisdiction and loses on the merits, the Defendant will still win the case. Thus, under both split vote scenarios, the Plaintiff winning on jurisdiction and losing on the merits, or the Plaintiff winning on the merits, but losing on the jurisdiction, the Defendant wins the case. This can be generalized to the statement that if there are two distinct sequential issues, the same party will win each split vote permutation.

It can also be proven that if there are two distinct independent issues, the same party will win each split vote permutation. We begin by assuming the contrary, that a different party would win the case depending on which of the two split votes scenarios occurred. Since it does not matter who wins which scenario, we can chart this story by letting the Defendant win the case if he wins on Issue A
and loses on Issue B, and letting the Plaintiff win the case if she wins on Issue A and loses on Issue B.

<table>
<thead>
<tr>
<th>ISSUE B</th>
<th>Plaintiff wins Issue B</th>
<th>Defendant wins Issue B</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>P wins A</td>
<td>D wins A</td>
</tr>
<tr>
<td>2</td>
<td>P wins B</td>
<td>P wins B</td>
</tr>
<tr>
<td>3</td>
<td>P WINS CASE</td>
<td>D WINS CASE</td>
</tr>
<tr>
<td>4</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

This chart reveals that, in all four voting possibilities, whoever wins Issue A wins the case. In none of the possibilities does Issue B affect the outcome of the case. Because we have defined an issue as a question that “can determine directly the outcome of a case,” Issue B cannot be considered an issue. Thus, we have a contradiction, and our assumption that a different party would win the case depending on which of the two split votes scenarios occurred must be erroneous. Therefore, we can conclude that whenever there are two distinct independent issues, the same party will win the case for each split vote permutation.

Therefore, in any case with two distinct issues, sequential or independent, the same party will win the case each split vote permutation.

Next, let X be any even number, such that there are X + 1 Justices. This
ensures an odd number of voters. Note that \( \frac{1}{2} X \) is always less than a majority because \( \frac{1}{2} X \) is less than \( \frac{1}{2} (X +1) \). In particular, on the Supreme Court, there are \( 8 + 1 \) Justices, and \( \frac{1}{2} \) of 8, or 4, is less than a majority. On the other hand, \( \frac{1}{2} X + 1 \) is always enough for a majority (on the Supreme Court, \( 4 +1 =5 \), constituting a majority). Similarly, \( X \) is always sufficient for a majority (on the Court, 8 is a majority).

Assume we have two distinct issues. Because we have distinct issues, it is rational for an individual Justice to either vote in favor of the same party on both issues or split their votes. In one permissible breakdown of votes, \( \frac{1}{2} X \) of the Justices would vote for one split vote permutation, and \( \frac{1}{2} X \) of the Justices vote for the other split vote permutation. Note that it has already been proven that the same party [call him the Defendant] will win under either split vote alternative. Now, assume that the remaining Justice chooses the unified vote in which the other party [call her the Plaintiff] won. On the Supreme Court, that would be the same as if 4 Justices voted for one split vote permutation, 4 Justices vote for the other split vote permutation, and the remaining Justice voted for the unified vote under which the Plaintiff prevails.

With the vote of that remaining Justice, a majority of voters \( (\frac{1}{2} X + 1 \) or 5 \) have voted for the Plaintiff on each of the two issues. However, since the
Defendant wins on either split vote permutations, he wins the case because a majority of voters (X out of X +1, or 8 out of 9) have voted with split votes. Thus, the majority decision on each issue is in the Plaintiff’s favor, yet a majority has voted that the Defendant should win the case. Thus, the Court has reached an irrational result.\textsuperscript{112}

Of course, this does not mean that the Court will reach an irrational result in each case of two distinct issues. Instead, we can say for certain that whenever there are two distinct issues, there is the real possibility that the Court, collectively, will reach an irrational result.\textsuperscript{113}

C. WHEN WILL IRRATIONALITY ARISE?

Obviously, though, most cases do not produce an irrational result. Thus, the next step in our inquiry is to determine when an irrational result will occur.

Many commentators have tried to describe the conditions for irrationality. Because they did not recognize the inherently mathematical nature of the problem, they have inaccurately diagnosed the problem.

For example, John Rogers argues that the occurrence of irrationality requires a plurality and concurring opinion. He states that an irrational decision
“potentially arises every time a majority is made up of (1) a plurality, and (2) a concurrence that refuses to adopt a necessary portion of the plurality's analysis. This occurs whenever there is any substantive difference in the holdings of a plurality decision and a concurrence.”  

This is incorrect for several reasons. First, there need not be a plurality opinion in an irrational case. For example, consider an appeal of a criminal conviction with two issues: 1) Was the confession coerced? and 2) Was the search improper? The Defendants wins the case if she prevails on either issue:

<table>
<thead>
<tr>
<th></th>
<th>Was the Confession Coerced?</th>
<th>Defendant wins Confession Issue</th>
<th>Was The Search Improper?</th>
<th>Defendant wins Search Issue</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Plaintiff wins Search Issue</td>
<td>P wins Confession Issue P wins Search Issue P WINS CASE</td>
<td>Plaintiff wins Search Issue</td>
<td>D wins Confession Issue D wins Search Issue D WINS CASE</td>
</tr>
<tr>
<td></td>
<td>Defendant wins Confession Issue</td>
<td>D wins Confession Issue D wins Search Issue D WINS CASE</td>
<td>Defendant wins Search Issue</td>
<td>D wins Confession Issue D wins Search Issue D WINS CASE</td>
</tr>
</tbody>
</table>

Now suppose the nine justices are evenly split three ways, with three votes each for choices I, II, and III. There were therefore be 6 votes for the plaintiff to win the confession issue [I + III] and a different 6 votes for the plaintiff to win the search issue [I + II]. Nonetheless, the defendant would win the case with 6 votes
Thus, irrationality arises even without a plurality opinion.

Secondly, Rogers’ analysis is incorrect because it omits the fact that irrationality requires a dissent. If all the justices agreed on the outcome [boxes II, III, and IV], majorities would agree that the defendant should win the confession issue [II + IV], the search issue [III + IV] and the case with 6 votes [II + III + IV].

Maxwell Stearns is similarly incorrect in his conclusion that the same conditions that lead to the cycling (or lack of transitivity) described by Condorcet and Arrow lead to irrational results. In fact, cases with cycling need not end in an irrational result, and cases with irrational results need not contain cycling.

We can see a case with cycling that does not create an irrational result by returning to the Pentagon Papers hypothetical. The division between the Justices in that example created a “cycle” between three choices: the injunction “Violates Both Separation of Powers and Equal Protection”; the injunction “Violates only Separation of Powers but not Equal Protection”; and the injunction “Violates only Equal Protection but not Separation of Powers.” Nonetheless, because a majority of Justices voted that the newspaper should win on each issue [First Amendment and Separation of Powers] and all of the Justices voted that the newspapers should win the case, there was no irrational result. Thus, the conditions that lead to
cycling do not necessarily lead to irrational results.

Similarly, the conditions that cause irrational results need not lead to cycling. Consider this simplified version of the vote in *Miller*. To make the chart easier to follow, I have eliminated the separation-of-powers issue and assumed that Justices Scalia and Thomas would vote, as they did in the subsequent case of *Nguyen*, that Miller had standing but that the law did not violate equal protection. Thus, they would vote the same way Justice Stevens did. In such case, the voting breakdown would appear as follows:

<table>
<thead>
<tr>
<th>Author of Opinion and Number of Justices Joining the Opinion</th>
<th>Does Miller Have Standing To Raise Her Father’s Constitutional Claim?</th>
<th>Does Law’s Gender-Based Distinction Violate Equal Protection?</th>
<th>Does Miller Win?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stevens (2)</td>
<td>Yes (2)</td>
<td>No (2)</td>
<td>No (2)</td>
</tr>
<tr>
<td>Scalia (2)</td>
<td>Yes (2)</td>
<td>No (2)</td>
<td>No (2)</td>
</tr>
<tr>
<td>O’Connor (2)</td>
<td>No (2)</td>
<td>Yes (2)</td>
<td>No (2)</td>
</tr>
<tr>
<td>Breyer (3)</td>
<td>Yes (3)</td>
<td>Yes (3)</td>
<td>Yes (3)</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>Yes 7-2</strong></td>
<td><strong>Yes 5-2</strong></td>
<td><strong>No 6-3</strong></td>
</tr>
</tbody>
</table>

As in the actual case, this is an irrational result, because Miller prevailed on all relevant issues but lost the case. It is not, however, inevitable, that the opinions in this case represent the sort of cycling, or lack of transitivity, described by
Kenneth Arrow. To see why, it is necessary to examine the preference order for each group of Justices.

There are four possibilities among which the Justices can choose:

I. Standing and Equal Protection Violation;

II. No Standing and Equal Protection Violation;

III. Standing and No Equal Protection Violation; and

IV. No Standing and No Equal Protection Violation.

Because no Justice detailed a full preference order for all four options, I will make some guesses as to what they would be. First, since each opinion revealed a preference for one combination, it is certainly plausible to assume that the opposite combination may have been the least preferred of the author. Second, if we assume that, for ranking second and third-choice preferences, each of the Justices cared more about their preferred views on equal protection than on standing, the preference order chart can be completed as follows:
<table>
<thead>
<tr>
<th>Preference Order</th>
<th>Option 1</th>
<th>Option 2</th>
<th>Option 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Standing, Not Violate Equal Pro</td>
<td>No Standing, Violates Equal Pro</td>
<td>Standing, Violates Equal Pro</td>
</tr>
<tr>
<td>2</td>
<td>No Standing, Not Violate Equal Pro</td>
<td>Standing, Violates Equal Pro</td>
<td>No Standing, Violates Equal Pro</td>
</tr>
<tr>
<td>3</td>
<td>Standing, Violates Equal Pro</td>
<td>No Standing, Not Violate Equal Pro</td>
<td>Standing, Not Violate Equal Pro</td>
</tr>
<tr>
<td>4</td>
<td>No Standing, Violates Equal Pro</td>
<td>Standing, Not Violate Equal Pro</td>
<td>No Standing, Not Violate Equal Pro</td>
</tr>
</tbody>
</table>

There is no cycling, or lack of transitivity, in this case because one choice, “Standing and Violates Equal Protection” [in bold], prevails over all three remaining options in head-to-head votes. Five Justices [the groups represented by Breyer and O’Connor] prefer “Standing and Violates Equal Protection” to either “Standing and Not Violate Equal Protection” or “No Standing and Not Violate Equal Protection”. Seven Justices [the groups represented by Breyer and Stevens ] prefer “Standing and Violates Equal Protection” to either “No Standing and Violates Equal Protection.” Thus, Standing and Equal Protection Violation, is the Condorcet winner.\(^{119}\)

There is no cycling, despite the fact that the voting pattern resulted in an
irrational decision. Thus, we have seen that irrational results can arise even under conditions that do not lead to cycling. Since we have also seen that cycling can occur without an irrational opinion, we can conclude that the same conditions do not lead to both cycling and irrational opinions.

In order to determine the necessary and sufficient conditions for an irrational decision to occur, we must look at the voting breakdowns which lead one party being a loser on every issue but winning the case anyway. If there were only one issue, no rational Justice could vote in favor of one party on the issue, but not on winning the case. Thus, there must be at least two distinct issues. Next, there must be no majority opinion, since the rational reasoning of the majority opinion would preclude an irrational result. Because there is no majority opinion, assuming all the Justices are voting, the Court must divide among at least three opinions containing at least three different voting permutations.

The key to understanding how those votes must be divided to create an irrational opinion is the critical observation that when there are two issues the same party wins the case by winning either of the split votes. Combined with the more self-evident point that a different party wins the case for each of the two unified votes, we can see that one party will win the case by prevailing on either of the split votes or one of the unified votes.
To see how that will lead to a discovery of the conditions for creating irrational opinions, we can look at a chart showing two distinct issues. Assume that the parties are the Defendant and the Plaintiff and that the Defendant is the party who wins the case if there is a split vote. The chart of the voting possibilities would then be as follows:

<table>
<thead>
<tr>
<th>ISSUE A</th>
<th>ISSUE B</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plaintiff wins Issue A</td>
<td>Defendant wins Issue A</td>
</tr>
<tr>
<td>Plaintiff wins Issue B</td>
<td>Defendant wins Issue B</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Plaintiff wins Issue A</th>
<th>Defendant wins Issue A</th>
</tr>
</thead>
<tbody>
<tr>
<td>P wins A</td>
<td>D wins A</td>
</tr>
<tr>
<td>P wins B</td>
<td>P wins B</td>
</tr>
<tr>
<td>P WINS CASE</td>
<td>D WINS CASE</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Plaintiff wins Issue B</th>
<th>Defendant wins Issue B</th>
</tr>
</thead>
<tbody>
<tr>
<td>P wins A</td>
<td>D wins A</td>
</tr>
<tr>
<td>P wins B</td>
<td>D wins B</td>
</tr>
<tr>
<td>D WINS CASE</td>
<td>D WINS CASE</td>
</tr>
</tbody>
</table>

In our example, an irrational result is only obtained if the Defendant wins the case, but the Plaintiff receives a majority vote on each issue. An irrational result cannot be obtained in the reverse way, meaning that for our scenario, the Defendant wins on each issue but the Plaintiff wins the case. This is because the only voting permutation under which the Plaintiff wins is by winning both issues. Thus, the only way for the Plaintiff to win is by having a majority of Justices vote
that she wins on both issues [permutation I]. If that were to happen, the Plaintiff
would both win on each issue and win the case, so there would not be an irrational
result. Thus, were an irrational opinion to arise from this fact pattern, it must be
the Plaintiff who receives a majority vote on each issue while the Defendant wins
the case.

The Plaintiff wins on issue A only if adding the number of votes in the left
hand column [I + III] equal a majority. Similarly, the Plaintiff wins on issue B
only if adding the number of votes in the top row [I + II] equal a majority. More
generally, the party who must win on both issues in order to win the case will win
on each issue only if the sums from adding the votes for his only winning
permutation separately to each of the split decisions separately total a majority.

The Defendant wins the case by either winning one of the split votes [II or
III] or the unified vote for which he wins both of the issues [IV]. Thus, the
Defendant also wins the case if the sum of the votes in all three permutations is a
majority, if the votes in II + III + IV yield a majority of the votes cast. In more
general terms, if the sum of the number who select the split votes added to the
number who chose the unified vote which leads to the same result total a majority,
the party who wins the case when there are split votes wins the case.

We can now see the requirements for an irrational opinion. One party, the
party who needs to win on both issues in order to win the case, must win each issue by having the sums from adding the votes for his only winning permutation separately to each of the split decisions separately total a majority. The other party would win the case if the sum of Justices voting who select the split votes plus the unified vote which leads to his victory total a majority. 123

Thus, the Court reaches an irrational result if the following occur:

1. There are two distinct issues;
2. There is no majority opinion; and
3. The votes of the Justices are divided in such a way that:
   a. The combined votes for all of the winning permutations for which the party who prevails for a split decision total at least a majority {so that he wins the case}; and
   b. The sums obtained from adding the votes for the one winning permutation for the other party separately to each of the split decisions total at least a majority {so that she wins on each issue}. 124

From these requirements it further follows that if there is an irrational opinion, the only party who can win is the one who prevails when there is a split vote. In addition, there must be at least one dissenting vote for the losing party’s
unified vote permutation. There also must be at least one vote for each split vote permutation.  

