

Why We Call the Supreme Court “Supreme”

A CASE STUDY ON THE IMPORTANCE OF SETTLING THE NATIONAL LAW

Thomas E. Baker

*It is usually more important that a rule of law be settled,
than that it be settled right.*

Justice Louis D. Brandeis¹

JUSTICE BRANDEIS wisely understood the importance of settling the national law. He appreciated the unique responsibility of the Supreme Court, sitting at the apex of the federal judicial system, to resolve conflicts and uncertainties in the law for once and for all. The Justices of the Supreme Court should always be mindful of their institutional responsibility to administer the national law. I believe they failed to do so in *Free v. Abbott Laboratories, Inc.*,² decided April 3, 2000.

I do not expect readers to be familiar with the case. *Free* will not be highlighted in any of the annual most-important-cases-of-the-term articles. It raised an arcane but important issue

of civil procedure: whether all the members of a plaintiff class must individually satisfy the amount-in-controversy requirement in a suit brought under the diversity statute. An equally divided Supreme Court affirmed the lower court judgment. That was “The End” as far as the Justices were concerned.

But the Justices are supposed to be concerned with more than moving cases and clearing their docket. The Supreme Court is supposed to settle even arcane issues of federal law. The Supreme Court is supposed to resolve conflicts among the courts of appeals. I submit that this was one case in which the Justices should have suppressed their individual-

Thomas Baker holds the James Madison Chair in Constitutional Law and is Director of the Constitutional Law Center at Drake University Law School.

¹ *Di Santo v. Pennsylvania*, 273 U.S. 34, 42 (1927) (Brandeis, J., dissenting).

² 120 S. Ct. 1578 (2000).

ity and independence for the sake of the federal court system at large. Someone on the Court should have been willing to compromise and change his or her own vote to settle an important issue and to move the policy question back to Congress. By my lights, the affirmance by an equally divided court was as unfortunate as it was unsatisfactory. This essay is a case study on the importance of settling the national law.

I

After noting that Justice O'Connor took no part in the decision, the *per curiam* opinion in *Free* simply reads: "Judgment affirmed by an equally divided court."³ This appellate resolution (really a non-resolution) comports with long-standing Supreme Court practice and procedure.

In the absence of a full court, when the Justices are evenly divided (4-4 or 3-3) the Supreme Court's practice is not to write an opinion but to enter a judgment that perfunctorily affirms the lower court judgment.⁴ Thus the lower court judgment is allowed to stand but there is no Supreme Court precedent. In baseball, a tie goes to the runner; in the High Court, a tie goes to the Respondent.

This has been the practice from the begin-

ning. It is something of an historical irony that the first occasion of one of these implicit affirmances was in the very first case that presented an issue of constitutional law back when there were only six Justices on the Court; the rule was formally proclaimed a generation later.⁵ Over the intervening 200-plus years, there have been about 140 incidents of the rule being "unremittingly applied."⁶

The rule of affirmance by an equally divided court is a judge-made rule, an internal procedural finesse. It is a judicial creation. It is not required by the Constitution or by any statute.⁷ Arguably, this particular judge-made rule does not have the same kind of extra-judicial status as the Rule of Four, by which the vote of a minority of four Justices is sufficient to grant a writ of *certiorari*. The Rule of Four, unlike the rule of implicit affirmance, has become interwoven in the warp and woof of the jurisdictional statutes. Since 1925, the Justices have encouraged Congress to amend those statutes with the assurance and mutual understanding that the Rule of Four is a permanent, regular Court procedure; in reliance, Congress has amended those statutes to provide the Court with increasing discretion to grant and deny review of cases as the Justices see fit.⁸ In contrast, the rule of affirmance by an equally divided court

3 120 S. Ct. at 1578. The standard and the procedures for recusal by an individual Justice are beyond the scope of this essay. See generally Steven Lubet, *Disqualification of Supreme Court Justices: The Certiorari Conundrum*, 80 Minn. L. Rev. 657 (1996); Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 Brook. L. Rev. 589 (1987).

