

COMMENT

Original Jurisdiction Deadlocks

Although nine Justices sit on the Supreme Court, absences or vacancies (or both) sometimes require that fewer than nine Justices preside over a case. When the number of missing Justices is odd (and the number of presiding Justices therefore even), there arises the possibility of a tie vote on that case's merits. In cases arising under the Court's appellate jurisdiction, a tie translates into a summary affirmance of the lower court's ruling. But what happens in original jurisdiction cases, which by definition present no lower court ruling to affirm?

New Jersey v. Delaware,¹ a case decided last Term, nearly presented this conundrum. Had two more Justices dissented in the case, the Court would have found itself in the perplexing posture of an original jurisdiction deadlock (OJD). It is unknown how the Court would have handled an OJD in *New Jersey*, or how it would handle one in any future case. It is, as one commentator has observed, "a question experts in Supreme Court procedure have been unable to answer."²

Though the Court skirted the issue in *New Jersey*, the challenge posed by OJDs remains important. Original jurisdiction cases maintain a steady presence on the Court's docket,³ and it is only a matter of time before one of them

1. 128 S. Ct. 1410 (2008).

2. Linda Greenhouse, *Court Blocks Plans for New Gas Plant in New Jersey*, N.Y. TIMES, Apr. 1, 2008, at B4; see John V. Orth, *How Many Judges Does It Take To Make a Supreme Court?*, 19 CONST. COMMENT. 681, 686 n.27 (2002) ("What would happen in the event of an evenly divided court in a case within the Supreme Court's original jurisdiction is unknown.").

3. The Supreme Court has issued around 175 "full decisions" in original jurisdiction cases. LAWRENCE BAUM, THE SUPREME COURT 9 (8th ed. 2004). The Court has rendered at least ten such decisions in the past eleven years. See *New Jersey*, 128 S. Ct. 1410; *Alaska v. United States*, 545 U.S. 75 (2005); *Kansas v. Colorado*, 543 U.S. 86 (2004); *Virginia v. Maryland*, 540 U.S. 56 (2003); *Kansas v. Colorado*, 533 U.S. 1 (2001); *New Hampshire v. Maine*, 532 U.S. 742 (2001); *Arizona v. California*, 530 U.S. 392 (2000); *Federal Republic of Germany v.*

results in a tie. The Court should therefore treat last Term's close call as an opportunity to develop a clear and principled approach to resolving OJDs.

I. THE NEED FOR A RULE

The Court has confronted only two OJDs, and on both occasions it struggled due to a lack of a clear tiebreaking rule. First, in the nineteenth-century case of *Virginia v. West Virginia*,⁴ Chief Justice Chase announced that the Justices were "equally divided on the demurrer, and equally divided also upon the order which should be made in consequence of that division."⁵ As a result, the matter stood unresolved for nearly three years.⁶ Second, in the twentieth-century disbarment action of *In re Isserman*, the Court split evenly on the question of disbarment but ordered disbarment anyway.⁷ One year later, the Court changed its mind and overruled its prior decision.⁸

Unfazed by this troubled past, the Court remains unprepared for future OJDs. Rather than bind itself to a prospective rule, the Court has chosen to wait for the next OJD before determining a proper resolution.⁹ Such a wait-and-see strategy may offer some near-term savings of judicial energy, but this modest benefit is outweighed by significant costs. For one thing, ad hoc OJD resolutions entail procedural decisionmaking in the face of foreseeable substantive consequences. Unsatisfactory solutions may well emerge from these situations because the Justices' views on the merits of a deadlocked case could distort their views on the appropriate response to the OJD itself. Moreover, there is the danger that the practical problem presented by *Virginia* will recur—namely, that a second deadlock will occur on the issue of how to deal with the initial deadlock on the merits. Finally, ad hoc rulings tend to be unstable, as illustrated by the Court's flip-flopping in *In re Isserman*.¹⁰

United States, 526 U.S. 111 (1999); *New Jersey v. New York*, 523 U.S. 767 (1998); *Breard v. Greene*, 523 U.S. 371 (1998).

4. 78 U.S. (11 Wall.) 39 (1870).

5. CHARLES FAIRMAN, *RECONSTRUCTION AND REUNION 1864-88*, pt. 1, at 625 (The Oliver Wendell Holmes Devise, History of the Supreme Court of the United States, vol. 6, 1971).

6. *Id.*

7. 345 U.S. 286 (1953), *vacated on reh'g*, 348 U.S. 1 (1954).

8. 348 U.S. 1.