D. THE IRRATIONALITY THEOREM IN ACTION

In the past 60 years, the Supreme Court has issued numerous irrational decisions, in addition to *Miller v. Albright*. In the interest of brevity, I will discuss one recent such case, *Eastern Enterprises v. Apfel*, in detail, and summarize the others in the appendix.

*Eastern Enterprises* involved a challenge to the retroactive application of the Coal Act. Pursuant to the Coal Act, which was enacted in 1992, Eastern Enterprises, a company that had sold its coal producing business in 1965, was required to pay at least 50 million dollars for the health benefits of former employees. There were two main issues in the case: 1) Did the retroactive application of the Coal Act constitute a “takings” in violation of the Takings Clause of the 5th Amendment; and 2) Did the retroactive application of the Coal Act violate the Due Process Clause?

There were three main opinions in the case. Justice O’Connor wrote the plurality opinion for herself, Chief Justice Rehnquist, and Justices Scalia and
Thomas, finding the Coal Act unconstitutional. Her opinion stated that the Coal Act violated the Takings Clause, because it required Eastern Enterprises to bear the substantial expense of, “lifetime health benefits for miners based on its activities decades before those benefits were promised.” While not definitively deciding the Due Process question, the opinion expressed strong, “concerns about using the Due Process Clause to invalidate economic legislation.”

Justice Kennedy wrote an opinion on behalf of himself alone. He stated that the Takings Clause was not violated by the Coal Act because it did not, “affect an obligation relating to a specific property interest.” Nonetheless, he stated the Coal Act was unconstitutional as violative of “due process restrictions against severe retroactive legislation.”

Finally, Justice Breyer wrote a dissent for himself and Justices Ginsburg, Stevens, and Souter. This opinion declared that the Coal Act was constitutional. Breyer agreed with Kennedy that the Takings Clause did not apply because the Coal Act did not affect “an interest in physical or intellectual property, but [imposed] an ordinary liability to pay money.” Breyer also found that Coal Act did not violated the Due Process Clause because it was not “fundamentally unfair” to impose liability, especially when Eastern Enterprises had, “until 1987, continued to draw sizable profits from the coal industry though a wholly owned
subsidiary.”

By putting the votes of the different Justices in chart form, we can see the extraordinary result: A majority of the Justices voted against Eastern Enterprises on both of the relevant issues, yet the company won the case. The following chart summarizes the reasoning and conclusion of each opinion in *Eastern Enterprises*:

<table>
<thead>
<tr>
<th>Author of Opinion and Number of Justices Joining the Opinion</th>
<th>Does the Takings Clause Apply To Imposition Of Retroactive Liability by the Coal Act?</th>
<th>Does the Retroactive Aspect of the Coal Act Violate Substantive Due Process?</th>
<th>Does Eastern Enterprise Win?</th>
</tr>
</thead>
<tbody>
<tr>
<td>O'Connor (4)</td>
<td>Yes (4)</td>
<td>No (4)</td>
<td>Yes (4)</td>
</tr>
<tr>
<td>Kennedy (1)</td>
<td>No (1)</td>
<td>Yes (1)</td>
<td>Yes (1)</td>
</tr>
<tr>
<td>Breyer (4)</td>
<td>No (4)</td>
<td>No (4)</td>
<td>No (4)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>No 5-4</td>
<td>No 8-1</td>
<td>Yes 5-4</td>
</tr>
</tbody>
</table>

Logic would indicate that if the only basis on which the Coal Act is challenged is the claim that it violates the Takings Clause and the Due Process Clause, and the law violates neither, it must be constitutional. Nonetheless, the aggregation of the differing opinions leads to the irrational result that the Court concludes the Coal Act is unconstitutional, even though a majority [albeit a different majority] of the Justices find it passes constitutional muster under each of the challenged provisions.
The consequences which have flowed from the *Eastern’s* irrationality have been more troubling than from *Miller*. It is indeed an understatement, as one Court of Appeals noted, that, “[t]he splintered nature of the Court makes it difficult to distill a guiding principle....”

Several courts have held that because there were five votes against finding a Takings Clause violation unless the Government action affected a specific property interest, the case “makes clear that plaintiffs must first establish an independent property right before they can argue that the state has taken that right without just compensation.” Other courts have “assumed,” the opposite, that the plurality's view that an extreme retroactive law can violate the Takings Clause simply be requiring a large payment, “is entitled to some persuasive precedential effect....”

Further, courts have split over whether *Eastern Enterprises* changed or reaffirmed the way of analyzing whether retroactive laws violate substantive due process. Some have concluded that there is a new, stricter test for retroactive laws: “To the extent that *Eastern* embodies principles capable of broader application, we believe that due process analysis encompasses the relevant concerns....Instead of relying solely on the length of the retroactivity, we assess the relationship of the retroactively imposed liability to the governmental interests asserted in its defense.” Other courts have viewed *Eastern Enterprises* in a diametrically
opposed manner, as confirming a reluctance to utilized the due process clause in such circumstances: “[W]e take seriously the *Eastern Enterprises* plurality's cautionary words about employing the Due Process Clause to invalidate economic legislation...”\(^\text{142}\)

Thus, the irrational decision of *Eastern Enterprises*, not surprisingly, has left an incoherent muddle in its wake. The next question is how should our legal system deal with irrational opinions.

**IV. What Should be Done about Irrational Decisions?**

The mathematical inevitability of irrational decisions has led to various schemes for preventing individual irrational decisions from arising. Unfortunately, in each case, the proposed cure is worse than the ailment.

**A. *Bush v Gore*: A Case of Disingenuous Voting?**

One way to avoid an irrational result if it one or more Justices change their vote so that the results of votes on the individual issues is consistent with the result of the case.\(^\text{143}\) Before discussing whether Justices should change votes, I will
examine a surprising instance where some Justices may secretly have done just that.

It is entirely possible that a fear of creating an irrational opinion contributed to the unusual alignment of votes in the case which marked the end of the disputed 2000 presidential election, *Bush v. Gore.* In *Bush v. Gore*, the Supreme Court was faced with three issues involving the Florida Supreme Court’s order for a manual recount of disputed ballots: 1) Whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, § 1, cl. 2, of the United States Constitution; 2) Whether the use of “standardless” manual recounts violated the Equal Protection Clause; and 3) If there were an Equal Protection violation, did the “safe-harbor” date provided in the federal election statute preclude the possibility of a constitutional recount. In order to stop the recount, the Court needed to rule “yes” on either a) question one, or b) both questions two and three.

In a *per curiam* opinion, joined by Chief Justice Rehnquist, and Justices Scalia, Thomas, O’Connor, and Kennedy, the Court ruled that the recount ordered by the Florida Supreme Court violated the Equal Protection Clause, because it failed to “satisfy the minimum requirement for non-arbitrary treatment of voters.” According to the *per curiam* opinion, the Florida recount would have been
conducted by various local election boards determining the validity of the ballots absent “specific rules designed to ensure uniform treatment.” Because different boards would likely use different standards, a ballot that was counted as valid in one county might well be considered invalid elsewhere. By permitting this differential treatment, stated the *per curiam* opinion, the Florida Supreme Court violated, “its obligation to avoid arbitrary and disparate treatment of the members of its electorate.” Because it concluded that there was not time for a revised recount before the so-called “safe-harbor” date provided in the federal election statute, the *per curiam* opinion concluded that no recount could be held.

The *per curiam* opinion did not address the merits of Article II claim, that the Florida Supreme Court had impermissibly established new standards for resolving Presidential election contests. Chief Justice Rehnquist, however, wrote a concurring opinion, joined by Justices Scalia and Thomas. While stressing that they “join the *per curiam* opinion,” they added that the Article II claim provided “additional grounds that require us to reverse the Florida Supreme Court’s decision.”

There were four dissenting Justices, Justices Stevens, Ginsburg, Breyer, and Souter. All four found no violation of Article II. Justices Stevens and Ginsburg also found no violation of equal protection. Justices Breyer and Souter did find
that the differential counting of ballots violated the equal protection clause, but both concluded that there was sufficient time for an appropriate recount.

Of all of the mysteries surrounding the *Bush v Gore* decision, one of the more provocative is why the three concurring Justices signed onto the *per curium* equal protection analysis, when it seems to be the sort of analysis they would normally oppose. After all, these are not Justices with a reputation for utilizing an expansive reading of the Equal Protection Clause.

As Justice Thomas wrote in a dissent to the 1996 case of *M.L.B. v. S.L.J.*, an opinion which was joined by Chief Justice Rehnquist and Justice Scalia: “[T]he Equal Protection Clause shields only against purposeful discrimination.” Thus, it is surprising to see these same three Justices put their names on the *per curium* opinion which apparently uses a heightened form of scrutiny despite the fact that no particular group in the case was subject to either intentional discrimination or inevitable harm.

In addition, the standard announced in the *per curium* opinion, was not one of the traditional ones used by the Court. In fact, the standard that government must “avoid arbitrary and disparate treatment of the members of its electorate,” had never been utilized previously by the Court in a voting rights case. The three concurring Justices have often displayed downright hostility for what they term
“newly minted” standards.\textsuperscript{152} Nonetheless, there was no a word of criticism from the three that the \textit{per curium} opinion had created and applied such a newly minted standard.

The mystery, then, is why the three signed onto the \textit{per curium} opinion if it contained constitutional analysis which they would normally oppose vigorously. The mystery is heightened by the fact that the same ultimate result would have been reached even had they not signed onto the reasoning of the \textit{per curium} opinion. As stated earlier, in order to reverse the decision of the Florida Supreme Court and end the recounting process, it would have been sufficient to use either the Equal Protection Clause or Art. II, § 1, cl. 2. Thus, if the three who signed the concurring opinion had voted for the \textit{judgement} of reversing the Florida court, but done so solely on the Art. II, § 1, cl. 2 rationale described in their opinion, the result of the case would have been the same: five votes to end the recount immediately.

The solution to the mystery may be that Justices Rehnquist, Scalia, and Thomas feared that taking such a path would have led to a perception that the President of the United States had been “selected” by an irrational decision. Indeed, an irrational decision would have arisen had the other two Justices who signed the \textit{per curium} opinion, Justices Kennedy and O’Connor, explicitly rejected
their Article II argument. Such a rejection is far from fanciful. Not only is Justices Kennedy and O’Connor disagreement implicit in the silence of the *per curium* opinion on that issue, reporters covering the Supreme Court disclosed that the two Justices refused to sign an opinion drafted by Chief Justice Rehnquist which focused on the Article II claim.

Thus, if Justices Kennedy and O'Connor supported the Equal Protection claim and rejected the Article II claim, while Justices Rehnquist, Scalia, and Thomas supported the Article II claim but rejected the Equal Protection argument, the result would have been the classic irrational decision: a majority voting in favor of respondent Gore on every relevant issue, yet the Court ruling in favor of petitioner Bush. The following chart reveals this alternative result:

<table>
<thead>
<tr>
<th>Author of Opinion and Number of Justices Joining the Opinion</th>
<th>Did the Florida Supreme Court Establish New Election Standards in Violation of Art. II?</th>
<th>Did the Use of “Standardless” Recounts Violate Equal Protection?</th>
<th>Should Recount be Stopped?</th>
</tr>
</thead>
<tbody>
<tr>
<td>O’Connor + Kennedy (2)</td>
<td>No (2)</td>
<td>Yes (2)</td>
<td>Yes (2)</td>
</tr>
<tr>
<td>Rehnquist (3)</td>
<td>Yes (3)</td>
<td>No (3)</td>
<td>Yes (3)</td>
</tr>
<tr>
<td>Breyer (2)</td>
<td>No (2)</td>
<td>Yes (2)</td>
<td>No (2)</td>
</tr>
<tr>
<td>Stevens (2)</td>
<td>No (2)</td>
<td>No (2)</td>
<td>No (2)</td>
</tr>
<tr>
<td>TOTAL</td>
<td><strong>No 6-3</strong></td>
<td><strong>No 5-4</strong></td>
<td><strong>Yes 6-3</strong></td>
</tr>
</tbody>
</table>
Considering the outcry at the decision as written, one can only imagine the ridicule the Court would have endured had it issued a demonstrably irrational opinion. Thus, it is certainly a plausible solution to our mystery to conclude that, perhaps, Justices Rehnquist, Scalia, and Thomas chose what they saw as the lesser of two evils: signing onto an equal protection analysis with which they did not fully agree rather than issue an irrational decision to resolve the most politically volatile case in at least half a century.

The above interpretation of *Bush v Gore* illustrates one way to avoid irrational decisions: Justices can mask their true views and sign onto an opinion with whose conclusion on a particular issue they disagree. It would certainly be problematic, however, for the Court to adopt a practice of Justices secretly voting against their conscience on a particular issue in order to prevent an irrational decision.

It is of fundamental importance that Justices be honest about their reasoning. As one federal district judge has declared: “The requirement that the judiciary be candid is perhaps absolute.”

The [hopefully] most obvious reason for this requirement is that there is a “moral obligation of candor.” One should not need string cites to establish that Justices should not try to deceive the readers of their opinions.

There are also numerous pragmatic reasons why Justices should not pretend to hold different opinions than they do in reality. Firstly, candor promotes “the public
accountability of judges and to stimulate judicial reflection and self-control.” One of the main benefits of published opinions is that they prevent Justices from basing decisions on “unprincipled” grounds. In the words of Professor Deborah Hellman: “Candor thus acts as a prophylactic; the requirement of publicity insures that the reasons on which decisions are based are at least minimally acceptable to the public.... [Publicity] will prevent the judge from endorsing views that others perceive as wildly illegitimate.”

A second pragmatic argument against judicial subterfuge is that such deception is bound to be revealed, or at least suspected, sooner or later. The belief that Justices have not been honest in their published opinions, “destroys their credibility.”

Additionally, such a disingenuous vote creates a misleading precedent. Taking the Bush v Gore interpretation as an example, imagine the dilemma facing a lower court the next time there is an equal protection challenge to a recount decision. Technically, lower courts must follow the teaching of the majority’s per curiam opinion, and utilize its novel standard that to be constitutional a state must, “avoid arbitrary and disparate treatment of the members of its electorate.” When that lower court is reviewed, though, that standard might be rejected by the same Court that announced it. If indeed Justices Rehnquist, Scalia, and Thomas did not truly agree with the per curium’s equal protection analysis, they might well vote with
Justices Stevens and Ginsburg and return to the traditional lower equal protection standard of rational review. We would then have the unfortunate irony of an unequal application of the equal protection clause.