4 Robert L. Stern, et al., *Supreme Court Practice* 233 (7th ed. 1993). See William L. Reynolds & Gordon G. Young, *Equal Divisions in the Supreme Court: History, Problems, and Proposals*, 62 N.C. L. Rev. 29 (1983).

5 *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825); *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792).

6 Reynolds & Young, *supra* note 4, at 31 (counting 123 equal divisions as of 1983 and adding the results of a Westlaw search).

7 See 28 U.S.C. § 1 (quorum requirement of six Justices); 28 U.S.C. § 2109 (statutory requirement to affirm in the absence of a quorum).

8 Stern, et al., *supra* note 4, at 230-33; David M. O'Brien, *Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court's Shrinking Docket*, 13 J. L. & Pol. 779 (1997); Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-five Years After the Judges' Bill*, 100 Colum. L. Rev. 1643 (2000); John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. Rev. 1 (1983).

has not been blessed by Congress. So, in theory, the Supreme Court could more easily change the rule. Presumably, the Justices could even adopt the contrapositive rule to automatically and in every case *reverse* each and every judgment when the Justices are equally divided.⁹ Therefore, I submit – and this is crucial for my thesis here – that the Justices can choose to ignore their own implicit affirmance rule in particular cases, when the circumstances warrant it.

This approach would take away from the judicial individuality of the Justices, to be sure, but I believe that would be good for the Court and the court system. The modern Justices have come to behave like “nine scorpions in a bottle,” to use Justice Holmes’s colorful metaphor. They have become too individualistic. They write separate opinions that cite to lines of their own prior separate opinions in what might be labeled an in-chambers *faux stare decisis*. They spend too much effort pulling and hauling over internal procedural rules. They seem unwilling to engage in the kind of collegial and institutional decisionmaking needed to achieve a majority consensus. The Justices should be more willing to place the role of the Court in our court system above their own individual role.¹⁰

II

I believe there were three good reasons in the *Free* case to ignore the rule of implicit affirmance. First, the investment of private and

public resources in this particular litigation was substantial; the case went up and down the courts for years and in the end was left with a rather anticlimactic outcome. Second, the nature of the statutory question in the case calls out for a final answer – one way or the other – to settle a roiling issue of federal jurisdiction and procedure. Third, the Supreme Court’s responsibility for resolving inter-circuit conflicts is paramount in the federal appellate system. The Justices seemingly were content to ignore the particular equities of the parties and apparently were willing to leave the legal issue in the repeating loop of inter-circuit conflicts. If they had been truer to their institutional responsibility, the interpretative issue of the Supplemental Jurisdiction statute would have been settled on the judicial side, so then Congress could get into the act and revisit the statute.

Again, Justice Brandeis fully understood and appreciated the fundamental design of the system of separated powers and the proper role of the Supreme Court. He expressed it eloquently and succinctly: “It is usually more important that a rule of law be settled, than that it be settled right. Even where error in declaring the rule is a matter of serious concern, it is ordinarily better to seek correction by legislation.”¹¹

A

The *Free* case has a long and convoluted history. In October 1993, plaintiffs filed a class action lawsuit in Louisiana state court on

⁹ Reynolds & Young, *supra* note 4, at 41-56.

¹⁰ See Richard L. Revesz & Pamela S. Karlan, Nonmajority Rules and the Supreme Court, 136 U. Pa. L. Rev. 1067 (1988); Igor Kirman, Note, Standing Apart to be a Part: The Precedential Value of Supreme Court Concurring Opinions, 95 Colum. L. Rev. 2083 (1995); Note, Plurality Decisions and Judicial Decisionmaking, 94 Harv. L. Rev. 1127 (1981).

