THE OHIO BIRTH CERTIFICATE FIASCO: A CASE OF INSTITUTIONAL FAILURE

Jonathan L. Entin*

Perhaps the judiciary gets to "say what the law is,"[1] but sometimes a court cannot reach the merits of a dispute. The plaintiff might lack standing,[2] the case might not be ripe,[3] it might have become moot,[4] the court might lack subject-matter or personal jurisdiction,[5] the claim might be precluded,[6] or the case might present a nonjusticiable issue.[7] Even when an appellate court resolves a case on the merits, the judges might not agree on a rationale. The lack of a majority opinion does not prevent the court from rendering a judgment, but it can pose challenges in determining a decision's precedential significance. The United States Supreme Court has suggested that, in the absence of a majority rationale, the controlling rule should be the one based on "the narrowest grounds."[8] The phenomenon of plurality opinions has generated a fair amount of commentary, not

*David L. Brennan Professor Emeritus of Law, Case Western Reserve University. Nancy Marcus and Steven Steinglass made helpful comments on earlier drafts, but the author bears sole responsibility for all errors of any kind.

1. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
2. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972).
3. *See, e.g.,* Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967).
4. *See, e.g.,* Arizonans for Off. Eng. v. Arizona, 520 U.S. 43 (1997).
5. *See, e.g.,* Brownback v. King, 592 U.S. 209 (2021) (subject-matter jurisdiction); Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco Cnty., 582 U.S. 255 (2017) (personal jurisdiction).
6. *See, e.g.,* Kremer v. Chem. Constr. Corp., 456 U.S. 461 (1982).
7. *See, e.g.,* Rucho v. Common Cause, 588 U.S. 684 (2019).
8. Marks v. United States, 430 U.S. 188, 193 (1977).

least because of the difficulty of determining the narrowness of a rationale.[9]

A plurality decision at least has a majority in favor of a judgment, even if the basis for that judgment is difficult to discern. The Ohio Supreme Court recently failed to agree on a judgment in a case where a transgender woman sought to change the sex designation on her birth certificate. In *In re Application for the Correction of Birth Record of Adelaide*,[10] only four of the seven members believed that the court had jurisdiction, but those four disagreed about the merits; three other members thought that no appellate jurisdiction existed, so they declined to address the merits at all. In the absence of a majority favoring a particular resolution, the fragmented outcome left the lower court's ruling undisturbed. This situation might seem analogous to one in which the United States Supreme Court is equally divided, which results in the affirmance of the lower court judgment under review.[11] In fact, the Ohio situation is worse than that. The court was not equally divided in the birth certificate case. If it faced such a prospect (due to a recusal or vacancy), the state constitution authorized the designation of an appellate judge to sit in place of a member who could not

9. *See, e.g.,* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (rejecting a First Amendment challenge to a municipal ban on political advertising on rapid transit cars, where four Justices concluded that the city was acting in a proprietary rather than a governmental capacity and a fifth Justice concluded that political advertisements invaded the privacy of riders who were a captive audience). For thoughtful commentary, see John F. Davis & William L. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59; Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 804–11 (1982); Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795 (2017).

10. 2024–Ohio–5393 (Ohio Nov. 19, 2024).

11. This practice dates to the earliest years of the republic. *See* William L. Reynolds & Gordon G. Young, *Equal Divisions in the Supreme Court: History, Problems, and Proposals*, 62 N.C. L. REV. 29, 33–34 (1983). This rule is also reflected in the statute defining a quorum of the Supreme Court and providing that, in the absence of a quorum, the Court should enter an order affirming the judgment at issue "with the same effect as upon affirmance by an equally divided court." 28 U.S.C. § 2109.

have participated in the case.[12] Rather, all of the justices participated, but they could not muster a majority in support of any result. The birth certificate deadlock represented an institutional failure. There were at least two ways in which the court might have mustered a majority in support of a clear judgment. The U.S. Supreme Court has used both of those approaches, and the Ohio Supreme Court should have used one of them here.