9. See Ryan Black & Lee Epstein, *Recusals and the "Problem" of an Equally Divided Court*, 7 J. APP. PRAC. & PROCESS 75, 82 n.34 (2005).

10. The potential for uncertainty points to an additional downside to an ad hoc approach: distortions in the Justices' recusal determinations. Indeed, this is a phenomenon already observed in appellate cases. See, e.g., *An Open Discussion with Justice Ruth Bader Ginsburg*, 36

II. THREE POTENTIAL STRATEGIES

Given the need to establish a method of resolving OJDs, the next task is to determine what the best method would be. This Part identifies three common tiebreaking strategies—continuation, designation, and disposition—and evaluates each strategy’s potential to resolve OJDs in a satisfactory manner.

A. Continuation

One tiebreaking strategy treats a tie vote as an intermediate, rather than final, stage in the decision-making process. Embracing such a “continuation strategy,” the Court could adopt a rule similar to the one that governs federal jury deliberations. Just as nonunanimous juries continue to convene in an effort to achieve unanimity, a split panel of Justices could respond to an OJD by continuing to deliberate until a majority coalition materializes. In other words, a tie vote would signify that a decision had not yet been reached, and the case would remain on the docket until a majority of the Justices comes to a consensus.

This strategy has some virtues. It might, for example, prompt individual Justices to reassess their positions on the merits and to consider the views of their colleagues with greater care. That said, the continuation strategy presents severe drawbacks. First, as hung juries regularly demonstrate, decisionmakers often do not change their minds to produce decisions, even when under strong pressure to do so. Especially in the high-stakes cases that occupy the Court’s docket, Justices might be loath to switch allegiance for the sole sake of ending deadlock.¹¹ For this reason, the continuation strategy could produce intolerable delay.¹²

CONN. L. REV. 1033, 1038 (2004) (noting that “it is important that [Justices] not lightly recuse [them]selves” because “if one of us is out, that leaves eight, and the attendant risk that we will be unable to decide a case”); Black & Epstein, *supra* note 9, at 97. Distortions would be exacerbated in the original jurisdiction context, in which there exists the added burden of deciphering a tie’s meaning.

11. See William L. Reynolds & Gordon G. Young, *Equal Divisions in the Supreme Court: History, Problems, and Proposals*, 62 N.C. L. REV. 29, 36 (1983).
12. Members of the Court have at times expressed concern about undue delay in the resolution of cases. See, e.g., *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 111 (1998) (Breyer, J., concurring in part and concurring in the judgment) (criticizing the majority opinion on the grounds that “it increases . . . the risk of ‘justice delayed’ that means ‘justice denied’”); *Di Santo v. Pennsylvania*, 273 U.S. 34, 42 (1927) (Brandeis, J., dissenting) (“It is usually more important that a rule of law be settled, than that it be settled right.”).

More importantly, deadlock-induced allegiance switching would be normatively undesirable. The continuation strategy would not necessarily produce the best outcome in a deadlocked case; it would more likely produce whichever outcome happened to be preferred by the Court's most obdurate personalities.¹³ In short, the Court should disfavor a tiebreaking process that rewards stubbornness at the expense of dispassionate deliberation.

B. Designation

A second tiebreaking strategy involves the intervention of an additional participant to break the decision-making body's deadlock. Many legislatures employ this "designation strategy,"¹⁴ and the approach has found favor in some state courts as well.¹⁵

In the Supreme Court, however, most applications of the designation strategy would be unlawful. Although 28 U.S.C. § 294(d) permits federal judges to assume temporary duties on lower courts, it also provides that "[n]o such designation or assignment shall be made to the Supreme Court."¹⁶ Additionally, such delegations, even if provided for by statute, might present constitutional problems.¹⁷

Legal difficulties do not arise, of course, when the designated tiebreaker is herself a Justice. Thus, if a judicial absence or vacancy is short lived, the Court can simply vote to rehear a deadlocked case and then revote on the deadlocked issue with a full panel. Not surprisingly, this is a common response to appellate