B. The Limits of Disclosed Vote Switching

Some of these problems might be mitigated were a Justice to declare openly that, despite an individual determination of the relevant issues that lead to one party winning the case, he or she was voting for a judgement in which the other party prevails. Similar candor has been seen in several instances where a Justice switched his or her vote to produce a majority judgment in a case which presented three possible judgments — affirmation, reversal, or remand — and none would have otherwise received a majority vote.\textsuperscript{165}

But Justices can also “switch votes” to prevent the Court’s opinion from being irrational.\textsuperscript{166} Consider the case of \textit{Pennsylvania v. Union Gas Co.}\textsuperscript{167} There were two issues in that case: 1) Did Congress intend the Superfund law to permit private suits against the states for damages; and 2) Does Congress have the power, under the Commerce Clause to permit such suits? Union Gas needed a positive answer to both of these questions to win the case. Indeed, a majority of Justices found that Congress did intend the law to permit such private suits, and a different majority found that Congress had the requisite power. However, there were
five different Justices who individually believed either that Congress did not intend the law to permit such private suits, or that Congress did not have the power to do so. Because either view would lead to Pennsylvania winning the case, had all the Justices voted for a judgement consistent with their individual reasoning an irrational result would have occurred: Union Gas would have prevailed on every issue, but Pennsylvania would have won the case.¹⁶⁸

Justice White, though, stated that despite the fact that he believed Congress did not intend the law to permit such private suits, he would defer to the majority who voted that it did.¹⁶⁹ Thus, because White believed that Congress would have the Constitutional authority to pass such a law, he “switched sides” and voted with four other Justices that Union Gas should win the case. Accordingly, there was a majority vote in favor of Union Gas. White’s switch averted an irrational result, since now Union Gas prevailed on every issue and also won the case.¹⁷⁰

Including Pennsylvania v. Union Gas, there have been only three cases, where a Justice switched votes and prevented the Court from issuing an irrational opinion.¹⁷¹ Doubtlessly, such a switch has the virtue of ensuring that there is a “rational” result in a particular case, and helps create clear holdings on the underlying issues of the case.¹⁷²

Nonetheless, there are several problems with Justices engaging in such vote-switching. Firstly, the Justice who switches votes to prevent a collective irrational
result, will, by that very act, be guilty of irrational reasoning. Thus, Justice White, in *Union Gas*, ended up declaring, in effect, both that Congress did not intend the Superfund law to permit private suits against the states for damages but that Pennsylvania could still be sued under the Superfund law.

A second problem is that the vote-switching Justice effectively controls the outcome of the case unilaterally. This is not the same as a “swing” Justice, who affects the outcome of a case when his or her determination of the appropriate disposition of a particular issue coincides with one group of Justices or another. Rather, vote switching permits one Justice to control the outcome by the individual selection of one voting procedure or another. As Professors Kornhauser & Sager note, such procedural decisions “ought to be a matter of articulate and reflective practice, not the private impulse of each Justice.”

Finally, there is no obvious principle for when a Justice should switch votes. It has been suggested that in the few vote-switching cases, individual Justices were motivated by the “precedential importance” of the issue which became the Court’s holding due to their vote. Not only is it improper for a single Justice to manipulate voting procedures to reach a personally desired outcome, such a practice could easily lead to retaliatory vote switching to defeat the scheme. For example, in *Union Gas*, Justice Scalia voted that Congress did intend the law to permit such private suits, but that Congress lacked the requisite Constitutional power. If Justice Scalia
cared more about the constitutional than the statutory issue, and had felt that Justice White was inappropriately “gaming the system,” he could have altered his vote to find that Congress, in fact, did not intend the law to permit private suits. This second vote-switch would create a majority for the proposition that there was no statutory authority for the suit, and the Court would thus not reach the constitutional issue. We should not welcome a system that permits, let alone encourages, such unprincipled machinations.178

C. The Futility of Changing Voting Protocols

Some scholars have argued that the problem of group irrationality should be dealt with by having the Justices decide cases by voting directly on the individual issues in each case, rather than on merely the outcome.179 Using the terminology of David Post and Steven Salop, they would prefer that Justices use “issue voting,” rather than the current system of “outcome voting.”180

One advantage of issue voting is that when there is a case involving collective irrationality, the Court will still be able to produce usable precedent. For example, if the Court in *Miller* had voted by issue, there would have been a clear-cut 7-2 majority for finding standing, at least a 5-2 majority for finding that the Court have the power to grant the relief requested, and a [probable] majority of at least 5-2 in favor of striking down the distinction as unconstitutional sex-based discrimination. These
three holdings would then be treated as “usable precedents,” for lower courts as well as future Supreme Court decisions.

There are several problems with issue voting, however. One is that the definition of what is an “issue” is often not self-evident. Frequently, there will be more than one way to define the relevant issues, and to define the “sub-issues” that need to be addressed.\textsuperscript{181} For example, the question of whether a statute should be interpreted in a way which leads to a particular party winning a case might be subdivided into narrower questions of whether a) the plain language of the statute or (b) whether the statute’s legislative history mandate an interpretation favorable to that party.\textsuperscript{182}

A second problem with issue-voting is that it would not prevent the problem of thwarting the will of a majority of the Court. Specifically, in \textit{Miller}, a majority of the Justices believed that the plaintiff should lose her law suit, yet under issue-voting, the Court would have been forced to declare her the winner. In fact, issue voting can lead to a situation where not only is the will of the majority thwarted, the will of every single voting Justice is frustrated.

To illustrate, consider a hypothetical of an American citizen, captured in Afghanistan, who is held without a hearing as an enemy combatant.\textsuperscript{183} Assume that in order for the Government to prevail, Congress must have authorized the detention. Next, assume that the Government has declared that it will have to release the
detainee if ordered to hold a hearing, because such a hearing would require the disclosure of material harmful to national security. Thus, in order for the Government to continue to hold the detainee, the Court must find that when Congress authorizes a detention, no Due Process hearing is required. Finally, in order to continue holding the detainee, the Government must show that the detention does not violate the Geneva Convention.

Now, assume that the Court is divided into three camps. Justice O’Connor [representing herself and Justices Rhenquist, Kennedy, and Breyer] votes:

1) That Congress authorized the detention;

2) That when Congress authorizes a detention, a Due Process hearing is required; and

3) That detention does not violate the Geneva Convention.

Thus, four Justices vote that the detainee must be released because a hearing before a neutral forum must be held for the detention to be valid.

Next, assume that Justice Scalia [representing himself and Justices Stevens and Thomas] votes:

1) That Congress did not authorize the detention;

2) That when Congress does authorizes a detention, a Due Process hearing is not required; and

3) That the detention does not violate the Geneva Convention.

Thus, because they concluded that Congress did not authorize the detention,
these three Justices vote that the detainee must be released.

Finally, assume that Justice Souter [representing himself and Justice Ginsburg] votes:

1) That Congress did authorize the detention;

2) That when Congress does authorize a detention, a Due Process hearing is not required; and

3) That the detention does violate the Geneva Convention.

Thus, because they concluded that the detention does violate the Geneva Convention, these two Justices vote that the detainee must be released.

In our current system of outcome voting, as all of the Justices find that the detention is unlawful, the detainee must be released.

If the Court utilized issue-voting, though, the case would turn out very differently. A majority of Justices would have found for the Government on each issue:

1) Congress authorizes the detention
   O’Connor (4) + Souter (2) = 6 votes

2) A Due Process hearing is not required
   Scalia (3) + Souter (2) = 5 votes

3) The detention does not violate the Geneva Convention
   O’Connor (4) + Scalia (3) = 7 votes

In a system utilizing issue voting, the Government would win the case because it prevailed on each issue. This would lead to the remarkable situation where the
detainee who brought the case would remain in detention, despite the fact that every single Justice believed he should be released. If we were not to term such a result irrational, we would certainly have to term it unjust. 184

The reason that both the traditional outcome voting and the alternative issue voting both can create such illogical and arguably unjust results is that, under either regimen, a disconnect can arise between the group’s collective reasoning [as reflected by majority vote on individual issues] and the group’s collective result [as reflected in its majority vote on the result]. It is not the voting protocol that causes the problem but the very nature of collective decision-making. Faced with this inevitability, we are called upon to consider what techniques can best ameliorate the problem.

Some commentators have put forth more complex voting protocols. For example, Professors Kornhauser and Sage proposed the use of “metavote” 185 Under their plan, Justices faced with an irrational decision would vote on whether to use issue voting or outcome voting for that particular case. The primary advantage to such a system is that the Justices would decide together which was more important to preserve in that case: the judgment or the resolution of the issues. 186

There are several problems with the metavote proposal. First, the same divisions within the Court which caused the irrationality will frequently render the metavote meaningless. To return to our discussion of Eastern Enterprises, it would
be surprising if the Justices who were troubled enough by the retroactive application of the Coal Act to vote that it was unconstitutional, would opt during a “metavote” for issue voting, which would not only permit the Act to stand but would create holdings that such retroactivity did not offend either the Takings Clause and the Due Process Clause.

Additionally, as Professor Jonathan Nash pointed out, because there are multiple factors to consider during a metavote, the metavote could lead to an irrational result.\textsuperscript{187} In other words, a series of votes could lead to a [different] majority voting that every factor for outcome voting had been met but that another majority also voted for the result of issue voting. Thus, the metavote is subject to the same dangers as the current system.

Nash has proposed an even more complicated hybrid system. Nash attempts to draw a “bright line” between what he terms a “pure question of law” and an “application of law to fact.”\textsuperscript{188} At the risk of over-simplifying his proposal, Nash suggests that outcome-based voting be used to establish the appropriate legal standard governing a particular cause of action, and then each application of law to fact under that standard would be determined separately, using issue-based voting.\textsuperscript{189} If there is a disagreement in the Court over which voting protocol to use, a “true metavote may be required to resolve the controversy.”\textsuperscript{190}

There are many problems with this proposal as well. First, the line between a
“pure question of law” and an “application of law to fact” is not especially bright.

Remember that one of the issues in *Miller v. Albright*, was whether Equal Protection was violated by a Federal law which imposed different rules for obtaining citizenship for illegitimate children who had only one American citizen parent, depending on the sex of the citizen parent. Justice Stevens, stated that such distinctions are constitutional, because they meet the standard that “normally governs gender discrimination,” which he describes as “substantially related to important governmental objectives”. He cites for support of this standard *United States v. Virginia*. By contrast, Justice Breyer, citing the same case, stated that the law violated equal protection because it lacked, “the ‘exceedingly persuasive’ support that the Constitution requires.” It is not self-evident whether the issue of whether the law violates Equal Protection is a “pure question of law” – determining the appropriate standard for judging gender discrimination cases – or an “application of law to fact” – applying an agreed upon standard to the facts of the case.

It is not even clear that there would be agreement as to what are the issues being voted upon. Nash states that the Supreme Court’s opinion in *Apodaca v. Oregon*, “ultimately raised only a single issue of pure law - whether the Constitution requires a unanimous jury verdict for a criminal conviction to stand in state court.” By contrast, every Justice voting in the case saw that the question required the resolution of two distinct issues [or subissues]: 1) Whether the same
standard applies to state as to federal criminal trials; and 2) Whether a unanimous jury was required in federal criminal trials.\textsuperscript{197}

Finally, one would not expect any court, let alone the Supreme Court, to adopt a voting protocol as complicated as that proposed by Jonathan Nash. Especially since there would still be irrational decisions under even that plan,\textsuperscript{198} it is unlikely that courts will turn to this proposal to resolve the problem of irrational decisions.

Thus, while there are benefits to each proposed change in voting protocol, they are not the solution to the problem of irrational decisions. The problem which results from the very structure of judicial decision-making, then, is destined to remain.

D. Irrational Solutions

1. Tinkering Around the Edges

Even though it is impossible to eliminate irrational opinions, there are certain steps that can be taken at the margins to make things better. One step that would help would be if the Justices who saw that an irrational opinion was looming, decided to avoid discussing issues that were logically unnecessary for them to decide when reaching their own decision. In \textit{Miller v. Albright}, for example, once Justices O’Connor and Kennedy had decided that the plaintiff lacked standing, their vote was
going to be that she lose the case. There was no need for them to discuss the merits of the sex discrimination claim.\(^{199}\) The five votes in her favor on the merits of her claim could not be considered a “holding” because the plaintiff lost the case. In fact, as it turned out, the Court eventually reached the opposite conclusion on the sex discrimination claim. Thus, had O’Connor and Kennedy not discussed that claim in \textit{Miller}, there would have been no change in the result of the case \textit{[the plaintiff still would have lost]}, and no change in the substantive law \textit{[since no “holding” was created in Miller]}. There would, however, not have been an irrational opinion, since there would not have been the enough votes on all the relevant issues to create a majority in the plaintiff’s behalf on all of those issues. Had they not voiced their opinion unnecessarily, there would not have been an irrational Court decision. Put differently, when dealing with irrational opinions, “The better part of valor is discretion.”\(^{200}\)

Another suggestion for dealing with irrational opinions focuses on those issued by lower-level appellate courts. John Nash proposes that the Supreme Court should be especially willing to accept a petition for certiorari so it can review irrational opinions by lower appellate courts.\(^{201}\) Indeed, it would certainly be beneficial if a higher court could eliminate the inevitable confusion sowed by irrational opinion. That, of course, does not deal with the Supreme Court’s own irrational opinions.
Ultimately, we must face the reality that as long as we utilize multi-member courts, it is impossible to eliminate the possibility of irrational appellate opinions. Rather than rail at the dilemma wrought by the imperfections of our system, though, we should recognize that these imperfections are simply part of the inherent limitations of humanity. Law is certainly not the only intellectual discipline to confront such limitations.

For example, chaos theory is based on the realization that there are certain relatively basic systems in biology, physics, and mathematics for which long-range prediction is impossible. The difficulties posed by chaos theory can be illustrated by the calculation of the population density of a tiny insect which increases when food is plentiful but decreases during times of overcrowding. Because of a phenomena known as “sensitive dependence on initial conditions,” even the slightest errors in calculating the starting density will, over time, lead to extraordinarily erroneous results. Moreover, any change along the way will render the initial prediction meaningless. This is sometimes termed the “butterfly effect,” because an act as seemingly insignificant as a butterfly flapping its wings can change the weather around the world (though of course, we can never know in what way). The humbling lesson of chaos theory is that such systems are destined to
remain unpredictable. As one theorist noted: “We cannot blame this failure on the influence of unknown factors, because there are none. It is rather the result of our own terminal inability to measure or represent the present with infinite precision.”

A similarly humbling experience can be derived from an examination of the famous Heisenberg Uncertainty Principle from quantum physics. In simple terms, Werner Heisenberg discovered in 1927 that it was impossible to determine precisely both the position and the momentum of a subatomic particle, such as an electron, because the light needed to identify the position of the particle will alter its momentum. Thus, we can say that the more we know about the particle’s position, the less we know about its momentum. Since one needs to know both the position and momentum of a particle to determine where it will be in the future, the Uncertainty Principle means that we can never predict precisely the future location of these particles. As Steven Hawking wrote: “[O]ne certainly cannot predict future events exactly if one cannot even measure the present state of the universe precisely.” Once again, this is not a result of a failure of human effort but a limitation imposed by nature.

A final example of such limitations is Kurt Gödel’s “Incompleteness Theorem.” In 1928, David Hilbert, one of the leading mathematician of the 20th Century, issued a challenge to the mathematical community. He wanted someone to create a “complete” formal logical system, one that would be able to prove or
disprove any mathematical hypothesis. Two years later, Gödel, announced an unexpected end to the challenge. Gödel had proven that no such system could ever be created, that within any system of the kind envisioned by Hilbert, there would always be true mathematical statements that were unprovable. Such systems were fated to be “incomplete.” There is no amount of effort which will eliminate this incompleteness. In the words of mathematician Rudy Rucker, “Our world is endlessly more complicated than any finite program or any finite set of rules.”

