
THE PRECEDENT-BASED VOTING PARADOX

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A voting paradox arises when the outcome of a case is the opposite of the resolution of the individual issues within the case. For instance, eight Justices believe a statute is constitutional under the Due Process Clause, and five Justices believe the same statute is constitutional under the Takings Clause. Yet, because one Justice believes the statute violates the Due Process Clause and four Justices believe the statute violates the Takings Clause, a majority of the Court finds the statute is unconstitutional. Scholars have looked at voting paradoxes in the Supreme Court and found roughly twenty over the Court's history.

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In this Article, drawing mostly on social choice theory, I describe and model a particular kind of voting paradox that no one has addressed before – the precedent-based voting paradox. Unlike previously described voting paradoxes, which scholars have noted need at least two issues presented to the Court, the precedent-based voting paradox can arise when seemingly only one issue is presented to the Court. As I show in the Article, because the question of whether to overrule precedent can almost always lurk in the background of an issue, almost any case before the Court can result in a voting paradox.

Beyond introducing and modeling these precedent-based voting paradoxes, this Article makes four novel contributions to the growing literature on Supreme Court voting paradoxes. First, with the precedent-based voting paradox understood, voting paradoxes in the Supreme Court are more common than previously thought, and this Article catalogs the eleven precedent-based voting paradoxes that have occurred in Supreme Court history. Second, because of the precedent-based voting paradox, this Article argues that changing the Court's voting rules from outcome to issue voting, as some have argued in order to avoid voting paradoxes, would not solve the problem because even single issues can result in a precedent-based voting paradox. Third, this Article shows how Justices can use the precedent-based voting paradox to manipulate voting patterns to achieve results they want. Finally, this Article argues that lawyers should consider the precedent-based voting paradox when briefing cases and more frequently include arguments to overturn precedent.

INTRODUCTION

Imagine you have a case before the Supreme Court.¹ Your case contains two separate legal issues, and you have to win both in order to win your case. For instance, in a lawsuit alleging a violation of a constitutional right, you have to convince the Justices both that you brought the claim within the statute of limitations and that the government infringed upon your client's constitutional right.² After briefing and argument, the Court decides your case, and you win on both of those issues. And yet, despite successfully convincing a majority of the Justices that you brought your case within the statute of limitations *and* successfully convincing a majority of the Justices that the government infringed upon your client's constitutional right, you lose the case.

¹ In this Article, I focus my analysis on the Supreme Court. However, the analysis has much broader implications as it applies to any multi-member panel of judges that has the authority to overturn precedent. In the federal system, this includes en banc panels of the courts of appeals; in state judiciaries, this includes state supreme courts as well as any lower court with this authority.

² Winning on only one of these issues would not give your client a victory: either you will have filed within the statute of limitations but have proved no constitutional violation, or you will have missed the statute of limitations even though you have demonstrated a constitutional violation.

How is this possible? In what is called a “voting paradox,” the Court can rule against you even though majorities agree with you on the individual issues. A voting paradox can arise whenever two or more issues are presented to the Court, when no one way of resolving both issues gets majority support, and when there is also a dissent. If the resulting groups of Justices are split on the multiple issues, the outcome of the case can be the opposite of the outcome that the resolution of the individual issues should lead to.³ This paradox has occurred many times throughout the Supreme Court’s history and may have been behind the Court’s voting alignment in *Bush v. Gore*.⁴

Over the past two decades, several legal scholars have detailed this voting paradox.⁵ They have focused on theorizing and modeling how the Supreme Court, with Justices voting according to the outcome of the case rather than the individual issues presented in the case, can produce voting paradoxes. Under

³ I provide a detailed explanation of voting paradoxes *infra* Part I.

⁴ 531 U.S. 98, 103 (2000). Michael Abramowicz and Maxwell Stearns argue that the Court’s voting alignment in *Bush v. Gore* reflected a desire to avoid a voting paradox in such an important case. See Michael Abramowicz & Maxwell L. Stearns, *Beyond Counting Votes: The Political Economy of Bush v. Gore*, 54 VAND. L. REV. 1849, 1854 (2001).

⁵ See MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 306 (2000); Abramowicz & Stearns, *supra* note 4, at 1854; Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 821 (1982); Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 1 (1993); Michael I. Meyerson, *The Irrational Supreme Court*, 84 NEB. L. REV. 895, 901 (2006); Jonathan Remy Nash, *A Context-Sensitive Voting Protocol Paradigm for Multimember Courts*, 56 STAN. L. REV. 75, 76-77 (2003); David G. Post & Steven C. Salop, *Issues and Outcomes, Guidance, and Indeterminacy: A Reply to Professor John Rogers and Others*, 49 VAND. L. REV. 1069, 1069 (1996) [hereinafter Post & Salop, *Issues and Outcomes*]; David Post & Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 GEO. L.J. 743, 744 (1992) [hereinafter Post & Salop, *Rowing Against the Tidewater*]; Robert C. Power, *Affirmative Action and Judicial Incoherence*, 55 OHIO ST. L.J. 79, 137 (1994); John M. Rogers, *“I Vote This Way Because I’m Wrong”: The Supreme Court Justice as Epimenides*, 79 KY. L.J. 439, 439 (1991) [hereinafter Rogers, *“I Vote This Way”*]; John M. Rogers, *“Issue Voting” by Multimember Appellate Courts: A Response to Some Radical Proposals*, 49 VAND. L. REV. 997, 999 (1996) [hereinafter Rogers, *“Issue Voting”*]; Maxwell L. Stearns, *The Case for Including Marks v. United States in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321, 322 (2000); Maxwell L. Stearns, *How Outcome Voting Promotes Principled Issue Identification: A Reply to Professor John Rogers and Others*, 49 VAND. L. REV. 1045, 1048, 1050 (1996) [hereinafter Stearns, *How Outcome Voting*]; Maxwell L. Stearns, *Should Justices Ever Switch Votes?: Miller v. Albright in Social Choice Perspective*, 7 SUP. CT. ECON. REV. 87, 89 (1999) [hereinafter Stearns, *Should Justices Ever Switch Votes*]; Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309, 314 (1995); Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1338 (1995) [hereinafter Stearns, *Standing Back*].

these scholars' models, voting paradoxes can arise only when more than one issue is presented to the Court.

But imagine now that you have a different case before the Supreme Court. Unlike the previous hypothetical, this case seems to present only one issue to be resolved. Under the voting paradox model other scholars have developed, because there is only one issue in the case, it seems impossible to win on your one issue but lose the case. Thus, it seems impossible to have a voting paradox. However, what seems to be a safe bet is not. In this Article, I show that behind almost every Supreme Court case involving just one issue lurks a separate issue of whether to adhere to or abandon the precedent that governs the initial issue in the case. With this second issue in the mix, almost every case before the Court is at risk of resulting in what I call a "precedent-based voting paradox."⁶

While the multiple-issue voting paradox cases have been modeled and explored in detail by scholars, this type of voting paradox case, where ostensibly there is only one legal issue presented to the Court but a voting paradox can still arise because of the question of how to treat precedent, has not. This Article undertakes that task.

In doing so, this Article not only explains the precedent-based voting paradox and how it fits within the general voting paradox model as developed by social choice and other theoretical models, but it also explores the implications of this new understanding of the model. And there are serious implications here – empirical, theoretical, and normative.

First, understanding that otherwise single-issue cases can present voting paradoxes when the continuing value of precedent is open or opened for debate means that voting paradoxes are more likely to occur than has previously been understood. In fact, contrary to prior scholarship that has suggested that voting paradoxes are a limited phenomenon, the precedent-based voting paradox shows that voting paradoxes can arise in almost every case before the Court. This Article describes this possibility, particularly in constitutional cases where Justices feel less of an obligation to adhere to precedent. Moreover, this Article catalogs eleven Supreme Court cases that should be part of the list of Supreme Court paradoxes – cases that have been overlooked or miscategorized in the past.

Second, the precedent-based voting paradox creates a problem for supporters of issue voting by the Supreme Court. Some scholars argue that, to avoid the standard voting paradox, the Supreme Court should resolve cases by voting by issue rather than by outcome, as it currently does. As I show in this Article, changing the Court's voting rule to issue voting would not escape this problem because the resolution of almost every single issue before the Court could result in a precedent-based voting paradox.

Third, the precedent-based voting paradox raises the possibility that Justices will be able to manipulate voting patterns to achieve results they want. By

⁶ I detail how the precedent-based voting paradox works *infra* Part II.

addressing the issue of whether to overturn the precedent behind the case, Justices can reach a desired result even if they feel that the other legal issue presented to the Court compels the opposite result. Justices can change the outcome in this way even without a majority of the Justices agreeing to overturn the precedent. Because Justices sometimes question precedent on their own and other times insist that they cannot question precedent unless the option to do so is presented by the parties in the case, they can strategically manipulate these options in order to reach the outcome they wish. Due to the precedent-based voting paradox, which option they choose can change the result of the case even without getting any other colleague, let alone a majority of colleagues, to agree.

Finally, the existence of this type of voting paradox means that lawyers should more frequently raise the issue of overturning precedent. A large number of cases before the Supreme Court turn on the question of whether the case falls within the boundaries of a particular precedent's rule.⁷ Lawyers who introduce the issue of whether the precedent should be overruled can increase their chances of winning the case by increasing the possibility that a precedent-based voting paradox will arise. Even if there is no chance that a majority of the Court would agree that the precedent should be overruled, getting just a single Justice to agree to overrule the precedent might be enough to switch a losing case to a winning case.

This Article's exploration of these precedent-based voting paradoxes proceeds as follows. First, in Part I, I will explain multiple-issue voting paradoxes by looking at *Eastern Enterprises v. Apfel*⁸ and *Kassel v. Consolidated Freightways Corp.*⁹ Then, I will summarize the literature that has explored the multiple-issue voting paradox, paying close attention to the way scholars have modeled these cases under social choice theory in particular. In Part II, I will argue that although precedent-based voting paradoxes fit within these models, they are of a distinct nature and are worth studying separately. I will use *Hein v. Freedom from Religion Foundation, Inc.*¹⁰ to illustrate the precedent-based voting paradox and then develop a generalized model for precedent-based voting paradoxes that will show how they not only fit within the voting paradox model but also illuminate and expand it. Finally, in Part III, I will argue that precedent-based voting paradoxes are important for understanding Supreme Court decision-making and attorney argument strategy.

⁷ LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 172 (1998) (discussing the prevalence of relying on precedent in Supreme Court reasoning).

⁸ 524 U.S. 498 (1998).

⁹ 450 U.S. 662 (1981).

¹⁰ 551 U.S. 587 (2007).

I. MULTIPLE-ISSUE VOTING PARADOXES

Before getting into the specifics of precedent-based voting paradoxes, it is useful to discuss the multiple-issue voting paradoxes that other scholars have already analyzed. Doing so provides a comparative and analytic framework for better understanding precedent-based voting paradoxes. To this end, I will detail two cases that have already been studied by voting paradox scholars: *Eastern Enterprises v. Apfel*¹¹ and *Kassel v. Consolidated Freightways Corp.*¹² These two cases present slightly different types of multiple-issue voting paradoxes, so they are both useful to showcase. After presenting them, I will explain the voting paradox theory and model that others have developed and that will be useful for understanding the precedent-based voting paradox that I describe later.

A. *Eastern Enterprises v. Apfel: A Voting Paradox with Two Separate Main Issues*

Eastern Enterprises v. Apfel presents a straightforward multiple-issue voting paradox. In *Eastern Enterprises*, a former coal company challenged the federal Coal Industries Retiree Health Benefit Act of 1992 as unconstitutional.¹³ The company relied on two separate constitutional theories: that the Act violated the Fifth Amendment's Due Process Clause and that it violated the Fifth Amendment's Takings Clause.¹⁴ With five separate opinions and three different groups of Justices deciding the two constitutional issues differently, the case resulted in a voting paradox.

Justice O'Connor's plurality opinion, which was joined by Chief Justice Rehnquist and Justices Scalia and Thomas, found the Act unconstitutional as violating the Takings Clause.¹⁵ *Eastern Enterprises* had exited the coal business in 1965, yet in 1992 Congress required the company to fund lifetime health benefits for a group of miners *Eastern Enterprises* had employed before it left the business.¹⁶ The plurality opinion analyzed the new economic burden on *Eastern Enterprises* as a taking of property even though the Act did not fall within usual takings cases "in which the government directly appropriates private property for its own use."¹⁷ Justice O'Connor's opinion viewed the Act as imposing a form of regulatory taking because the Act deprived *Eastern Enterprises* of its assets, despite the money flowing to private individuals

¹¹ 524 U.S. 498 (1998).

¹² 450 U.S. 662 (1981).

¹³ *E. Enters.*, 524 U.S. at 517 (O'Connor, J., plurality opinion).

¹⁴ *Id.* at 503-04. The relevant portions of the Fifth Amendment state as follows: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

¹⁵ *E. Enters.*, 524 U.S. at 504.

¹⁶ *Id.* at 504-17.

¹⁷ *Id.* at 522.

rather than the government.¹⁸ She analyzed the Act under the Takings Clause factors enunciated in previous cases: “[T]he economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action.”¹⁹ Under that analysis, the Act was an unconstitutional taking.²⁰

Justice O’Connor’s opinion also addressed the company’s Due Process Clause claim. Under the doctrine of substantive due process, the company would have to show that the Act was “arbitrary and irrational.”²¹ Ultimately, the plurality concluded that because it found the Act unconstitutional under the Takings Clause, it “need not address” the due process claim.²² Nonetheless, the plurality was quite clear that it viewed the due process claim as frivolous, as it explicitly and approvingly referred to the Court’s history of having abandoned invalidating economic legislation under the theory of substantive due process.²³

Justice Kennedy, writing for himself, concurred in the judgment while also dissenting in part.²⁴ Justice Kennedy disagreed with the Takings Clause analysis in the plurality. According to him, the Act did not take any form of property but rather merely “impose[d] an obligation to perform an act, the payment of benefits.”²⁵ Takings Clause precedent, according to Justice Kennedy, applies only to “a specific property right or interest.”²⁶ However, even though the Act did not violate the Takings Clause, Justice Kennedy found

¹⁸ *Id.* at 523.

¹⁹ *Id.* at 523-24 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)); *see also id.* at 528-29 (“Our decisions, however, have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties’ experience.”).

²⁰ *Id.* at 529-37 (analyzing and balancing those factors and concluding that “in the specific circumstances of this case . . . the Coal Act’s application to Eastern effects an unconstitutional taking”).

²¹ *Id.* at 537 (citation omitted).

²² *Id.* at 538.

²³ *Id.* at 537. Despite only addressing the issue in dicta, the plurality noted that the Court had previously “expressed concerns about using the Due Process Clause to invalidate economic legislation.” *Id.* It repeated very strong language within two cases that such analysis had been “abandon[ed],” *id.* (citing *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963)), and that “[t]he day is gone” when the Court used this doctrine to strike down economic regulation, *id.* (citing *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955)).

²⁴ Justice Thomas also concurred, but did so while joining Justice O’Connor’s opinion in its entirety. He wrote to state his view that the Ex Post Facto Clause might, contrary to settled precedent, apply to civil legislation as well as criminal. *Id.* at 538-39 (Thomas, J., concurring). His opinion is irrelevant for the voting paradox analysis, as he joins the plurality in its entirety.

²⁵ *Id.* at 540 (Kennedy, J., concurring in the judgment and dissenting in part).

²⁶ *Id.* at 541.

that it did violate the Due Process Clause.²⁷ To Justice Kennedy, for many of the same reasons as stated by the plurality, the Act was retroactive legislation that was so arbitrary and irrational that it was “one of the rare instances” that violated the very permissive standard that applies to substantive due process challenges of economic regulations.²⁸ Thus, Justice Kennedy agreed with the plurality that the Act was unconstitutional, though he reached that conclusion for opposite reasons.

Justice Breyer wrote the main dissenting opinion, joined by Justices Stevens,²⁹ Souter, and Ginsburg. Justice Breyer’s dissent agreed with portions of both the plurality and Justice Kennedy’s concurrence but concluded that the Act did not violate the Constitution. Justice Breyer agreed with Justice Kennedy that the Court’s takings jurisprudence did not apply to “an ordinary liability to pay money, and not to the Government, but to third parties.”³⁰ And, like the strong suggestion in Justice O’Connor’s plurality opinion, Justice Breyer concluded that the Act did not violate principles of substantive due process.³¹ Thus, because in their view the Act violated neither the Due Process Clause nor the Takings Clause, the dissenters believed it was constitutional.

Combining all the votes, the Court found, paradoxically, that the Act was unconstitutional but also that the Act violated neither the Takings Clause nor the Due Process Clause. Five Justices concluded that the Act was unconstitutional (Chief Justice Rehnquist along with Justices O’Connor, Scalia, and Thomas in the plurality and Justice Kennedy in his concurrence in the judgment). Five Justices found the Act constitutional under the Takings Clause (Justice Kennedy in his concurrence in the judgment and Justices Stevens, Souter, Ginsburg, and Breyer in dissent). Eight Justices concluded that the Act was constitutional under the Due Process Clause (Chief Justice Rehnquist and Justices O’Connor, Scalia, and Thomas in the plurality and Justices Stevens, Souter, Ginsburg, and Breyer in dissent). The voting paradox arises because the combination of finding the Act constitutional under the Takings Clause, something a majority of the Court agreed with, and finding the Act constitutional under the Due Process Clause, something a different majority of the Court agreed with, should lead to the conclusion that the Act is constitutional. However, the Court, through a third majority, found the Act

²⁷ *Id.* at 547.

²⁸ *Id.* at 547-50.

²⁹ Justice Stevens wrote a short dissenting opinion of his own (joined by Justices Souter, Ginsburg, and Breyer) stressing a different view than the plurality of the factual history of Eastern Enterprises’s obligations. *Id.* at 550-53 (Stevens, J., dissenting). Like Justice Thomas’s concurrence, *see supra* note 24, Justice Stevens’s opinion is irrelevant for the voting paradox analysis.

³⁰ *Id.* at 554 (Breyer, J., dissenting).

³¹ *Id.* at 566-67. Unlike the plurality, however, Justice Breyer engages in a due process analysis of the fairness of the Act. *Id.* at 556-66.

unconstitutional. In chart form,³² the *Eastern Enterprises* voting paradox looks like this:

Opinion author and number of Justices joining ³³	Does the Act violate the Takings Clause?	Does the Act violate the Due Process Clause?	Is the Act unconstitutional?
O'Connor (4)	Yes (4)	No (4)	Yes (4)
Kennedy (1)	No (1)	Yes (1)	Yes (1)
Breyer (4)	No (4)	No (4)	No (4)
Total	No (5-4)	No (8-1)	Yes (5-4)

The bottom line shows the tally for each issue and highlights the paradox. The paradox arises because no individual Justice would vote according to the bottom line, as answering the first two questions “no” (concluding that the Act is constitutional under both the Takings Clause and the Due Process Clause), would lead to answering the third question “no” as well (concluding that the law is constitutional). However, the Court as a collective entity can and did answer the first two questions “no” but the third, outcome-determinative question “yes.”

B. *Kassel v. Consolidated Freightways Corp.: A Voting Paradox with One Main Issue and Two Sub-Issues*

*Kassel v. Consolidated Freightways Corp.*³⁴ presents a slight variation on the multiple-issue voting paradox. *Kassel*, unlike *Eastern Enterprises*, presented the Justices with just one issue: whether Iowa’s restriction on vehicle length on its highways violates the dormant Commerce Clause.³⁵ However, each Justice approached the inquiry by looking at two separate sub-issues: first, whether the dormant Commerce Clause inquiry is limited to determining whether the Iowa statute is protectionist; and second, whether the Court can evaluate new evidence of Iowa’s purpose or just what Iowa’s legislature considered when passing the law. The resulting split on these issues created a voting paradox.

Kassel presented a basic dormant Commerce Clause issue. Under dormant Commerce Clause doctrine, when Congress has not regulated interstate commerce in a particular area, the Court has ruled there is a presumption that Congress intended to leave that area free from unduly burdensome state regulation.³⁶ State laws that discriminate against interstate commerce, in purpose or effect, are almost always unduly burdensome because they are

³² I take this chart format convention, which I use repeatedly in this Article, from Meyerson, *supra* note 5, at 918.

³³ In this chart and the similar charts that follow, the number in parenthesis includes the opinion author.

³⁴ 450 U.S. 662 (1981).

³⁵ *Id.* at 664 (Powell, J., plurality opinion).