This essay proceeds as follows. Part I summarizes the Ohio birth certificate case, and Part II explains alternatives that could have prevented the judicial deadlock in that case by affording arrangements that would have created a majority in favor of some disposition. Those alternatives reflect practices of members of the U.S. Supreme Court that would have avoided the sort of trainwreck that occurred in Ohio.

I. THE BIRTH CERTIFICATE CASE

In 2021, a transgender woman applied to her local probate court to change her birth certificate to designate her sex as female.[13] The probate court denied the application.[14] The court of appeals affirmed.[15] The Ohio Supreme Court granted review in October 2022.[16] The

12. OHIO CONST. art. IV, § 2(A) (authorizing the chief justice to "direct any judge of any court of appeals" to sit on the supreme court in place of a nonparticipating justice).

13. *In re* Adelaide, slip op. ¶ 31 (opinion of Donnelly, J.); *id.* ¶ 56 (opinion of Brunner, J.); *id.* ¶ 95 (opinion of Deters, J.).

14. *Id.* ¶ 31 (opinion of Donnelly, J.); *id.* ¶ 59 (opinion of Brunner, J.); *id.* ¶ 96 (opinion of Deters, J.). The applicant also sought to have the name on her birth certificate changed. *Id.* ¶ 56 (opinion of Brunner, J.); *id.* ¶ 95 (opinion of Deters, J.). The probate court granted the change of name. *Id.* ¶¶ 95–96 (opinion of Deters, J.). One of the opinions identified the applicant's birth name, *id.* ¶ 95 (opinion of Deters, J.), a detail that is unnecessary to the present discussion and therefore is omitted.

15. *Id.* ¶ 2 (opinion of Fischer, J.); *id.* ¶ 31 (opinion of Donnelly, J.); *id.* ¶ 61 (opinion of Brunner, J.); *id.* ¶ 96 (opinion of Deters, J.).

16. *See* 10/11/22 Case Announcements, 2022–Ohio–3546 (accepting review in No. 2022–0934).

case was argued on April 4, 2023, and the fragmented decision was announced on November 19, 2024.[17]

Three of the seven justices, in an opinion by Justice Deters that was joined by Chief Justice Kennedy and Justice DeWine, concluded that no appeal lay from the probate court's denial of the application to change the sex marker on the birth certificate because there was no adversity in the case.[18] This meant that the court of appeals had no authority to entertain the appeal, and neither did the supreme court. Accordingly, these three justices would have reversed the court of appeals and remanded with directions to dismiss the appeal.[19]

The other four justices doubted the validity of the jurisdictional objection. Justice Fischer noted that no party or amicus had raised concerns about jurisdiction and that the issue arose only at oral argument.[20] In his view, the court should have ordered supplemental briefing on jurisdiction, which never happened.[21] But he also expressed skepticism about the absence of jurisdiction.[22] On the merits, Fischer believed that the

17. *In re* Adelaide, 2024–Ohio–5393.

18. *Id.* ¶ 109 (opinion of Deters, J.). Deters described the probate court's function in dealing with applications to change birth certificates as "administrative" in nature and noted that this function "do[es] not involve adversarial interests." *Id.* ¶ 107 (opinion of Deters, J.). He analogized this function to appointing commissioners to the board of park districts as well as to granting marriage licenses and solemnizing marriages. *Id.* Whatever the similarity between appointing park commissioners and correcting birth certificates, the analogy raises additional questions. For example, because the General Assembly may not exercise judicial power, *see* OHIO CONST. art. II, § 32, perhaps the judiciary may not perform administrative functions—at least administrative functions that are not directly related to functioning of the courts. *Cf.* Mistretta v. United States, 488 U.S. 361, 404 (1989) (suggesting constitutional limits on assigning nonjudicial duties to federal judges). Even if the probate court can perform the administrative function relating to correction of birth certificates, that process involves a hearing. *See* OHIO REV. CODE ANN. § 3705.15(A) (West). And the result of that hearing might be subject to judicial review. *See* OHIO REV. CODE ANN. § 119.12(A) (West). Resolution of these questions is beyond the scope of the present discussion.