¹¹ *Di Santo v. Pennsylvania*, 273 U.S. 34, 42 (1927) (Brandeis, J., dissenting). See also *Burnett v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (“*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.”).

behalf of the class of retail consumers of infant formula against three manufacturers. They filed under Louisiana's antitrust laws, alleging a wholesale price-fixing conspiracy and seeking damages, including treble damages, attorneys' fees and interest, for the period January 1980 through December 1992. The defendants-manufacturers removed the case to federal court, alleging subject matter jurisdiction based on both the diversity and federal question heads.¹²

The United States District Court ruled that, although there was no federal question jurisdiction, there was diversity jurisdiction. The amount-in-controversy requirement complicated matters, however. The class representatives themselves could satisfy it, since they were seeking big-ticket attorneys' fees, but the potential damages of the individual absent class members amounted to mere chump change. The District Court interpreted the letter of the Supplemental Jurisdiction Statute, Section 1367 of Title 28 of the U.S. Code,¹³ to give and taketh away jurisdiction. The court decided the amount-in-controversy requirement was satisfied by aggregating the absent members' claims under subsection (a) of the statute. But the court exercised its discretion under subsection (c) of the statute to abstain from exercising jurisdiction, because the suit raised the novel issue whether indirect purchasers could sue under the state statute and the issue was further complicated by a question of federal preemption. Therefore, the District Court remanded the case to the state trial court.

On an interlocutory appeal, the Fifth Cir-

cuit affirmed the first part, reversed the second part, and remanded to the District Court. On remand, the District Court refused to grant approval of a class settlement that the lawyers had negotiated in the meantime and dismissed the suit with prejudice on the ground that indirect purchasers lacked standing to bring the suit under the Louisiana antitrust statute for wholesale price fixing. On the second appeal, the Fifth Circuit tried to certify the state law issue to the Louisiana Supreme Court, but that court denied the certification on a divided vote. Then the Fifth Circuit made a diversity prediction that Louisiana courts would follow federal law and not allow indirect purchasers like plaintiffs to sue under the Louisiana statute and accordingly affirmed. After the Fifth Circuit denied rehearing and rehearing *en banc*, the plaintiffs petitioned the Supreme Court for a writ of *certiorari*. The writ was granted on the question whether the District Court had subject matter jurisdiction to dismiss the lawsuit, *i.e.*, whether the Supplemental Jurisdiction Statute, Section 1367, authorizes aggregating the claims of absent class members to satisfy the amount-in-controversy requirement.

Even stated in summary fashion one has to wonder why all this lawyering and judging was not worthy of a Supreme Court decision once *certiorari* was granted and the appeal was fully briefed and orally argued. As the case ended up, seven years of litigation and a negotiated settlement were unceremoniously poured out of court based on an arcane technicality. The efforts of the parties, and the Justices and the *amicus curiae* in the Supreme Court, were for

12 Law review types should imagine elaborate footnoting in the dense paragraphs that follow in the text. See generally *Free v. Abbott Laboratories*, 1994 WL 117258 (M.D. La. 1994), vacated, 51 F.3d 524 (5th Cir. 1995), motion denied on remand, 953 F. Supp. 751 (M.D. La. 1997), motion granted to dismiss on remand, 982 F. Supp. 1211 (M.D. La. 1997), affirmed in part and question certified, 164 F.3d 270 (5th Cir. 1999), certified question denied, 739 So.2d 216 (La. 1999), affirmed, 176 F.3d 298 (5th Cir. 1999), affirmed by an equally divided court, 120 S. Ct. 1578 (2000).

13 28 U.S.C. § 1367. See generally Patrick D. Murphy, *A Federal Practitioner's Guide to Supplemental Jurisdiction Under 28 U.S.C. § 1367*, 78 Marq. L. Rev. 973 (1995).

naught.¹⁴ Furthermore, the non-decision goes against the idea that jurisdictional issues are merely ancillary to the merits and should be resolved forthrightly by the application of certain and efficient rules. In short, there is nothing to commend the outcome in the Supreme Court except for the coincidence of the judge-made rule of implicit affirmance by an equally divided court.