³⁶ *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 529, 545 (1949).

protectionist.³⁷ State laws that do not discriminate against interstate commerce are subject to a balancing test that weighs the state's interest in the law against the law's burden on interstate commerce.³⁸

In *Kassel*, the Court's three opinions differed on the test to be applied to state restrictions on truck length and how to evaluate the state's interests behind the restriction. Justice Powell's plurality opinion, joined by Justices White, Blackmun, and Stevens, applied the balancing test for non-discriminatory state laws that the Court had applied in previous truck-length cases.³⁹ Under that test, according to the plurality, the Court does not defer to the state's lawmakers in their assessment of the safety concerns⁴⁰ but rather evaluates on its own whether the "[r]egulations designed for that [safety] purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause."⁴¹ Employing that test, Justice Powell's plurality looked at the evidence the state presented at trial about the safety differences of different length trucks⁴² and compared that to the evidence the trucking company produced showing the burden that the regulation imposed on interstate commerce.⁴³ On balance, the burden on interstate commerce significantly outweighed the state's safety interests, and as a result, the plurality found the law to be an unconstitutional burden on interstate commerce.⁴⁴

Justice Brennan, joined by Justice Marshall, concurred in the judgment. He agreed with the plurality that the regulations were unconstitutional, but for different reasons. Justice Brennan believed that the balancing test used by the majority was inappropriate in the field of safety.⁴⁵ Rather, if the safety benefit asserted by the state is not "illusory, insubstantial, or nonexistent," the courts "must defer to the State's lawmakers on the appropriate balance to be struck

³⁷ *Hunt v. Wash. Apple Adver. Comm'n*, 432 U.S. 333, 352 (1977).

³⁸ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 146 (1970).

³⁹ *Kassel*, 450 U.S. at 671 (applying the test of *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 441 (1978), which is derived from *Pike*, 397 U.S. at 142).

⁴⁰ *Id.* at 675-76.

⁴¹ *Id.* at 670. The Court also "declined to 'accept the State's contention that the inquiry under the Commerce Clause is ended without a weighing of the asserted safety purpose against the degree of interference with interstate commerce.'" *Id.* (quoting *Raymond*, 434 U.S. at 443).

⁴² *Id.* at 671-74.

⁴³ *Id.* at 674-75.

⁴⁴ *Id.* at 678-79. Justice Powell also discussed the statute's possible protectionist goal, *id.* at 676-78, but did not rely on this parochialism to determine the statute's unconstitutionality. *See id.* at 678-79.

⁴⁵ *Id.* at 680-81 (Brennan, J., concurring in the judgment) ("[T]he only relevant evidence concerns whether the lawmakers could rationally have believed that the challenged regulation would foster [their] purposes . . . [not] whether *in fact* the regulation promotes its intended purpose . . .").

against other interests.”⁴⁶ Justice Brennan found fault in the Iowa statute, however, because it was protectionist, which is unconstitutional under the Commerce Clause.⁴⁷ Justice Brennan reached this conclusion by evaluating the “actual rationale” for the statute rather than the reasons Iowa’s lawyers gave for the statute during the litigation.⁴⁸ He criticized both the plurality and the dissent for “ask[ing] and answer[ing] the wrong question”⁴⁹ and ignoring the evidence that the legislature and governor enacted the length restriction in order to “discourage interstate truck traffic on Iowa’s highways.”⁵⁰ With that actual protectionist purpose, the safety interests articulated by the state at trial were irrelevant, and the regulation was unconstitutional.⁵¹

Justice Rehnquist’s dissenting opinion, joined by Chief Justice Burger and Justice Stewart, found the length restriction constitutional. The dissent agreed with Justice Brennan’s assessment of the level of deference given to a state asserting a safety interest, claiming that the Court should defer to the state by giving such safety measures a “strong presumption of validity.”⁵² However, the dissent disagreed with Justice Brennan about whether the Court should look only at the actual purpose of the regulation.⁵³ Instead, the dissent looked to the safety reasons the state established at trial to support the regulation.⁵⁴ As those reasons indicated that Iowa’s safety concerns were not illusory, the dissent concluded that “the challenged statute is a valid highway safety regulation and thus entitled to the strongest presumption of validity against Commerce Clause challenges.”⁵⁵

Thus, once again combining all the votes, the Court not only found that the Iowa restriction was unconstitutional but also that the Court should defer to the state’s assessment of safety and that new evidence of safety could be introduced. Six Justices found the law unconstitutional as violating the dormant Commerce Clause (Justices Powell, White, Blackmun, and Stevens in the plurality and Justices Brennan and Marshall in the concurrence in

⁴⁶ *Id.* at 681 n.1. He continued: “I therefore disagree with my Brother Powell when he asserts that the degree of interference with interstate commerce may in the first instance be ‘weighed’ against the State’s safety interests.” *Id.*

⁴⁷ *Id.* at 685.

⁴⁸ *Id.* at 681-82.

⁴⁹ *Id.* at 681.

⁵⁰ *Id.* at 681-82.

⁵¹ *Id.* at 687.

⁵² *Id.* at 690-91 (Rehnquist, J., dissenting); *id.* at 692 n.4 (“[A] majority of the Court goes on record today as agreeing that courts in Commerce Clause cases do not sit to weigh safety benefits against burdens on commerce when the safety benefits are not illusory.”).

⁵³ *Id.* at 692 n.4 (“I do not agree with my Brother Brennan, however, that only those safety benefits somehow articulated by the legislature as *the* motivation for the challenged statute can be considered in supporting the state law.”).

⁵⁴ *Id.* at 701-03.

⁵⁵ *Id.* at 693.

judgment). Five Justices concluded that the Court should defer to the state's assessment of safety interests (Justices Brennan and Marshall in the concurrence in judgment and Chief Justice Burger with Justices Rehnquist and Stewart in dissent). Seven Justices concluded that the Court should assess the state's safety interests by looking at new evidence introduced at trial rather than merely the articulated purpose that motivated the legislators (Justices Powell, White, Blackmun, and Stevens in the plurality and Chief Justice Burger with Justices Rehnquist and Stewart in dissent). The voting paradox arose because the combination of deferring to the state's assessment of safety, something a majority of the Court agreed with, and allowing new evidence of safety rather than actual purpose, something a different majority of the Court agreed with, should lead to the conclusion that the statute was constitutional. However, the Court, through a third majority, found it unconstitutional. In chart form, the *Kassel* voting paradox looks like this:

Opinion author and number of Justices joining	Should the Court defer to the state's assessment of safety?	Should the Court allow new evidence of the state's safety goals?	Is the Iowa restriction constitutional?
Powell (4)	No (4)	Yes (4)	No (4)
Brennan (2)	Yes (2)	No (2)	No (2)
Rehnquist (3)	Yes (3)	Yes (3)	Yes (3)
Total	Yes (5-4)	Yes (7-2)	No (6-3)

As with the *Eastern Enterprises* chart, the bottom line shows the tally for each issue as well as the paradox. No individual Justice would vote according to the bottom line because answering the first two questions "yes," concluding that the Court should defer if the state shows a safety interest and that the Court can accept the safety interest the state introduced at trial, would lead to answering the third question "yes" as well, concluding that the law is constitutional. However, the Court as a collective entity can and did answer the first two questions "yes" but the third, outcome-determinative question "no."

C. *Modeling Multiple-Issue Voting Paradoxes*

A small but growing number of scholars have discussed these voting paradox cases.⁵⁶ The most influential model of these paradoxes is the social choice model, but scholars have proposed and developed other models as well. Here, I will first set forth the social choice model in detail and then describe some of the other models that scholars have developed in the context of multiple-issue voting paradoxes.

⁵⁶ See sources cited *supra* note 5.

1. The Social Choice Model

Many scholars who have looked at voting paradoxes have put them in the context of social choice theory.⁵⁷ Social choice is the study of aggregating individual preferences into group preferences.⁵⁸ In the context of courts, social choice scholars study how a multi-member court can reach a decision by aggregating the preferences of the individual judges.⁵⁹

At the heart of social choice lies the related works of two individuals – Marquis de Condorcet and Kenneth Arrow. Condorcet first described a phenomenon that is an important part of social choice theory and is now known as Condorcet’s Paradox.⁶⁰ The paradox can occur when a group of more than two individuals has to choose between more than two options.⁶¹ In certain situations – instances of Condorcet’s Paradox – aggregating the individuals’ choices becomes complicated because no choice is preferred by the group over all others.⁶²

To understand the paradox, it is helpful to first look at a situation in which the paradox does not arise. Imagine three law students who are friends and want to take an upper-level class together. They are deciding among three listed course offerings: Administrative Law, Business Organizations, and Constitutional Theory. They decide to rank their preferences for the class. The first student loves Administrative Law, likes Constitutional Theory next, and Business Organizations the least. The second student prefers Business Organizations first, Constitutional Theory next, and Administrative Law third. The third student would like to take Constitutional Theory the most, Administrative Law next, and Business Organizations the least. To summarize their individual preferences in order of most desired to least desired:

Student 1: Administrative Law, Constitutional Theory, Business Organizations
Student 2: Business Organizations, Constitutional Theory, Administrative Law
Student 3: Constitutional Theory, Administrative Law, Business Organizations

⁵⁷ See, e.g., STEARNS, *supra* note 5, at 306-07; Easterbrook, *supra* note 5, at 13; Rogers, “Issue Voting,” *supra* note 5, at 1001 n.27, 1016 n.71, 1026 n.97.

⁵⁸ See AMARTYA SEN, RATIONALITY AND FREEDOM 66 (2002) (posing the main issue for social choice theory as how it is “possible to arrive at cogent aggregative judgments about the society . . . given the diversity of preferences, concerns, and predicaments of the different individuals *within* the society”).

⁵⁹ See, e.g., Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1257-86, 1288-89 (1994).

⁶⁰ The Paradox has been described in detail in a large number of sources. For a good overview of the Paradox, as well as an analysis of the work of the Marquis de Condorcet, see generally Cheryl D. Block, *Truth and Probability – Ironies in the Evolution of Social Choice Theory*, 76 WASH. U. L.Q. 975 (1998).

⁶¹ With only two options, the paradox does not arise. See WILLIAM V. GEHRLEIN, CONDORCET’S PARADOX 2-4 (2006); Block, *supra* note 60, at 985.

⁶² See DAVID VAN MILL, DELIBERATION, SOCIAL CHOICE AND ABSOLUTIST DEMOCRACY 21-22 (2006); Block, *supra* note 60, at 984-89.

Condorcet's method of aggregating these individual preferences is to have a series of head-to-head votes for each option.⁶³ In other words, Condorcet suggests comparing each option to the other options individually and determining which option the voters would most prefer in that matchup. These individual votes require two important assumptions. First, the students must vote rationally, such that a student who prefers Administrative Law first, Constitutional Theory second, and Business Organizations third would prefer not only Administrative Law (first preference) over Constitutional Theory (second) and Constitutional Theory (second) over Business Organizations (third) but also Administrative Law (first) over Business Organizations (third). Second, the students must vote sincerely, meaning that they must vote in accordance with their individual rankings in each head-to-head matchup and not change their votes out of other considerations.⁶⁴

Using Condorcet's head-to-head method and his assumptions for this example produces a clear winner. To illustrate, one such head-to-head vote would be between Administrative Law and Constitutional Theory. This matchup would result in a win for Constitutional Theory, as both Student 2 and Student 3 prefer taking Constitutional Theory over Administrative Law. Voting between Constitutional Theory and Business Organizations also results in a win for Constitutional Theory, as both Student 1 and Student 3 prefer Constitutional Theory over Business Organizations. Because Constitutional Theory beats both of the alternatives, it is the winner.⁶⁵ In this situation, Constitutional Theory is the "Condorcet winner" because it is the alternative that prevails over all other alternatives.⁶⁶

However, consider a slightly different formulation of the preferences. Student 2 and Student 3 continue to have the same preferences, but Student 1's preferences change just slightly. Student 1 still prefers Administrative Law the most but then prefers Business Organizations, with Constitutional Theory last. Now, the summary of the preferences looks like this:

Student 1: Administrative Law, Business Organizations, Constitutional Theory
Student 2: Business Organizations, Constitutional Theory, Administrative Law
Student 3: Constitutional Theory, Administrative Law, Business Organizations

⁶³ See GEHRLEIN, *supra* note 61, at 5-7.

⁶⁴ Maxwell L. Stearns, *An Introduction to Social Choice*, in ELGAR HANDBOOK ON PUBLIC CHOICE (forthcoming 2009) (draft copy at 4-5, on file with the Boston University Law Review) (explaining these two assumptions in detail); *see also* Stearns, *Standing Back*, *supra* note 5, at 1343-49 (demonstrating the increased irrationality that results when these assumptions are relaxed).

⁶⁵ Taking a vote between Administrative Law and Business Organizations (which Administrative Law would win, as Student 1 and Student 3 prefer it to Business Organizations) changes nothing, as Constitutional Theory is the winner over both of them in individual head-to-head votes.

⁶⁶ Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971, 989 n.55 (1989); Stearns, *supra* note 59, at 1255.

Under this preference structure, Condorcet's method of determining a winner does not work because no course is the winner over each of the other two alternatives. Between Administrative Law and Business Organizations, Administrative Law wins (Student 1 and Student 3 versus Student 2). Between Administrative Law and Constitutional Theory, Constitutional Theory wins (Student 2 and Student 3 versus Student 1). The students might stop there and think that if Administrative Law beats Business Organizations and Constitutional Theory beats Administrative Law, then between Constitutional Theory and Business Organizations, Constitutional Theory must win. However, the students would not only be going against Condorcet's method of holding head-to-head votes for all options,⁶⁷ but would also be wrong based on their individual preferences. Between Constitutional Theory and Business Organizations, Business Organizations wins (Student 1 and Student 2 versus Student 3). Thus, with each head-to-head matchup, the students get a different winner:

Administrative Law versus Business Organizations: Administrative Law wins

Administrative Law versus Constitutional Theory: Constitutional Theory wins

Constitutional Theory versus Business Organizations: Business Organizations wins

Stated differently, each option wins against one of the other options but loses against the third. With this arrangement of the preferences, there is no Condorcet winner. Instead, there is a Condorcet Paradox.⁶⁸ And, because the head-to-head voting could continue indefinitely without producing a winner (in the vote order above, after Business Organizations wins against Constitutional Theory, going back to voting between Business Organizations and Administrative Law just produces the same results once again), the votes result in "cycling."⁶⁹

Condorcet's work was originally ignored by all but a small handful of scholars⁷⁰ until Duncan Black focused modern attention on Condorcet.⁷¹ Kenneth Arrow then built upon Condorcet's work by proving that the

⁶⁷ In fact, limiting the number of head-to-head votes puts control into the hands of the person making the agenda, as the agenda-setter can control the outcome by choosing which votes occur in which order. For a detailed examination of this phenomenon, see generally Michael E. Levine & Charles R. Plott, *Agenda Influence and Its Implications*, 63 VA. L. REV. 561 (1977).

⁶⁸ See Kornhauser & Sager, *supra* note 5, at 12 n.22 ("Almost every discussion of voting mentions, alludes to, or focuses on the Condorcet Paradox."); see also GEHRLEIN, *supra* note 61, at 16-19. Cheryl Block notes that some scholars call it "Arrow's Paradox" or "Arrow's Impossibility Theorem" instead of "Condorcet's Paradox." Block, *supra* note 60, at 981 & n.23.

⁶⁹ See, e.g., Block, *supra* note 60, at 1008-09.

⁷⁰ See William H. Riker, *Voting and the Summation of Preferences: An Interpretive Bibliographical Review of Selected Developments During the Last Decade*, 55 AM. POL. SCI. REV. 900, 901-02 (1961).

⁷¹ DUNCAN BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* 159-80 (1958).

possibility of an irrational or paradoxical result is an inherent feature of every voting system that meets four basic criteria commonly associated with fair and democratic voting: range, unanimity, nondictatorship, and independence of irrelevant alternatives.⁷² Range (also called unrestricted scope) exists when the voting system allows each individual to choose among any of the available options in whatever order the individual wants.⁷³ Unanimity exists when the system results in the group preferring an outcome if everyone in the group individually prefers that outcome.⁷⁴ Nondictatorship exists when no one member of the group is able to control the outcome despite the other members of the group having an opposite preference.⁷⁵ Independence of irrelevant alternatives exists when an individual's preference between two alternatives is independent of the individual's preference between other alternatives.⁷⁶ Arrow's Theorem proves that no voting system can have these four characteristics and also produce rational results.⁷⁷

Arrow's Theorem applies in the Supreme Court, as the Court has to aggregate the preferences of individual Justices to reach a collective outcome.⁷⁸ Accordingly, the Court has to relax at least one of the four criteria in order to reach a collective decision that appears rational. The Court relaxes the range criterion in two ways: first, it has to produce an outcome, thus removing failure to act from the possible preferences; second, the Court generally adheres to the principle of *stare decisis*, thus removing the

⁷² See generally KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963). I have benefitted from other writers who have explained Arrow's Impossibility Theorem in very accessible ways. See generally, e.g., ALFRED F. MACKEY, *ARROW'S THEOREM: THE PARADOX OF SOCIAL CHOICE* (1980); DENNIS C. MUELLER, *PUBLIC CHOICE III* (2003).

⁷³ See MACKEY, *supra* note 72, at 7-8 ("If you are going to consult the wishes of the multitude at all, you may as well let them express whatever preferences they really have, for whatever alternatives they happen to be faced with, under no artificially imposed restraints.").

⁷⁴ See *id.* at 8 ("It is difficult to see how the social choice could be said to reflect individual preferences or be responsive to them in any significant sense if it failed to ratify unanimous consensus.").

⁷⁵ See *id.* at 8 ("[A]n acceptable aggregation device should be a *collective* choice procedure, not merely rubber stamping one-person rule.").

⁷⁶ See *id.* at 8-9 ("[O]nly the bare ordering of individuals' preferences is to be taken into account. [Moreover,] only a restricted class of them is to be responded to. In generating a social ranking of a given set of alternatives, only preference orderings of *those alternatives* (and no others) are to be taken into account.").

⁷⁷ "Rational" results are defined as those that are transitive. In other words, if the group prefers A to B and B to C, it prefers A to C. See *id.* at 103-04.

⁷⁸ Again, as mentioned earlier, even though I am discussing just the Supreme Court in this Article, the same holds true of appellate courts generally and, for the part of this Article discussing overturning precedent, for all appellate courts that have the power to revisit precedent.

reconsideration of settled principles from the possible preferences.⁷⁹ I will discuss these aspects of range in the Supreme Court in depth later, as they are important to understanding the precedent-based voting paradox.⁸⁰

Several legal scholars have looked at Condorcet's Paradox and Arrow's Theorem to explain the voting paradox cases described here. Most notably, Maxwell Stearns has written at length about these cases and how they fit within social choice theory.⁸¹ According to Stearns, the voting paradox cases all involve a strong possibility of cycling.⁸² However, the Supreme Court reaches a result in the case anyway by operating, as mentioned above, under limited range: it cannot choose among unlimited options, as it must decide whether to reverse or affirm the lower court judgment before it.⁸³ That is, the Supreme Court uses outcome voting to determine the result of the case, and the outcomes that it can choose from are usually limited to two.⁸⁴ Thus, in the voting paradox cases, the Court can still choose a winner in the case, but it does so in an irrational manner by choosing an outcome that is not consistent with the majority resolutions of the multiple issues before the Court.

Using social choice terminology, voting paradoxes arise when the issues before the Court are multidimensional and the Justices have asymmetrical preferences. Multidimensionality contrasts with unidimensionality, which exists when the individual preferences can be arranged on a spectrum in which each individual prefers the option closer to her own over any option further away.⁸⁵ For instance, the three law students agree to form a study group together and disagree on whether they should meet for one hour, two hours, or three hours, with each ranking each option. Most likely, the student thinking

⁷⁹ See, e.g., STEARNS, *supra* note 5, at 84-88.

⁸⁰ The other criteria are less important in this context. Judge Frank Easterbrook claims that appellate courts obviously act consistent with unanimity, nondictatorship, and independence of irrelevant alternatives. Easterbrook, *supra* note 5, at 824-31. Maxwell Stearns disputes Easterbrook's analysis and provides a detailed model of appellate courts (mostly the Supreme Court) with respect to these three conditions, showing that they are relaxed in various ways in some situations. See Stearns, *supra* note 59, at 1276-83; Stearns, *Should Justices Ever Switch Votes*, *supra* note 5, at 88-94. Other than some aspects of the independence of irrelevant alternatives condition discussed *infra* note 198 and accompanying text, these details are not important for understanding the precedent-based voting paradox.

⁸¹ See generally STEARNS, *supra* note 5.

⁸² Stearns, *Should Justices Ever Switch Votes*, *supra* note 5, at 125-27.

⁸³ *Id.* at 109.

⁸⁴ The Supreme Court occasionally has three possible outcomes it can reach – affirm, reverse, or remand. See STEARNS, *supra* note 5, at 153-54; Rogers, “*I Vote This Way*,” *supra* note 5, at 459-61.

⁸⁵ Stearns, *Should Justices Ever Switch Votes*, *supra* note 5, at 116 (“Implicit in the assertion of a unidimensional continuum is the premise that, if forced to choose among each of the remaining opinions, those writing or joining the opinions at the outer edge would most prefer the one closest to them and least prefer the one farthest from them.”).

the group needs three hours would prefer to study for two hours over just one hour, and the student thinking the group needs to study for only one hour would prefer two hours over taking all three.