19. *In re* Adelaide, slip op. ¶ 109 (opinion of Deters, J.).

20. *Id.* ¶ 5 (opinion of Fischer, J.).

21. *Id.* ¶¶ 6–7 (opinion of Fischer, J.).

22. *Id.* ¶¶ 8–22 (opinion of Fischer, J.). Fischer noted that the state registrar of vital statistics "may have a directly adverse interest in light of his or her

court of appeals had correctly affirmed the probate court's rejection of the sex-change application because the relevant statute does not allow a probate court "to grant an application to correct a sex marker on a birth certificate when the cause for the application arises from changes in fact or circumstance that occur *after* the applicant's birth."[23]

Justice Donnelly, joined by Justice Stewart, agreed with Justice Fischer that the probate court lacked authority to approve an application to correct the sex marker on a birth certificate if the basis for the correction did not involve a recording error at the time of birth.[24] Donnelly explained that the statute authorizing birth certificate corrections applied only when a birth "has not been properly or accurately recorded."[25] This means that we should focus on "the prompt and accurate recording of the circumstances surrounding births as they are known at that time."[26] The statute does not authorize corrections to birth certificates "arising from changes in fact or circumstance that occur after the birth."[27] Other statutes provide for corrections relating to subsequent

---

duties . . . of maintaining a record of vital statistics." *Id.* ¶¶ 16–17 (opinion of Fischer, J.). Whatever the cogency of this observation, the registrar was not involved in the case.

23. *Id.* ¶ 24 (opinion of Fischer, J.).

24. Donnelly agreed with Fischer that supplemental briefing might have been helpful had the court ordered it much earlier, but he concluded that further delaying the decision was inappropriate in light of the lengthy time that the court had the case under consideration. *Id.* ¶¶ 33–34 (opinion of Donnelly, J.).

25. *Id.* ¶ 37 (opinion of Donnelly, J.). The statute provides, in relevant part:

> Whoever claims to have been born in this state, and, whose registration of birth is not recorded, or has been lost or destroyed, or has not been properly and accurately recorded, may file an application for registration of birth or correction of the birth record in the probate court of the county of the person's birth or residence or in the county in which the person's mother resided at the time of the person's birth.
>
> (A) An application to correct a birth record shall set forth all of the available facts required on a birth record and the reasons for making the application, and shall be verified by the applicant. . . .
>
> The probate judge, if satisfied that the facts are as stated, shall make an order correcting the birth record . . . .

OHIO REV. CODE ANN. § 3705.15 (West).

26. *In re* Adelaide, slip op. ¶ 39 (opinion of Donnelly, J.).

27. *Id.* ¶ 40 (opinion of Donnelly, J.).

developments, such as adoption and legal name changes.[28] While recognizing that "our understanding of gender . . . has changed considerably since the beginning of *this* century" and accepting "the lived experience of those persons who . . . find themselves born in a body whose biological sex does not correspond to their understanding of their gender identity,"[29] he urged the legislature to pass a law that would allow transgender persons to correct the sex marker on their birth certificates "to show, officially, who they know themselves to be."[30] This, he concluded, would be "a matter of justice."[31]

Justice Brunner agreed with her three colleagues that the adversity issue was at best misguided,[32] but she would have gone much further and ruled in the applicant's favor. In her view, the relevant statute "does not distinguish between cisgender and transgender persons," so "if [the statute] allows *anyone* to apply to correct a sex marker on a birth certificate, then by its very terms it allows *everyone* to apply to correct a sex marker under the same terms."[33] Moreover, the law's plain language contains "no temporal constraints," which makes the Fischer-Donnelly approach unpersuasive.[34] Indeed, barring transgender persons from obtaining a sex marker correction on their birth certificates might irrationally discriminate against such persons.[35] Because she believed that the probate court

28. *Id.* ¶ 41 (opinion of Donnelly, J.) (discussing OHIO REV. CODE ANN, §§ 3705.12 & 3705.13 (West)).