The federal statutory issue is a big deal. Indeed, this is a bread-and-butter issue. Consumer class action lawsuits survive or fail on it. Lawyers’ livelihoods depend on it. Either the absent members of a plaintiff class can or cannot aggregate their damages to satisfy the amount-in-controversy requirement in the diversity statute. The court system needs an answer.

Class action lawyers on each side of the “versus” engage in a subtle and complicated dance of forum shopping.¹⁵ In theory, of course, class action standards and procedures are national on the federal side and generally uniform on the state side. Still, there are local courts in some jurisdictions that are significantly more likely to certify and then nurture and sustain the large-scale, multi-state class action. Plaintiffs’ attorneys file suits in those courts. This helps explain why some of the biggest lawsuits in the country are filed in some of the smallest towns. So defendants’ attorneys, especially

those who are representing out-of-state defendants, are keen on being able to remove these state court lawsuits into a federal court. They are looking to get into a court that may be less willing to certify class actions, in the first place, or they may hope for a court they perceive to be less plaintiff-oriented and more favorable toward settlement negotiations.¹⁶ The Supreme Court’s non-precedential resolution in *Free* turned out the lights in the gymnasium and left class action lawyers to dance in the dark without a chaperone.

B

It is a bit of hornbookery that “[t]he law on aggregation of claims to satisfy the requirement of amount in controversy is in a very unsatisfactory state.”¹⁷ The least settled and most contentious aspect of the aggregation rules has to do with plaintiff class actions and the Supplemental Jurisdiction statute.

In *Zahn v. International Paper Co.*,¹⁸ decided in 1973, the Supreme Court held that even if the named plaintiffs representing the class do have claims for more than the required amount, they cannot represent a class of absent members who do not themselves have the necessary amount in controversy. That was where things stood until 1990, when Congress enacted the Supplemental Jurisdiction statute.¹⁹ Subsection (a) of the statute autho-

14 Compare Petitioner’s Brief, 2000 WL 35848 (Jan. 13, 2000) with Respondent’s Brief, 2000 WL 177169 (Feb. 14, 2000). The state law question was still left unclear. See Brief of the State of Louisiana as Amicus Curiae in Support of Petitioners, 2000 WL 35729 (Jan. 13, 2000) (arguing that the Fifth Circuit got it wrong).

15 See Brief of the Chamber of Commerce of the United States of America and the Chemical Manufacturers Association as Amici Curiae in Support of Respondents, 2000 WL 177171 (Feb. 11, 2000); Brief of the Products Liability Advisory Council as Amicus Curiae in Support of Respondents, 2000 WL 177172 (Feb. 14, 2000); Brief of the Securities Industry Association as Amicus Curiae in Support of Respondents, 2000 WL 193323 (Feb. 14, 2000).

16 See Neal Miller, An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction, 41 Am. U. L. Rev. 369 (1992).

17 Charles Alan Wright, Law of Federal Courts § 36 at 209 (5th ed. 1994).

18 414 U.S. 291 (1973).

19 Judicial Improvements Act of 1990, Act of Dec. 1, 1990, Pub. L. 101-650, 104 Stat. 5089, codified at 28 U.S.C. § 1367.

rizes the district courts to exercise supplemental jurisdiction over related claims generally to the limits of the Article III power, but subsection (b) expressly creates several exceptions in diversity actions by explicit citations to particular Federal Rules of Civil Procedure by number. The exceptions listed in subsection (b), however, do not explicitly refer to the class action rule, Federal Rule of Civil Procedure 23.