Multidimensionality exists when preferences cannot be ranked linearly and the individual holding the extreme position could prefer the complete opposite position to anything in the middle.⁸⁶ Multidimensionality most frequently occurs when there are two distinct issues presented to the individuals making the choices.⁸⁷ For instance, the law students need to decide whether to hold their study session in the morning or afternoon and whether to meet on Monday or Tuesday. Those options can reveal multidimensionality because individual preferences for the four options – Monday morning, Monday afternoon, Tuesday morning, Tuesday afternoon – might not be ranked linearly. Certainly one student might prefer meeting as soon as possible and thus prefer the meeting times in chronological order. But another student, a morning person, might prefer meeting in the mornings on either day over meeting either afternoon. Or another student might prefer meeting at the earliest possible time or latest possible time because she has conflicts in between.

A group of individuals has asymmetrical preferences with respect to multiple issues when opposite issue preferences produce the same result.⁸⁸ Returning to our law students, the group of three is now deciding which courses to take, but within this new scenario, the school has a rule that students who take either Trial Advocacy or Appellate Advocacy are eligible to get into a third-year clinic.⁸⁹ For this example, the first-choice preferences are as follows:

- Student 1: Trial Advocacy, not Appellate Advocacy
- Student 2: Not Trial Advocacy, Appellate Advocacy
- Student 3: Not Trial Advocacy, not Appellate Advocacy

Student 3's preference would result in the group not getting into the clinic. But, both Student 1 and Student 2, although having opposite preferences on both of the courses, would reach the same result – that the group would get into the clinic. The choices here are thus asymmetrical.⁹⁰

⁸⁶ *Id.* at 116 n.99.

⁸⁷ See ALLAN M. FELDMAN & ROBERTO SERRANO, WELFARE ECONOMICS AND SOCIAL CHOICE THEORY 263-68 (2d ed. 2006).

⁸⁸ Stearns, *Should Justices Ever Switch Votes*, *supra* note 5, at 124 (citing *Miller v. Albright*, 523 U.S. 420 (1998), a case in which “the opposite issue resolutions by the O’Connor and Stevens camps produces precisely *the same result*, and thus asymmetrical preferences”).

⁸⁹ The students in this example do not have preferences about whether they get into the clinic.

⁹⁰ The students would have symmetrical choices if the situation were slightly changed and in order to get into the clinic the students would have to take *both* trial advocacy and appellate advocacy. The choice preferences are as follows:

When the issues are multidimensional and the preferences asymmetrical, cycling can occur. Taking the scenario of the three students trying to coordinate their schedules on Trial Advocacy and Appellate Advocacy, the three options presented above can be labeled A (Trial Advocacy, no Appellate Advocacy), B (no Trial Advocacy, Appellate Advocacy), or C (no Trial Advocacy, no Appellate Advocacy). A possible preference order for each student would be as follows:

Student 1: A, B, C (the student prioritizes taking at least one of the courses)

Student 2: B, C, A (the student prioritizes not taking Trial Advocacy)

Student 3: C, A, B (the student prioritizes not taking Appellate Advocacy)

A cycle results here, with no option beating out all others in head-to-head votes. But, if the range is restricted, such as requiring the students to vote not on the individual course options but rather on the ultimate question of whether they want to get into the clinic, a winner can be selected. In that case, both Student 1 and Student 2 prefer course options that get them into the clinic, so that outcome wins over Student 3's preference for course options that do not. However, now we have the voting paradox, as a majority prefers not taking trial advocacy, a majority prefers not taking appellate advocacy, yet a majority prefers getting into the clinic.

Stearns shows that cases that do not exhibit both multidimensionality⁹¹ and asymmetrical preferences⁹² will not result in voting paradoxes; however, cases that do exhibit both of those features make voting paradoxes possible. The two cases discussed above fit in this category of multidimensionality and asymmetrical preferences. In *Eastern Enterprises v. Apfel*,⁹³ the two issues are multidimensional as they are not linearly related to one another: whether the Act violates the Takings Clause is completely independent from whether it

Student 1: Trial Advocacy, Appellate Advocacy

Student 2: No Trial Advocacy, no Appellate Advocacy

Student 3: No Trial Advocacy, Appellate Advocacy

Student 1 and Student 2 have opposite preferences that lead to opposite results – Student 1's preference gets the group into the clinic, whereas Student 2's preference does not.

⁹¹ Stearns uses *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), as a case that has a plurality opinion but lacks multidimensionality. See Stearns, *Should Justices Ever Switch Votes*, *supra* note 5, at 111-17. In unidimensional cases, the rule of *Marks v. United States*, 430 U.S. 188 (1977), applies: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .'" *Id.* at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). The *Marks* rule makes sense in unidimensional cases because the Justices taking the extreme position would naturally prefer the middle position to the opposite extreme. Stearns explains this in detail in STEARNS, *supra* note 5, at 124-30.

⁹² Stearns uses *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), as a case that has a plurality opinion but lacks asymmetrical preferences. See Stearns, *Should Justices Ever Switch Votes*, *supra* note 5, at 117-21.

⁹³ 524 U.S. 498 (1998).

violates the Due Process Clause. Moreover, the voting preferences are asymmetrical as Justice O'Connor's and Justice Kennedy's opinions reach opposite conclusions on the two issues yet reach the same result in the case, both finding the Act unconstitutional.⁹⁴ Likewise, in *Kassel v. Consolidated Freightways Corp.*,⁹⁵ there are two separate issues that are not arranged linearly on a spectrum: should the Court defer to the state's safety rationale and should the Court accept new justifications from the state. Thus, there is multidimensionality. The preferences are asymmetrical because the Justices reaching opposite results on the two issues (Justice Powell's plurality opinion and Justice Brennan's concurrence in judgment) reach the same result on the case – that the statute is unconstitutional.⁹⁶

We cannot be certain that there is Condorcet cycling in either case, as the Justices do not rank their preferences of the various options, but there is a very real possibility such cycling exists.⁹⁷ However, because the Court ultimately votes based on outcomes rather than individual issues, the Court can reach a result even though there may be a cycle embedded in the outcome. In other words, the Court relaxes one of the fairness conditions in Arrow's theorem,

⁹⁴ See *supra* Part I.A.

⁹⁵ 450 U.S. 662 (1981).

⁹⁶ See *supra* Part I.B.

⁹⁷ For instance, in *Eastern Enterprises*, the three sets of opinions have the following three permutations, labeled A, B, and C for future reference:

O'Connor:	Violates Takings Clause, does not violate Due Process Clause (A)
Kennedy:	Does not violate Takings Clause, violates Due Process Clause (B)
Breyer:	Does not violate Takings Clause, does not violate Due Process Clause (C)

It is possible that the true ranked preferences of each of the opinions is as follows:

O'Connor:	A, B, C (would rule on Due Process Clause as alternative)
Kennedy:	B, C, A (believes Takings Clause is not viable possibility, as opinion makes clear)
Breyer:	C, A, B (believes Due Process Clause is weakest argument based on history)

This set of preferences would lead to the voting paradox that occurred in the case itself and would result in cycling in head-to-head contests between each alternative. However, another plausible set of preferences would not lead to cycling:

O'Connor:	A, B, C (would rule on Due Process Clause as alternative to reach same result)
Kennedy:	B, A, C (would rule on Takings Clause as alternative to reach same result)
Breyer:	C, A, B (believes Due Process Clause is weakest argument based on history)

In this case, there is no cycling, as A wins the series of head-to-head contests (A is preferred by a majority over both B and C), and yet the voting paradox still exists (as it occurred in the case itself). Because the Justices tend to justify only the position they have taken and do not generally explain their entire set of preferences, we cannot know for certain whether cycling exists or not within a particular voting paradox.

specifically range, in order to avoid a Condorcet Paradox. Yet, in doing so, the voting paradoxes described above arise.

2. Other Models

Other scholars have looked at voting paradoxes outside the context of social choice. For instance, Lewis Kornhauser and Lawrence Sager frame voting paradoxes as a clash between results based on outcome and issue voting:

In simple disputes that present only one cause of action (or ground for recovery), the doctrinal paradox will arise if two conditions are met: (1) a majority of judges would each rule against the plaintiff on at least one issue, and (2) there is no one issue on which a majority of judges would join in ruling against the plaintiff. Condition (1) ensures that, in case-by-case adjudication, the court finds *against* the plaintiff. Condition (2) ensures that, in issue-by-issue adjudication, the court finds *for* the plaintiff.⁹⁸

Jonathan Remy Nash uses a mathematical formulation to explain the different results based on outcome as opposed to issue voting.⁹⁹ Michael Meyerson develops what he calls a “mathematical approach,” and gives a proof that results in several different preconditions that he says are necessary for the voting paradox to arise.¹⁰⁰

⁹⁸ Kornhauser & Sager, *supra* note 5, at 11-12 n.21. They recognize however that “[u]nfortunately, we cannot at this point state necessary and sufficient conditions for the doctrinal paradox generally.” *Id.*

⁹⁹ Nash, *supra* note 5, at 80-82. Nash first diagrams a “two-dimensional” case in which the appellant requires the presence of both issues to win; this case presents four possible preferences for the judges:

	B	-B
A	w	y
-A	x	z

Id. at 80. Using this diagram, Nash states that a “paradox will arise whenever $x + y + z > w$ (so that outcome-based voting presents a result favorable to the appellee), yet $w + y > x + z$ and $w + x > y + z$ (so that the appellant prevails on both issues).” *Id.* at 80-81.

¹⁰⁰ Meyerson, *supra* note 5, at 932-33. According to Meyerson, for a paradox (or “irrational opinion”) to arise:

- (i) There must be at least two distinct issues;
- (ii) There cannot be a majority opinion;
- (iii) There must be a minimum of three opinions such that:
 - a. There is at least one issue in each opinion which is resolved in favor of a different party than in the other two opinions; and
 - b. At least two of the opinions which reach the same conclusion as to who should ultimately prevail must resolve at least two issues in favor of different parties; and
- (iv) For cases with only two issues, the votes of the Justices are divided in such a way that:

Kornhauser and Meyerson argue that their models are more precise than the social choice model. In particular, they believe that the voting paradox is separate from the social choice concepts of the Condorcet Paradox and cycling.¹⁰¹ Both argue that cycling does not inevitably lead to a voting paradox and that a voting paradox does not necessarily contain cycling.¹⁰² Cycling does not necessarily lead to a voting paradox because if all of the options that would otherwise cycle on individual rankings lead to the same outcome, then there is no voting paradox.¹⁰³ Conversely, a voting paradox does not necessarily have to contain cycling. In a voting paradox situation, if the two groups that reach the same result through opposite reasoning rank the opposite position last, then the third group – which reaches the opposite result but agrees with each of the other groups on one point – would be the Condorcet winner.¹⁰⁴ Because cycling is neither necessary nor sufficient to create a voting paradox, these scholars prefer the alternate formulations.¹⁰⁵

-
- a. The combined votes for the party who prevails in both split decisions total a majority (so that he wins the case); and
 - b. The sums from adding the unified votes for the other party separately to each of the split decisions total a majority (so that she wins on each issue).

Id.

¹⁰¹ See Lewis A. Kornhauser, *Modeling Collegial Courts. II. Legal Doctrine*, 8 J.L. ECON. & ORG. 441, 453 (1992); Meyerson, *supra* note 5, at 929-30 (“There is no cycling, even though the voting pattern resulted in an irrational decision.”).

¹⁰² Kornhauser, *supra* note 101, at 453 (“[T]he doctrinal paradox may occur even when some complete resolution of the case defeats every other complete resolution of the case in pairwise contests, and the doctrinal paradox need not occur when no such Condorcet winner exists.”); Meyerson, *supra* note 5, at 927-30 (using hypotheticals to demonstrate both points and explaining that “cases with cycling need not end in an irrational result, and cases with irrational results need not contain cycling”).

¹⁰³ For instance, the law students who have to take either Trial Advocacy or Appellate Advocacy in order to get into the clinic could rank their preferences as follows (with A being Trial Advocacy, Appellate Advocacy; B being Trial Advocacy, no Appellate Advocacy; and C being no Trial Advocacy, Appellate Advocacy):

- Student 1: A, B, C (prioritizing Trial Advocacy)
- Student 2: B, C, A (prioritizing taking one advocacy course over both)
- Student 3: C, A, B (prioritizing Appellate Advocacy)

In this scenario, there is cycling because no one option wins in head-to-head battles. However, there is no voting paradox, as all three students prefer a course package that results in them getting into the clinic. Thus, the result of a vote on the outcome (whether to get into the clinic) does not produce a result inconsistent with the vote on each individual course (whether to take Trial Advocacy and whether to take Appellate Advocacy).

¹⁰⁴ Thus, with the law student clinic preferences ranked slightly differently (with the same notations as described *supra* note 103 but now adding D into the mix for the choice of no Trial Advocacy, no Appellate Advocacy):

- Student 1: B, D, C (prioritizing not taking Appellate Advocacy)
- Student 2: C, D, B (prioritizing not taking Trial Advocacy)

Regardless of the theoretical differences among these competing models, the previously discussed voting paradox cases fit nicely within all of them, just as they fit within the social choice model. Taking the most general formulation from Kornhauser and Sager as illustrative,¹⁰⁶ both *Eastern Enterprises* and *Kassel* have different results based on outcome and issue voting.¹⁰⁷ In both cases, outcome-based voting leads to the Court's result, whereas issue-based voting leads to the opposite result.

II. PRECEDENT-BASED VOTING PARADOXES

The work on voting paradoxes has focused on the two-issue cases presented above – either with two completely separate issues or with one issue that has two distinct sub-issues. The scholars studying the voting paradoxes describe them as an important issue but a phenomenon that is limited to a “narrow subset” of cases.¹⁰⁸ Further examination of precedent-based voting paradoxes, however, shows that voting paradoxes can arise in a much larger subset of

Student 3: D, B, C (or D, C, B) (prioritizing no advocacy course but indifferent about which one to take by itself)

In this scenario, by outcome voting, the students choose to get into the clinic (both Student 1 and Student 2 result in getting into the clinic). However, by issue voting, there are two votes for not taking Trial Advocacy (Student 2 and Student 3) and two votes for not taking Appellate Advocacy (Student 1 and Student 3). The result is a voting paradox. Yet, there is no cycling, because in head-to-head voting, option C (no Trial Advocacy, no Appellate Advocacy) wins.

¹⁰⁵ Although these scholars point to these issues as flaws in the social choice model, it is unlikely that Stearns, the leading author writing about the social choice model, would disagree. Stearns acknowledges that voting paradoxes might not lead to cycling because we have no way of knowing the Justices' individual ranked preferences. Stearns, *Should Justices Ever Switch Votes*, *supra* note 5, at 125. Meyerson assumes that Justices would probably prefer the opposite outcome to switching both issue positions. Meyerson, *supra* note 5, at 929. Stearns, on the other hand, says there is no way to know whether the Justices would prefer switching the outcome or switching both positions. Stearns, *Should Justices Ever Switch Votes*, *supra* note 5, at 125. Both are really saying the same thing: because Justices vote based on outcome and we have to assume their preferences beyond their stated position, some voting paradoxes mask cycling while others may not.

¹⁰⁶ See *supra* text accompanying note 98.

¹⁰⁷ For *Eastern Enterprises*, see discussion *supra* Part I.A. For *Kassel*, see discussion *supra* Part I.B.

¹⁰⁸ Stearns, *Should Justices Ever Switch Votes*, *supra* note 5, at 127 (“[W]hile expanding dimensionality increases the possibility of cycling majorities, cycling is only conceivable in a *narrow subset* of multidimensional cases, those in which the collective resolutions of dispositive issues reveal an asymmetry such that the opposite resolutions of dispositive issues lead to the same outcome.” (emphasis added)); see also Meyerson, *supra* note 5, at 930 (describing the strict requirements for a voting paradox and stating that “there must be at least two distinct issues”); Nash, *supra* note 5, at 80 (“Roughly speaking, a case that presents only one issue could not produce one result using issue-based voting and another using outcome-based voting.”).

cases than previously thought. In fact, because almost every Supreme Court case can fit the criteria described below, almost every case can result in a voting paradox.

In this Part, I first describe the seemingly one-issue voting paradox case of *Hein v. Freedom from Religion Foundation, Inc.*¹⁰⁹ Then I situate *Hein* within the models already described and develop a generalized model of the precedent-based voting paradox. In the final Part of the Article, I conclude by arguing that these cases are important for understanding Supreme Court decision-making because they are more common than previously thought, they show the likely futility of issue-based voting schemes, they give Justices more of an ability to strategically manipulate results, and they give lawyers a reason to raise the issue of overturning precedent more frequently.

A. *Hein v. Freedom from Religion Foundation, Inc.: The Precedent-Based Voting Paradox*

Unlike the two main issues in *Eastern Enterprises* or the two sub-issues in *Kassel*, the Court was presented with only one issue in *Hein v. Freedom from Religion Foundation, Inc.*¹¹⁰ In *Hein*, the Court had to answer whether Freedom from Religion Foundation, a non-profit corporation that works to keep government and religion separate, had standing to challenge conferences that were part of President Bush's Faith Based and Community Initiatives program as violations of the Establishment Clause.¹¹¹ In order to answer that question, the litigants and the Justices agreed that the Court had to determine whether the facts of *Hein* fell within the rule of *Flast v. Cohen*,¹¹² a case decided nearly four decades earlier. With seemingly only this one issue before the *Hein* Court, it would appear impossible for a voting paradox to arise. However, because Justices Scalia and Thomas introduced the issue of overruling the precedent upon which the case hinged,¹¹³ an issue that was not briefed or raised to the Court, *Hein* resulted in a voting paradox.

Under long-established doctrine in federal court, a taxpayer generally does not have standing to challenge government actions simply based on the fact that he pays taxes.¹¹⁴ The Supreme Court established this doctrine in *Frothingham v. Mellon*¹¹⁵ when it rejected a taxpayer's challenge to the Federal Maternity Act of 1921 as violating the Takings Clause.¹¹⁶ The plaintiff

¹⁰⁹ 551 U.S. 587 (2007).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 2559-60.

¹¹² 392 U.S. 83 (1968).

¹¹³ *Hein*, 551 U.S. at 618 (Scalia, J., concurring in the judgment).

¹¹⁴ *Flast*, 392 U.S. at 83.

¹¹⁵ 262 U.S. 447 (1923).

¹¹⁶ *Id.* at 479-80. The Maternity Act "provide[d] for an initial appropriation and thereafter annual appropriations for a period of five years . . . for the purpose of cooperating

argued that because the Act would require expenditures by the federal government, it injured her as a taxpayer whose taxes would be increased accordingly.¹¹⁷ The Court rejected her claimed injury, explaining that her alleged interest in the government following the Constitution was “essentially a matter of public and not of individual concern.”¹¹⁸ Without a showing of “direct injury as the result of [the statute’s] enforcement,” the taxpayer had no standing and would be asking the courts to infringe on the legislature’s or executive’s powers without a need to do so.¹¹⁹ The Court has applied this rule of taxpayer standing repeatedly since *Frothingham*.¹²⁰

However, in *Flast v. Cohen*,¹²¹ the Court carved out one exception to the general rule denying taxpayer standing.¹²² In *Flast*, the plaintiffs challenged the constitutionality of federal expenditures under Titles I and II of the Elementary and Secondary Education Act of 1965.¹²³ They sued, claiming standing solely on the basis of being federal taxpayers and arguing that their federal tax dollars were unconstitutionally supporting teaching and supplies for religious schools.¹²⁴ Reevaluating its taxpayer standing jurisprudence, the Court found “no absolute bar in Article III to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs.”¹²⁵ Rather, when a taxpayer challenges congressional expenditures as violating the Establishment Clause, the taxpayer has standing.¹²⁶ The Court applied a two-part nexus test to come to this conclusion. Under the first part, requiring a taxpayer to “establish a logical link between [taxpayer] status and the type of legislative enactment attacked,”¹²⁷ the taxpayers in *Flast* established such a nexus by challenging congressional spending pursuant to Article I, Section 8’s taxing and spending power.¹²⁸ Second, “the taxpayer must establish a nexus between [taxpayer] status and the precise nature of the

with [the states] to reduce maternal and infant mortality and protect the health of mothers and infants.” *Id.* at 479.

¹¹⁷ *Id.* at 486.

¹¹⁸ *Id.* at 487.

¹¹⁹ *Id.* at 488.

¹²⁰ See, e.g., *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 333 (2006) (citing precedent to reject taxpayer standing in a dormant Commerce Clause challenge); *United States v. Richardson*, 418 U.S. 166, 171-73 (1974) (describing the *Frothingham* precedent with respect to a taxpayer Statement and Account Clause challenge).

¹²¹ 392 U.S. 83 (1968).