29. *Id.* ¶ 42 (opinion of Donnelly, J.).

30. *Id.* ¶ 45 (opinion of Donnelly, J.).

31. *Id.* (opinion of Donnelly, J.).

32. *See id.* ¶¶ 73–78 (opinion of Brunner, J.); *see also id.* ¶ 53 (opinion of Brunner, J.) (objecting to invoking the adversity theory without giving the applicant an opportunity to submit a brief on the issue).

33. *Id.* ¶ 65 (opinion of Brunner, J.).

34. *Id.* ¶ 67 (opinion of Brunner, J.).

35. *Id.* ¶ 65 (opinion of Brunner, J.). In support of this observation, Brunner cited Ray v. McCloud, 507 F. Supp. 3d 925, 934–40 (S.D. Ohio 2020)). The *Ray* decision struck down as unconstitutional an administrative policy that absolutely forbade transgender persons from changing the sex marker on their birth certificate. *Id.* at 929. The court found transgender persons to constitute a

had statutory authority to grant the application to change the transgender person's sex marker on her birth certificate, the supreme court should reverse the appellate court's judgment and remand to the probate court to grant the application to change the sex marker on the birth certificate.[36]

In short, three justices concluded that the court lacked jurisdiction to hear the appeal because there was no adverse party. On the other hand, four justices disagreed that the lack of adversity deprived the court of jurisdiction. Three of those four justices would have affirmed the appellate court's judgment because they believed that the relevant statute did not authorize the probate court to grant an application to change the sex marker on a birth certificate because the applicant long after birth concluded that the sex marker on her birth certificate failed to reflect her gender identity. The fourth justice who rejected the adversity theory also interpreted the statute as authorizing the probate court to grant the application to correct the sex marker and therefore

---

quasi-suspect class and therefore applied heightened scrutiny to the plaintiffs' claims. *Id.* at 937–38. Having concluded that the state's policy failed intermediate scrutiny, though, the court concluded that the policy also failed rational-basis review. *Id.* at 939. Justice Donnelly questioned the relevance of *Ray*, correctly observing that a federal district court ruling does not bind the Ohio Supreme Court. *In re* Adelaide, 2024–Ohio–5393, ¶ 42 n.2. Justice Brunner might have responded (but did not) that the reasoning in *Ray* that struck down a policy about changes to sex markers on birth certificates might have persuasive value in construing a statute providing for correction of birth certificates, particularly when Donnelly's interpretation of the statute effectively barred probate courts from correcting sex markers on birth certificates. Resolution of this issue is beyond the scope of the present discussion.

On a related note, while *Adelaide* was pending in the Ohio Supreme Court, two federal courts of appeals reached opposite conclusions on the constitutionality of state policies that prohibited transgender persons from changing the sex marker on their birth certificates. *Compare* Gore v. Lee, 107 F.4th 548 (6th Cir. 2024) (rejecting a constitutional challenge to Tennessee's policy), *with* Fowler v. Stitt, 104 F.4th 770 (10th Cir. 2024) (striking down Oklahoma's policy as a form of unconstitutional sex-based discrimination), *vacated and remanded for further consideration in light of United States v. Skrmetti*, 145 S. Ct. 1816 (2025), No. 24–801 (U.S. June 30, 2025). It appears from an inspection of the online docket in *Adelaide* that no one brought these cases to the attention of the Ohio Supreme Court.

36. *In re* Adelaide, slip op. ¶ 72 (opinion of Brunner, J.).

would have reversed on the merits. Counting heads, we see that no disposition commanded a majority of the seven-member court. Because the Ohio Constitution requires a majority of the court to render a judgment,[37] this meant that no judgment was possible. The absence of a supreme court judgment left intact the appellate court's judgment, which affirmed the probate court's denial of the application to change the transgender person's sex marker on her birth certificate.

The Ohio Supreme Court could have avoided this deadlock, as the next part explains.