If you were to draw a map of the lower court rulings on this issue, it would resemble those funky graphics in *USA TODAY*. The Fifth Circuit and the Seventh Circuit have reached the conclusion that Section 1367 supersedes *Zahn* and therefore supplemental jurisdiction over the claims of absent plaintiff class members is proper even if the absent class members do not meet the amount-in-controversy requirement.²⁰ The Third Circuit and the Tenth Circuit have held that nothing in the language or purpose of Section 1367 indicates that Congress intended to overrule *Zahn*, so there is no supplemental jurisdiction over claims that fail to meet the amount-in-controversy requirement as a matter of Supreme Court precedent.²¹ Numerous district courts have chosen up sides, as well. Indeed, the national law is so Balkanized that the leading treatise on federal practice and procedure has devoted a lengthy section to the plaintiff class aggregation question with extensive annotations to the court reports and the commentary on the matter.²²

Some of the lower court judges who have concluded that the plain meaning of the statute overrules *Zahn* frankly admit in their

judicial opinions that the legislative history of the statute indicates that Congress did not intend the overruling and go on to admit they suspect that the failure to list the class action rule in the exceptions in subsection (b) was a clerical error. They nonetheless read the text of the Supplemental Jurisdiction statute wearing judicial blinders.²³ Other lower court judges have concluded that the issue of the statutory overruling is so important and the omission of the reference to class actions is so obviously a mistake that to give the statute a literal interpretation would compound the legislative error. They consequently refuse to play a game of “Gotcha!” with Congress.²⁴

The Supreme Court decided *Zahn* in 1973 and the Supplemental Jurisdiction statute has been on the books for a decade. The lower federal courts are all over the map on the question whether the statute supersedes the Supreme Court’s precedent. Barrels of ink have been spilled onto the pages of law reviews analyzing the issue. What were the Justices waiting for in *Free*? This was an up-or-down, Siskel and Ebert kind of review question. The Supreme Court’s non-decision will guarantee that this issue will be relitigated over and over in the lower courts as the judges are forced to choose up sides. Had the Justices decided *Free* – one way or the other – Congress would be more likely to reenter the fray and amend the problematic Supplemental Jurisdiction statute. Federal courts commentators and the American Law Institute have been pleading for a congressional fix, having all but given up on the lower federal

20 *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928 (7th Cir. 1996); *In re Abbott Laboratories*, 51 F.3d 524 (5th Cir. 1995) (see supra note 12 case history).

21 *Meritcare, Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214 (3d Cir. 1999); *Leonhardt v. Western Sugar Co.*, 160 F.3d 631 (10th Cir. 1998).

22 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure*, § 3523.1 at 127-93 (Supp. 2000).

23 *In re Abbott Laboratories*, 51 F.3d 524 (5th Cir. 1995).

24 *Deep v. Manufacturers Life Ins. Co.*, 944 F. Supp. 358, 363 (D.N.J. 1996).

courts in the aftermath of the chaos of judicial interpretations.²⁵

C

Maintaining the uniformity of federal law has been an overriding constitutional policy since the drafting of the Supremacy Clause.²⁶ Uniformity was one of the chief purposes for the creation of “one supreme Court” in Article III.²⁷ A commitment to the uniformity of the national law undergirded the obligation in the First Judiciary Act that members of the Supreme Court ride circuit, the vestigial remnant of which is the designation of Circuit Justices.²⁸ The felt constitutional need for uniformity compelled the Court to uphold the constitutionality of the statute authorizing its review of state court decisions.²⁹ The famous Judges’ Bill of 1925 gave the Supreme Court discretionary authority over its docket to allow the Court to achieve greater uniformity in the national law.³⁰

During the Burger Court era, when the Supreme Court was deciding upwards of 150

cases, Justice Byron White had a routine of dissenting from denials of *certiorari* that presented a missed opportunity to resolve a conflict among the circuits. The excuse back then was there were simply too many important cases for the Court to be able to resolve all the conflicts that should be resolved. His dissents could add up to 40 or more in a typical Term. No one on the Rehnquist Court has continued Justice White’s practice. In recent Terms the Court has been deciding downwards of 100 cases. It stands to reason, therefore, that these days a good many more intercircuit conflicts are going unresolved and persisting longer. For example, a monthly column in *U.S. LAW WEEK* collects 15 to 20 conflicts each month, of differing importance and difficulty.³¹