¹²² *Id.* at 102-03.

¹²³ *Id.* at 85.

¹²⁴ *Id.* at 85-86.

¹²⁵ *Id.* at 101.

¹²⁶ *Id.* at 105-06.

¹²⁷ *Id.* at 102.

¹²⁸ *Id.* at 103.

constitutional infringement alleged.”¹²⁹ An Establishment Clause challenge satisfies this test because the original purpose of the clause was to prevent the government from taxing and spending to aid religious groups.¹³⁰ More recent cases have limited the use of *Flast*'s nexus test to Establishment Clause challenges to congressional expenditures under the Taxing and Spending Clause.¹³¹

Hein appeared to involve just one issue – whether *Flast*'s exception is broad enough to allow for a taxpayer challenge, under the Establishment Clause, to executive branch action funded by Congress through general executive branch appropriations.¹³² In a five-to-four decision, the Court held that the taxpayer did not have standing. However, there was no majority opinion, as the five Justices who voted against standing produced three separate opinions. A complete review of the various opinions reveals a voting paradox, despite the case initially appearing to have only one issue. Seven Justices agreed that *Flast* was still good law and six Justices agreed that *Flast* is indistinguishable; however, five Justices voted against the plaintiffs' standing, thus producing a voting paradox.

Justice Alito's plurality opinion, joined by Chief Justice Roberts and Justice Kennedy, squarely concluded that a taxpayer challenge to executive branch actions was not included in the *Flast* exception to the no taxpayer standing rule.¹³³ Justice Alito began his analysis by stating that the taxpayers in *Flast* challenged “an express congressional mandate and a specific congressional appropriation.”¹³⁴ Unlike the *Flast* plaintiffs, the *Hein* plaintiffs could not show a “link between congressional action and constitutional violation.”¹³⁵ Justice Alito explained:

Respondents do not challenge any specific congressional action or appropriation; nor do they ask the Court to invalidate any congressional

¹²⁹ *Id.* at 102.

¹³⁰ *Id.* at 103-04 (citing JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), reprinted in 2 THE WRITINGS OF JAMES MADISON 183, 186 (Gaillard Hunt ed., 1901)).

¹³¹ See, e.g., *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 333, 333-34 (2006) (holding that *Flast* does not apply to taxpayer challenge to a local law as violating the dormant Commerce Clause); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 470 (1982) (holding that *Flast* does not apply to taxpayer Establishment Clause challenges to the federal government's distributing property through the Property Clause); *Tilton v. Richardson*, 403 U.S. 672, 674 (1971) (holding that *Flast* does apply to taxpayer Establishment Clause challenge to the federal government's spending power under the Higher Education Facilities Act of 1963).

¹³² *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 588-89 (2007) (Alito, J., plurality opinion).

¹³³ *Id.* at 608.

¹³⁴ *Id.* at 603; see also *id.* at 604 (calling the challenge one “to a direct and unambiguous congressional mandate”).

¹³⁵ *Id.* at 605.

enactment or legislatively created program as unconstitutional. That is because the expenditures at issue here were not made pursuant to any Act of Congress. Rather, Congress provided general appropriations to the Executive Branch to fund its day-to-day activities. These appropriations did not expressly authorize, direct, or even mention the expenditures of which respondents complain. Those expenditures resulted from executive discretion, not congressional action.¹³⁶

According to Justice Alito, none of the past taxpayer standing cases found standing in such circumstances,¹³⁷ and the *Hein* plaintiffs' challenge did not have the nexus required under *Flast*.¹³⁸

Moreover, the plurality opinion refused to extend *Flast* beyond congressional expenditures.¹³⁹ Rather, *Flast*, according to the plurality, "has largely been confined to its facts."¹⁴⁰ Otherwise, extending *Flast* to executive branch actions would create a rule that would "subject every federal action – be it a conference, proclamation or speech – to Establishment Clause challenge by any taxpayer in federal court" and would threaten basic principles of separation of powers.¹⁴¹ The plurality clearly stated that *Flast* was neither extended nor overruled: "We do not extend *Flast*, but we also do not overrule it. We leave *Flast* as we found it."¹⁴² Thus, in the plurality opinion, three Justices concluded that *Flast*'s exception did not apply to executive branch actions but that *Flast* itself was still good law.¹⁴³

Justice Scalia concurred in the judgment, joined only by Justice Thomas. He stated his disagreement with the plurality very clearly:

If this Court is to decide cases by rule of law rather than show of hands, we must surrender to logic and choose sides: Either [*Flast*] should be applied to (at a minimum) *all* challenges to the governmental expenditure of general tax revenues in a manner alleged to violate a constitutional

¹³⁶ *Id.* (footnote omitted).

¹³⁷ *Id.* at 605-06 (citing *Bowen v. Kendrick*, 487 U.S. 589, 619-20 (1988); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 479 (1982); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 288 (1974); *United States v. Richardson*, 418 U.S. 166, 175 (1974)).

¹³⁸ *Id.* at 608-09.

¹³⁹ *Id.* at 609.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 610. The plurality feared that federal courts would be required to "superintend, at the behest of any federal taxpayer, the speeches, statements, and myriad daily activities of the President, his staff, and other Executive Branch officials." *Id.* at 589.

¹⁴² *Id.* at 615.

¹⁴³ Justice Kennedy concurred in the plurality opinion but also wrote a separate opinion. Because he joined the plurality, nothing in his concurrence changes the vote tally on *Flast*'s applicability to executive branch actions or whether *Flast* should be overruled. The only part of his concurrence that is somewhat relevant is the definitive statement that *Flast* "is correct and should not be called into question." *Id.* at 616 (Kennedy, J., concurring).

provision specifically limiting the taxing and spending power, or *Flast* should be repudiated.¹⁴⁴

He criticized the plurality for finding immaterial distinctions between the facts of *Hein* and the facts of *Flast* and concluded that the two cases were “indistinguishable.”¹⁴⁵ An equal opportunity critic, Justice Scalia also criticized the dissent’s position that *Flast* should be extended because he found it unsupportable and inconsistent.¹⁴⁶ Therefore, because *Flast* was inconsistent with standing jurisprudence generally and had been inconsistently applied since it was decided,¹⁴⁷ he concluded that “*Flast* should be overruled.”¹⁴⁸

Justice Souter’s dissenting opinion, joined by Justices Stevens, Ginsburg, and Breyer, took the position that *Flast* was good law and that it applied to executive actions pursuant to a general appropriation from Congress.¹⁴⁹ He argued that taxpayers suffer no different injury when the executive branch spends tax money for religious purposes (the facts of *Hein*) than when Congress specifically authorizes spending tax money for religious purposes (the facts of *Flast*).¹⁵⁰ Furthermore, the Court’s review of the executive’s actions triggers no greater separation of powers concerns than when it reviews legislation from Congress.¹⁵¹ Therefore, because *Flast* and *Hein* present the same essential facts – a taxpayer challenging government spending tax money for religious purposes – the taxpayer in *Hein* should have standing just like the taxpayer in *Flast*.¹⁵²

To summarize, the tally of votes indicates the Justices found that *Flast* was good law and that the facts of *Hein* were not distinguishable from *Flast*. But, paradoxically, the Justices concluded that the plaintiffs did not have standing. Five Justices concluded there was no standing (Chief Justice Roberts and Justices Kennedy and Alito in the plurality along with Justices Scalia and Thomas in Justice Scalia’s concurrence in judgment). Seven Justices found that *Flast* was good law (Chief Justice Roberts and Justices Kennedy and Alito in the plurality and Justices Stevens, Souter, Ginsburg, and Breyer in dissent). Six Justices concluded that *Flast* was indistinguishable from the facts of *Hein* (Justices Scalia and Thomas in Justice Scalia’s concurrence in judgment and Justices Stevens, Souter, Ginsburg, and Breyer in dissent). Thus, the precedent-based voting paradox arose because the combination of *Flast*

¹⁴⁴ *Id.* at 618 (Scalia, J., concurring in the judgment); *see also id.* at 628 (stating that “there are only two logical routes available to this Court”: apply *Flast* broadly to all government expenditures or overrule *Flast*).

¹⁴⁵ *Id.* at 629.

¹⁴⁶ *Id.* at 632.

¹⁴⁷ *Id.* at 618-28.

¹⁴⁸ *Id.* at 637.

¹⁴⁹ *Id.* at 640-41 (Souter, J., dissenting).

¹⁵⁰ *Id.* at 637-38.

¹⁵¹ *Id.* at 639-40.

¹⁵² *Id.* at 643.

remaining good law, something a majority of the Court agreed with, and the facts of *Hein* being indistinguishable from *Flast*, something a different majority of the Court agreed with, should result in a conclusion that there was standing; however, a third majority found no standing. In chart form, the *Hein* precedent-based voting paradox looks as follows:

Opinion author and number of Justices joining	Is <i>Flast</i> good law?	Is this case the same as <i>Flast</i> ?	Is there standing?
Alito (3)	Yes (3)	No (3)	No (3)
Scalia (2)	No (2)	Yes (2)	No (2)
Souter (4)	Yes (4)	Yes (4)	Yes (4)
Total	Yes (7-2)	Yes (6-3)	No (5-4)

No individual Justice would vote according to the bottom line, as answering the first two questions “yes” would require answering the last question “yes,” thus concluding that there is standing. However, the Court as an entity, aggregating the votes of individual Justices, can and did answer both of the first questions “yes” but the last question “no.”

B. Modeling Precedent-Based Voting Paradoxes

As illustrated by *Hein*, precedent-based voting paradoxes, although comfortably fitting within the social choice and other models explained above, are important to separate out from other voting paradoxes because they illustrate key aspects of the models. In this Section, I provide a general model for the precedent-based voting paradox and focus on two aspects of general voting paradox modeling for which the precedent-based voting paradox has importance.

On the surface, *Hein* and *Kassel* are the same. Both present one constitutional issue for the Court to decide: in *Kassel*, whether the Iowa statute violates the dormant Commerce Clause;¹⁵³ in *Hein*, whether the taxpayer has standing under Article III to challenge the executive’s expenditure of generally-appropriated funds.¹⁵⁴ In each case, the Justices considered two sub-issues to resolve the issue presented, and the voting pattern on those two sub-issues ultimately resulted in a voting paradox.

Also like *Kassel*,¹⁵⁵ *Hein* fits comfortably within both the social choice and the other voting paradox models. Under the social choice model, *Hein* has multidimensionality. The two issues the Justices discuss in the case – whether to overrule *Flast* and whether *Flast* encompasses the facts of *Hein* – cannot be arranged linearly so that a Justice who prefers one extreme would *necessarily*

¹⁵³ *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 664 (1981).

¹⁵⁴ *Hein*, 551 U.S. at 593 (Alito, J., plurality opinion).

¹⁵⁵ See *supra* Part I.C (describing how *Kassel* fits in both models).

prefer a middle position over the opposite extreme.¹⁵⁶ Justice Scalia's opinion demonstrates this, as he states that there is no middle position – either *Flast* should be overruled or it should be extended to cover the facts of *Hein* (the other extreme, taken by Justice Souter's dissent).¹⁵⁷ He rejects as illogical the position that *Flast* should be reaffirmed but not extended to cover *Hein* (the middle position, taken by Justice Alito's plurality).¹⁵⁸ *Hein* also presents preferences that are asymmetrical, as Justice Alito's plurality and Justice Scalia's concurrence in the judgment reached opposite conclusions on both issues but reached the same outcome – the plaintiff has no standing.¹⁵⁹ Thus, the opinions present the possibility of cycling¹⁶⁰ and, with Justice Souter's dissent, create the voting paradox.

Hein also easily fits Kornhauser and Sager's generalization of the other models. Using outcome-based voting, a majority of the Justices reached the

¹⁵⁶ I stress the word “necessarily” in this sentence because it is certainly possible that a Justice could hold preferences that are linearly arranged and thus unidimensional. For instance, Justice Scalia could believe the following, in order of preference: *Flast* should be overruled (the position Justice Scalia took), *Flast* should be retained and applied (the dissent's position), *Flast* should be retained but differentiated and limited (Justice Alito's position). This preference arrangement would be multidimensional because no linear relationship exists among the ranked choices. However, Justice Scalia might instead have the following preferences, despite the strong language in his opinion indicating how illogical he finds Justice Alito's position: *Flast* should be overruled (the position Justice Scalia took), *Flast* should be retained but differentiated and limited (Justice Alito's position), *Flast* should be retained and applied (the dissent's position). This set of preferences would be unidimensional because there is a linear progression from one position to the next. The key here is that because the two issues of whether to retain *Flast* and whether to apply it are independent of one another, they can result in multidimensional preferences.

¹⁵⁷ *Hein*, 551 U.S. at 618 (Scalia, J., concurring in the judgment).

¹⁵⁸ *See, e.g., id.* at 618, 628-29.

¹⁵⁹ Justice Alito's plurality concluded that *Flast* was good law but that it differed from the case at hand. *Id.* at 608-09 (Alito, J., plurality opinion). Justice Scalia's concurrence in the judgment concluded that *Flast* was no longer good law and that it was the same as the case at hand. *Id.* at 618 (Scalia, J., concurring in the judgment). Even though both Justices concluded differently on the two issues, they reached the same result: no standing.

¹⁶⁰ Demonstrating this explicitly, we can represent the various positions as follows:

- A: retain *Flast*; this case is different (Alito plurality position)
- B: overturn *Flast*; this case is the same (Scalia concurrence in judgment position)
- C: retain *Flast*; this case is the same (Souter dissent position)

We do not know for sure, but a very plausible ranking of the Justices' preferences is as follows:

Alito plurality:	A, B, C
Scalia concurrence in judgment:	B, C, A
Souter dissent:	C, A, B

This preference ranking would result in a cycle. For more on these preference assumptions, see discussion *infra* notes 169-72 and accompanying text.

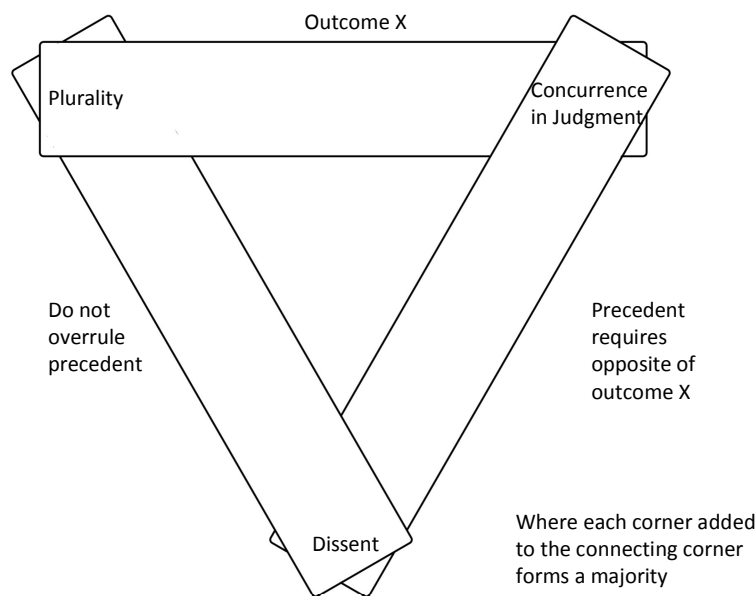
conclusion that the plaintiffs have no standing. However, using issue-based voting, different majorities conclude for the plaintiffs, with one majority finding that *Flast* is good law and a different majority finding that *Hein* is the same as *Flast*.

This analysis can be broadened to model any precedent-based voting paradox.¹⁶¹ A precedent-based voting paradox case will have at least three separate opinions, with two reaching the same outcome (usually a plurality and concurrence) and one reaching the opposite (the dissent).¹⁶² Either the plurality or the concurrence will, as Justice Scalia's concurrence did in *Hein*, argue both for overruling the underlying precedent and arguing that if the precedent is confirmed as good law, it must logically be applied to the facts of the case before the Court. The other non-dissenting opinion will, like Justice Alito's plurality opinion in *Hein*, argue the opposite – that the precedent is good law but that the precedent should not be extended to the present facts. These two issues will always be multidimensional and the preferences in the two opinions asymmetrical. The dissent, like Justice Souter's dissent in *Hein*, will reach the opposite conclusion by combining the positions of the two other opinions – holding that the precedent should be reaffirmed and that it applies to the case before the Court.

The charts used earlier to show the voting alignments in the various cases were useful for the specific tallies of those cases. The following diagram generalizes the precedent-based voting paradox:

¹⁶¹ The Appendix *infra* details the Supreme Court's other precedent-based voting paradoxes.

¹⁶² There can certainly be other opinions, like Justice Kennedy's concurrence in *Hein*, that do not change how the Justice or Justices vote on the issues but rather elaborate on the reasons for their votes. *See, e.g., Hein*, 551 U.S. at 617-18 (Kennedy, J., concurring).



In the diagram, each corner of the triangle represents a different opinion. The opinion in any one corner shares the position described with the corner connected to it and takes the opposite position of the side of the triangle opposite the corner. Thus, the various opinions in the generic diagram above can be read as follows:

Plurality: It shares a side with the concurrence and votes “outcome X.” It shares a side with the dissent and votes “do not overrule precedent.” It also votes that the precedent does not require the opposite of outcome X (the position of the opposite side), a position shared by no other opinion.

Concurrence in judgment: It shares a side with the plurality and votes “outcome X.” It shares a side with the dissent and votes “precedent requires opposite of outcome X.” It also votes that the precedent should be overruled (not “do not overrule precedent”), a position shared by no other opinion.

Dissent: It shares a side with the plurality and votes “do not overrule precedent.” It shares a side with the concurrence and votes “precedent requires opposite of outcome X.” It also votes for the opposite of outcome X (not “outcome X”), a position shared by no other opinion.

Because each opinion has the number of votes such that adding up any combination of corners forms a majority, there is majority support for all three labeled positions. And, because the positions “do not overrule precedent” and “precedent requires opposite of outcome X” logically entail the outcome that is

the opposite of outcome X, that the case results in “outcome X” is the precedent-based voting paradox.

Again, looked at in this manner, the precedent-based voting paradox is another voting paradox along the lines of *Kassel*.¹⁶³ However, there are important aspects of the precedent-based voting paradox that make exploring its model worthwhile. I set forth two reasons here; in the next Section, I will discuss the implications of the precedent-based voting paradox for the Court’s decision-making process.

First, the precedent-based voting paradox enables better understanding of one of the basic requirements of the social choice model – multidimensionality compared to unidimensionality. Unlike other voting paradox cases in which there are two distinct issues, the two issues in precedent-based voting paradoxes are related in a way that they can be restated as one issue with multiple options. For instance, in *Hein*, the issue can be stated as whether taxpayers have standing, with the Justices’ opinions taking the following positions aligned in a progression from least to most generous rule for the plaintiffs:

Scalia concurrence:	No standing for taxpayers
Alito plurality:	Standing for taxpayers challenging legislative expenditures only
Souter dissent:	Standing for taxpayers challenging legislative or executive expenditures

Viewed this way, the three positions in *Hein* appear to be unidimensional, as they progress from the least generous standing rule for taxpayers, to a moderately-generous rule, to the most generous rule. Without introducing the issue of precedent, it might seem self-evident that any Justice preferring either of the extreme positions would prefer the middle position to the opposite extreme.¹⁶⁴

More generally, all precedent-based voting paradox cases can be modeled in this fashion. The opinions will break down roughly along the following progression, again seemingly from one extreme to the other:

Baseline rule:	General category of actions is constitutional
Precedent-based rule:	Some actions within the general category are unconstitutional
Present case extension:	Based on precedent, new kind of action also unconstitutional. ¹⁶⁵

¹⁶³ See *supra* Part I.B.

¹⁶⁴ Described this way, the preferences would seem a natural fit for the *Marks* narrowest-grounds rule. See *supra* note 91.

¹⁶⁵ The generalization here is stated based on the baseline rule that the set of actions is constitutional. However, the generalization can also be about actions that are unconstitutional, in accordance with statute, against a statute, etc.

Like the restated positions in *Hein*, the generalized positions of the precedent-based voting paradox appear to be unidimensional because it seems that those who prefer one of the extremes would favor the middle over the opposite extreme. After all, if a Justice believes that the baseline rule is correct, then it makes sense that the same Justice would prefer a limited exception to the rule (the precedent-based rule) over the more expansive exception to the rule (the present case extension), and vice versa. With a seemingly unidimensional issue, no precedent-based voting paradox should arise, as the social choice model requires multidimensionality for a voting paradox.