II. ALTERNATIVES TO JUDICIAL DEADLOCK

The *Adelaide* fiasco might have been avoided if one or more Ohio justices had been willing to adopt a fallback position that would have provided at least four votes for a judgment. This could have happened had Justice Brunner, for example, said that she was open to construing the statute as Justices Fischer, Donnelly, and Stewart did, as not authorizing a change in the sex marker on a transgender person's birth certificate. That would have meant that a majority of the Ohio Supreme Court agreed both that appellate jurisdiction existed and that the statute had the same meaning. Admittedly, this alternative seems unlikely, because Justice Brunner did not believe that the statute prevented the granting of the application to change the sex marker on the transgender person's birth certificate when the applicant came to understand who she really was.

Alternatively, one or more of the three justices who doubted the existence of appellate jurisdiction might have indicated how they thought the statute should be interpreted if the court did have jurisdiction. Admittedly, this too might have seemed like a compromise of judicial principle.[38] But this scenario is hardly hypothetical.

37. OHIO CONST. art. IV, § 2(A).

38. A third alternative exists: one of the four justices who thought that the court had jurisdiction might have changed his or her mind, providing a majority finding lack of appellate jurisdiction. This scenario presumably would have

Justice DeWine, one of the jurisdictional skeptics, raised the adversity question in the first minute of oral argument, and he did so by alluding to a separate opinion in a Utah case.[39] Justice DeWine did not write in *Adelaide*, and Justice Deters, who wrote for the jurisdictional skeptics, did not mention the Utah case. But the author of the separate opinion in the Utah case addressed not only the lack of adversity but also the merits. Associate Chief Justice Lee first explained why the court lacked jurisdiction to decide the case in the absence of adversity.[40] Although this opinion was a solitary dissent that made no difference to the outcome, Lee explained in detail why he believed that the court had reached the wrong conclusion on the merits of the case even if it did have jurisdiction.[41] This shows that at least one of the jurisdictional skeptics in *Adelaide* could have addressed the merits to avoid the deadlock that occurred in that case.

The U.S. Supreme Court has faced situations in which no majority existed for any disposition in several cases and avoided deadlock when at least one member agreed to support a second-best approach in order to provide a majority for resolving a legal controversy. Those examples reflect both compromises on the merits and compromises involving jurisdiction. Let's start with two cases in which at least one Justice retreated from a substantive interpretation to assure the existence of a majority in support of a disposition.

---

prevented the court from hearing another case dealing with this issue in the future, at least unless a future court were prepared to overrule the jurisdictional holding. Such a scenario seems never to have occurred in the U.S. Supreme Court, so I see no reason to explore this alternative.

39. Oral Argument at 0:58, *In re* Adelaide, No. 2022–0934, https://ohiochannel.org/video/supreme-court-of-ohio-case-no-2022-0934-in-re-application-for-correction-of-birth-record-of-adelaide.

40. *In re* Childers-Gray, 487 P.3d 96, 136–44 (Utah 2021) (Lee, A.C.J., dissenting). Unlike the Ohio court, the Utah Supreme Court did receive supplemental briefing on whether adversity was essential to its jurisdiction. *Id.* at 103.

41. *Id.* at 146–65 (Lee, A.C.J., dissenting). The Utah dissenter thought that the court should have received adversarial briefing on the merits as a prudential matter. *Id.* at 144–46 (Lee, A.C.J., dissenting).

The first example was a civil rights case, *Screws v. United States*,[42] a "shocking and revolting" case that arose from a Georgia sheriff's beating to death of Robert Hall, an African American suspect against whom he had a longstanding grudge.[43] Sheriff Claude Screws was convicted at trial, and the court of appeals affirmed,[44] but the Supreme Court nearly deadlocked. Three Justices thought that the federal law under which the sheriff had been prosecuted was unconstitutional because the central government had no authority to prosecute crimes such as homicide and assault—the substantive offenses at issue—which were the exclusive responsibility of the states.[45] Four other Justices voted to uphold the constitutionality of the federal law, but only insofar as it punished persons who acted with the purpose of depriving an individual of a specific constitutional right.[46] Because the jury had not been instructed to this effect, these Justices concluded that the sheriff should get a new trial before a properly instructed jury.[47] Two other Justices believed that the conviction should be affirmed.[48]