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13. Cf. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 674 (1994) (Stevens, J., concurring in part and concurring in the judgment) (noting that "[a]n accommodation is . . . necessary" to render a disposition in the case).
 14. See U.S. CONST. art. I, § 3 (designating the Vice President as the official tiebreaker for votes in the Senate).
 15. See *Reynolds & Young*, *supra* note 11, at 36; see, e.g., N.J. CONST. art. VI, § 2, para. 1; TEX. CONST. art. V, § 11; *Winterwerp v. Allstate Ins. Co.*, 357 A.2d 350 (Md. 1976); Edward A. Hartnett, *Ties in the Supreme Court of New Jersey*, 32 SETON HALL L. REV. 735, 738 (2003).
 16. 28 U.S.C. § 294(d) (2000); see also *id.* §§ 291-292 (establishing the procedures by which active district and circuit court judges may sit by designation on other courts); Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 WM. & MARY L. REV. 643, 647 (2002) ("[T]he statute authorizing the assignment of retired district and circuit judges to judicial duties specifically excludes assignments to the Supreme Court.").
 17. See *Reynolds & Young*, *supra* note 11, at 39 n.52 ("The argument against designation . . . would contend that there is but one supreme court, *The Supreme Court*. . . . Moving a judge to the Supreme Court, the argument continues, requires an appointment to that Court. Support for the argument is provided by the need felt, at least in some states, to provide specifically for that designation in the Constitution.").

ties during brief absences.¹⁸ When recusals or long-term absences occur, however, this solution will not work. To deal with these circumstances, the Court must employ a different approach.

C. Disposition

Rather than preventing ties from happening or breaking them when they do happen, the third tiebreaking strategy treats ties as triggering predetermined substantive outcomes. These outcomes are generated by decision rules that the Court has stipulated in advance of deliberations. The Court's approach to appellate ties provides a constructive example of the "disposition strategy." Instead of requiring further deliberation or the assistance of a designated tiebreaker, a tie-vote translates into a victory for whichever party won in the court below.¹⁹

The disposition strategy is well suited to resolving OJDs for three reasons. First, it provides for immediate and decisive resolutions. Second, it apprises the parties and Justices at the outset of each case of the consequences of a tie and allows them to shape their behavior accordingly. Third, it implicates no clear statutory or constitutional problems because it involves participation in the final decision-making process by only the duly appointed Justices themselves.

The difficulty with the disposition strategy lies in identifying the proper decision rule for OJDs. Indeed, the OJD problem arises precisely because the procedural posture of original jurisdiction cases precludes extension of the clear-cut summary affirmance rule governing appellate ties; after all, one cannot affirm the lower court when there is no lower court to affirm. As the next Part demonstrates, however, a decision rule akin to the rule that prevails in the appellate jurisdiction context would in fact be workable in the original jurisdiction context as well.

III. A "NON-DISRUPTION" DECISION RULE FOR ORIGINAL JURISDICTION DEADLOCKS

It is a common rule of voting that, absent exceptional conditions, a multimember body must have the support of a majority of its members in

18. See Linda Greenhouse, *Supreme Court: Mysteries of Tie Votes and Calls for Reargument*, N.Y. TIMES, Apr. 3, 1985, at A20.

19. See, e.g., *Warner-Lambert Co. v. Kent*, 128 S. Ct. 1168 (2008).

order to take action.²⁰ The Court's approach to appellate ties reflects a commitment to this principle. Because a tie vote demonstrates that no majority favors a particular disposition, the resulting disposition is the one that leaves the preexisting legal landscape intact.²¹ In the words of Justice Field, "If the judges are divided, the reversal cannot be had, for no order can be made. The judgment of the court below, therefore, stands in full force."²²

As far as the Court is concerned, this "non-disruption" principle represents a desirable basis for a tiebreaking rule. By preferring inaction over action, the non-disruption principle helps the Court resist "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power."²³ In other words, a presumption in favor of non-disruption ensures that the Court is something more than evenly split before it exercises powers that are subject to grave abuse.

The Court should implement the non-disruption principle in the original jurisdiction context by resolving OJDs against the party that has asked it to intervene on its behalf. This Part demonstrates how such a rule could work and why this rule makes sense. In particular, the non-disruption principle can and should establish the default approach to OJDs arising out of (1) the question of whether to hear an original case at all and (2) the merits questions presented by the case.

A. *Deciding Whether To Take a Case*

Although the Court's past OJDs have involved questions on the merits, future OJDs might arise at an earlier stage. Under the Court's rules of procedure, each original case must begin with a motion for leave to file a complaint, and this motion can be granted only by a majority vote. Motions for leave fall into two categories: discretionary motions, with leave granted only

20. See, e.g., HENRY M. ROBERT ET AL., ROBERT'S RULES OF ORDER art. VIII, § 44 (10th ed. 2000) ("On a tie vote the motion is lost . . .").