The same limitations on perfectability that are seen in chaos theory, the Uncertainty Principle, and the Incompleteness Theorem, are inherent in irrational opinions. Whenever a group makes a decision based on the individual members’ assessment of multiple issues, there exists the possibility that the group will issue an irrational opinion. However, just as chaos theory, the Uncertainty Principle, and the Incompleteness Theorem do not prevent scientists and mathematicians from making important discoveries and solving difficult problems, neither will irrational opinions prevent our courts from resolving most cases rationally.

When an irrational opinion does arise, then, we can simply view it as a lesson in human limitations, a particularly important lesson for judges and lawyers. In the words of Imre Lakatos, a philosopher of science. “Why not honestly admit .... fallibility, and try to defend the dignity of fallible knowledge from cynical scepticism, rather than delude ourselves that we can invisibly mend the latest tear in
the fabric of our ‘ultimate’ intuitions?”214

V. CONCLUSION

The key to understanding truly irrational court opinions is to recognize the confounding aspects of group decision-making. As one commentator noted: “[A]n analyst errs in treating appellate court decisions ‘as if they were the act of a single judge.’”215

Nonetheless, not every problem that afflicts group decision-making in theory will be relevant to our judicial system. Thus, Arrow’s Impossibility Theorem will not be a serious source of problem for our Courts.

By contrast, we cannot escape the possibility of the irrationality opinion in which of a majority of Justices vote that one party prevails on all relevant issues but still loses the case. Such irrational opinions have been issued before, and will surely be delivered again. They will stand as testaments to the inevitable imperfections of human endeavors, including our judicial system.
APPENDIX

ADDITIONAL IRRATIONAL CASES


   A majority of the Justices voted that a state ban of all use of sound violated the First Amendment. A different majority voted that the New Jersey law in question did ban all sound trucks. Nonetheless, the Court found the law constitutional.

<table>
<thead>
<tr>
<th>Author of Opinion and Number of Justices Joining the Opinion</th>
<th>Does a State Ban on all Sound Trucks Violate the First Amendment?</th>
<th>Does the N.J. Law Ban All Sound Trucks?</th>
<th>Does the N.J. Law Violate the First Amendment?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reed (3)</td>
<td>Yes (3)</td>
<td>No (3)</td>
<td>No (3)</td>
</tr>
<tr>
<td>Frankfurter (1)</td>
<td>No (1)</td>
<td>Not Say (1)</td>
<td>No (1)</td>
</tr>
<tr>
<td>Jackson (1)</td>
<td>No (1)</td>
<td>Yes (1)</td>
<td>No (1)</td>
</tr>
<tr>
<td>Black (3)</td>
<td>Yes (3)</td>
<td>Yes (3)</td>
<td>Yes (3)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>Yes 6-2</td>
<td>Yes 4-3</td>
<td>No 5-3</td>
</tr>
</tbody>
</table>

Congress passed a law vesting federal district courts with diversity jurisdiction over suits between citizens of States and the District of Columbia. The only two possible constitutional bases for this law were Article I and III. A majority of the Justices voted that Article I did not give Congress this power, and a different majority voted that Article III did not give Congress this power. Nonetheless, a majority of the Court voted that Congress did have this power.

<table>
<thead>
<tr>
<th>Author of Opinion and Number of Justices Joining the Opinion</th>
<th>Does Art I permit Congress to vest diversity jurisdiction over suits between citizens of States and the District of Columbia?</th>
<th>Does Art III permit Congress to vest diversity jurisdiction over suits between citizens of States and the District of Columbia?</th>
<th>Can Congress to vest diversity jurisdiction over suits between citizens of States and the District of Columbia?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jackson (3)</td>
<td>Yes (3)</td>
<td>No (§)</td>
<td>Yes (3)</td>
</tr>
<tr>
<td>Rutledge (2)</td>
<td>No (2)</td>
<td>Yes (2)</td>
<td>Yes (2)</td>
</tr>
<tr>
<td>Vinson (2)</td>
<td>No (2)</td>
<td>No (2)</td>
<td>No (2)</td>
</tr>
<tr>
<td>Frankfurter (2)</td>
<td>No (2)</td>
<td>No (2)</td>
<td>No (2)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>No 6-3</td>
<td>No 6-3</td>
<td>Yes 5-4</td>
</tr>
</tbody>
</table>

A defendant was challenging his conviction for willful failure to pay taxes on funds which he had acquired through illegal embezzlement. A majority of Justices voted that embezzled funds must be treated as taxable income, and a different majority voted that the defendant willfully failed to pay taxes on those funds. Nonetheless, the Court voted that the defendant could not be tried for willfully failing to pay taxes on the funds.

<table>
<thead>
<tr>
<th>Author of Opinion and Number of Justices Joining the Opinion</th>
<th>Are Embezzled Funds taxable income?</th>
<th>Did the defendant willfully refuse to pay taxes on Embezzled Funds?</th>
<th>Can the defendant be charged with failure to pay taxes on Embezzled Funds?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Warren (3)</td>
<td>Yes (3)</td>
<td>No (3)</td>
<td>No (3)</td>
</tr>
<tr>
<td>Clark (1)</td>
<td>Yes (1)</td>
<td>Yes (1)</td>
<td>Yes (1)</td>
</tr>
<tr>
<td>Harlan (2)</td>
<td>Yes (2)</td>
<td>Yes (2)</td>
<td>Yes (2)</td>
</tr>
<tr>
<td>Douglas (2)</td>
<td>No (2)</td>
<td>Yes (2)</td>
<td>No (2)</td>
</tr>
<tr>
<td>Whitaker (1)</td>
<td>No (1)</td>
<td>No (1)</td>
<td>No (1)</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>Yes 6-3</td>
<td>Yes 5-4</td>
<td>No 6-3</td>
</tr>
</tbody>
</table>

The NLRB ordered an employer to provide a list of its employees’ names to a union seeking to organize the employees. In an earlier adjudication with different parties, the NLRB had announced a prospective “rule” that employers needed to provide such a list. A majority of the Justices voted that the earlier rule was invalid as the NLRB did not have discretion to promulgate rules in adjudicatory proceedings. A majority also ruled that without formal rule-making proceedings, such a requirement could not be imposed in the instant case. Nonetheless, the Court voted to require the employer to make the employee list available.

<table>
<thead>
<tr>
<th>Author of Opinion and Number of Justices Joining the Opinion</th>
<th>Does NLRB rule, announced in adjudicatory proceeding, that employers give list of employees to union bind future employers?</th>
<th>Can NLRB impose requirement that employers give list of employees to union in this case without rule-making procedures?</th>
<th>Must Employer give list of employees to union?</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Fortas (4)</em></td>
<td>No (4)</td>
<td>Yes (4)</td>
<td>Yes (4)</td>
</tr>
<tr>
<td><em>Black (3)</em></td>
<td>Yes (3)</td>
<td>No (3)</td>
<td>Yes (3)</td>
</tr>
<tr>
<td><em>Harlan (1)</em></td>
<td>No (1)</td>
<td>No (1)</td>
<td>No (1)</td>
</tr>
<tr>
<td><em>Douglas (1)</em></td>
<td>No (1)</td>
<td>No (1)</td>
<td>No (1)</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>No 6-3</td>
<td>No 5-4</td>
<td>Yes 7-2</td>
</tr>
</tbody>
</table>

A criminal defendant was convicted based, in part, on hearsay evidence. A majority of the Court voted that the Confrontation Clause is violated if hearsay evidence is admitted which creates “a real risk of impairing the accuracy of the truth-determining process.” A different majority voted that the evidence in the defendant’s case created such a risk. Nonetheless, the Court voted that admitting the hearsay evidence did not violate the Confrontation Clause.

<table>
<thead>
<tr>
<th>Author of Opinion and Number of Justices Joining the Opinion</th>
<th>Is Confrontation Clause violated by admission of hearsay evidence which creates a “real risk” of inaccurate fact-finding?</th>
<th>Did the hearsay evidence in this case create a “real risk” of inaccurate fact-finding?</th>
<th>Was the Confrontation Clause violated by admission of hearsay evidence in the instant case?</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Stewart (4)</em></td>
<td>Yes (4)</td>
<td>No (4)</td>
<td>No (4)</td>
</tr>
<tr>
<td><em>Harlan (1)</em></td>
<td>No (1)</td>
<td>Yes (1)</td>
<td>No (1)</td>
</tr>
<tr>
<td><em>Marshall (4)</em></td>
<td>Yes (4)</td>
<td>Yes (4)</td>
<td>Yes (4)</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>Yes 8-1</td>
<td>Yes 5-4</td>
<td>No 5-4</td>
</tr>
</tbody>
</table>

A criminal defendant was convicted in a state court with less than a unanimous verdict. A majority of the Court voted that a unanimous jury was required in federal criminal trials, and a different majority voted that the same standard applies to state as to federal criminal trials. Nonetheless, the Court voted that a unanimous jury was not required in state criminal trials.

<table>
<thead>
<tr>
<th>Author of Opinion and Number of Justices Joining the Opinion</th>
<th>Is a unanimous jury required in federal criminal trials?</th>
<th>Does the same standard apply in state and federal criminal trials?</th>
<th>Is a unanimous jury required in state criminal trials?</th>
</tr>
</thead>
<tbody>
<tr>
<td>White (4)</td>
<td>No (4)</td>
<td>Yes (4)</td>
<td>No (4)</td>
</tr>
<tr>
<td>Powell (1)</td>
<td>Yes (1)</td>
<td>No (1)</td>
<td>No (1)</td>
</tr>
<tr>
<td>Stewart + Douglas (4)*</td>
<td>Yes (4)</td>
<td>Yes (4)</td>
<td>Yes (4)</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>Yes 5-4</td>
<td>Yes 8-1</td>
<td>No 5-4</td>
</tr>
</tbody>
</table>

* The two opinions of Justices Stewart and Douglas, were both joined by Justices Brennan and Marshall. The relevant opinions are found in both *Apodaca v. Oregon*, 406 U.S. 404 (1972) and *Johnson v. Louisiana*, 406 U.S. 356 (1972)

When Cuba sued a bank over a loan, the bank counter-claimed, based on Cuba’s seizing of its property. A majority of the Court found that the “act of state” doctrine generally precludes judicial review when a foreign government takes property within its borders. Different majorities also found that there was no exception even if the President attempts to authorize jurisdiction, and that there was no exception for counter-claims. Nonetheless, a majority found that the Court had jurisdiction.

<table>
<thead>
<tr>
<th>Author of Opinion and Number of Justices Joining the Opinion</th>
<th>Can Court Generally Hear Case When Foreign Government Seizes Property Within its Own Territory?</th>
<th>Can the President authorize Jurisdiction in such cases?</th>
<th>Is there an exception for counter-claims?</th>
<th>Does the Court have jurisdiction?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rehnquist (3)</td>
<td>No (3)</td>
<td>Yes (3)</td>
<td>Yes (3)</td>
<td>Yes (3)</td>
</tr>
<tr>
<td>Douglas (1)</td>
<td>No (1)</td>
<td>No (1)</td>
<td>Yes (1)</td>
<td>Yes (1)</td>
</tr>
<tr>
<td>Powell (1)</td>
<td>Yes (1)</td>
<td>Not Say (1)</td>
<td>No (1)</td>
<td>Yes (1)</td>
</tr>
<tr>
<td>Brennan (4)</td>
<td>No (4)</td>
<td>No (4)</td>
<td>No (4)</td>
<td>No (4)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>No 8-1</td>
<td>No 5-3</td>
<td>No 5-4</td>
<td>Yes 5-4</td>
</tr>
</tbody>
</table>

An injured worker wanted to file a second worker’s compensation claim in Washington D.C., after receiving an award in Virginia. There were two competing precedents: *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943), which had held that the Full Faith and Credit Clause barred a second suit; and *Industrial Commission v. McCartin*, 330 U.S. 622 (1947), which permitted second suits unless the first state had a statute with “unmistakable language” barring such suits. A majority of the Justices voted to overrule *McCartin*. A different majority voted that *Magnolia* should not be overruled. Nonetheless, the Court voted to permit the second suit.

<table>
<thead>
<tr>
<th>Author of Opinion and Number of Justices Joining the Opinion</th>
<th>Can an Injured Worker Bring Suit in a 2nd State without regard to the Full Faith and Credit Clause?</th>
<th>Does the First State have the right to bar a second suit only by “Unmistakable Language”?</th>
<th>Can this Injured Worker Bring Suit in a 2nd State?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stevens (4)</td>
<td>Yes (4)</td>
<td>No (4)</td>
<td>Yes (4)</td>
</tr>
<tr>
<td>White (3)</td>
<td>No (3)</td>
<td>Yes (3)</td>
<td>Yes (3)</td>
</tr>
<tr>
<td>Rehnquist (2)</td>
<td>No (2)</td>
<td>No (2)</td>
<td>No (2)</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>No 5-4</td>
<td>No 6-3</td>
<td>Yes 7-2</td>
</tr>
</tbody>
</table>

A majority of the Court concluded that disparate impact, without proof of discriminatory intent, was enough to violate the regulations promulgated under Title VI of the Civil Rights Act of 1964. A different majority concluded that compensatory damages should be available for violations of regulations promulgated under Title VI. Nonetheless, the Court voted that compensatory damages would not be available for violations of regulations promulgated under Title VI if there is only a showing of disparate impact, without proof of discriminatory intent.

<table>
<thead>
<tr>
<th>Author of Opinion and Number of Justices Joining the Opinion</th>
<th>Are Compensatory Damages Available For Violations Of Regulations Promulgated Under Title VI?</th>
<th>Is Disparate Impact Sufficient to Violate the Regulations Promulgated Under Title VI?</th>
<th>Are Compensatory Damages Available For Violations Of Regulations Promulgated Under Title VI if Only Disparate Impact is shown?</th>
</tr>
</thead>
<tbody>
<tr>
<td>White (1)</td>
<td>Yes (1)</td>
<td>No (1)</td>
<td>No (1)</td>
</tr>
<tr>
<td>Powell (3)</td>
<td>No (3)</td>
<td>No (3)</td>
<td>No (3)</td>
</tr>
<tr>
<td>O’Connor (1)</td>
<td>No (1)</td>
<td>Yes (1)</td>
<td>No (1)</td>
</tr>
<tr>
<td>Marshall (1)</td>
<td>Yes (1)</td>
<td>Yes (1)</td>
<td>Yes (1)</td>
</tr>
<tr>
<td>Stevens (3)</td>
<td>Yes (3)</td>
<td>Yes (3)</td>
<td>Yes (3)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>Yes 5-4</td>
<td>Yes 5-4</td>
<td>No 5-4</td>
</tr>
</tbody>
</table>

The biological father of a child whose mother was married to, and cohabiting with, another man at time of child's conception and birth, wanted to sue under California law for visitation rights. A majority of the Justices voted that a state may not constitutionally deny a hearing on visitation rights to the biological father of such a child. A different majority voted that California law denied such a hearing. Nonetheless, the Court voted that the California law was constitutional.