This messy distribution would have left the Court gridlocked: four Justices favoring a new trial before a properly instructed jury, two Justices favoring affirmance of the conviction, and three advocating dismissal of the charges on constitutional grounds, with no majority supporting any disposition of the case. For this reason, Justice Rutledge—one of the two favoring affirmance—very reluctantly joined with the four-member plurality in calling for a new trial at which the government would have to prove that Sheriff Screws

42. 325 U.S. 91 (1945).

43. *Id.* at 92–93.

44. *Id.* at 94.

45. *Id.* at 138–39 (Roberts, J., joined by Frankfurter & Jackson, JJ., dissenting).

46. *Id.* at 104–05 (Douglas, J., joined by Stone, C.J., and Black & Reed, JJ.) (plurality opinion).

47. *Id.* at 107, 113.

48. *Id.* at 113–17 (Rutledge, J., concurring in the result); *id.* at 134–61 (Murphy, J., dissenting).

intended to deny Mr. Hall his day in court when the sheriff beat Hall to death in the course of arresting him on a minor charge.[49]

We saw a similar acquiescence in *Hamdi v. Rumsfeld*,[50] the first Supreme Court case arising from the events of September 11, 2001. At issue was the custody of Yaser Esam Hamdi, an American citizen who had been born in Louisiana and moved overseas with his family during childhood.[51] In 2001, Hamdi resided in Afghanistan and was turned over to American forces deployed there following the September 11 attack, after which he was held in the United States as an enemy combatant.[52] Hamdi challenged the legality of his detention, and the Court fragmented in trying to resolve the case. Four Justices—Justice O'Connor, joined by Chief Justice Rehnquist and Justices Kennedy and Breyer—thought that Congress had allowed the government to detain citizens as enemy combatants by passing a joint resolution known as the Authorization for Use of Military Force (AUMF).[53] But those Justices also concluded that a citizen detained as an enemy combatant had a due process right to challenge the government's assertion of his enemy-combatant status and to rebut the government's claim before a neutral decision-maker.[54] Two other Justices—Souter and Ginsburg—disagreed with the plurality on the significance of the AUMF resolution, concluding that the AUMF did not authorize the detention of an American citizen as an enemy combatant and that his detention therefore violated a separate federal statute forbidding the imprisonment or detention of any citizen except as allowed by act of Congress.[55] Three other Justices dissented, although for

49. *Id.* at 113, 134 (Rutledge, J., concurring in the result).

50. 542 U.S. 507 (2004).

51. *Id.* at 510.

52. *Id.* at 510–11.

53. *Id.* at 518 (plurality opinion) (citing Pub. L. No. 107–40, 115 Stat. 224 (2001)).

54. *Hamdi*, 542 U.S. at 533.

55. *Id.* at 541 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment).

different reasons. Justice Scalia, joined by Justice Stevens, concluded that the government could either prosecute a citizen such as Hamdi in federal court or detain him, but it could resort to detention of a citizen only if Congress suspended the availability of habeas corpus relief—and Congress had not suspended the writ.[56] Justice Thomas, by contrast, would have upheld the government's action in its entirety, reasoning that Congress had in fact authorized Hamdi's detention and that the judiciary lacked the institutional capacity to second-guess the executive's determination.[57]

The distribution of views portended judicial deadlock. Four Justices believed that Congress had authorized the government to detain Hamdi as an enemy combatant, although those Justices also thought that he had a right to contest his detention in a fair hearing. Four other Justices viewed citizen Hamdi's detention as unauthorized by Congress. Only one Justice believed that the government should prevail on the merits. This meant that the Court was deadlocked on whether the government could lawfully detain Hamdi, with no majority on either side of that question. Justice Souter, explicitly invoking Justice Rutledge's approach in *Screws*, decided to agree with the plurality and endorse a remand to allow Hamdi to rebut the government's claim that he was in fact an enemy combatant who could be detained for that reason.[58]