21. See, e.g., Hartnett, *supra* note 16, at 652 (characterizing the practice as "an application of a broader principle that applies generally in multimember bodies governed by majority rule: the body cannot take any affirmative action based on a tie"). In support of this point, Harnett cites to an old case from the British House of Lords which relied on the "ancient principle" of *semper praesumitur pro negante* ("it is always presumed in favor of the negative") to treat a tie vote as an affirmance of the lower court. See *Regina v. Millis*, 8 Eng. Rep. 844, 982 (1843).

22. *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 112 (1868).

23. *INS v. Chadha*, 462 U.S. 919, 951 (1983); see also *id.* ("When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it." (emphasis added)).

when the Court considers the case worthy of its attention, and nondiscretionary motions, with leave granted automatically unless the case does not satisfy jurisdictional requirements.²⁴ For each type of motion, the consequences of a tie are clear: the motion should fail because it lacks the support of a majority of Justices considering it. This approach is consistent with a tie-breaking system that strives for non-disruption; the Court abstains from taking action in the case by removing the case from its docket.

B. *Reviewing the Special Master's Recommendations*

After accepting an original case, the Court customarily appoints a Special Master to oversee its development.²⁵ The modern reliance on the Master is attributable to two factors: (1) the increased size of the Court's appellate docket, which has left the Justices with less time to deal with motion practice, discovery, and trial, and (2) the Gordian complexity of original cases, which typically involve fact-intensive disputes arising from interstate compacts and border agreements.²⁶

Today the Court deals with the merits of original cases by reviewing the Master's provisional recommendations.²⁷ This unique procedural posture leaves two plausible ways to resolve OJDs by way of non-disruption. A tie could mean either defeat for the party that appeals the Master's recommendations or defeat for the party that originally carried the operative burden of proof.

There are four reasons for preferring an OJD strategy that gives determinative weight to the Master's recommendations. The first reason stems from the Court's practice of affirming the Master when no party files

24. The Court's original jurisdiction over state-versus-state cases is nondiscretionary; its original jurisdiction over all other types of cases mentioned in Article III is discretionary. See 28 U.S.C. § 1251 (2000); EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE § 10.1, at 609-13 (9th ed. 2007).

25. See GRESSMAN ET AL., *supra* note 24, § 10.12, at 642. A survey of the Court's original docket indicates that the Court has not in the past twenty-five years issued an opinion on the merits of an original case without a Master's recommendations before it.

26. The Master's rise in prominence has not gone uncriticized. See, e.g., Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625 (2002); see also *Maryland v. Louisiana*, 451 U.S. 725, 763 (1981) (Rehnquist, J., dissenting) ("Of course this Court cannot sit to receive evidence or conduct trials – but that fact should counsel reluctance to accept cases where the situation might arise, not resolution of the problem by empowering an individual to act in our stead.").

27. See Carstens, *supra* note 26, at 655-56.

exceptions to his recommendations.²⁸ In effect, this practice provides strong evidence that the Court already views the Master's recommendations as materially shifting the decisional baseline in original jurisdiction cases. Put another way, if a Master's findings are deemed presumptively correct when parties fail to object, it seems sensible to deem them presumptively correct for purposes of a tie-breaker system premised on non-disruption.

Second, affirming the Master's recommendations in OJDs is likely to produce the superior substantive outcome. Normally, the Master is an expert in the relevant area of law²⁹ and has presided over the lion's share of the litigation.³⁰ As a result, he is likely to have greater familiarity with the case (and better understanding of its underlying issues) than the Justices who appointed him. All things being equal (including the vote), the Justices have good reason to defer to the Master's judgment.

Third, affirming the Master provides the most workable approach. If a Master-based rule were off limits, the Justices would have to look instead to burden allocations. At first glance this approach seems straightforward, but in actuality confusion would abound. As Professors Reynolds and Young have noted,

Suppose . . . the Justices divide four to four on the legal sufficiency of a defense that is supported by stipulated facts. Should the result depend upon who would have had to establish the facts underlying the defense—should the defense fail, in other words, because by analogy to the usual rules of burden of proof, the defendant has the burden on that matter? Should it depend upon who had the burden of going forward or upon who had the burden of persuasion, assuming the two to be different? Should rules designed to allocate responsibility for initiating a factual inquiry or for persuading on the facts . . . have anything to do with who ought to prevail on even divisions over a question of law?³¹

28. *E.g.*, *Wisconsin v. Illinois*, 388 U.S. 426 (1967); see GRESSMAN ET AL., *supra* note 24, § 10.12 at 643; Carstens, *supra* note 26, at 656.