<table>
<thead>
<tr>
<th>Author of Opinion and Number of Justices Joining the Opinion</th>
<th>Can a State Deny a Biological Father a Hearing on Visiting Child If Mother Was Married To, and Cohabiting With Another Man, at, Child's Conception and Birth?</th>
<th>Does California Law Permit a Hearing on Visiting Child If Mother Was Married To, and Cohabiting With Another Man, at, Child's Conception and Birth?</th>
<th>Is California law Constitutional?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scalia (4)</td>
<td>Yes (4)</td>
<td>No (4)</td>
<td>Yes (4)</td>
</tr>
<tr>
<td>Stevens (1)</td>
<td>No (1)</td>
<td>Yes (1)</td>
<td>Yes (1)</td>
</tr>
<tr>
<td>Brennan (3)</td>
<td>No (3)</td>
<td>No (3)</td>
<td>No (3)</td>
</tr>
<tr>
<td>White (1)</td>
<td>No (1)</td>
<td>No (1)</td>
<td>No (1)</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>No 5-4</strong></td>
<td><strong>No 8-1</strong></td>
<td><strong>Yes 5-4</strong></td>
</tr>
</tbody>
</table>
The Supreme Court ruled in *American Trucking Association v. Scheiner*, 483 U.S. 266 (1987) (*Sheiner*), that an unapportioned flat highway use tax violated the Dormant Commerce Clause. In *Smith*, a majority of the Justices voted that *Scheiner* had been properly decided, and a different majority voted that non-criminal constitutional rules should be applied retroactively. Nonetheless, the Court voted that *Scheiner* should not be applied retroactively.

<table>
<thead>
<tr>
<th>Author of Opinion and Number of Justices Joining the Opinion</th>
<th>Was Scheiner properly decided?</th>
<th>Should Constitutional decisions be applied retroactively?</th>
<th>Should Scheiner be applied retroactively?</th>
</tr>
</thead>
<tbody>
<tr>
<td>O’Connor (4)</td>
<td>Yes (4)</td>
<td>No (4)</td>
<td>No (4)</td>
</tr>
<tr>
<td>Scalia (1)</td>
<td>No (1)</td>
<td>Yes (1)</td>
<td>No (1)</td>
</tr>
<tr>
<td>Stevens (4)</td>
<td>Yes (4)</td>
<td>Yes (4)</td>
<td>Yes (4)</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>Yes 8-1</td>
<td>Yes 5-4</td>
<td>No (5-4)</td>
</tr>
</tbody>
</table>
NOTES


2 The On-line Medical Dictionary, http://www.graylab.ac.uk/omd/index.html

3 The first time the Supreme Court used the phrase “rational basis” in a constitutional test was 1914, when it declared, “The State has a wide range of discretion with respect to establishing classes for the purpose of imposing revenue taxes, and its laws upon the subject are not to be set aside as discriminatory unless it clearly appears that there is no rational basis for the classification.” Singer Sewing Machine Co. v. Brickell, 233 U.S. 304, 316 (1914)(emphasis added). The Court’s first use of the word “rational” in a constitutional standard was four years earlier in Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U.S. 35, 43 (1910): “That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed....”Id. (emphasis added).


7 Cloer v. Gynecology Clinic, Inc., 120 S. Ct. 862, — (2000)(Scalia, J. dissenting)

8 Washington v. Glucksberg, 521 U.S. 702, 766 (1997)(O’Connor, J. concurring). See also Bush v. Vera, 517 U.S. 952, 1031(1996)(Stevens, J., dissenting)(stating that, “it is irrational to assume that a person is not qualified to vote or to serve as a juror simply because she has brown hair or brown skin. It is neither irrational, nor invidious, however, to assume that a black resident of a particular community is a Democrat if reliable statistical evidence discloses that 97% of the blacks in that community vote in Democratic primary elections.”)

9 517 U.S. 620 (1996)

10 Id., 517 U.S. at 632 (emphasis added).

11 Id., 517 U.S. at 641 (Scalia, J. dissenting)(emphasis added).The Supreme Court ruled that it was not rational to criminalize homosexual activity in Lawrence v. Texas, 539 U.S. 558, 578 (2003).
12 This is comparable to the rule of logic known as the “law of the excluded middle,” which states that a given proposition is either true or untrue. Steven F. Barker, The Elements of Logic 120 (1980). For examples in law of this rule, see e.g. Tesoro Petroleum Corp. v. State, 42 P.3d 531, 545 (Alas. 2002)(stating that a worker performing a single task cannot be both an employee and an independent contractor); Carbon County v. Union Reserve Coal Co.,898 P.2d 680, 686 (Mont. 1995)(stating that, in interpreting lease permitting removal of natural resources, “coal and gas are mutually exclusive terms”).


14 Dunn, 284 U.S., at 393. U.S v. Powell, 469 U.S. 57 (1984).(jury acquitted defendant of possessing two kilograms of cocaine, but found him guilty of using the telephone to possess the same two kilograms of cocaine).


19 The field of “social choice” explores the ways in which group decision-making can lead to a set of results which would be irrational were they made by a single individual. See e.g., David Luban Social Choice Theory as Jurisprudence, 69 S. Cal. L. Rev. 521 (1996) (stating, “Social choice theory studies the most basic question of democratic politics and welfare economics: How should the preferences of many individuals be amalgamated into a single social choice?”). See generally Michael Abramowicz and Maxwell L. Stearns, Beyond Counting Votes: The Political Economy of Bush v. Gore, 54 Vand. L. Rev. 1849, 1906 (2001).

20 Kenneth J. Arrow, Social Choice and Individual Values 3, n.4. (1951)

21 See e.g., Kenneth M. O’Brien, Storm Center 293-94 (3rd ed. 1993)

22 See e.g., id. at 314-28.

23 See e.g., id. at 335-52 There are numerous permutations as well. A Justice can sign a majority opinion, and file a concurring opinion. That will not detract from the main opinion reflecting the majority’s choice. Alternatively, a Justice could sign onto part of a majority opinion and dissent from the rest.

24 There are actually more than 2 “results” – Affirm; Reverse and Remand; and Reverse and Dismiss. In practical terms, though, the Court is usually faced with the choice of Affirm or Reverse. In those rare cases where there are three options and no majority in favor of any disposition, a
Justice has switched votes to create a majority. See e.g. Screws v. United States, 325 U.S. 91, 134 (1945) (Rutledge, J., concurring)(stating he would have preferred to affirm the judgment of the lower court, but was voting to create a majority in favor of “reverse and remand,” rather than outright reversal.)


27 See text accompanying notes — and —, supra.


29 This sort of irrationality has been variously termed a “doctrinal paradox” see e.g., Kornhauser & Sager, supra, *The One and the Many*, 81 Cal. L. Rev. 1, at 11, and a “voting anomaly.” see e.g. Stearns, supra, *Should Justices Ever Switch Votes*, 7 S. Ct. Econ. Rev. at 90.


34 See Cheryl D. Block, *Truth And Probability - Ironies in The Evolution of Social Choice Theory*, 76 Wash. U. L. Q. 975, 987 (1998)(stating that “hose with control over the agenda or procedures are in a position to intentionally manipulate results.”). In fact, even if those in charge desire to be neutral, their agenda-setting choice will still determine the election. See Michael E. Levine & Charles R. Plott, *Agenda Influence and its Implications*, 63 Va. L. Rev. 561, 589 (1977)(stating that the agenda can control the outcome of the voting, even if, “adopted with the most outcome-neutral intentions.”).


36 C.L Dodgson, *A Method of Taking Votes on More than Two Issues* (1876), reprinted in Duncan Black, *The Theory of Committees and Elections* 224, 230 (1968). In fact, the likelihood of cycling increases with an increase in the number of different options from which to choose. See Brams, *Paradoxes in Politics*, supra note , at ___(stating that as the number of candidates increases towards infinity, the probability of cycling occurring among three voters increases to 100%).


41 *Id.*, 95 Harv.L.Rev. At 831.

42 Consider Justice Scalia’s opinion in *Cruzan, v. Director, Missouri Department of Health*, 497 U.S. 261 (1990). In *Cruzan*, the Court, by a 5-4 vote, ruled that the State of Missouri did not violate the Due Process Clause by requiring parents of a comatose daughter to prove “by clear and convincing evidence” that she would have wanted the termination of life support. The Court stated that the “State's great interest in the “protection and preservation of human life.” *Id.* at 283, outweighed the “constitutionally protected liberty interest in refusing unwanted medical treatment.” *Id.* at 278. Justice Scalia joined the majority opinion, but wrote a concurring opinion indicating that he preferred a different rationale:

> While I agree with the Court's analysis today, and therefore join in its opinion, I would have preferred that we announce, clearly and promptly, that the federal courts have no business in this field; that American law has always accorded the State the power to prevent, by force if necessary, suicide -- including suicide by refusing to take appropriate measures necessary to preserve one's life....

*Id.* at 293.

43 Specifically, in none of the cases discussed in this Article do the Justices describe their preference order for all permutations of the issues in a case. Since the cases collected in this Article are the most fractured of the multi-issue cases, and because there is no obvious reason for a Justice to go through such a process, it seems highly unlikely that such a listing has occurred in any case.


45 In the real case, Chief Justice Burger and Justices Harlan and Blackmun voted to uphold the *See id.* 403 U.S. at 756 (Harland, J. dissenting (stating the President had “constitutional primacy in the field of foreign affairs.”)) Both Chief Justice Burger and Justice Blackmun signed Harlan’s dissent.

46 In the real case, Justices Marshall, White, and Stewart focused on the Separation of Powers. *See id.* 403 U.S. at 741 (Marshall, J., concurring) (“The issue is whether this Court or the Congress has the power to make law.”); *id.* 403 U.S. at 732 (White, J. concurring) (“At least in the absence of legislation by Congress, based on its own investigations and findings, I am quite unable to agree that the inherent powers of the Executive and the courts reach so far as to authorize remedies having such sweeping potential for inhibiting publications by the press.”). Justice Stewart joined Justice White’s opinion.

47 In the real case, Justices Brennan, Douglas, and Black focused exclusively on the First Amendment and did not discuss the Separation of Powers. *See id.* 403 U.S. at 725 (Brennan, J.,concurring) (“[T]he First Amendment stands as an absolute bar to the imposition of judicial restraints in circumstances of the kind presented by these cases.”); *id.* 403 U.S. at 714-15 (Black,
J., concurring) (“I believe that every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment.”) Justice Douglas joined Justice Black’s opinion.

48 I took the phrase “shifting majority” from Rogers, I Vote This Way Because I’m Wrong, supra note, 79 Ky. L.J. at 456.

49 Note that the exact same result could follow even if the preference order did not result in cycling. Consider the same voting breakdown, only this time assume that the Harlan group was so concerned with Separation of Powers that its strongest preference was to have the injunction lifted on Separation of Powers grounds alone, with its next preference being relying on both.

The Justices’ revised preference order would then appear as follows [with the changed votes in bold]:

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Violates Both</td>
<td>Only Violates 1st Amendment</td>
<td>Only Violates Sep of Powers</td>
</tr>
<tr>
<td>2</td>
<td>Only Violates Sep of Powers</td>
<td>Violates Both</td>
<td>Violates Both</td>
</tr>
<tr>
<td>3</td>
<td>Only Violates 1st Amendment</td>
<td>Only Violates Sep of Powers</td>
<td>Only Violates 1st Amendment</td>
</tr>
<tr>
<td>4</td>
<td>Not Violate Either</td>
<td>Not Violate Either</td>
<td>Not Violate Either</td>
</tr>
</tbody>
</table>

This time there is no cycling. “Violates Both” prevails over the other three choices in head-to-head competitions, defeating “Only Violates Sep of Power” 6-3 [Marshall + Douglas prevailing]; defeating “Only Violates 1st Am 6-3 [Marshall and Harlan prevailing]; and defeating “Not Violate either” 9-0. Thus, “Violates Both” is the Condorcet winner and there is no lack of transitivity.

The Court’s decision, again might be contained in three separate opinions, all supporting the newspaper and each expressing a different set of issue resolutions. The Court might, however, end up again with an opinion with “shifting majorities,” holding that the President violated both the Separation of Powers and the First Amendment.

Thus, whether or not head-to-head voting results in cycling, the process of Supreme Court voting can lead to the identical finished product.

50 Stearns, Should Justices Ever Switch Votes, supra note, 7 S. Ct. Econ. Rev. at 109.

51 Id., 7 S.Ct. Econ. Rev. at 110.
52 See text accompanying notes — supra.

53 One such example might be Lee v. Weisman, 505 U.S. 577, 592 (1992), where four Justices went along with Justice Kennedy’s opinion that prayer at a high school graduation was an unconstitutional “coercion” of religion by the Government, even though the four apparently saw the case as more of an “endorsement” of religion which violated the First Amendment. Id. 505 U.S. at 609 (Blackmun, J., concurring) (stating that “our cases have prohibited government endorsement of religion, its sponsorship, and active involvement in religion, whether or not citizens were coerced to conform”). Justice Kennedy had previously refused to find mere “endorsement” as unconstitutional, County of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., dissenting) (stating that “This view of the Establishment Clause reflects an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents....”) Accordingly, the four joined Justice Kennedy’s “coercion” analysis to constitute a winning majority opinion.

54 Stearns, supra note , 7 S.Ct. Econ. Rev. at 110.

55 Easterbrook, Ways of Criticizing the Court, supra note, at 831.

56 See e.g., Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985), overruling National League of Cities v. Usery, 426 U.S. 833 (1976), and holding Congress can enforce minimum-wage laws against the states.

57 Easterbrook, Ways of Criticizing the Court, supra note, at 830.

58 For example, the principles could be federalism, separation of powers, and stare decisis.

59 See e.g., Printz v. United States, 521 U.S. 898 (1997). In holding unconstitutional a federal law which required state law enforcement officers to conduct background checks on prospective handgun purchasers, the majority opinion cited two values: federalism ("The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens") and separation of powers ("The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President."). Id. 521 U.S. at 920 & 922.

60 Arrow, Social Choice and Individual Values, supra note, at 3.


62 Morrison, 529 U.S. at 617.

63 Id., 529 U.S. at 618.

64 Morrison, 529 U.S. at 628 (Souter, J., dissenting)

65 See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)(upholding Civil Rights

66 *Compare Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (stating that any incidental burden on the free exercise of religion must be justified by a “compelling state interest”), *with Employment Div. v. Smith*, 494 U.S. 872, 878 (1990) (stating that if a burden on the free exercise of religion is merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.

67 *501 U.S. 560 (1991)*

68 *Barnes*, 501 U.S. at 562. (Rehnquist, C.J., plurality)

69 *Id.* at 572 (Scalia, J., concurring in the judgment).

70 *Id.* at 581 (Souter, J., concurring in the judgment).

71 *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 409 n.4 (6th Cir. 1997).

72 Easterbrook, *Ways of Criticizing the Court*, supra note, at 831


74 414 U.S. 453 (1974)

75 414 U.S. at 456.


77 *Block*, 467 U.S. at 353, n. 4.

78 523 U.S. 83 (1998)

79 *Steel Company*, 523 U.S. at 101.