However, that the preferences are based on precedent here illustrates that what appears to be a unidimensional issue spectrum can actually be multidimensional.¹⁶⁶ A Justice who prefers the baseline rule without exceptions might believe that if the precedent will continue to exist but with exceptions, something that Justice disfavors, then the principled view demands accepting the full application of the precedent and allowing a broader class of exceptions rather than limiting the exceptions. In other words, the Justice who thinks the baseline rule is correct would prefer the present-case extension over the precedent-based rule. To illustrate, here are the positions again, this time with letter symbols associated with each one:

- A: Baseline rule: general category of actions is constitutional
- B: Precedent-based rule: some actions within the general category are unconstitutional
- C: Present case extension: new kind of action also unconstitutional

A logical set of preferences is as follows:

- Justice Group 1: A, C, B (preferring full extension to the middle position)
- Justice Group 2: B, A, C (preferring no exception to the full extension)¹⁶⁷
- Justice Group 3: C, B, A (preferring middle position to no exception)

This set of preferences, for which there is no Condorcet winner (thus, there is cycling), illustrates that the previously-conceived unidimensional issue becomes multidimensional because of the preference by the first group for the “all or nothing” approach. This preference scheme is more of a possibility when the question of upholding precedent is one of the issues in the case, as the Justices in Group 1 could view the logically-required extension of the precedent as one of the reasons for overruling it. In fact, Group 1 captures Justice Scalia’s *Hein* concurrence almost exactly. Because *Flast* cannot be limited to just legislative expenditures, it must cover executive expenditures as

¹⁶⁶ Stearns calls this “multi-peaked preferences within a unidimensional issue spectrum [that] can be translated into uni-peaked preferences within a multidimensional issue spectrum.” Stearns, *Should Justices Ever Switch Votes*, *supra* note 5, at 116 n.99.

¹⁶⁷ Justice Group 2 could also have preferences B, C, A (preferring full extension to no exception). If these were the preferences of Group 2, a voting paradox would still arise, but there would be no cycling. See discussion *supra* note 103 and accompanying text.

well; however, giving broad taxpayer standing goes against basic Article III standing principles, so *Flast* should be overruled.¹⁶⁸

In fact, in the precedent-based voting paradox, it is even more likely that the paradox masks cycling. Recall that one of the critiques of the social choice model of the voting paradox is that not every voting paradox contains cycling. As described above, that is certainly true, as the Justices' opinions do not rank preferences for all possible issue resolutions.¹⁶⁹ However, in the typical precedent-based voting paradox, the Justices advocating overruling the precedent are more likely to indicate their voting preferences beyond their first choice resolution. They are more forthcoming because they must justify why they take the extreme position of overturning precedent. This justification usually points out why the position of keeping the precedent but not extending it (the position taken by the other opinion that reaches the majority outcome) is not a tenable position. Making that preference clear is tantamount to declaring that position their least preferred resolution of the issues. By implication, the dissent's preference for keeping the precedent and extending it seems more likely to be the middle preference. This is exactly what Justice Scalia does in his concurring opinion in *Hein*. By calling the position taken by the majority illogical,¹⁷⁰ Scalia provides more information about his complete set of preferences than is usual in an opinion.¹⁷¹

Thus, in the precedent-based voting paradox, a case with apparent unidimensionality actually contains multidimensionality. What changes the analysis is the existence of the question of whether to overrule precedent. Adding that issue into the case creates multidimensionality and increases the possibilities of cycling and a voting paradox.

Second, the precedent-based voting paradox demonstrates the importance of *stare decisis* in avoiding cycling and voting paradoxes. Recall that range is one of the factors from Arrow's Theorem.¹⁷² Range requires that the outcome be consistent with the individuals' ability to rank their preferences for the complete slate of options.¹⁷³ The Supreme Court limits range in ways that have already been discussed, most notably in that the Justices vote on outcomes rather than ranking their preferences for the various issues before them.¹⁷⁴ Another important limit on range before the Court is *stare decisis*.

¹⁶⁸ *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 628 (2007) (Scalia, J., concurring in the judgment).

¹⁶⁹ See discussion *supra* notes 101-05 and accompanying text.

¹⁷⁰ See *Hein*, 551 U.S. at 618, 628-29.

¹⁷¹ Nonetheless, as mentioned previously, it is entirely possible that even though Justice Scalia called the seemingly middle position illogical he would, if forced to choose, prefer it over the opposite extreme. In doing so, he would sacrifice absolute logical consistency for a doctrinal result that he prefers.

¹⁷² See *supra* notes 72-73 and accompanying text.

¹⁷³ See text accompanying notes 78-84.

¹⁷⁴ STEARNS, *supra* note 5, at 110-11.

Stare decisis generally limits the Justices from reconsidering issues that have already been decided in the past.¹⁷⁵ By limiting reconsideration, stare decisis limits range and thus is another factor that contributes to the Court avoiding irrational results.¹⁷⁶

However, in the precedent-based voting paradox, range is not so limited because stare decisis no longer eliminates from consideration the question of whether to adhere to precedent. Although only a subset of the Justices reconsiders the precedent, that small number is enough to create the voting paradox and the possibility of cycling. Taking *Hein* as illustrative, had Justices Scalia and Thomas not argued in favor of overruling *Flast*, no voting paradox would exist. The Court would have produced an opinion saying the plaintiffs had standing based on *Flast* (if Justices Scalia and Thomas voted for the position they said *Flast* logically required) or saying the plaintiffs had no standing because *Flast* did not extend that far (if Justices Scalia and Thomas voted for the outcome they reached in their opinion, despite calling the two cases indistinguishable). No voting paradox could have existed because there would have been just one issue without any multidimensionality (standing or no standing). But, with *Flast*'s continuing value on the table as an issue, at least for some of the Justices, the power of stare decisis as a range restriction is relaxed. And, with range now closer to being completely restored, the voting paradox is more likely to arise.¹⁷⁷

¹⁷⁵ This black letter definition of stare decisis is controversial in the sense that scholars dispute whether courts actually feel bound by stare decisis. Compare, e.g., EPSTEIN & KNIGHT, *supra* note 7, at 163-77 (arguing that stare decisis "serves as a constraint on justices acting on their personal preferences"), with JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 76-85 (2002) (arguing that stare decisis does not actually bind Justices, as "the justices have rarely acceded to those [precedents] of which they disapprove").

¹⁷⁶ Stearns provides a detailed analysis of how stare decisis reduces the possibility of cycling because it prevents judges who adhere to it from voting for certain options that they might otherwise consider. See STEARNS, *supra* note 5, at 170-97; Stearns, *Standing Back*, *supra* note 5, at 1356-57 ("In short, stare decisis . . . can best be understood in social choice terminology as a cycle-prevention vehicle."). He explains: "In the Supreme Court, for example, the stare decisis doctrine, which presumptively operates as a prohibition on rejected motions, has the effect of excluding from the justices' permissible range those options that were rejected in prior binding precedents." *Id.* at 1368. In fact, Stearns almost predicts the future by, twelve years prior to *Hein*, using a very similar example to demonstrate the importance of stare decisis to preventing cycling. See *id.* at 1335-50, 1368-70.

¹⁷⁷ Stearns has written in detail about the function of stare decisis over multiple cases, rather than only within one case, as I am concerned with here.

Without stare decisis, all justices are free to vote on the constitutionality of the [currently-considered government action] without regard to precedent, and on whether the two cases should be governed by the same rule. By broadening the number of issues in this manner, however, the Court would reveal a cycle that may prevent it from issuing a decision in the second case.

This model for the precedent-based voting paradox and its implications for multidimensionality and range are important to understanding the voting paradox model generally. And, as described in the next Part, with precedent-based voting paradoxes separated out, we can more fully understand the impact voting paradoxes have on Supreme Court decision-making.

III. THE IMPLICATIONS OF PRECEDENT-BASED VOTING PARADOXES

Separating out precedent-based voting paradoxes is important not only for understanding the more general voting paradox model but also for understanding some important aspects of Supreme Court decision-making. This Part will address four of those implications: (a) the conditions that could give rise to voting paradoxes are more common than previously understood; (b) a switch to issue voting by the Court would not solve the problem of the voting paradox; (c) precedent-based voting paradoxes allow Justices an opportunity to manipulate voting to get the result they want; and (d) the possibility of a precedent-based voting paradox should convince lawyers to more frequently argue for precedent to be overruled.

A. *More Common than Previously Understood*

Other scholars who have written about voting paradoxes have stressed that, although important for understanding group voting, they are rare.¹⁷⁸ They are rare because, as generally understood, they require two separate issues presented to the Court. Further, the two issues must be, in the language of social choice, multidimensional (rather than unidimensional), and they must be decided by a three-way divided court in an asymmetrical manner.

However, the precedent-based voting paradox shows that voting paradoxes can be more common than previously thought. A precedent-based voting paradox can arise in any case in which the following two conditions exist: (1) there is a single issue to be decided, and (2) the resolution of that issue is based on controlling precedent.

Stearns, *Standing Back*, *supra* note 5, at 1356. Stearns's analysis is similar to the analysis here; however, his observations about stare decisis should not be limited to courts cycling "over time." *Id.* When one or more Justices do not follow stare decisis in a particular case, paradoxical results rooted in cycling can appear within that single case, not just over the course of multiple cases.

¹⁷⁸ Michael Meyerson provides a list of fourteen paradoxes in Supreme Court history. Meyerson, *supra* note 5, at 934 n.128. Judge John M. Rogers provides a list of fourteen (possibly sixteen) paradoxes that he found through 1990. Rogers, "*I Vote This Way*," *supra* note 5, at 443 n.9. Cross-referencing these lists against each other and combining them with some cases referenced by Maxwell Stearns, it appears that commentators have found up to twenty voting paradox cases in the Supreme Court. See generally Stearns, *Should Justices Ever Switch Votes*, *supra* note 5. Given the number of appellate panels at both the state and federal levels, the overall number of voting paradoxes in the American judicial system is likely significantly higher.

These conditions certainly do not describe every case before the Court, as there will always be cases involving a single-issue the Court has never previously addressed. Those cases, unless there is a hidden multidimensional set of sub-issues, will not give rise to any voting paradox.

However, given this understanding of precedent-based voting paradoxes, every other case before the Supreme Court could give rise to a voting paradox. The one issue before the Court need not have substantive sub-issues, as in *Kassel*. Rather, the one issue that the Court is deciding must only rely on precedent. Once that factor is present, then the possibility of a precedent-based voting paradox arises, as the Court can split along the lines described in this article.¹⁷⁹

Even further increasing the likelihood of a precedent-based voting paradox is the presence of a constitutional issue. A necessary piece of the puzzle for a precedent-based voting paradox requires one or more of the Justices to believe that the precedent at issue should be overruled. Stare decisis usually binds judges to precedent and prevents them from overruling that precedent, even if they believe that the precedent was wrongly decided in the first place.¹⁸⁰ However, as Justices have repeated many times, they are less bound by principles of stare decisis when the precedent involves a constitutional issue. As Justice Brandeis stated in an oft-quoted passage:

Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions.¹⁸¹

More recently, the Court has stated that the policy of stare decisis “is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions.”¹⁸²

¹⁷⁹ See *supra* Part II.B.

¹⁸⁰ See generally MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* (2008) (describing various theories of precedent and studying the actual power it has in various constitutional areas).

¹⁸¹ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting) (citation and footnotes omitted).

¹⁸² *Agostini v. Felton*, 521 U.S. 203, 235 (1997). Difficulty of correction is not the only reason Justices and commentators have given justifying a lessened power of stare decisis in constitutional matters. Justice Douglas explained that a judge must adhere to the Constitution rather than precedent about the Constitution: “A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it.” William O.

Although Justice Brandeis's statement may not have been true as a historical matter when he wrote it,¹⁸³ it has been true as an empirical matter since then.¹⁸⁴ The Supreme Court considers itself less bound by stare decisis in constitutional cases than in statutory or common law cases.¹⁸⁵ Moreover, Justices are even freer to individually call for overturning constitutional precedent than the Court as a whole, as Justices more frequently urge a precedent to be overruled in a concurrence or dissent than in opinions for the Court.¹⁸⁶ Thus, there is a heightened possibility for a precedent-based voting paradox in constitutional cases compared to statutory or common law cases.

This heightened possibility can be seen when looking at the Court's precedent-based voting paradoxes. Of the eleven precedent-based voting paradoxes I have identified, nine involve constitutional issues. The Appendix summarizes the eleven precedent-based voting paradoxes, presenting each in a short narrative and a diagram, following the convention described earlier.¹⁸⁷ They all take essentially the same form as *Hein*, presented here as representative of the others:

*Hein v. Freedom from Religion Foundation, Inc.*¹⁸⁸

Decision: The Court found that Freedom from Religion Foundation lacked standing to bring its claim against the executive for violating the Establishment Clause. Five Justices found that taxpayers have no standing to challenge the executive spending money allegedly in violation of the Establishment Clause. Seven Justices found that *Flast v. Cohen*¹⁸⁹ was still good law, and six Justices

Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949). Some scholars have agreed, arguing that adhering to precedent over a correct interpretation of the Constitution is actually unconstitutional. See, e.g., Emery G. Lee III, *Overruling Rhetoric: The Court's New Approach to Stare Decisis in Constitutional Cases*, 33 U. TOL. L. REV. 581, 584-85 (2002) (providing a rundown of several scholars' opinions about the constitutionality of adherence to incorrect precedent).

¹⁸³ See Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 703-30 (1999) (reviewing historical treatment of precedent and concluding that, despite Justice Brandeis's *Burnet* dissent, constitutional precedent was treated no differently until the twentieth century).

¹⁸⁴ See SEGAL & SPAETH, *supra* note 175, at 84 (showing that sixty-six percent of precedents overruled between 1953 and 2000 were constitutional precedents); Christopher P. Banks, *The Supreme Court and Precedent: An Analysis of Natural Courts and Reversal Trends*, 75 JUDICATURE 262, 263 (1992) (showing that 60.5% of overturned precedent from 1789 through 1991 were constitutional, compared with 27% percent statutory).

¹⁸⁵ Yet even within the area of constitutional law, the Court rarely overturns its own precedent. See GERHARDT, *supra* note 180, at 9-10 ("From 1789 through the end of the 2004 term, the Court, in 133 cases, expressly overruled 208 [constitutional] precedents.").

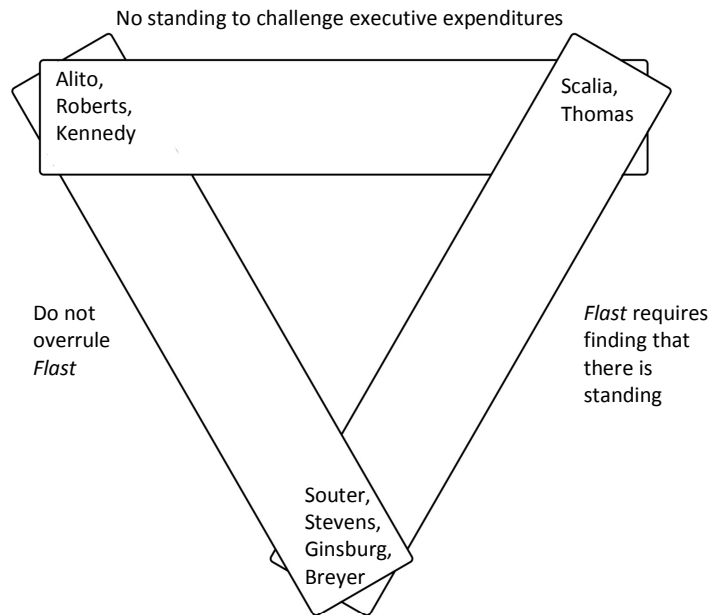
¹⁸⁶ See *id.* at 12-13.

¹⁸⁷ See *supra* text accompanying notes 162-63.

¹⁸⁸ 551 U.S. 587 (2007).

¹⁸⁹ 392 U.S. 83 (1968).

agreed that *Flast* required a finding that taxpayers could challenge executive expenditures under the Establishment Clause.¹⁹⁰



All of the precedent-based voting paradoxes identified in this article fit this pattern.¹⁹¹ They almost all arise in areas of constitutional law, and at least one Justice decides that a precedent of the Court should be overruled. This easily-repeatable pattern, along with the existence of these eleven cases that would otherwise present only one issue, indicate that voting paradoxes are not only more possible than previously thought, but also more common.

B. *Issue or Outcome Voting*

The precedent-based voting paradox also has implications for the debate over outcome versus issue voting. Some scholars who have addressed voting paradoxes in the past have used the existence of the voting paradox as the basis for rethinking the best voting rule for the Supreme Court. As described earlier, the Court currently uses outcome voting to reach a result, as it votes on the outcome and then the Justices write their opinions to support the outcome. Some scholars argue that voting paradoxes are a good reason to change from outcome voting to issue voting.¹⁹² They propose instead that the Court should

¹⁹⁰ For the specific votes and explanations, see discussion *supra* Part II.A.

¹⁹¹ See *supra* note 165 and accompanying text.

¹⁹² See, e.g., Kornhauser & Sager, *supra* note 5, at 23-24 (arguing that while no codified voting protocol exists, the Court tends to favor outcome-based voting which is particularly

use issue voting: “[H]ave the court as a whole collectively assess each of the legal issues raised in the case and reach collective decisions on each of those issues, again by majority vote. The court’s judgment then would be determined by the result it reached on each of the underlying issues.”¹⁹³

Outcome versus issue voting is hotly contested. Supporters of issue voting argue that the procedure avoids voting paradoxes, is fairer to litigants, and provides better guidance to lower courts and the public.¹⁹⁴ In particular, regarding voting paradoxes, if the Court voted only on the issues and let the outcome logically flow from the resolution of those issues, no paradox could arise. Thus, in *Eastern Enterprises*, the Court would vote on the two issues of whether the statute violates the Due Process Clause and whether it violates the Takings Clause.¹⁹⁵ Because there would be separate majorities concluding that neither of these provisions is violated,¹⁹⁶ the outcome would then logically be that the statute is constitutionally valid. Critics of a change to issue voting object that issue voting promotes strategic identification of issues because issues can always be manipulated or even split into sub-issues, which can themselves result in voting paradoxes.¹⁹⁷ Strategically determining issues within a case would violate Arrow’s requirement of independence of irrelevant alternatives, because judges could identify issues in order to reach other issues or outcomes.¹⁹⁸

The precedent-based voting paradox supports these critics of issue voting. Looking at *Hein* as an example, on its face and as briefed to the Court, the case presented just one issue – whether the plaintiff had standing. By itself, that one issue cannot result in a voting paradox, as it would be illogical for any single opinion to hold that the plaintiffs had standing but still lost. However, when some Justices reached the question of whether the Court should overrule the precedent upon which the plaintiffs’ claim was based, the Justices created an opportunity for a voting paradox.¹⁹⁹ Thus, a case that seemingly presented one issue resulted in a voting paradox. Precedent-based voting paradoxes therefore refute the notion that voting on issues rather than outcomes will prevent paradoxes. Rather, voting on single issues does not remove the possibility of a voting paradox because each issue can almost always be broken

problematic with voting paradoxes); Post & Salop, *Issues and Outcomes*, *supra* note 5, at 1084; Post & Salop, *Rowing Against the Tidewater*, *supra* note 5, at 772.

¹⁹³ Post & Salop, *Rowing Against the Tidewater*, *supra* note 5, at 744.

¹⁹⁴ See Kornhauser & Sager, *supra* note 5, at 58-59; Post & Salop, *Rowing Against the Tidewater*, *supra* note 5, at 770-72.

¹⁹⁵ See discussion *supra* Part I.A

¹⁹⁶ For the voting patterns on these issues, see chart *supra* Part I.A.

¹⁹⁷ See Rogers, “Issue Voting,” *supra* note 5, at 1002-04; Stearns, *How Outcome Voting*, *supra* note 5, at 1061-65.

¹⁹⁸ See STEARNS, *supra* note 5, at 121-22.

¹⁹⁹ The implications of this feature of precedent-based voting paradoxes are discussed *infra* Part III.C.

into a sub-issue of whether the precedent should be overruled, which could itself create a voting paradox.

Of course, the supporter of issue voting could argue that the Justices should vote on the precedent as a separate issue.²⁰⁰ However, voting separately on the precedent could result in almost indefinite voting, as each precedent can be further broken down into the precedent that forms the basis of the precedent at issue. At some point, the Justices will be voting anew on the entirety of the area of law, producing unwanted consequences. Every seemingly straightforward case involving the application of an area of law to a new set of facts could have to be argued and decided based on an evaluation of the entire area of law as an original matter. In turn, this could promote instability in the law and engage the litigants and judges in needless extended incursions into otherwise settled doctrine.²⁰¹

C. *Judicial Outcome Manipulation*

The precedent-based voting paradox is also important because it gives Justices an opportunity to strategically change the outcome of a case by introducing the issue of whether to overrule the precedent the central issue relies upon.²⁰² As discussed above, the precedent-based voting paradox is really a case that presents one substantive issue to the Court, such as, in *Hein*, whether the taxpayer plaintiff has standing under Article III to challenge the executive's expenditure of money.²⁰³ Had the Justices decided that issue without any of them reevaluating precedent, no voting paradox could have arisen and the outcome of the case might have been different. The three-Justice plurality, which did not overrule *Flast* yet found there was no standing, and the four-Justice dissent, which adhered to *Flast* and found there was standing, would keep the same positions, as they did not rely on overturning precedent. The two-Justice concurrence in the judgment, which wanted to overrule *Flast*, might have reluctantly agreed with the dissent, as the

²⁰⁰ See Post & Salop, *Issues & Outcomes*, *supra* note 5, at 1077-84 (arguing that judges should vote on all primary issues presented by a case).