29. See Carstens, *supra* note 26, at 648 (noting that non-judge Masters in particular are chosen on account of a "demonstrated specialized expertise with respect to the issues central to the dispute").

30. See GRESSMAN ET AL., *supra* note 24, § 10.12, at 642-44 (outlining in detail the Master's numerous adjudicative duties).

31. Reynolds & Young, *supra* note 11, at 46. Another alternative might call for the remedy that is most likely to leave in place the real world status quo ante—regardless of which party happens to shoulder the relevant evidentiary burdens. But application of this rule would

Indeed, analytical complexities might lead to ties over where controlling burdens should lie, thus rendering a burden-based tiebreaker not a tiebreaker at all.

Finally, burden-based rules can lead to counterintuitive results. Recall the disbarment question presented by *In re Isserman*.³² Applying a non-disruption approach, the Court logically should have resolved the tie in Isserman's favor, because disbarment requires an affirmative act on the part of the Court. But Chief Justice Vinson reached the opposite conclusion, noting that the Court had asked Isserman "to show good cause why he should not be disbarred."³³ One year later, perhaps sensing the illogic and unfairness of the result, the Court vacated its ruling and reinstated Isserman.³⁴ The Court's handling of *In re Isserman* illustrates that a disposition approach relying on evidentiary burdens can create not only confusion within the Court, but also serious disruption of the real-world status quo ante. Fortunately, the Court can avoid these difficulties by simply heeding the Special Master's recommendations.³⁵

Some might dispute my characterization of a findings-based non-disruption rule as a "disposition strategy," arguing that it is more akin to a designation rule that appoints the Special Master to serve as the tiebreaking Justice. The Master, however, would never break a tie under this rule; rather, the Justices themselves would break the tie by adhering to a decision rule that they, and only they, have adopted. Indeed, an affirmed Special Master no more "decides" an OJD than an affirmed lower court "decides" a deadlocked

also be far from clear in many situations. In quiet title actions between states, for example, there is typically no status quo ante (other than ongoing conflict) for the Court to leave intact. See, e.g., *Georgia v. South Carolina*, 497 U.S. 376, 379 (1990) (involving a "prolonged dispute between the two States over the location of their boundary along the lower reaches of the Savannah River").

32. 345 U.S. 286 (1953).

33. *Id.* at 287.

34. 348 U.S. 1 (1954).

35. Of course, an OJD might arise when there are no Master's recommendations to affirm. *In re Isserman* now provides clear guidance for one set of cases—that is, disbarment actions. But what might the Court do with a Master-free OJD that does not involve disbarment? One possible solution for this improbable scenario is the following: When the case appears to present a clear status quo ante, the Court should continue to adhere to the non-disruption principle by doing nothing to upset the current state of affairs. When the Court anticipates difficulties in defining non-disruption, however, it could opt instead for an "anti-designation" rule, which would randomly recuse an additional Justice before oral argument to render the Court incapable of producing a tie.

appellate case. So long as the latter practice goes unchallenged, the former practice should pass muster as well.³⁶

CONCLUSION

In addressing OJDs, this Comment has touched on a few broader points. First, the non-disruption decision rule outlined above demonstrates that ties need not always translate into deadlock; they can just as easily generate fair and logical outcomes. Second, the emphasis on Special Masters suggests that an honest assessment of modern Supreme Court practice must treat the Justices' role in original litigation as an essentially appellate one.³⁷ For better or worse, Special Masters play a central role in the adjudication of original jurisdiction disputes, and this is the reality that an OJD tiebreaking system, in addition to other procedural rules for original cases, does well to acknowledge. Finally, this Comment draws attention to a basic but overlooked principle of procedural rulemaking: a small amount of upfront planning prevents a large amount of future hassle. Having awkwardly managed two OJDs in its past and having narrowly avoided one last Term, the Court should adopt a default rule that translates an OJD into a disposition that does not interfere with the status quo ante. In most contexts, this rule would call for affirming the recommendations of the Special Master.

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36. It might be argued that the Master's participation is more objectionable under Article III when he does not sit on the federal bench. The Court has relied more heavily on non-Article III Masters as of late, *see* GRESSMAN ET AL., *supra* note 24, § 10.12, at 645, and it would do well to resume selecting Masters who have been appointed and confirmed to serve as federal judges.
37. *See* Carstens, *supra* note 26, at 656 ("The delegation of trial tasks to a Special Master, followed by review by the Supreme Court, allows the Court to operate facilely in the manner in which it is most accustomed—that of an appellate court scrutinizing the facts and conclusions of an inferior actor or body.").