80 Justice Stevens referred to this result as “a logical dilemma,” *Steel Company*, 523 U.S. at 120, n12 (Stevens, J., dissenting). Justice Scalia, for the Court, referred to the lack of transitivity as “a broken circle.” *Steel Company*, 523 U.S. at 97 n2.

81 *See Kornhauser and Sager, Unpacking the Court*, supra note, 96 Yale L.J. at 117 n35(1986) (stating that, “a perfectly stable voting pattern emerges from such a court. If the individual judges decide cases consistently, like cases will be decided alike, and no problem of consistency presents itself.”). *See also* Rogers, *I Vote This Way*, supra note, 79 Ky. L.J. at 468-69.

82 In terms of formal logic, the first sentence in the quote is a syllogism, consisting of, of two alternate premises and a conclusion. The next sentence declares the two premises to be true. The
last sentence rejects the conclusion. Assuming there are no unspoken premises, this would be an illogical conclusion.


85 There were actually five opinions, with all three dissenters, Justices Ginsburg, Souter and Breyer, signing onto two decisions, one authored by Justice Ginsburg, the other by Justice Breyer. For purposes of the analysis of the Court’s irrationality in Miller it is easier to consider just Justice Breyer’s opinion, as Justice Ginsburg’s focused primarily on the history of discriminatory immigration laws and did not address the other two issues of the case. Miller, 523 U.S. at 460 -71 (Ginsburg, J., dissenting).

86 Miller, 523 U.S. at 436 & 444-45 (Stevens, J.).

87 Id., 523 U.S. at 455 n1. (Scalia, J., concurring).

88 Id. 523 U.S. at 453.

89 Id., 523 U.S. at 445 (O’Connor, J., concurring).

90 Id., 523 U.S. at 452-53.

91 Justice Ginsburg also wrote a dissent in which Justices Breyer and Souter joined. Because her opinion did not address all of the issues raised in the case, and she joined in Breyer’s opinion, for this analysis I will treat her opinions as reflected in Breyer’s dissenting opinion.

92 Miller, 523 U.S. at 473-74 (Breyer, J., dissenting). The lower court had ruled that the father lacked standing because he was not harmed by his daughter’s lack of citizenship.

93 Rainey v. Chever,270 Ga. 519; 510 S.E.2d 823, cert den. 527 U.S. 1044 (1999). The statute stated that "neither the father nor any child of the father nor any other paternal kin shall inherit from or through a child born out of wedlock if it shall be established by a preponderance of evidence that the father failed or refused openly to treat the child as his own or failed or refused to provide support for the child." Ga. Code Ann. § 53-2-4(b)(2) (Supp. 1996).

94 Rainey,270 Ga. at 520; 510 S.E.2d at 824. See also U. S. v. Ahumada-Aguilar, 189 F.3d 1121, 1126 (9th Cir. 1999)(stating that “had the facts in Millerbeen like those in this case, a majority of the Court would have found [the law] unconstitutional by applying heightened scrutiny.”). Accord Lake v. Reno, 226 F.3d 141 (2nd Cir. 2000).

95 U. S. v. Gomez-Orozco, 28 F. Supp. 2d 1092, 1094 (C.D.Ill. 1998), rev’d on other grounds, 188 F.3d 422 (7th Cir. 1999). See also Nguyen v. I.N.S. , 208 F.3d 528, 533 (5th Cir. 2000), aff’d 533 U.S. --- , 121 S. Ct. 2053 (2001)(upholding sex discrimination in immigration law, in part, because, “The [Miller]court found that the statute met several important governmental objectives....”);

97 Justice Scalia wrote a concurring opinion, which Justice Thomas joined, stating that he still believed that “the Court lacks power to provide relief of the sort requested in this suit....” Nguyen, 533 U.S at 73 (Scalia, J., concurring). He wrote that because, a “majority of the Justices in Miller having concluded otherwise, (opinion of STEVENS, J., joined by REHNQUIST, C. J.); (GINSBURG, J., joined by SOUTER and BREYER, JJ., dissenting); (BREYER, J., joined by SOUTER and GINSBURG, JJ., dissenting); and a majority of the Court today proceeding on the same assumption.” it was “appropriate” for him to reach the merits of the equal protection claims. Id. (citations to specific pages omitted). Id., 533 U.S. at 73-74. It is noteworthy that Justice Scalia seems to be implying that the five votes on the issue garnered from the different opinions in Miller was worthy of comparable respect to the votes comprising the majority in the Court’s opinion in Nguyen.

98 Id., 533 U.S at 58(citations to specific pages omitted).

99 Miller, 523 U.S. at 452-53 (O’Connor, J., concurring).

100 Nguyen, 533 U.S. at 62-65.

101 Id., 533 U.S. at 73.

102 Nguyen, 533 U.S at 87 (O’Connor, J., dissenting). She suggested several gender-neutral means for accomplishing the governmental purposes, such as a requirement that the parent be present at birth or have knowledge of birth. Id. at 88.

103 Id., 533 U.S at 97,(O’Connor, J., dissenting).

104 See e.g., Evan H. Caminker, Sincere and Strategic Voting Norms on Multimember Courts, 97 Mich. L. Rev. 2297, 2304 (1999), describing the “basic legal issues on whose resolution the proper case disposition depends.”

105 The determination of when a issue is “preliminary” is more a matter of law than of logic. For example, in order to constrain the power of the Courts, issues as to jurisdiction are generally decided before the Court reaches the substance of an issue. See e.g. Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 94 (1998). Similarly, when faced with both a statutory and constitutional issue, the Court will resolve the statutory issue first, in order to be able to avoid a constitutional decision.
if possible. See e.g., *Ashwander v. TVA*, 297 U.S. 288, 345-348 (1936) (Brandeis, J., concurring).

106 Just because the secondary issue does not need to be addressed if the primary issue is resolved a certain way, does not mean the secondary issue will not be discussed by the Justices. A Justice may rationally present a “conditional” analysis, finding no jurisdiction and then discussing the merits after declaring, “If there is jurisdiction....” Thus, it is often possible to determine each Justice’s view on the secondary issue, even if some believe the primary issue will conclude the case.

107 Because the conclusion that a law passes the compelling interest test cannot rationally coexist with the conclusion that the same law fails mid-level scrutiny, see text accompanying notes —, *supra*, the issues of whether mid-level and compelling interest scrutiny are met are not “distinct” issues.

108 The definition of “loser” does not include certain situations where some Justices decline to address a particular issue. For example, consider a case where four Justices find no jurisdiction but say nothing about the merits, another four find jurisdiction and a violation of the Equal Protection Clause, and one finds jurisdiction and no violation of equal protection. In such a case, a majority (4+1) finds jurisdiction, so the proposition that there is no jurisdiction is a “loser.” Since there are not at least five votes for either side on the Equal Protection issue, neither view of that clause is a “loser” for this case.

109 This, of course, is what happened in *Miller* and is the focus of this Article.

110 If there are more than two issues, the analysis would be identical if all of the voters unanimously place all but the same two choices at the bottom of their list of preferences.

111 Note that this proof assumes that the number of Justices is odd.

112 The Irrationality Theorem can be easily generalized to cover more than two distinct issues. For all but two issues, one rational outcome would be if the Justices were unanimous on the resolution of each issue in such a way that the case was not concluded. For example, the Justices could find the plaintiff had standing, or that one part of the Constitution was *not* violated. Thus, the resolution of the case would depend on the other resolution of two issues. From there, we have proven an irrational result is always possible.

113 Irrational results can be achieved through many voting permutations other than the one utilized in the proof. Consider the following matrix of voting possibilities.
### ISSUE A

<table>
<thead>
<tr>
<th>Split wins Issue A</th>
<th>Total t wins Issue A</th>
</tr>
</thead>
<tbody>
<tr>
<td>S wins A</td>
<td>T wins A</td>
</tr>
<tr>
<td>S wins B</td>
<td>S wins B</td>
</tr>
<tr>
<td>S WINS CASE I</td>
<td>S WINS CASE II</td>
</tr>
</tbody>
</table>

### ISSUE B

<table>
<thead>
<tr>
<th>Total wins Issue B</th>
<th>T wins A</th>
<th>T WINS CASE IV</th>
</tr>
</thead>
<tbody>
<tr>
<td>S wins A</td>
<td>T wins B</td>
<td></td>
</tr>
<tr>
<td>T wins B</td>
<td>S WINS CASE III</td>
<td></td>
</tr>
<tr>
<td>S WINS CASE II</td>
<td>T WINS CASE IV</td>
<td></td>
</tr>
</tbody>
</table>

Assume there are two distinct issues and no majority opinion. If the votes for the split decisions (II + III) total a majority, S wins the case. If the only other votes are for T to win both issues (IV), there will be an irrational result. S will win this case, but T will win a majority for each issue. More generally, any time there is no majority opinion, but the sum of each voting combination (II + III), (II + IV), and (III + IV) equals a majority, there will be an irrational decision.

114 Rogers, *I Vote This Way*, *supra* note, 79 Ky. L.J. at 443-444.

115 This would hold true no matter how many votes each of the three permutations received. Since there is no majority opinion, each box receives few than five votes. That means that each of the other two boxes must equal five or greater. Thus, Boxes II + IV will be a majority [giving the defendant a majority vote on the confession issue] and Boxes III + IV will be a majority [giving the defendant a majority vote on the search issue].

116 See e.g. Stearns, *Should Justices Ever Switch Votes*, *supra* note, 7 Sup. Ct. Econ. Rev. at 156 (describing his analysis of cases with irrational results as focused on “the relevant grouping in which a collective intransivity has the potential to occur,”); Abramowicz and Stearns, *supra* note, *Beyond Counting Votes*, 54 Vand. L. Rev. at 1930 (referring to the voting anomaly, ie the irrational result, occurring when there is a “possible set of cyclical preferences” and “no Condorcet winner is available.”) See also Rogers, *I Vote This Way*, *supra* note, 79 Ky. L.J. at 466 [stating “This anomaly is closely related to the possibility of ‘cycling’...”].

117 See text accompanying notes, *supra*.

118 The Justices’ preference order was:
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Violates Both</td>
<td>Only Violates 1st Amendment</td>
<td>Only Violates Sep of Powers</td>
</tr>
<tr>
<td>2</td>
<td>Only Violates Sep of Powers</td>
<td>Violates Both</td>
<td>Only Violates 1st Amendment</td>
</tr>
<tr>
<td>3</td>
<td>Only Violates 1st Amendment</td>
<td>Only Violates Sep of Powers</td>
<td>Violates Both</td>
</tr>
<tr>
<td>4</td>
<td>Not Violate Either</td>
<td>Not Violate Either</td>
<td>Not Violate Either</td>
</tr>
</tbody>
</table>

For a discussion of why this creates cycling, see text accompanying notes, supra.

119 The reason the Condorcet winner was not the outcome of the case is that the Justices do not decide which parties win cases using Condorcet’s head-to-head technique. Thus, while indeed the individual choices of “Standing” and “Equal Protection Violation,” were selected by a majority of the Justices, the result of the case is not one which would follow rationally from those resolutions of the relevant issues.

120 Sometimes, a case with multiple issues can be reduced to two issues by breaking up the way the issues are considered. For example, in Miller there were three issues: standing, separations of powers, and equal protection. By dividing the votes into two categories, first jurisdiction, then the merits, the case is reduced to two distinct issues:

I. Jurisdiction

<table>
<thead>
<tr>
<th>Author of Opinion and Number of Justices Joining the Opinion</th>
<th>Does the Court have Jurisdiction?</th>
<th>Does Law’s Gender-Based Distinction Violate Equal Protection?</th>
<th>Does Miller Win?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stevens (2)</td>
<td>Yes (2)</td>
<td>No (2)</td>
<td>No (2)</td>
</tr>
<tr>
<td>O’Connor (2)</td>
<td>No (2)</td>
<td>Yes (2)</td>
<td>Not (2)</td>
</tr>
<tr>
<td>Scalia (2)</td>
<td>No (2)</td>
<td>Not Say (2)</td>
<td>No (2)</td>
</tr>
<tr>
<td>Breyer (3)</td>
<td>Yes (3)</td>
<td>Yes (3)</td>
<td>Yes (3)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>Yes 5-4</td>
<td>Yes 5-2</td>
<td>Yes 6-3</td>
</tr>
</tbody>
</table>
[A majority of the Court, in a rational vote, decides they have jurisdiction to hear the case]

II. Merits

<table>
<thead>
<tr>
<th>Author of Opinion and Number of Justices Joining the Opinion</th>
<th>Does the Court have Jurisdiction?</th>
<th>Does Law’s Gender-Based Distinction Violate Equal Protection?</th>
<th>Does Miller Win?</th>
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</thead>
<tbody>
<tr>
<td>Stevens (2)</td>
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<td>No (2)</td>
</tr>
<tr>
<td>O'Connor (2)</td>
<td>No (2)</td>
<td>Yes (2)</td>
<td>Not (2)</td>
</tr>
<tr>
<td>Scalia (2)</td>
<td>No (2)</td>
<td>Not Say (2)</td>
<td>No (2)</td>
</tr>
<tr>
<td>Breyer (3)</td>
<td>Yes (3)</td>
<td>Yes (3)</td>
<td>Yes (3)</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>Yes 5-4</strong></td>
<td><strong>Yes 5-2</strong></td>
<td><strong>Yes 6-3</strong></td>
</tr>
</tbody>
</table>

This is the same irrational decision as the original framework, but reduced to two distinct issues.

For a discussion of cases with multiple issues which cannot be so reduced, see note, infra.

121 See text at notes — supra.

122 It is not necessarily true that the Plaintiff is the party who must win on both distinct issues to win the case. Sometimes it is the Defendant who must prevail on both issues to win the case. Consider a constitutional challenge to a state law barring same-sex couples from civil marriage, where the plaintiffs argue that the law violates both equal protection and due process. See e.g., Goodridge v. Dep't of Pub. Health, 440 Mass. 309, 320 (Mass., 2003). In order for the defendant state to win the case, must win on both the equal protection and due process grounds. As the chart below reveals, if the plaintiffs win on either of the split vote permutation, they win the case.
<table>
<thead>
<tr>
<th></th>
<th>EQUAL PROTECTION</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Defendant wins</td>
<td>Plaintiff wins</td>
</tr>
<tr>
<td></td>
<td>Equal Protection</td>
<td>Equal Protection</td>
</tr>
<tr>
<td>Defendant wins</td>
<td>D wins Equal</td>
<td>P wins Equal</td>
</tr>
<tr>
<td>Due Process</td>
<td>Protection</td>
<td>Protection</td>
</tr>
<tr>
<td>D WINS CASE</td>
<td>I</td>
<td>II</td>
</tr>
<tr>
<td>Plaintiff wins</td>
<td>D wins Equal</td>
<td>P wins Equal</td>
</tr>
<tr>
<td>Due Process</td>
<td>Protection</td>
<td>Protection</td>
</tr>
<tr>
<td>P WINS CASE</td>
<td>III</td>
<td>IV</td>
</tr>
</tbody>
</table>

123 This mathematical approach permits is a far more precise description than the social choice analysis which described the conditions for irrationality, as “multidimensionality and asymmetry.” See e.g., Stearns, Should Justices Ever Switch Votes, supra note , 7 S. Ct. Econ. Rev. at 156 . Multidimensionality can be most easily understood by contrasting it with “unidimensionality.” A question is unidimensional when the different options can be arrayed on a spectrum, where either extreme position would prefer a median position to the opposite extreme. Id. at 116-17. Thus, the question of whether to put no salt, a little salt, or a lot of salt in a soup, is unidimensional, since, in most cases, those who prefer either no salt or a lot of salt would prefer the moderate approach as their second choice. By contrast, if the question involves the possibility of placing more than one ingredient, such as salt and/or carrots in the soup, no such linear ranking is possible, and that question would be deemed multidimensional. Id. at 128. Thus, multidimensionality basically refers to the same concept as two distinct issues.