²⁰¹ On the other hand, reconsidering precedent each time would decrease the path dependency associated with stare decisis. See Stearns, *Standing Back*, *supra* note 5, at 1357-59 (explaining the anomaly created with path dependency: "that a group of cases presented to the same court in different order can produce opposite legal doctrine").

²⁰² I use the word "strategically" consistent with how Lee Epstein and Jack Knight have discussed "strategic decision making." EPSTEIN & KNIGHT, *supra* note 7, at 12. They have defined the term as follows:

To put it plainly, strategic decision making is about *interdependent* choice: an individual's action is, in part, a function of her expectations about the actions of others. To say that a justice acts strategically is to say that she realizes that her success or failure depends on the preferences of other actors and the actions she expects them to take, not just on her own preferences and actions.

Id.

²⁰³ See *supra* Part II.B.

concurrency repeatedly stated that *Flast* is indistinguishable.²⁰⁴ Thus, the outcome of the case would be that the taxpayer plaintiff had standing.

Yet, the Court concluded that the taxpayer did not have standing. Justices Scalia and Thomas, unprompted by the parties,²⁰⁵ took it upon themselves to revisit *Flast*. Because they did, and because they concluded that *Flast* should be overruled, they were able to switch the otherwise logically-required²⁰⁶ outcome of the case by creating a precedent-based voting paradox. Of course, the opinion gives no indication that they questioned the precedent *only* because they did not like the result of the case under *Flast*. However, the precedent-based voting paradox raises the specter that they addressed *Flast*'s precedential value, without prompting from the parties, in order to manipulate the case to get the result they wanted without having to take what they believed was an illogical position.

Examining the questions presented to the Justices in the eleven precedent-based voting paradoxes identified in this article (*Hein* and the ten in the Appendix) further raises that possibility. In only two of the precedent-based voting paradox cases identified in the Appendix – *Webster v. Reproductive Health Services*²⁰⁷ and *FEC v. Wisconsin Right to Life, Inc.*²⁰⁸ – did the questions presented to the Court by the parties raise the issue of overruling precedent.²⁰⁹ In the other nine cases, the questions the parties presented to the

²⁰⁴ Someone believing in the attitudinal model of decision-making would dispute this assessment of the concurrence's vote in the hypothetical world in which *Flast* is not reconsidered. Under the attitudinal model of decision-making, Supreme Court Justices vote their policy preferences. So, presuming Justices Scalia and Thomas voted against taxpayer standing because that is the result they wanted in *Hein*, had they not been able to address *Flast*, they would have agreed with Justice Alito's plurality to get the result they wanted. See JEFFERY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 65 (1993) (“[The attitudinal model] holds that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices.”). The social choice model relies upon an assumption of sincere ranking of preferences. See discussion *supra* note 64 and accompanying text.

²⁰⁵ See Brief for the Petitioners at 45-49, *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587 (2007) (No. 06-157) (arguing for a narrow reading of *Flast* rather than overturning it); Brief for Respondents at 46-47, *Hein*, 551 U.S. 587 (No. 06-157) (arguing against two amici's suggestions to overrule *Flast*).

²⁰⁶ See *Hein*, 551 U.S. at 628 (Scalia, J., concurring in the judgment) (stating that there are “only two logical routes” available to the Court: apply *Flast* or overrule it).

²⁰⁷ 492 U.S. 490, 519-20 (1989).

²⁰⁸ 551 U.S. 449, 456-57, 504 (2007).

²⁰⁹ Brief for Appellants at II, *Webster*, 492 U.S. 490 (No. 88-605) (“7. Should the *Roe v. Wade*, 410 U.S. 113 (1973), trimester approach for selecting the test by which state regulation of abortion services is reviewed be reconsidered and discarded in favor of a rational basis test?”); Brief for Appellee at i, *Wis. Right to Life, Inc.*, 551 U.S. 449 (Nos. 06-969 & 06-970) (“3. Whether this Court's facial upholding of the electioneering communication prohibition in *McConnell v. FEC*, 540 U.S. 93 (2003), must be overturned . . .”).

Court did not raise the issue of overruling precedent. In five of these remaining nine cases, the briefing also does not suggest overruling precedent.²¹⁰ In the other four cases, the briefs raise the issue of overruling precedent in varying degrees of directness: in *Hein*, overruling *Flast* is brought up only by two amici, not by the federal government as petitioner;²¹¹ in *National Mutual Insurance Co. v. Tidewater Transfer Co.*,²¹² overruling *Hepburn v. Ellzey*²¹³ is merely hinted at by the petitioner's brief;²¹⁴ and, other than in the two cases in which the questions presented directly address the issue, only in *Planned Parenthood of Southeastern Pennsylvania v. Casey*²¹⁵ and *Glidden Co. v. Zdanok*²¹⁶ do litigants, in the content of their briefs, directly urge that the precedent be overruled.²¹⁷ Thus, in just over a third (four of eleven) of the precedent-based voting paradox cases did the Justices who voted to overturn precedent do so at the direct urging of the parties in the case.

Conventional wisdom suggests that the Supreme Court tends not to consider overruling precedent without being urged to do so by the parties.²¹⁸ The Court has stated this position clearly: "The principles that animate our policy of *stare decisis* caution against overruling a longstanding precedent on a theory not argued by the parties"²¹⁹ It has also said that it is inappropriate to overrule precedent "without argument or even invitation."²²⁰ Yet Justices are erratic in following this general rule. In fact, as seen by looking at the precedent-based voting paradoxes, sometimes Justices decide to overrule precedent without the parties inviting them to do so.²²¹

²¹⁰ In fact, in *American Trucking Ass'ns v. Smith*, Justice O'Connor dropped a footnote chastising Justice Scalia for addressing the issue of *stare decisis* even though "the parties do not raise, and this case does not present, any question regarding the continued vitality of our dormant Commerce Clause jurisprudence." *Am. Trucking Ass'ns v. Smith*, 496 U.S. 167, 183 n.1 (1990).

²¹¹ Brief of the State of Indiana et al. as Amici Curiae in Support of the Petitioners at 14-29, *Hein*, 551 U.S. 587 (No. 06-157); Brief of Amicus Curiae Foundation for Moral Law, Inc., Suggesting Reversal at 14-20, *Hein*, 551 U.S. 587 (No. 06-157).

²¹² 337 U.S. 582 (1949).

²¹³ 6 U.S. (2 Cranch) 445 (1805).

²¹⁴ Brief for Petitioner at 18-20, *Nat'l Mut. Ins. Co.*, 337 U.S. 582 (No. 29).

²¹⁵ 505 U.S. 833 (1992).

²¹⁶ 370 U.S. 530 (1962).

²¹⁷ Brief for Respondents at 105-17, *Casey*, 505 U.S. 833 (Nos. 91-744 & 91-902) (arguing for overruling *Roe v. Wade* as an alternative ground for decision); Brief for Respondents at 5, 22, *Glidden Co.*, 370 U.S. 530 (No. 242).

²¹⁸ Epstein and Knight call this the "norm of *sua sponte*": "the practice of disfavoring the creation of issues not raised in the record before the Court." EPSTEIN & KNIGHT, *supra* note 7, at 160.

²¹⁹ *United States v. Int'l Bus. Machs. Corp.*, 517 U.S. 843, 856 (1996) (Thomas, J.).

²²⁰ *Am. Dredging Co. v. Miller*, 510 U.S. 443, 447 n.1 (1994) (Scalia, J.).

²²¹ In fact, the authors of the two statements previously quoted, Justice Thomas and Justice Scalia, respectively, were the Justices who voted, without being urged to do so by

Almost three decades ago, Judge Easterbrook wrote that Justices who inconsistently follow precedent, “strategic manipulators” as he calls them, are more powerful than those who do.²²² The precedent-based voting paradox is one way this is so. Justices can decide whether, despite disagreeing with a particular precedent, they are comfortable with the outcome of the particular application of the precedent. If they are, they can continue to adhere to the precedent. However, if they are not comfortable with the outcome of the case under the relevant precedent, they can decide to revisit the precedent. And, because of the precedent-based voting paradox, without attracting a majority of other Justices (and in the case of a four to one to four decision, without attracting any other Justice at all), the Justice or Justices arguing to overrule precedent can flip the outcome of the case despite agreeing that the precedent requires the opposite outcome.

Claiming that Justices manipulate precedent based on their own conceptions of what the right or wrong outcome of a case might be is nothing new.²²³ Scholars with many different views of how Justices should and do treat precedent have made this claim before. However, the precedent-based voting paradox shows one more vehicle that the Justices can use to do so.

D. *Strategic Litigation Planning for Attorneys*

The precedent-based voting paradox must also be considered by lawyers when arguing cases that involve precedent. Any lawyer who has a case in which the lawyer’s position is that the precedent should not be extended to cover the facts of the case before the Court should consider raising the issue of overruling precedent as well.²²⁴ Without understanding the precedent-based

the parties, to overturn *Flast in Hein*. The fact that their previous statements about not overruling without invitation contradict their actions gives further evidence in support of my argument in this section. See also STEPHANIE A. LINDQUIST & FRANK B. CROSS, *MEASURING JUDICIAL ACTIVISM* 64 (2009) (finding Justices Scalia and Thomas among the most activist contemporary Justices concerning precedent).

²²² Easterbrook, *supra* note 5, at 822.

²²³ See, e.g., EPSTEIN & KNIGHT, *supra* note 7, at 165 (“As long as justices generally comply with the norm [of stare decisis], they will be free to deviate from precedent in those cases in which their personal preferences so differ from precedent that they feel compelled to change the existing law.”); WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 30 (1964).

²²⁴ Of course, the argument needs to be non-frivolous so as not to run into any ethical and, in federal court, Rule 11 issues. See FED. R. CIV. P. 11. Also, the lawyer needs to be careful of other strategic briefing concerns, such as length, number of arguments, strength of arguments, and distractions. See, e.g., *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983) (“Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.”); *id.* at 753 (“A brief that raises every colorable issue runs the risk of burying good arguments – those that, in the words of the great advocate John W. Davis, ‘go for the jugular’ – in a verbal mound made up of strong and weak contentions.”)

voting paradox, making such an argument might seem fruitless, as it might be clear that a majority of the Court would never vote to overrule the precedent and a majority of the Court would believe that the precedent should apply in this case. However, the precedent-based voting paradox makes it possible for lawyers to win their cases despite unfavorable majorities on both of those key points. The lawyer who understands that a small number of Justices (even just one) voting to overrule the precedent can flip the outcome of the case despite a majority believing the precedent is good law and that the precedent applies in this case is at a distinct advantage. If such an argument to overturn precedent is possible, a good lawyer must make that argument even if she expects that there is no possibility a majority of the Court would agree.²²⁵

For instance, a lawyer litigating a follow-up case to *Parents Involved in Community Schools v. Seattle School District No. 1*²²⁶ might benefit from understanding the precedent-based voting paradox. *Parents Involved* struck down Seattle's and Louisville's voluntary school integration plans as violating the Equal Protection Clause because they both involved race-based student assignment.²²⁷ Justice Kennedy wrote a concurring opinion arguing that, under certain circumstances, some uses of race would be constitutional.²²⁸ In dissent, Justice Breyer, writing for himself and three other Justices, was not as sanguine as Justice Kennedy about the use of race in the future, stating that the breadth of the Court's decision in *Parents Involved* "would threaten" other federal and state programs that use race as a factor in education.²²⁹

Given this alignment of the Justices on these issues, the precedent-based voting paradox could be crucial in future related litigation. A future case may challenge other uses of race in education, such as any of those that Justice Breyer mentions in his dissent.²³⁰ In such a case, the federal, state, or local

(citation omitted); ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 22 (2008); *id.* at 98 ("Brevity requires ruthlessness in wringing out of your argument everything that doesn't substantially further your case: entire points that prove to be weak . . .").

²²⁵ This argument might seem to contradict the previous section which argued that Justices pick and choose when to vote to overrule precedent even when the parties have not raised the issue. The two are not inconsistent, however, because this section merely argues that lawyers can increase their chances of success, as raising the issue of overruling precedent would, at the least, remove the common objection mentioned above that the Court should not overrule without the parties' first requesting it do so.

²²⁶ 551 U.S. 701 (2007).

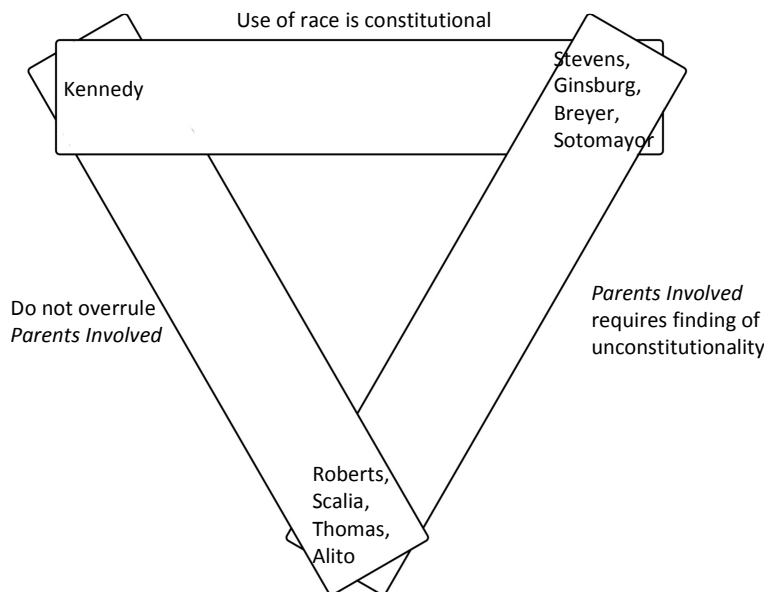
²²⁷ *Id.* at 732-35 (concluding the use of race was not narrowly tailored to the government's interest).

²²⁸ *Id.* at 788-89 (Kennedy, J., concurring in part and concurring in the judgment) (describing ways schools can use race to further diversity).

²²⁹ *Id.* at 861 (Breyer, J., dissenting).

²³⁰ *See id.* at 828-29 (Breyer, J., dissenting) ("Presidential administrations for the past half-century have used and supported various race-conscious measures. . . . And during the

government defending its use of race before the Court should, despite *Parents Involved* controlling the issue, raise the possibility of overruling *Parents Involved*. Doing so would increase its chances of winning even though a majority of the Court might conclude that *Parents Involved* is good law²³¹ and a different majority of the Court might conclude that *Parents Involved* required a finding that the challenged law was unconstitutional.²³² Given the Justices' voting in *Parents Involved*, the following precedent-based voting paradox is within the realm of possibility:



same time, hundreds of local school districts have adopted student assignment plans that use race-conscious criteria.”).

²³¹ The potential majority believing that *Parents Involved* is good law would be the Justices who voted for the outcome in *Parents Involved*: Chief Justice Roberts along with Justices Scalia, Kennedy, Thomas, and Alito.

²³² The potential majority believing that *Parents Involved* required finding that the challenged use of race was unconstitutional would consist of the four Justices in the plurality of *Parents Involved*, who believe that race can never be used constitutionally, plus the three remaining Justices from the dissent who, even though they believe race may be used constitutionally, stated that the *Parents Involved* ruling threatened future uses of race. I also include Justice Sotomayor in this majority on the assumption (that I work with throughout this hypothetical) that she would vote along the same lines as Justice Souter, the Justice she replaced. In other words, this majority would be every Justice other than Justice Kennedy, whose separate concurrence in *Parents Involved* indicated that he believed the case outcome was consistent with future constitutional uses of race.

This outcome is far from the only, or even the most likely, result in such a hypothetical case,²³³ but raising the possibility of overruling *Parents Involved* gives the Court one more option of ruling in the government's favor.

Even though almost all of the precedent-based voting paradoxes in the Court's history have involved constitutional issues, the same principle applies to lawyers with statutory cases before the Court. Because of the greater weight given statutory precedent,²³⁴ the lawyer might have a harder time convincing a Justice to overrule such precedent, but the lawyer should still make the argument if it is not frivolous. For instance, *Monell v. Department of Social Services*²³⁵ prohibits respondeat superior liability for municipalities sued under 42 U.S.C. § 1983.²³⁶ Private entities acting as state actors can be subject to suit under § 1983, but the Supreme Court has yet to address whether the *Monell* rule against respondeat superior liability applies to them.²³⁷ If such a case were to reach the Supreme Court, the plaintiff's attorney should raise the possibility of overruling *Monell*.²³⁸ Doing so would create the possibility of having a paradoxical ruling in which a majority of the Justices agreed that *Monell* was still good law, a majority of the Justices believed that *Monell*'s rule about liability for public entities should extend to private entities as well, but with a majority of Justices ruling that private defendants are liable. The key would be that a group of Justices believed that *Monell* should be overruled²³⁹ but that, if not overruled, it does cover private defendants. The precedent-based voting paradox would look as follows:

²³³ For instance, Justices Stevens, Breyer, Ginsburg, and Sotomayor might not believe, upon further reflection, that *Parents Involved*, and in particular a broad reading of Justice Kennedy's narrowest-grounds concurrence, requires finding the challenged use of race unconstitutional. That this possibility might be more likely than the one I have sketched in the text is irrelevant. The point is that the lawyer representing the government should understand that the precedent-based voting paradox is one more possible route to winning the case. With that understanding, she should make the argument for overruling the precedent so she increases the likelihood the case results in a paradox and thus increases the chances of winning.

²³⁴ See discussion *supra* notes 180-86 and accompanying text.

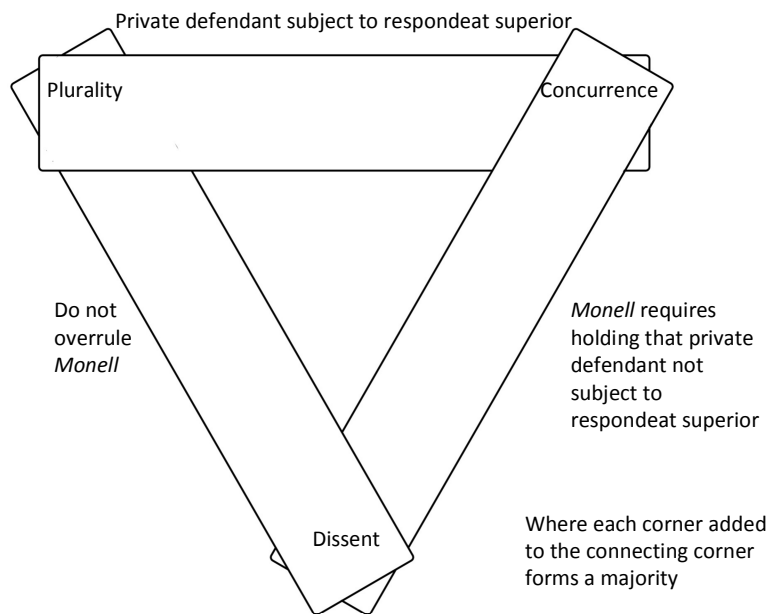
²³⁵ 436 U.S. 658 (1978).

²³⁶ *Id.* at 691.

²³⁷ See generally Richard Frankel, *Regulating Privatized Government Through Section 1983*, 76 U. CHI. L. REV. 1463-65 (2009) (describing the open issue in the Supreme Court, although all eleven circuit courts have ruled that respondeat superior does not apply to private entities as § 1983 defendants).

²³⁸ Although the case is long-standing precedent, it has been extensively criticized. See *id.* at 1462-63 (citing scholars who have criticized *Monell*).

²³⁹ Justices Breyer, Stevens, and Ginsburg have called for the Court to "reexamine the legal soundness" of *Monell*. *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 431 (1997) (Breyer, J., dissenting).



Of course, there is no certainty that raising the possibility of overruling the precedent will create a precedent-based voting paradox that will win the case for the lawyer's client. However, by not doing so, the lawyer would be decreasing the likelihood that the Court would decide the case in her client's favor, even if only by a small amount.

CONCLUSION

From the scholarly debate over how to solve the problem of voting paradoxes, it is quite clear that they are unavoidable in multi-member appellate courts. As Michael Meyerson states: "Rather than rail at the dilemma wrought by the imperfections of our system, however, we should recognize that these imperfections are simply part of the inherent limitations of humanity."²⁴⁰ In fact, not only should we accept them, but we should also study them to understand what they mean for decision-making.