The increase in numbers and the growing persistence of circuit splits is worrisome as a matter of principle. The same provision in a federal statute can vary in what it means in different parts of the country. The federal law is thus less of a national law. Indeed, on an important issue, there may be more variations

25 See, e.g., James E. Pfander, Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism, 148 U. Pa. L. Rev. 109 (1999); Michael A. Baldassare, Note, Pandora’s Box or Treasure Chest?: Circuit Courts Face 28 U.S.C. § 1367’s Effect on Multi-Plaintiff Diversity Actions, 27 Seton Hall L. Rev. 1497 (1997); Mark C. Cawley, Note, The Right Result for the Wrong Reasons: Permitting Aggregation of Claims Under 28 U.S.C. § 1367 in Multi-Plaintiff Diversity Litigation, 73 Notre Dame L. Rev. 1045 (1998); Christopher M. Fairman, Note, Abdication to Academia: The Case of the Supplemental Jurisdiction Statute, 28 U.S.C. § 1367, 19 Seton Hall Legis. J. 157 (1994); Darren Gold, Note, Supplemental Jurisdiction Over Claims by Plaintiffs in Diversity Cases: Making Sense of 28 U.S.C. § 1367(b), 93 Mich. L. Rev. 2133 (1995); Mark Hutcheson, Note, Unintended Consequences: 28 U.S.C. § 1367’s Effect on Diversity’s Amount-in-Controversy Requirement, 48 Baylor L. Rev. 247 (1996).

26 U.S. Const. Art. VI, cl. 2. See Federalist Paper No. 80 (Alexander Hamilton).

27 U.S. Const. Art. III. See Federalist Paper Nos. 22 & 78 (Alexander Hamilton). John Rutledge argued that the country could do without lower federal courts but establishing a single national supreme court was essential “to secure the national rights & uniformity of Judgmts.” Notes of Debates in the Federal Convention of 1787 Reported by James Madison 71 (Adrienne Koch, ed. 1987).

28 Act of Sept. 24, 1789, 1 Stat. 73; 28 U.S.C. § 42.

29 *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816).

30 Act of Feb. 13, 1925, 43 Stat. 936. See also *supra* note 8. A concern for uniformity had persuaded Congress to expand the jurisdictional statute of the Supreme Court in 1914, the only expansion in history. Act of Dec. 23, 1914, 38 Stat. 790.

31 E.g., Circuit Split Roundup, 68 U.S.L.W. 2654 (May 2, 2000).

in the national law than the number of time zones in the country. This state of affairs burdens national actors especially. It perpetuates the evils of forum shopping. It compromises the norm of the rule of law for circuit judges to be able to get away with acting like junior varsity Justices without a realistic threat of being benched. The hierarchy of courts and the command of precedent are weakened. The Justices should know better than to allow this to happen. Indeed, the Justices' very own U.S. Supreme Court Rules identify a conflict among the circuits as a proper priority for granting a petition for a writ of *certiorari*.³² Presumably, that was the point of granting the writ in the *Free* case, in the first place.³³ The conflict over the Supplemental Jurisdiction statute can only get worse.

Thus, the non-decision in *Free* failed to answer the contested and controlling issue of federal jurisdiction in the case, failed to reconcile the earlier Supreme Court precedent with the later-enacted Supplemental Jurisdiction statute, and failed to resolve a conflict among the circuits. The predictive value of the *per curiam* decision amounts to anyone's guess whether Justice O'Connor would join one side or the other in the totally suppressed debate among the Justices over the so-called plain meaning of the statute "to be announced" in some distant case in which she does not own stock in one of the corpo-

rations in the litigation.³⁴ What a fitting headnote!

III

Justice Brandeis would not infrequently suppress his individual opinion and acquiesce in an opinion and judgment with which he did not agree, particularly in statutory cases. "In ordinary cases," he instructed Felix Frankfurter, "you want certainty and definiteness and it doesn't matter terribly how you decide so long as it is settled."³⁵ That is the right thinking about how it should be.