According to Prof. Sterns, “Asymmetry arises when two camps resolve each of the two dispositive issues in opposite fashion, but nonetheless reach the same judgment.” Maxwell L. Stearns, The Condorcet Jury Theorem and Judicial Decisionmaking: A Reply to Saul Levmore, 3 Theoretical Inq. L. 125, 144 (2002). This definition, though, is merely a tautology. As I have proven earlier in this Article, whenever Justices divide between split vote possibilities, two camps can resolve each of the two issues in opposite fashion, but nonetheless reach the same judgment. See text accompanying notes , supra. In other words, every case which exhibits multidimensionality [ie two issues], will invariably exhibit asymmetry [ie the result of either split vote is that the same party wins the case] when different Justices select each split vote option.
Prof. Nash, in a brief discussion utilizing a more mathematical approach, comes closer to obtaining a full description of when irrationality occurs. Nash, *A Context-Sensitive Voting Protocol Paradigm, supra* note, 56 Stan. L. Rev. at 80-82. Nonetheless, his analysis, like Stearn’s does not reflect the fact that every situation with two split vote permutations [what Nash terms “swing votes”] will have opposite votes on the issues resulting in the same judgment. *Id.*, 56 Stan. L. Rev. at 81. Thus, his analysis also does not include the fact that only one of the two parties can be the victor in an irrational case.

124 There is a more mathematical way to describe the votes which lead to an irrational opinion using the basic chart:

<table>
<thead>
<tr>
<th>ISSUE A</th>
<th>Plaintiff wins Issue A</th>
<th>Defendant wins Issue A</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plaintiff wins Issue B</td>
<td><em>P wins A</em>&lt;br&gt;<em>P wins B</em>&lt;br&gt;<em>P WINS CASE I</em></td>
<td><em>D wins A</em>&lt;br&gt;<em>P wins B</em>&lt;br&gt;<em>D WINS CASE II</em></td>
</tr>
<tr>
<td>ISSUE B</td>
<td>Defendant wins Issue B</td>
<td><em>P wins A</em>&lt;br&gt;<em>D wins B</em>&lt;br&gt;<em>P WINS CASE III</em></td>
</tr>
</tbody>
</table>

If $X =$ the total number of votes, then $I + III > 1/2X; I + II > 1/2X; \text{ and } II + III + IV > 1/2X.$

125 If there are more than two distinct issues, the situation can get much more complicated. The number of split vote scenarios increases rapidly [if there are 3 issues, there are 6 split vote permutations, if there are 4 issues, there are 14]. Moreover, it is no longer inevitable that the same party will prevail under every split vote permutation.

The situation is further complicated because of the different structures cases with multiple issues can take. For some situations with multiple issues, one party must prevail on all to win the case. For example, a private school faced with losing a tax break because of its racially discriminatory admissions policies claimed that the I.R.S was violating its rights to the free exercise of religion, to free association, and to due process and equal protection of the laws. *Bob Jones University v. Simon*, 416 U.S. 725, 735-736 (1974). It order to win the case, the Government needed to prevail on every issue.

By contrast, in some cases of more than two issues, different parties can win split decisions.
For example, in *Campbell v. Louisiana*, 523 U.S. 392 (1998), a white criminal defendant was challenging his conviction because on the grounds that there was racial discriminations against African-Americans in the selection of grand jurors. For the defendant to prevail, he needed to win on the standing issue, and on either the equal protection or due process claims. Thus, both parties could win a split decision. The defendant could win the case by winning on only two of three issues [standing and either equal protection or due process] and the government could win by winning on only two of three issues [either winning both equal protection or due process and losing standing or winning standing and either equal protection or due process].

Despite the complexities of cases with multiple issues, the basic principles of irrationality still hold. An irrational result for more than two distinct issues always requires that there be no majority opinion, and that there be votes for at least two split vote permutations.


129 *Eastern Enterprises*, 524 U.S. at 530-31 (O’Connor, J., plurality).

130 The Takings Clause of the Fifth Amendment states: "Nor shall private property be taken for public use, without just compensation."

131 *Eastern Enterprises*, 524 U.S. at 537 (O’Connor, J., plurality).

132 *Id.* The plurality did say that because they found that the Coal Act “violates the Takings Clause as applied to Eastern, we need not address Eastern’s due process claim.” *Id.* The obvious antipathy the plurality felt towards finding a substantive due process violation can be seen in the two quotations given to support their “concerns”. First, the plurality noted the Court’s “abandonment of the use of the ‘vague contours’ of the Due Process Clause to nullify laws which a majority of the Court believe to be economically unwise.” *Id.*, quoting *Ferguson v. Skrupa*, 372 U.S. 726, 731(1963). Next, the plurality repeated the declaration that, “The day is gone when this Court uses the Due Process Clause . . . to strike down . . . laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.” *Id.*, at 537-38, quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488
133 Eastern Enterprises, 524 U.S. at 544 (Kennedy, J., concurring in the judgment and dissenting in part).

134 Id. at 549.

135 Eastern Enterprises, 524 U.S. at 554 (Breyer, J., dissenting).

136 Id., 524 U.S. at 553-554.

137 Even though Justice O’Connor stated that “we need not address Eastern’s due process claim,” Eastern Enterprises, 524 U.S. at 537 (O’Connor, J., plurality), it is reasonable to interpret Justice O’Connor’s opinion as reflecting opposition to finding a due process violation. The two quotes she provides to support her “concerns” about using Due Process indicate, at minimum, a very strong reluctance to apply the Due Process Clause in cases of purely economic concern. She cited Ferguson v. Skrupa, 372 U.S. 726, 731 (1963) (noting “our abandonment of the use of the ‘vague contours’ of the Due Process Clause to nullify laws which a majority of the Court believe to be economically unwise”) and Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause . . . to strike down . . . laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought"), quoted at Eastern Enterprises, 524 U.S. at 537-38.

Moreover, if all four Justices signing on to the plurality opinion had been willing to rely on the Due Process Clause, they could have established, with Justice Kennedy’s fifth vote, a majority for that proposition. Because of the usual institutional desire for clear precedent, see infra text accompanying notes —, the willingness to create a splintered decision implies a lack of enthusiasm for the Due Process Clause.

Finally, for the conclusion that a majority of the Court favored one party yet ruled in favor of the other to be correct, only one member of O’Connor’s plurality would need to join the four dissenting Justices in opposition to finding a violation of the Due Process Clause. Considering the hostility evinced by Justices Scalia and Thomas to extending the Due Process Clause, such a state of affairs seems more than likely. See e.g., Stenberg v. Carhart, 530 U.S. 914, 980 (U.S., 2000)(Thomas, J., dissenting) (stating, “Nothing in our Federal Constitution deprives the people of this country of the right to determine whether the consequences of abortion to the fetus and to society outweigh the burden of an unwanted pregnancy on the mother. Although a State may permit abortion, nothing in the Constitution dictates that a State must do so.”); Cruzan v. Director, Missouri Dep’t of Health, 497 U.S. 261, 293 (1990)(Scalia, J., concurring)(stating “The text of the Due Process Clause does not protect individuals against deprivations of liberty simpliciter. It protects them against deprivations of liberty ‘without due process of law.’”).


140 U.S. V. Alcan Aluminum Corp., 49 F. Supp. 2d 96, 99 (N.D.N.Y. 1999). See also Pittsburg County Rural Water Dist. No. 7 v. City of McAlester, 358 F.3d 694, 718 (10th Cir. 2004)(stating “When a regulation adjusts the benefits and burdens of certain economic action to promote the common good, such regulation may in certain circumstances effect a taking.”); Anker Energy Corp. v. Consolidation Coal Co., 177 F.3d 161 (3rd Cir.) Cert. Den. --- U.S. --- (1999)(analyzing retroactivity by noting, “The plurality also found the lack of proportionality significant in its analysis of whether the Coal Act substantially interfered with Eastern Enterprises' reasonable investment backed expectations, and whether the nature of the governmental action was unusual....”).


143 This topic has been the subject of two excellent articles, Maxwell L. Stearns, “Should Justices Ever Switch Votes?: Miller v. Albright in Social Choice Perspective, 7 SUP. CT. ECON. REV. 87 (1999); and John M. Rogers, ‘I Vote This Way Because I'm Wrong.': The Supreme Court Justice as Epimenides” 79 Ky. L.J. 439 (1991).

144 531 U.S. 98 (2000). Professors Michael Abramowicz and Maxwell L. Stearns have similarly concluded that the decision of Chief Justice Rehnquist and Justices Scalia and Thomas to join the per curiam decision reflected their desire to avoid having to “decide a landmark case involving a presidential election ....based upon a set of rationales that simple counting could disclose not to support the judgment.” Abramowicz and Stearns, supra note , Beyond Counting Votes, 54 Vand. L. Rev. at 1939.

145 It was, in fact, an equal protection analysis many could oppose. In the words of one commentator:

A striking feature of the Court's opinion is its failure to utilize any of the normal machinery of equal protection analysis. There is no discussion of the relevant classes, no articulation of the appropriate level of review, no effort to determine whether a "purpose" or "effects" test is appropriate, no weighing of the countervailing state interest supporting the classification.

In Such Manner as the Legislature Thereof May Direct”)(describing the per curiam’s equal protection analysis “as a confused nonstarter at best, which deserves much of the scorn that has been heaped upon it.”).

See e.g., Bradley W. Joondeph, Bush v. Gore, Federalism, and the Distrust of Politics, 62 Ohio St. L.J. 1781, 1827 (2001)(stating, “The per curiam opinion in Bush v. Gore embraced a novel and rather expansive understanding of equal protection that seems largely out of character for the Rehnquist Court”); Sanford Levinson, The Return of Legal Realism, 272 The Nation 8 (January 8, 2001). (“How can one take seriously the majority's claims that their award of the presidency to Bush is based on their deep concern for safeguarding the fundamental values of equality? This majority has been infamous in recent years for relentlessly defending states' rights against the invocation of national legal or constitutional norms.”); Abramowicz and Stearns, supra note, Beyond Counting Votes, 54 Vand. L. Rev. at 1928 (stating “[T]he equal protection analysis appears to be in tension with the general jurisprudence of these three conservative jurists, and that includes the issue of voting rights.”).

519 U.S. 102 (1996). In M.L.B, the Court held that the Equal Protection Clause was violated when a state conditioned the taking of an appeal from the termination of parental rights on that parent's ability to pay record transcription costs.

M.L.B. 519 U.S. at 135.

See e.g., Richard A. Epstein, "In Such Manner as the Legislature Thereof May Direct,” supra note, 68 U. Chi. L. Rev. at 616 (2001)(stating that, “In a word, the Florida scheme is devoid of any suspect classification needed to trigger the equal protection analysis.”).

As the Court described the three tests in City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985):

The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.... The general rule gives way, however, when a statute classifies by race, alienage, or national origin.... [T]hese laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.... Legislative classifications based on gender also call for a heightened standard of review.... A gender classification fails unless it is substantially related to a sufficiently important governmental interest.

See, Abramowicz and Stearns, Beyond Counting Votes, supra note, 54 Vand. L. Rev. at 1939, n109. (Noting that an online search in the Westlaw Supreme Court cases database showed that the phrase"arbitrary and disparate treatment" as a test for a violation of equal protection had never appeared in a Supreme Court case.); Michael J. Klarman, Bush v. Gore Through the Lens of Constitutional History, 89 Calif. L. Rev. 1721, 1727(2001) (Stating that, “The majority's equal protection rationale creates entirely new law.”); Jamin B. Raskin, What's Wrong with Bush v. Gore
and Why We Need to Amend the Constitution to Ensure it Never Happens Again, 61 Md. L. Rev. 652, 678 (2002)(stating that “no doctrinal foundation existed for what the conservative Justices did in Bush v. Gore.”).

152 See e.g. Planned Parenthood v. Casey, 505 U.S. 833, 944 (1992)(Rehnquist, C.J. concurring in part and dissenting in part) (stating “The joint opinion, following its newly minted variation on stare decisis.”). This opinion was joined by Justices Scalia, and Thomas, as well as Justice White.

153 It has been reported that Justice Kennedy authored the per curiam opinion. See, e.g., David A. Kaplan, The Accidental President 284-85 (2001); Jeffery Rosen, “In Lieu of Manners,” N.Y. Times, Feb. 4, 2001, (Magazine), at 50.

154 See Linda Greenhouse, “Bush v. Gore: A Special Report; Election Case a Test and a Trauma for Justices,” N.Y. Times, Feb. 20, 2001, at A1. Ms. Greenhouse reports that Chief Justice Rehnquist’s draft had been intended as the majority opinion, but “failed to get the support of Justices Kennedy and O’Connor. They drafted their own opinion, concluding that the standardless recount violated the guarantee of equal protection.” Id.

155 The chart of the actual decision of Bush v Gore looks like this:

<table>
<thead>
<tr>
<th>Author of Opinion and Number of Justices Joining the Opinion</th>
<th>Did the Florida Supreme Court Establish New Election Standards in Violation of Art. II?</th>
<th>Did the Use of “Standardless” Recounts Violate Equal Protection?</th>
<th>Assuming an Equal Protection Violation, Did Safe Harbor Date Preclude a Recount?</th>
<th>Should Recount be Stopped?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Per Curium (5)</td>
<td>Not Say (5)</td>
<td>Yes (5)</td>
<td>Yes (5)</td>
<td>Yes (5)</td>
</tr>
<tr>
<td>Rehnquist (3)</td>
<td>Yes (3)</td>
<td>Not Say (3)</td>
<td>Not Say (3)</td>
<td>Yes (3)</td>
</tr>
<tr>
<td>Breyer (2)</td>
<td>No (2)</td>
<td>Yes (2)</td>
<td>No (2)</td>
<td>No (2)</td>
</tr>
<tr>
<td>Stevens (2)</td>
<td>No (2)</td>
<td>No (2)</td>
<td>No (2)</td>
<td>No (2)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>No 6-3</td>
<td>Yes 7-2</td>
<td>Yes 5-4</td>
<td>Yes 5-4</td>
</tr>
</tbody>
</table>

This is obviously not an “irrational” decision, since a majority supported a resolution of the Equal Protection argument in such a way that is squares with the Court’s outcome.

156 This is also the conclusion reached by Abramowicz and Stearns:

[A]bsent the apparent vote switch by the Rehnquist camp, a complaint that six Justices rejected the proposition that there was an equal protection problem demanding reversal and that six Justices rejected the proposition that the Florida
Supreme Court had effected an unconstitutional change in Florida election law would have been both easy to understand and powerful. Whether or not the Justices consciously recognized the potential existence of an issue voting anomaly, they presumably would have intuitively understood the likelihood of criticism of a disposition that lacks majority support for either of the two logically plausible, and agreed upon, rationales supporting a reversal.