This Article has done that with respect to a particular type of voting paradox – the precedent-based voting paradox. Unlike other voting paradoxes, the precedent-based voting paradox can arise when only one issue is presented to the Supreme Court but one or more Justices decide that the precedent upon which that issue relies should be overruled. Studying precedent-based voting paradoxes separate from other voting paradoxes is important because doing so indicates that voting paradoxes can arise in more circumstances than previously thought. Furthermore, the precedent-based voting paradox should

²⁴⁰ Meyerson, *supra* note 5, at 952.

inform the debate over issue versus outcome voting and give Justices and lawyers important options for strategy. Only by understanding these precedent-based voting paradoxes can we approach a more complete understanding of Supreme Court decision-making.

APPENDIX

Including *Hein v. Freedom from Religion Foundation, Inc.*,²⁴¹ I found eleven precedent-based voting paradoxes in Supreme Court history. To find these precedent-based voting paradoxes, I searched Westlaw's Supreme Court database for all cases that failed to produce a majority opinion. Then, I narrowed those cases down by searching for language, in any opinion, about overruling (language such as "overruled," "overturned," "no longer good law," "revisited," etc.). I discarded from that group of cases those that used one of those words incidentally (such as in a citation clause describing the weight of authority). I then read this resulting group of cases to determine the vote count on the issues the Justices addressed.

Using the same narrative and graphical depiction used earlier for *Hein*,²⁴² the other ten are presented here in chronological order.²⁴³

²⁴¹ 551 U.S. 587 (2007).

²⁴² See *supra* Part III.A.

²⁴³ It is no coincidence that the first precedent-based voting paradox I found is from 1949. As described in the Article, the precedent-based voting paradox can exist only when there is a plurality opinion. See *supra* text accompanying note 162. The number of plurality opinions from the Court has increased dramatically since the mid-1900s. See Ken Kimura, Note, *A Legitimacy Model for the Interpretation of Plurality Opinions*, 77 CORNELL L. REV. 1593, 1593 n.3 (1992).

*National Mutual Insurance Co. v. Tidewater Transfer Co.*²⁴⁴

Decision: The Court held that Congress could vest the federal courts with diversity jurisdiction over cases involving citizens of a state against citizens of the District of Columbia. Five Justices concluded that this was within Congress's power.²⁴⁵ However, seven Justices believed that *Hepburn v. Ellzey*,²⁴⁶ which held that the word "states" in Article III did not include the District of Columbia, should not be overruled,²⁴⁷ and a different six Justice majority held that *Hepburn* meant that Congress could not give diversity jurisdiction to the federal courts over citizens of the District of Columbia.²⁴⁸

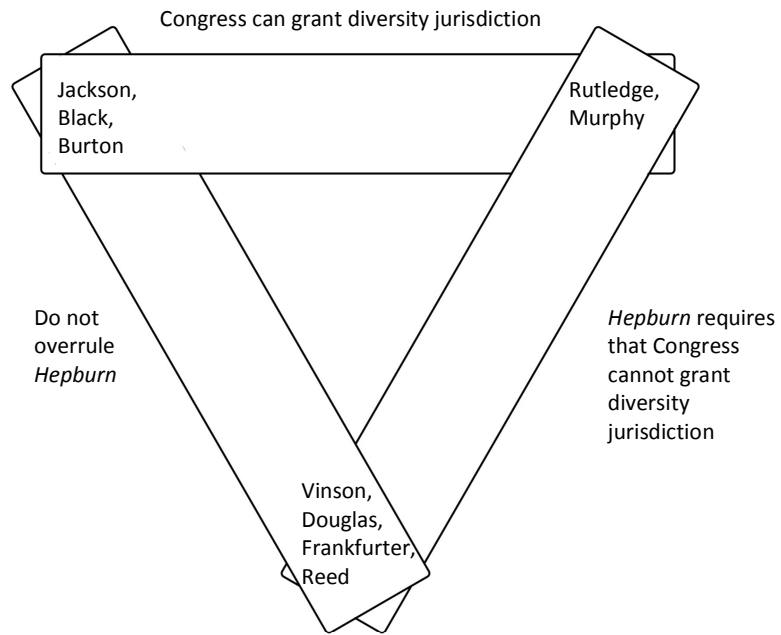
²⁴⁴ 337 U.S. 582 (1949).

²⁴⁵ Justice Jackson's plurality opinion, joined by Justices Black and Burton, found the act valid. *Id.* at 604 (Jackson, J., plurality opinion). Justice Rutledge's opinion concurring in the judgment, joined by Justice Murphy, agreed. *Id.* at 626 (Rutledge, J., concurring in the judgment).

²⁴⁶ 6 U.S. (2 Cranch) 445 (1805).

²⁴⁷ Justice Jackson's plurality opinion, joined by Justices Black and Burton, expressly refused to overrule *Hepburn*. *Nat'l Mut.*, 337 U.S. at 588 (Jackson, J., plurality opinion). Chief Justice Vinson's dissenting opinion, joined by Justice Douglas, did not refer to *Hepburn* by name, but did reference it and conclude it should not be overruled. *Id.* at 645-46 (Vinson, C.J., dissenting). Justice Frankfurter's dissenting opinion, joined by Justice Reed, did not specifically mention *Hepburn* but defended its holding extensively. *Id.* at 651-54 (Frankfurter, J., dissenting). Justice Rutledge's opinion concurring in the judgment, joined by Justice Murphy, concluded that *Hepburn* should be overruled. *Id.* at 625-26 (Rutledge, J., concurring in the judgment).

²⁴⁸ Justice Rutledge's opinion concurring in the judgment, joined by Justice Murphy, reasoned that *Hepburn* required finding Congress did not have this power. *Id.* at 617 (Rutledge, J., concurring in the judgment). The dissenting opinions of Chief Justice Vinson, joined by Justice Douglas, and Justice Frankfurter, joined by Justice Reed, did not mention *Hepburn* by name but argued that its holding required a finding that Congress did not have this power. *Id.* at 645-46 (Vinson, C.J., dissenting); *id.* at 651-54 (Frankfurter, J., dissenting). Only Justice Jackson's plurality opinion, joined by Justices Black and Burton, found that *Hepburn* still allowed Congress to enact this legislation. *Id.* at 588 (Jackson, J., plurality opinion) ("This conclusion [to not overrule *Hepburn*] does not, however, determine that Congress lacks power under other provisions of the Constitution to enact this legislation.").



*Glidden Co. v. Zdanok*²⁴⁹

Decision: The Court held that judges of the Court of Claims and the Court of Customs and Patent Appeals could sit on Article III federal courts without invalidating their judgments. Five Justices (out of seven hearing the case²⁵⁰) concluded that these judges did not compromise Article III courts.²⁵¹ A different set of five Justices held that the precedents of *Ex parte Bakelite Corp.*²⁵² and *Williams v. United States*²⁵³ required the conclusion that the judges of those courts could not sit on Article III courts.²⁵⁴ And a different majority of four Justices found those two cases still to be good law.²⁵⁵

²⁴⁹ 370 U.S. 530 (1962).

²⁵⁰ Justices Frankfurter and White took no part in the decision of the case. *Id.* at 585.

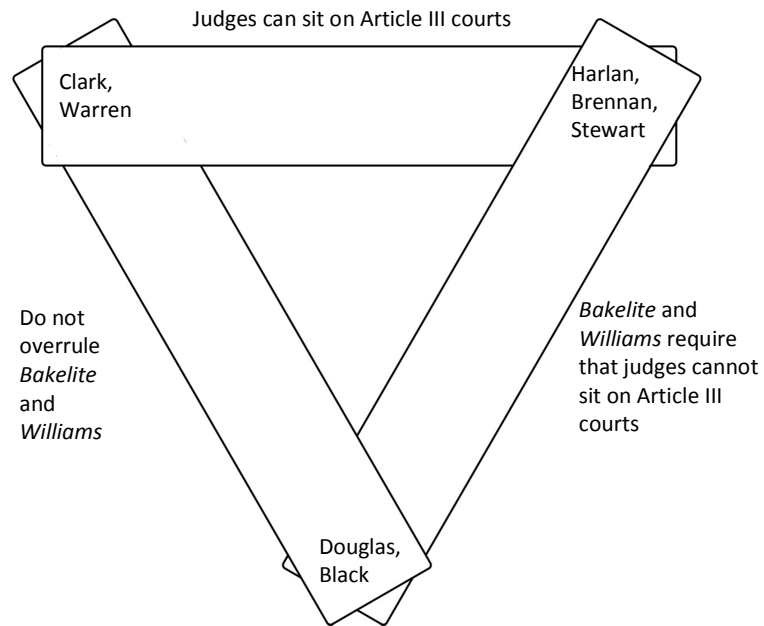
²⁵¹ Justice Harlan's plurality opinion, joined by Justices Brennan and Stewart, concluded that the judges could sit on Article III courts. *Id.* at 584-85 (Harlan, J., plurality opinion). Justice Clark's opinion concurring in the result, joined by Chief Justice Warren, concluded the same. *Id.* at 586, 587 (Clark, J., concurring in the result).

²⁵² 279 U.S. 438 (1929).

²⁵³ 289 U.S. 553 (1933).

²⁵⁴ Justice Harlan's plurality opinion, joined by Justices Brennan and Stewart, concluded that the precedent could not be narrowed. *Glidden*, 370 U.S. at 534 (Harlan, J., plurality opinion). Justice Douglas's dissenting opinion, joined by Justice Black, found the precedent applied directly to this case. *Id.* at 596-97 (Douglas, J., dissenting) (applying *Bakelite* and *Williams*). Only Justice Clark's concurring opinion, joined by Chief Justice Warren, differentiated both *Bakelite* and *Williams*. *Id.* at 586-88 (Clark, J., concurring in the result).

²⁵⁵ Justice Clark's opinion concurring in the result, joined by Chief Justice Warren, refused to overrule the two cases. *Id.* at 585 (Clark, J., concurring in the result). Justice Douglas's dissenting opinion, joined by Justice Black, concluded both cases were correct. *Id.* at 592 (Douglas, J., dissenting). To the contrary, Justice Harlan's plurality opinion, joined by Justices Brennan and Stewart, "reexamined" the decisions," *id.* at 543 (Harlan, J., plurality opinion), and reached the opposite conclusion. *Id.* at 552.



*First National City Bank v. Banco Nacional de Cuba*²⁵⁶

Decision: The Court held that the act of state doctrine did not bar the federal courts from hearing a counterclaim by a United States bank against a Cuban bank when the State Department gave legal advice that the doctrine should not be applied. Five Justices concluded that the lawsuit could proceed and was not barred by the act of state doctrine.²⁵⁷ Six Justices believed that *Banco Nacional de Cuba v. Sabbatino*²⁵⁸ required a finding that this lawsuit could not proceed.²⁵⁹ Eight Justices believed that *Sabbatino* was good law.²⁶⁰

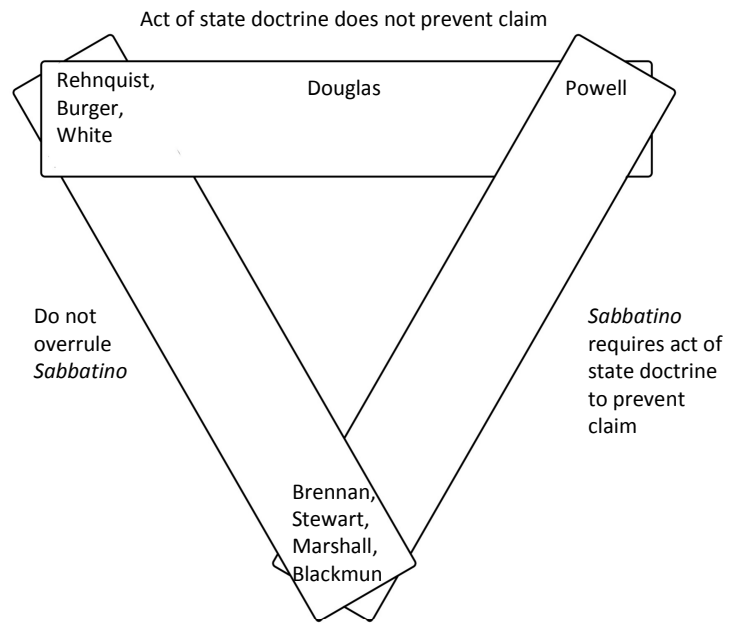
²⁵⁶ 406 U.S. 759 (1972).

²⁵⁷ Justice Rehnquist's plurality opinion, joined by Chief Justice Burger and Justice White, held the doctrine did not bar the suit. *Id.* at 769-70 (Rehnquist, J., plurality opinion). Justice Douglas's separate concurrence, *id.* at 771 (Douglas, J., concurring in the result), and Justice Powell's concurrence, *id.* at 776 (Powell, J., concurring in the judgment), agreed.

²⁵⁸ 376 U.S. 398 (1964).

²⁵⁹ Justice Powell's concurrence concluded that *Sabbatino* required barring the suit here. *First Nat'l*, 406 U.S. at 773 (Powell, J., concurring in the judgment). Justice Brennan's dissent, joined by Justices Stewart, Marshall, and Blackmun, concluded that *Sabbatino* clearly applied. *Id.* at 790 (Brennan, J., dissenting). Justice Douglas's concurrence concluded that *Sabbatino* would require barring the suit but nonetheless allowed the suit to go forward on a different theory under *National City Bank v. Republic of China*, 348 U.S. 356 (1955). *First Nat'l*, 406 U.S. at 772 (Douglas, J., concurring in the result). Only Justice Rehnquist's plurality opinion, joined by Chief Justice Burger and Justice White, distinguished *Sabbatino*. *Id.* at 767 (Rehnquist, J., plurality opinion).

²⁶⁰ Only Justice Powell's concurring opinion argued for *Sabbatino* to be overruled. *First Nat'l*, 406 U.S. at 774-75 (Powell, J., concurring in the judgment). Justice Brennan's dissent, joined by Justices Stewart, Marshall, and Blackmun, explicitly rejected overruling *Sabbatino*. *Id.* at 778 (Brennan, J., dissenting). Justice Rehnquist's plurality, joined by Chief Justice Burger and Justice White, and Justice Douglas's concurrence did not explicitly reject overruling *Sabbatino* but both treated the case as good law. *See id.* at 767 (Rehnquist, J., plurality opinion); *id.* at 772 (Douglas, J., concurring in the result).



*Lalli v. Lalli*²⁶¹

Decision: The Court held that New York's requirement that illegitimate children inheriting from their fathers prove their parentage differently than others was constitutional. Five Justices concluded there was no constitutional violation.²⁶² A majority of five Justices believed that *Trimble v. Gordon*²⁶³ required a finding that the New York requirement violated the Constitution.²⁶⁴ A majority of seven Justices agreed that *Trimble* should not be overruled.²⁶⁵

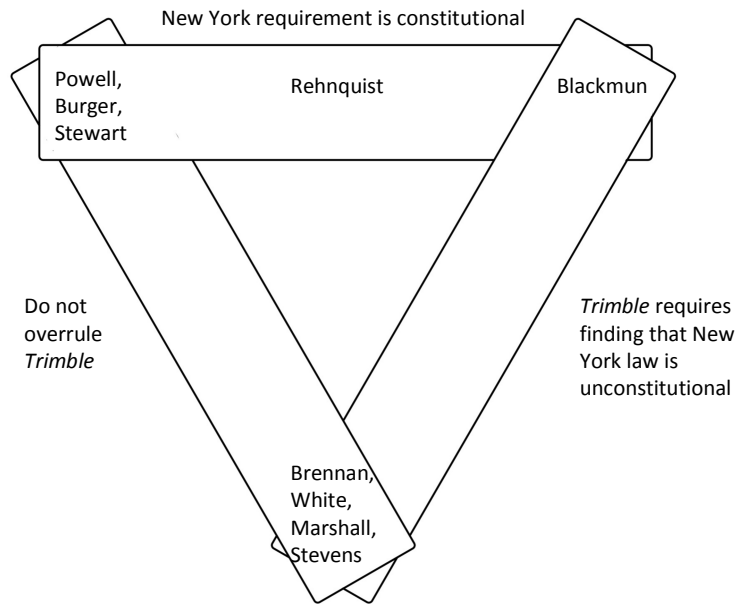
²⁶¹ 439 U.S. 259 (1978).

²⁶² Justice Powell's plurality opinion, joined by Chief Justice Burger and Justice Stewart, concluded the law was constitutional. *Id.* at 275-76 (Powell, J., plurality opinion). Justice Rehnquist concurred in the judgment for the reasons stated in his dissent in *Trimble v. Gordon*, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting). *Lalli*, 439 U.S. at 276 (Rehnquist, J., concurring in the judgment). Because Justice Rehnquist did not express any opinion on whether *Trimble*'s majority holding requires a finding of constitutionality or not, he is not included in the vote counting here other than for the five Justice majority holding the law is constitutional. Justice Blackmun's concurrence in the judgment agreed with the result. *Id.* at 276 (Blackmun, J., concurring in the judgment).

²⁶³ 430 U.S. 762 (1977).

²⁶⁴ Justice Blackmun's concurrence in the judgment argued that *Trimble* could not be distinguished. *Lalli*, 439 U.S. at 277 (Blackmun, J., concurring in the judgment). Justice Brennan's dissent, joined by Justices White, Marshall, and Stevens, concluded that the statute was inconsistent with *Trimble* and should thus be found unconstitutional. *Id.* at 277-79 (Brennan, J., dissenting). Justice Powell's plurality opinion, joined by Chief Justice Burger and Justice Stewart, differentiated *Trimble*. *Id.* at 266-68 (Powell, J., plurality opinion).

²⁶⁵ Only Justice Blackmun argued for overruling *Trimble*. *Id.* at 277 (Blackmun, J., concurring in the judgment). The other Justices, minus Justice Rehnquist, implicitly reaffirmed *Trimble* as they applied it directly to this case. *See id.* at 266-68 (Powell, J., plurality opinion); *id.* at 277-79 (Brennan, J., dissenting, joined by White, Marshall, and Stevens, JJ.).



*Thomas v. Washington Gas Light Co.*²⁶⁶

Decision: The Court held that the Full Faith and Credit Clause did not bar a claimant from recovering workers' compensation from the District of Columbia after already receiving benefits from Virginia for the same injuries. Seven Justices found that the Full Faith and Credit Clause was not violated.²⁶⁷ However, six Justices believed that *Magnolia Petroleum Co. v. Hunt*²⁶⁸ required a finding that the Constitution was violated,²⁶⁹ and a different group of five Justices believed that *Magnolia* should not be overruled.²⁷⁰

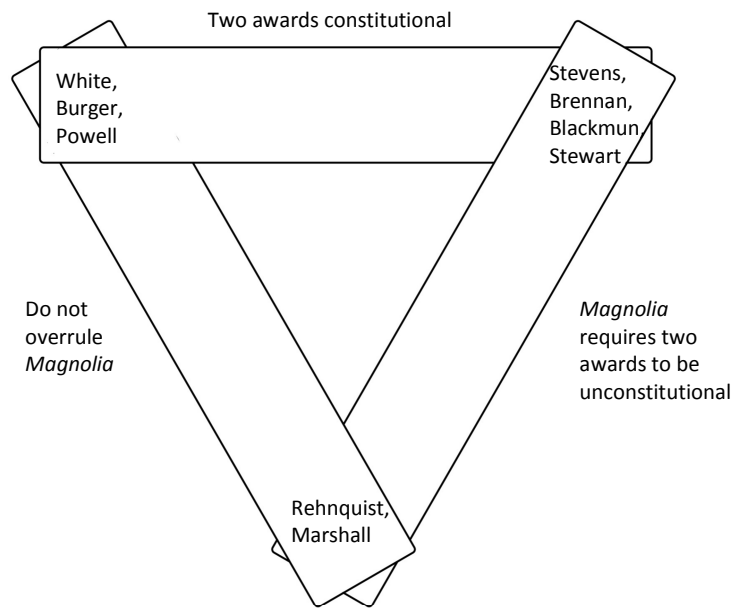
²⁶⁶ 448 U.S. 261 (1980).

²⁶⁷ Justice Stevens's plurality opinion, joined by Justices Brennan, Blackmun, and Stewart, concluded that successive awards are allowed. *Id.* at 286 (Stevens, J., plurality opinion). Justice White's opinion concurring in the judgment, joined by Chief Justice Burger and Justice Powell, agreed. *Id.* at 286 (White, J., concurring in the judgment).

²⁶⁸ 320 U.S. 430 (1943).

²⁶⁹ Justice Stevens's plurality opinion, joined by Justices Brennan, Blackmun, and Stewart, concluded that *Magnolia* could not be distinguished. *Thomas*, 448 U.S. at 272 (Stevens, J., plurality opinion). Justice Rehnquist's dissent, joined by Justice Marshall, also found *Magnolia* to be indistinguishable. *Id.* at 291 (Rehnquist, J., dissenting). Justice White's opinion concurring in the judgment, joined by Chief Justice Burger and Justice Powell, did not find *Magnolia* controlling. *Id.* at 289-90 (White, J., concurring in the judgment).