Over the history of the Supreme Court, some Justices not infrequently sublimated their judicial egos, suppressed their individual voices, voted against themselves, so to speak, in particular cases, out of respect for the Court as an institution. Their lineage can be traced through outstanding jurists of all judicial eras: John Marshall,³⁶ Joseph Story,³⁷ Oliver Wendell Holmes, Jr.,³⁸ and Benjamin Cardozo.³⁹ Supreme Court scholars have concluded that there is a "[p]revailing consensus" that "[c]ertain forms of strategic behavior, such as insincere voting to forge a majority ... are routinely practiced and viewed as permissible, perhaps even obligatory" depending on the circumstances of the individual case under consideration.⁴⁰ These behaviors and practices go back to the beginning of the Supreme

32 S. Ct. R. 10.

33 120 S. Ct. 525 (1999).

34 Although the Justices do not usually disclose their reason for recusal in a particular case, see note 3 supra, Justice O'Connor's 1998 Financial Disclosure Report (<http://www.apbnews.com/cjsystem/judges/>) indicates that she owns stock in Bristol-Myers Squibb Company, one of the named Respondent-Defendants in the *Free* case.

35 Philippa Strum, *Louis D. Brandeis – Justice for the People* 366 (1984).

36 Leonard Baker, *John Marshall – A Life in Law* 415 (1974).

37 R. Kent Newmyer, *Supreme Court Justice Joseph Story – Statesman of the Old Republic* 210 (1985).

38 Liva Baker, *The Justice From Beacon Hill – The Life and Times of Oliver Wendell Holmes* 401 (1991).

39 Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 Mich. L. Rev. 2297, 2323 n.78 (1999).

40 *Id.* at 2300. See also Lewis A. Kornhauser & Laurence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 Cal. L. Rev. 1, 10-17 (1993). It is worth footnoting, however, that

Court and have been practiced by Justices throughout the Court's history.

Thus, I am not suggesting that the incumbent Justices should have done something wholly novel or even remotely unethical. I am criticizing them for not fulfilling their responsibility in a case in which there were very good reasons to resolve the issue on the merits – a case in which only the mere coincidences of a recusal and an even division favored a non-precedential affirmance. Are not these the same Justices who are always invoking some version of cost-benefit analysis to balance away federal rights? The same ones who routinely invoke judicial efficiency to rule against petitioners right and left, but mostly left? This is the same Court, after all, that could imagine the constitutional spectacle of the Senate tossing a coin to convict and remove an impeached president.⁴¹ My suggestion does not come anywhere near that level of flippancy.

When grading a law school blue book, I usually give due credit for a student's answer that

cautiously but carefully argues both sides of an issue without reaching a conclusion, although I would expect an "A" answer to be bold enough to come down one way or the other on the merits. Every first year student is drilled in "IRAC": Issue, Rule, Analysis, *Conclusion*. But we are not talking about a law school hypothetical. The supplemental jurisdiction question was an important issue and was presented in a genuine case or controversy. The Justices are not beginning students of the law, they are Article III judges vested with constitutional tenure and the responsibility to decide cases and the obligation to explain their decisions.

I would give the Justices a "c-" for their effort, or lack of effort, in *Free v. Abbott Laboratories, Inc.* – "Minimum c work which, considering the stage of legal education at which it is submitted, evidences less than minimal professional competence to deal with more advanced work adequately and to deal with the problems of an average legal practice."⁴² *JB*

there is an even stronger consensus that trading votes is condemned as improper and illegitimate. But that is certainly not what I am proposing.

41 *Nixon v. United States*, 506 U.S. 224, 253 (1993) (Souter, J., concurring). See Thomas E. Baker, 2020 Year-End Report on the Judiciary by the Chief Justice of the United States, 24 *Pepp. L. Rev.* 859, 878 (1997) (satirical account that includes the "Coin-Toss Calendar," a futuristic appellate reform of the U.S. Court of Appeals for the Las Vegas Circuit).

42 Faculty Handbook, Drake University Law School at 65 (revised May 19, 1996).