Abramowicz and Stearns, Beyond Counting Votes, supra note, 54 Vand. L. Rev. at 1952, n328.


162 See David L. Shapiro, In Defense of Judicial Candor, 100 Harv. L. Rev. 731, 737 (1987)(stating that, “lack of candor seldom goes undetected for long, and its detection only serves to increase the level of cynicism about the nature of judging and of judges.”).

163 Guido Calabresi, A Common Law for the Age of Statutes 175 (1982). See also Hellman, The Importance of Appearing Principled, supra note, 37 Ariz. L. Rev. at 1127 (stating that, “a judge ought to avoid acting in a way that is likely to compromise the perceived integrity of the judiciary.”).

164 Bush v. Gore, 531 U.S. at 105.

165 There are strong institutional reasons for a Justice to switch his or her vote to ensure that a case is able to be resolved with a majority vote as to the judgment. See Edward A. Hartnett, Ties in the Supreme Court of the United States, 44 Wm and Mary L. Rev. 643, 672 (2002)(stating that, because of a “judgment impasse ... a vote switch is therefore appropriate”). As Justice Rutledge explained, “Stalemate should not prevail for any reason, however compelling, in a criminal cause or, if avoidable, in any other.” Screws v United States, 325 U.S. 91, 134 (1945) (Rutledge, concurring). Professor Stearns describes several cases where a Justice switched votes to produce a majority judgement. Stearns, supra, Should Justices Ever Switch Votes, supra note, 7 S. Ct. Econ. Rev. at 110. These cases include: Bragdon v Abbott, 524 U.S. 624, 656 (1998)(Stevens, concurring) (casting vote to remand rather than to affirm to produce majority judgment); Pennsylvania v Muniz,
496 U.S. 582, 608 (1990) (Rehnquist, concurring in part, concurring in the judgment in part, and dissenting in part) (casting vote to vacate and remand, to produce a majority judgment); Connecticut v Johnson, 460 U.S. 73, 89-90 (1983) (Stevens, concurring) (casting vote to affirm, rather than to dismiss certiorari, to produce majority judgment); Maryland Casualty Co. v Cushing, 347 U.S. 409, 423 (1954) (plurality opinion) (voting to remand, rather than to reverse); Klapprott v United States, 335 U.S. 601, 619 (1949) (Rutledge, concurring) (voting to remand, rather than to reverse); Von Moltke v Gillies, 332 U.S. 708, 726-27 (1948) (plurality opinion) (observing that two concurring justices have agreed to break deadlock by voting with plurality to remand, rather than voting to reverse); Screws, 325 U.S. at 134 (Rutledge, concurring) (switching vote to remand). Id. at 110 n76.

166 Essentially, this would mean that a Justice with a split vote was choosing to vote for the judgment of the party who needed to prevail on all of the issues to win the case.


168 This would have been the vote tally had all of the Justices voted for the judgment that was consistent with their individual assessment of the issues:

<table>
<thead>
<tr>
<th>Author of Opinion and Number of Justices Joining the Opinion</th>
<th>Did Congress Authorize Suits for damages against States in the Superfund Law?</th>
<th>Does Congress have the Constitutional Authority to Authorize such Suits?</th>
<th>Can Union Gas sue Pennsylvania?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brennan (4)</td>
<td>Yes (4)</td>
<td>Yes (4)</td>
<td>Yes (4)</td>
</tr>
<tr>
<td>Rehnquist (3)</td>
<td>No (3)</td>
<td>No (4)</td>
<td>No (4)</td>
</tr>
<tr>
<td>Scalia (1)</td>
<td>Yes (1)</td>
<td>No (1)</td>
<td>No (1)</td>
</tr>
<tr>
<td>White (1)</td>
<td>No (1)</td>
<td>Yes (1)</td>
<td>No (1)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>Yes 5-4</td>
<td>Yes 5-4</td>
<td>No 5-4</td>
</tr>
</tbody>
</table>

Technically, Chief Justice Rehnquist did not “author” an opinion in this case. Rather, he, along with Justices O’Connor and Kennedy, signed onto part of Justice Scalia’s opinion and part of Justice White’s, indicating that three of them believed that Congress did not intend the law to permit such private suits and that Congress lacked the power to do so.

169 Justice White wrote:
My view on the statutory issue has not prevailed, however; a majority of the Court has ruled that the statute, as amended, plainly intended to abrogate the immunity of the States from suit in the federal courts. I accept that judgment. This brings me to the question whether Congress has the constitutional power to abrogate the States' immunity. In that respect, I agree with the conclusion reached by Justice Brennan in Part III of his opinion, that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States.

*Pennsylvania v. Union Gas Co.*, 491 U.S. at 56 - 57 (White, J., concurring in the judgment in part and dissenting in part)

170 This is what the actual vote tally was:

```
<table>
<thead>
<tr>
<th>Author of Opinion and Number of Justices Joining the Opinion</th>
<th>Did Congress Authorize Suits for damages against States in the Superfund Law?</th>
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</tr>
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<tr>
<td>Brennan (4)</td>
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<td>Rehnquist (3)</td>
<td>No (3)</td>
<td>No (3)</td>
<td>No (3)</td>
</tr>
<tr>
<td>Stevens (1)</td>
<td>Yes (1)</td>
<td>No (1)</td>
<td>No (1)</td>
</tr>
<tr>
<td>White (1)</td>
<td>No (1)</td>
<td>Yes (1)</td>
<td>Yes (1)</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>Yes 5-4</strong></td>
<td><strong>Yes 5-4</strong></td>
<td><strong>Yes 5-4</strong></td>
</tr>
</tbody>
</table>
```

171 The other two cases were *Arizona v. Fulminante*, 499 U.S. 279 (1991); *United States v. Vuitch*, 402 U.S. 62 (U.S., 1971). In *Fulminante*, there were three issues: Was the confession coerced; Did the harmless error applies to the admission of a coerced confession; and Was the admission of the confession in this case harmless? Although Justice Kennedy believed the confession was not coerced [and thus the conviction should be valid], because a majority found otherwise, he voted to reverse the conviction on the ground that its admission was not harmless.499 U.S. at 313-14. In *Vuitch*, the Court faced two issues: Did the Supreme Court had jurisdiction to hear the appeal by the Government; and Was the statute in question was unconstitutionally vague? Even though Justices Harlan and Blackmun believed the Supreme Court did not have jurisdiction [and thus the Government should lose the case], because a majority found otherwise, they voted that the Government should win the case on the ground that statute was not unconstitutionally vague. 402
U.S. at 93 (Harlan, J., dissenting as to jurisdiction); Id. at 97-98 (opinion of Blackmun, J.).

There are three excellent articles discussing the vote-switch cases: Stearns, Should Justices Ever Switch Votes, supra note, 7 Sup. Ct. Econ. Rev. 87 (1999); Kornhauser & Sager, The One and the Many, supra note, 81 Cal. L. Rev. 1 (1993); Rogers, I Vote This Way, supra note, 79 Ky L J 439 (1991).

172 There is some question, however, as to how firm the holdings of a vote-switch case really are. When overruling the constitutional holding of Union Gas seven years after it was announced, the Court declared: “Reconsidering the decision in Union Gas, we conclude that none of the policies underlying stare decisis require our continuing adherence to its holding. The decision has, since its issuance, been of questionable precedential value, largely because a majority of the Court expressly disagreed with the rationale of the plurality.” Seminole Tribe v. Fla., 517 U.S. 44, 66 (1996).

173 Professor Rogers refers to this as, “individual inconsistency.” Rogers, I Vote This Way, supra note, 79 Ky. L.J. at 473-474.

174 For example, the Court by a 5-4 vote ruled that Congress could not authorize private law suits for damages against the State under Title I of the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 330, 42 U.S.C. §§§ 12111-12117, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, (2001), but by another 5-4 vote that Congress could authorize private law suits for damages against the State under Title II ADA, 104 Stat. 337, 42 U.S.C. §§§ 12131-12165, Tennessee v. Lane, 124 S. Ct. 1978 (2004). The only vote that changed between the decisions was the “swing vote” of Justice O’Connor.

175 Kornhauser & Sager, The One and the Many, supra note, 81 Cal. L. Rev. at 24.

176 Stearns, Should Justices Ever Switch Votes, supra note, 7 Sup. Ct. Econ. Rev. at 149.

177 Professor Rogers states that such vote switching will “undermine respect for the courts” Rogers, I Vote This Way, supra note, 79 Ky. L.J. at 475.

178 Such “voting against one's own conclusions,” in order to achieve a desired outcome is sometimes termed “strategic voting.” Rogers, I Vote This Way, supra note, 79 Ky. L.J. at 468. See also, Abramowicz and Stearns, Beyond Counting Votes, supra note, 54 Vand. L. Rev. at 1932 [stating that “principled” means “nonstrategic”].

179 Issue voting is different from what Professor Delson has termed “voting by part.” B. Rudolph Delson, Typography in the U.S. Reports and Supreme Court Voting Protocols, 76 N.Y.U.L. Rev. 1203, 1218 (2001)(hereinafter “Typography in the U.S. Reports”). Voting by part occurs when a Justice joins one part of another Justice's opinion without joining that opinion in its entirety. By contrast issue voting is the protocol under which the Court votes on each issue necessary to resolve a case, and then reaches its conclusion based on those votes. Id.

180 Post & Salop, Rowing Against the Tidewater, supra note, 80 Geo. L.J. at 744. They prefer the
hyphenated phrases of “issue-voting” and “outcome-voting”, id. but, for simplicity, I will drop the hyphen. See e.g. John M. Rogers, "Issue Voting" by Multimember Appellate Courts: A Response to Some Radical Proposals, 49 Vand. L. Rev. 997 (1996). Note that some other commentators prefer the phrase “issue by issue voting” See e.g., Delson, supra , “Typography in the U.S. Reports,” 76 N.Y.U.L. Rev. at 1204.

181 See e.g. Kornhauser & Sager, The One and the Many, supra note , 81 Cal. L. Rev. at 49 (stating “To resolve a controversy issue by issue, the judges must agree on what constitutes an issue”). For an excellent discussion of the problems associated with the different ways to state relevant issues and subissues, see John M. Rogers, “Issue Voting” by Multimember Appellate Courts: A Response to Some Radical Proposals 49 Vand. L. Rev. 997, 1002 (1996).


183 This example is derived from Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004). Although the voting patterns of the actual case differ from those in the hypothetical, the actual Court was badly divided on several of these issues, as well as others that were raised in the case.

184 A similar hypothetical was presented by John Rogers. Rogers, Issue Voting, supra note , 49 Vand. L. Rev. at 472-73. He imagined a capital case, where four Justices voted that an execution was barred by the fifth amendment but not the eighth amendment, while four other justices voted that the execution would violate the eighth but not the fifth amendment. Under issue voting, if the sole remaining Justice voted that neither provision barred the execution, there would be a 5-4 majority for finding neither amendment violated. Thus, if issue-voting were utilized, the defendant would be executed, despite the fact that 8 of the 9 Justices believed the execution unconstitutional. In the words of Professor Rogers, “This result cannot be right.” Id. at 473.

185 Kornhauser and Sage, The One and the Many, supra note ,81 Calif. L. Rev. at 30.

186 Id., 81 Calif. L. Rev. at 57. They suggest different factors that appellate courts could use in making their metavotes, including inter alia the comparative importance of the issues versus the outcome, the avoidance of path dependence, and whether the case involves the appeal of serious criminal convictions. Id., 81 Calif. L. Rev. at 33-41.


189 Id., 56 Stan. L. Rev. at 148. Nash also states that issue-voting should be utilized for, “arguments that would constitute independent appeals were interlocutory appeals permissible. Each of these arguments should be afforded separate votes.” Id., 56 Stan. L. Rev. at 147.

190 Id., 56 Stan. L. Rev. at 150.
191 Miller v. Albright, 523 U.S. at 434, n.11 (Stevens, J., concurring)


194 In fact, this question arose in United States v. Virginia, itself. Justice Ginsburg, writing for the majority, stated that she was merely summarizing, “the Court's current directions for cases of official classification based on gender”. 518 U.S. at 532. By contrast, Chief Justice Rehnquist complained that, by stating that the government must demonstrate an "'exceedingly persuasive justification'" to support a gender-based classification...the Court thereby introduces an element of uncertainty respecting the appropriate test.” United States v. Virginia, 518 U.S. at 559 (Rehnquist, C. J., concurring).


197 Nash’s plan, in fact, would prohibit Justices from breaking the issue into subissues: “The proposal directs that pure issues of law not be decomposed.” 56 Stan. L. Rev. at 153. For an analysis of the Court’s actual voting pattern in Apodaca, see Appendix, infra.


199 There was also no need for Justices Scalia and Thomas to discuss standing once they decided that the Court could not issue the requested remedy. Even without their input, though, there were still have been five votes for standing, and thus the same irrational opinion would have been issued.

200 William Shakespeare, Henry IV, Part I, Act 5, scene 4. It may be that in some circumstances, including perhaps Miller some Justices may believe that it is very important that lower courts see the number of Justices with a particular viewpoint on a disputed substantive question, such as the correct standard for dealing with sex discrimination. If so, they may simply conclude that the value of presenting that viewpoint, even in an irrational opinion, outweighs the confusion created by such opinions.

201 Nash, A Context-Sensitive Voting Protocol Paradigm, supra note , 56 Stan. L. Rev. at 157-58. He similarly suggests that when an intermediate appellate court panel generates an irrational opinion, the full court should tend to grant en banc review. Id. 56 Stan. L. Rev. at 157.

202 One should not assume that the rigorous field of chaos theory can be applied directly to fields such as law. Chaos theory is technically defined as “the qualitative study of unstable aperiodic behavior in deterministic nonlinear dynamical systems.”Stephen H. Kellert, In the Wake of Chaos


204 See John L. Casti, Complexification 89 (1994).


207 According to Heisenberg, once “the electron has been pushed by the light quantum, it has changed its momentum and its velocity, and one can show that the uncertainty of this change is just big enough to guarantee the validity of the uncertainty relations.” Werner Heisenberg, Physics and Philosophy: the Revolution in Modern Science 47-48 (1958).

208 “According to Heisenberg, the more accurately you measure where a particle is, the less accurately you are able to measure where it's going.” Tribe, The Curvature of Constitutional Space, supra note, 103 Harv. L. Rev. at 17.


211 The formal proof can be found in Kurt Gödel, On Formally Undecidable Propositions of
212 In greatly simplified terms, Gödel found a way to put into mathematical notation a version of the “Liar’s Paradox.” The “Liar’s Paradox.” involves the sentence, “This statement is false.” The problem arises because if we deem the statement in quotes to be “false” then it is by definition true. However, if we term the statement in quotes “true”, then it becomes false. Thus, the truthfulness or falsity of the statement cannot be determined. See Meyerson, Political Numeracy, supra note, at 164-65. See also Giuseppe Dari Mattiacci, Godel, Kaplow, Shavell: Consistency and Completeness in Social Decision-Making, 79 Chi.-Kent. L. Rev. 497, 515 (2004).