²⁷⁰ Justice White's opinion concurring in the judgment, joined by Chief Justice Burger and Justice Powell, stated this explicitly, *id.* at 289 (White, J., concurring in the judgment), as did Justice Rehnquist's dissent, which Justice Marshall joined, *id.* at 290 (Rehnquist, J., dissenting). Justice Stevens's plurality opinion, joined by Justices Brennan, Blackmun, and Stewart, called for *Magnolia* to be overruled. *Id.* at 286 (Stevens, J., plurality opinion).



*Webster v. Reproductive Health Services*²⁷¹

Decision: The Court held that Missouri's statute requiring viability-testing for abortions taking place after twenty-weeks of pregnancy was constitutional. A five Justice majority found that the statute was constitutional.²⁷² Five Justices concluded that *Roe v. Wade*²⁷³ required a finding that the viability-testing provision was unconstitutional.²⁷⁴ Eight Justices found that *Roe* was still good law.²⁷⁵

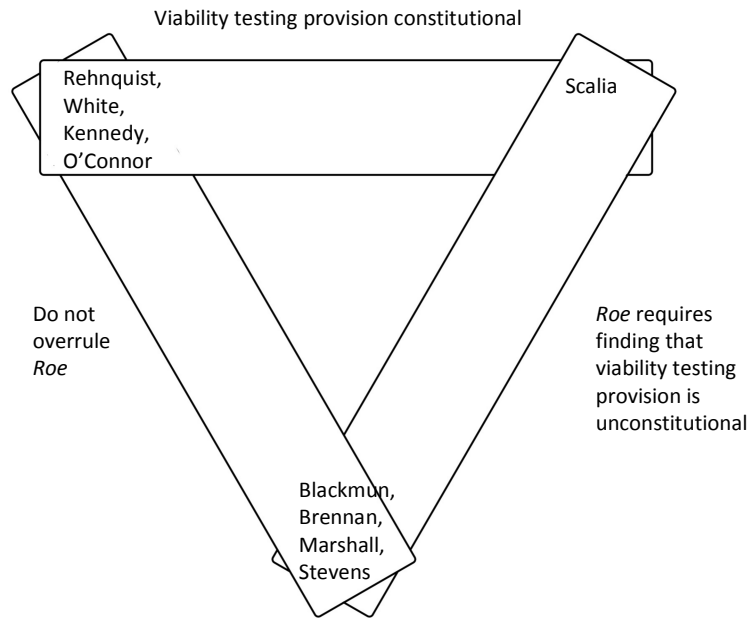
²⁷¹ 492 U.S. 490 (1989).

²⁷² Chief Justice Rehnquist's plurality on the viability-testing provision, joined by Justices White and Kennedy, found it constitutional. *Id.* at 520 (Rehnquist, C.J., plurality opinion). Justice O'Connor's concurrence in the judgment agreed, *id.* at 531 (O'Connor, J., concurring in part and concurring in the judgment), as did Justice Scalia in his concurrence in the judgment, *id.* at 537 (Scalia, J., concurring in part and concurring in the judgment).

²⁷³ 410 U.S. 113 (1973).

²⁷⁴ Justice Scalia's opinion concurring in the judgment found that the statute conflicted with *Roe* and its progeny. *Webster*, 492 U.S. at 536 n.* (Scalia, J., concurring in part and concurring in the judgment). Justice Blackmun's dissent, joined by Justices Brennan and Marshall, concluded that upholding the statute was in "flat contradiction to *Roe*." *Id.* at 541-42 (Blackmun, J., concurring in part and dissenting in part). Justice Stevens's separate dissent found that the viability-testing provision would not pass even the rational basis test of *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), thereby implicitly holding that the provision conflicted with the heightened scrutiny test of *Roe*. *See Webster*, 492 U.S. at 562-63 (Stevens, J., concurring in part and dissenting in part). Chief Justice Rehnquist's plurality, joined by Justices White and Kennedy, argued that *Roe* differed from this case. *Id.* at 521 (Rehnquist, C.J., plurality opinion). Justice O'Connor's opinion concurring in the judgment also distinguished *Roe*. *Id.* at 525-31 (O'Connor, J., concurring in part and concurring in the judgment).

²⁷⁵ Chief Justice Rehnquist's plurality, joined by Justices White and Kennedy, concluded that it left *Roe*'s holding "undisturbed." *Webster*, 492 U.S. at 521 (Rehnquist, C.J., plurality opinion). Justice O'Connor's opinion concurring in the judgment refused to re-consider *Roe*. *Id.* at 526 (O'Connor, J., concurring in part and concurring in the judgment) ("When the constitutional invalidity of a State's abortion statute actually turns on the constitutional validity of *Roe v. Wade*, there will be time enough to reexamine *Roe*."). Justice Blackmun's dissent, joined by Justices Brennan and Marshall, argued against overruling *Roe*. *Id.* at 557-60 (Blackmun, J., concurring in part and dissenting in part). Justice Stevens's dissent stated there was "no need" to modify *Roe*. *Id.* at 561 (Stevens, J., concurring in part and dissenting in part). Only Justice Scalia's opinion concurring in the judgment explicitly called for overturning *Roe*. *Id.* at 532 (Scalia, J., concurring in part and concurring in the judgment).



*American Trucking Ass'ns v. Smith*²⁷⁶

Decision: The Court held that Arkansas's equalization tax on trucks on state highways was constitutional for the time period the out-of-state truckers challenged it. A five Justice majority found that the tax was constitutional.²⁷⁷ However, a different five Justice majority concluded that *American Trucking Ass'ns v. Scheiner*²⁷⁸ required a finding that the tax was unconstitutional at the time it was applied.²⁷⁹ Yet, an eight Justice majority found that *Scheiner* was still good law.²⁸⁰

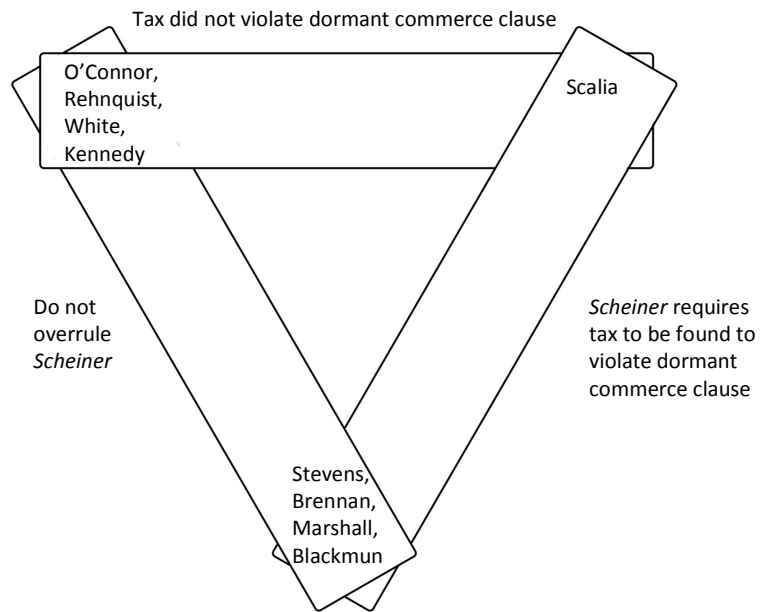
²⁷⁶ 496 U.S. 167 (1990).

²⁷⁷ Justice O'Connor's plurality opinion, joined by Chief Justice Rehnquist and Justices White and Kennedy, concluded that the tax was constitutional. *Id.* at 183 (O'Connor, J., plurality opinion). Justice Scalia's opinion concurring in the judgment agreed. *Id.* at 200-01 (Scalia, J., concurring in the judgment).

²⁷⁸ 483 U.S. 266 (1987).

²⁷⁹ Justice Scalia's opinion concurring in the judgment concluded that *Scheiner*, if upheld, would require a finding that the tax was unconstitutional. *Smith*, 496 U.S. at 204-05 (Scalia, J., concurring in the judgment). Justice Stevens's dissenting opinion, joined by Justices Brennan, Marshall, and Blackmun, agreed. *Id.* at 211-12 (Stevens, J., dissenting). Justice O'Connor's plurality opinion, joined by Chief Justice Rehnquist and Justices White and Kennedy, held that *Scheiner* did not apply to this case. *Smith*, 496 U.S. at 183 (O'Connor, J., plurality opinion).

²⁸⁰ Justice O'Connor's plurality opinion, joined by Chief Justice Rehnquist and Justices White and Kennedy, refused to reconsider *Scheiner*. *Id.* at 183 n.1 (O'Connor, J., plurality opinion). Justice Stevens's dissenting opinion, joined by Justices Brennan, Marshall, and Blackmun, applied *Scheiner* without reconsidering it. *Id.* at 211-12 (Stevens, J., dissenting). Only Justice Scalia's opinion concurring in the judgment argued for *Scheiner* to be overruled. *Id.* at 204-05 (Scalia, J., concurring in the judgment).



*Planned Parenthood of Southeastern Pennsylvania v. Casey*²⁸¹

Decision: The Court held that four out of five of Pennsylvania's restrictions on abortions were constitutional.²⁸² A seven Justice majority found that the provisions were constitutional.²⁸³ However, six Justices concluded that *Roe v. Wade*²⁸⁴ required a finding that all of Pennsylvania's provisions were unconstitutional.²⁸⁵ And a five Justice majority found that *Roe* was still good law.²⁸⁶

²⁸¹ 505 U.S. 833 (1992).

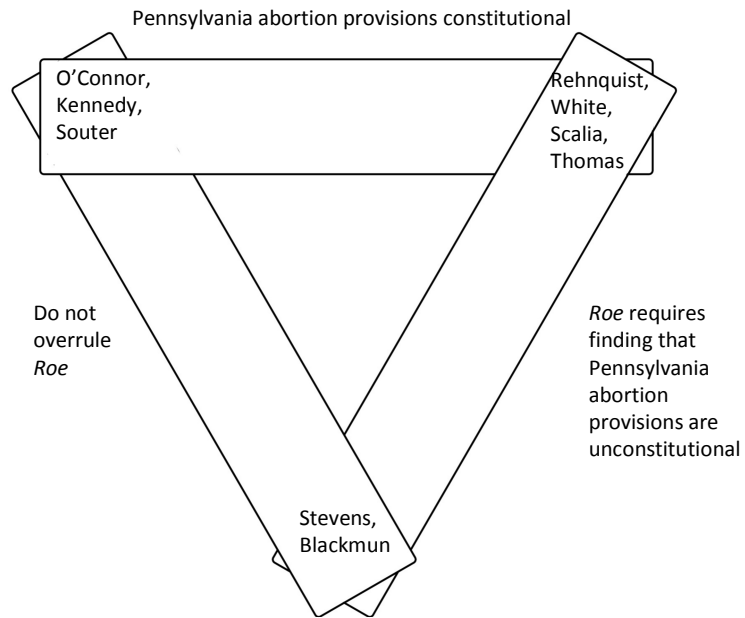
²⁸² The Court invalidated Pennsylvania's requirement that a married woman must notify her spouse before having an abortion. *Id.* at 887-98 (O'Connor, Kennedy, Souter, JJ., joint opinion) (finding the spousal notification requirement to be a substantial obstacle that would prevent a significant number of women from obtaining an abortion). The Court also invalidated a provision of the recordkeeping and reporting requirement that required a married woman to report the reason she failed to notify her husband. *Id.* at 901.

²⁸³ The joint opinion from Justices O'Connor, Kennedy, and Souter found Pennsylvania's provisions other than the spousal-notification requirement and the associated recordkeeping and reporting requirements constitutional. *Id.* at 879-87, 899-901 (O'Connor, Kennedy, and Souter, JJ., joint opinion). The two concurring opinions from Chief Justice Rehnquist and Justice Scalia, both joined by each other as well as Justices White and Thomas, agreed. *Id.* at 944 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (upholding all provisions, including spousal-notification); *id.* at 981 (Scalia, J., concurring in the judgment in part and dissenting in part) ("I would uphold the Pennsylvania statute in its entirety.").

²⁸⁴ 410 U.S. 113 (1973).

²⁸⁵ Justice Scalia's opinion concurring in the judgment, joined by Chief Justice Rehnquist and Justices White and Thomas, made this point entirely clear. *Casey*, 505 U.S. at 994 (Scalia, J., concurring in the judgment in part and dissenting in part). Justice Stevens's separate opinion concurring in part and dissenting in part reached the same conclusion about *Roe*'s application here. *Id.* at 917-18 (Stevens, J., concurring in part and dissenting in part) (finding provisions conflict with *Roe*). Justice Blackmun's separate opinion agreed. *Id.* at 926 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). Only the joint opinion distinguished *Roe* and upheld the Pennsylvania provisions. *Id.* at 879-87, 899-901 (O'Connor, Kennedy, and Souter, JJ., joint opinion).

²⁸⁶ The joint opinion of Justices O'Connor, Kennedy, and Souter refused to overrule *Roe*. *Id.* at 854-69 (O'Connor, Kennedy, and Souter, JJ., joint opinion). Justices Stevens's and Blackmun's separate opinions also defended and applied *Roe*. *Id.* at 912-14 (Stevens, J., concurring in part and dissenting in part); *id.* at 926 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). Chief Justice Rehnquist's and Justice Scalia's separate concurring opinions, both for each other and Justices White and Thomas, argued for *Roe* to be overturned. *Id.* at 944 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *id.* at 979-80 (Scalia, J., concurring in the judgment in part and dissenting in part).



*Holder v. Hall*²⁸⁷

Decision: The Court held that Section 2 of the Voting Rights Act of 1965²⁸⁸ did not permit a vote dilution challenge to the size of a governing authority. Five Justices concluded that the Voting Rights Act did not permit such a challenge.²⁸⁹ However, six Justices concluded that *Thornburg v. Gingles*²⁹⁰ required a finding that the Voting Rights Act permitted a vote dilution challenge in these circumstances.²⁹¹ And seven Justices believed that *Gingles* was still good law.²⁹²

²⁸⁷ 512 U.S. 874 (1994).

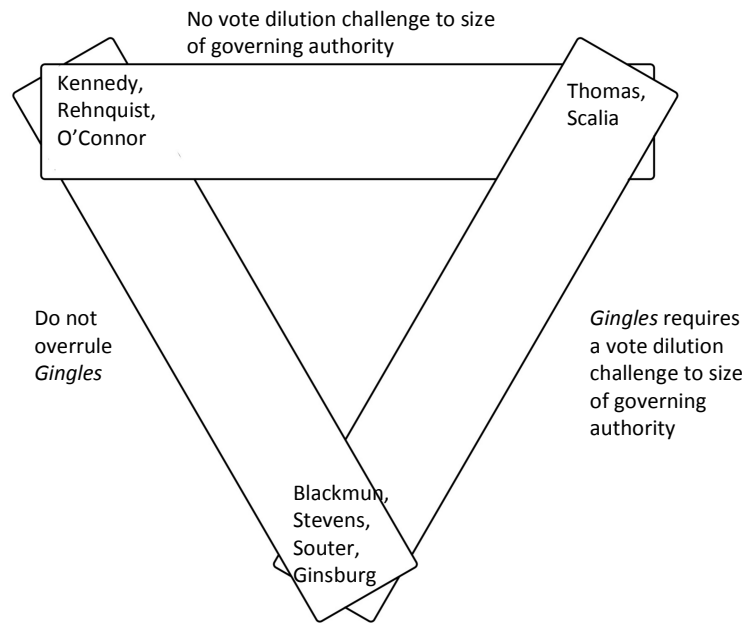
²⁸⁸ 42 U.S.C. § 1973 (2006) (prohibiting voting requirements that would abridge the right to vote on account of race or color).

²⁸⁹ Justice Kennedy's plurality opinion, joined by Chief Justice Rehnquist and Justice O'Connor, concluded the Voting Rights Act did not support such a claim. *Holder*, 512 U.S. at 885 (Kennedy, J., plurality opinion). Justice Thomas's opinion concurring in the judgment, joined by Justice Scalia, agreed. *Id.* at 891 (Thomas, J., concurring in the judgment).

²⁹⁰ 478 U.S. 30 (1986).

²⁹¹ Justice Thomas's opinion concurring in the judgment, joined by Justice Scalia, argued that *Gingles* required a finding that plaintiffs could maintain a Section 2 challenge. *Holder*, 512 U.S. at 915-17, 939 (Thomas, J., concurring in the judgment) ("In that respect, however, the districting practices we have treated as subject to challenge under the Act [in *Gingles*] are essentially similar to choices concerning the size of a governing authority."). Justice Blackmun's dissent, joined by Justices Stevens, Souter, and Ginsburg, argued that the outcome of the case was "inconsistent" with *Gingles* and other Voting Rights Act precedent. *Id.* at 950-51 (Blackmun, J., dissenting); *id.* at 951 n.3. Justice Kennedy's plurality opinion, joined by Chief Justice Rehnquist and Justice O'Connor, differentiated *Gingles*. *Id.* at 880-81 (Kennedy, J., plurality opinion). Justice O'Connor's separate concurrence in the judgment did the same. *Id.* at 887-88 (O'Connor, J., concurring in part and concurring in the judgment).

²⁹² Only Justice Thomas's opinion concurring in the judgment, joined by Justice Scalia, argued for overturning *Gingles*. *Id.* at 944-45 (Thomas, J., concurring in the judgment) ("In my view, our current practice should not continue. Not for another Term, not until the next case, not for another day."). Justice Kennedy's plurality opinion, joined by Chief Justice Rehnquist and Justice O'Connor, differentiated *Gingles* without arguing for it to be overruled. *Id.* at 880-81 (Kennedy, J., plurality opinion). Justice O'Connor's separate concurrence in the judgment specifically rejected Justice Thomas's call to "overhaul" Voting Rights Act jurisprudence. *Id.* at 885-86 (O'Connor, J., concurring in part and concurring in the judgment). Justice Blackmun's dissent, joined by Justices Stevens, Souter, and Ginsburg, applied *Gingles*. *Id.* at 950-52 (Blackmun, J., dissenting). Justice Stevens's separate opinion, joined by Justices Blackmun, Souter, and Ginsburg, defended applying stare decisis to *Gingles* and other Voting Rights Act cases. *Id.* at 965-66 (Stevens, J., separate opinion).



*FEC v. Wisconsin Right to Life, Inc.*²⁹³

Decision: Decided the same day as *Hein*, the Court found that the federal law that banned issue ads within thirty days of a federal primary election and sixty days of a federal general election was unconstitutional under the First Amendment. Five Justices concluded that issue ads were protected speech under the First Amendment.²⁹⁴ However, seven Justices believed that *McConnell v. FEC*²⁹⁵ required a conclusion that the federal government could ban issue ads consistent with the First Amendment.²⁹⁶ And six Justices believed that *McConnell* was still good law.²⁹⁷

²⁹³ 551 U.S. 449 (2007).

²⁹⁴ Chief Justice Roberts's opinion, joined by Justice Alito, found the ads were protected and the law unconstitutional as applied to them. *Id.* at 457 (Roberts, C.J.). Justice Scalia's concurring opinion, joined by Justices Kennedy and Thomas, agreed. *Id.* at 504 (Scalia, J., concurring in part and concurring in the judgment).

²⁹⁵ 540 U.S. 93 (2003).

²⁹⁶ Justice Scalia's concurring opinion, joined by Justices Kennedy and Thomas, repeatedly argued that *McConnell* would require reaffirming the law as applied to the ads at issue because it could not be distinguished from this case. *Wis. Right to Life*, 551 U.S. at 498-99, 499 n.7, 501 (Scalia, J., concurring in part and concurring in the judgment) ("[T]he *McConnell* regime is unworkable because of the inability of any acceptable as-applied test to validate the facial constitutionality of § 203 [of the Bipartisan Campaign Reform Act of 2002] – that is, its inability to sustain proscription of the vast majority of issue ads."). Justice Souter's dissenting opinion, joined by Justices Stevens, Ginsburg, and Breyer, explicitly stated the same. *Id.* at 525 (Souter, J., dissenting) ("[I]t is beyond all reasonable debate that the ads are constitutionally subject to regulation under *McConnell*"). Only Chief Justice Roberts and Justice Alito found that *McConnell* could be differentiated. *Id.* at 476 (Roberts, C.J.) (stating that the ads "fall outside the scope of *McConnell*'s holding").

²⁹⁷ Chief Justice Roberts and Justice Alito refused to revisit *McConnell*. *Id.* at 476 (Roberts, C.J.) ("We have no occasion to revisit [*McConnell*] today."). Justice Souter's dissenting opinion, joined by Justices Stevens, Ginsburg, and Breyer, argued against overruling *McConnell*. *Id.* at 534 (Souter, J., dissenting) ("[T]here is no justification for departing from our usual rule of stare decisis here."). Only Justices Scalia, Kennedy, and Thomas supported overruling *McConnell*. *Id.* at 504 (Scalia, J., concurring in part and concurring in the judgment).