The approach taken by Justice Rutledge in *Screws* and by Justices Souter and Ginsburg in *Hamdi* might have pointed the way for Justice Brunner to join, however reluctantly, with Justices Fischer, Donnelly, and Stewart in *Adelaide*. That would have provided a majority in favor of a judgment holding that the Ohio Supreme Court (and the court of appeals) had jurisdiction to review the probate court's denial of the application to change the sex marker on the birth

56. *Id.* at 554, 573 (Scalia, J., joined by Stevens, J., dissenting).

57. *Id.* at 579, 598 (Thomas, J., dissenting).

58. *Id.* at 553–54 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment).

certificate. But the differences between Justice Brunner and her three colleagues went well beyond the differences between Justice Rutledge and the *Screws* plurality and between Justices Souter and Ginsburg and the *Hamdi* plurality. Justice Brunner fundamentally disagreed with her colleagues about the meaning of the law relating to correction of birth certificates. She thought that the law allowed for a change in the sex marker in the circumstances of the *Adelaide* case, whereas Justices Rutledge, Souter, and Ginsburg read the measures at issue in *Screws* and *Hamdi* somewhat differently but at least in the same direction: Sheriff Screws could still be tried for his alleged crimes, and Mr. Hamdi could at least contest the basis for his detention. The applicant in *Adelaide* would obtain nothing if Justice Brunner acquiesced in the views of her three colleagues who agreed with her that the court had jurisdiction to hear the appeal.

This brings us to the other alternative suggested by the U.S. Supreme Court, one that would involve the Ohio justices who raised jurisdictional objections to hearing *Adelaide*. Before it decided *Roe v. Wade*[59] in 1973, the Court heard a separate challenge to the validity of the District of Columbia's abortion ban. At issue in *United States v. Vuitch*[60] was whether the D.C. law was unconstitutionally vague, but before reaching the merits the Court had to determine whether it had jurisdiction to hear the case at all because it involved a law that applied only in the District of Columbia. Five Justices—Justice Black, joined by Chief Justice Burger and Justices Douglas, Stewart, and White—concluded that the Court did have jurisdiction; a somewhat different set of four Justices—Justice Black, joined by Chief Justice Burger and Justices White and Blackmun—rejected the constitutional challenge to the D.C. abortion law.[61]

59. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

60. 402 U.S. 62 (1971).

61. *See id.* at 63 & n.*.

This is a case where you can't tell the players without a scorecard. A bare majority of five Justices thought that jurisdiction existed, but this meant that four Justices disagreed and therefore believed that the case was not properly before them. Those jurisdictional dissenters presumably would not address the merits. But two of the members of the jurisdictional majority took a different view of the merits. Justice Douglas concluded that the law was unconstitutionally vague.[62] And Justice Stewart thought that the law, properly construed, did not apply to a competent medical practitioner such as the defendant in the case.[63] In other words, three Justices thought the law was constitutional, two Justices thought it was unconstitutional or could not validly be applied to the defendant, and four Justices thought that the Court had no jurisdiction so presumably had no reason to address the merits.

To avoid the unattractive prospect of a deadlocked Court (this time 3–2–4, in contrast to the 4–2–2–1 in *Hamdi*), two of the jurisdictional dissenters decided to join the plurality on the merits and voted to uphold the validity of the D.C. abortion ban.[64] This provided a majority for rejecting the constitutional challenge to the law, although *Roe* overtook *Vuitch* less than two years later.[65]

Nor is *Vuitch* unique. In at least two other cases, members of the Supreme Court who questioned the existence of jurisdiction nevertheless addressed the merits in order to provide a majority for rendering judgment. In *Kesler v. Department of Public Safety*,[66]

62. *Id.* at 75, 80 (Douglas, J., dissenting in part).

63. *Id.* at 97 (Stewart, J., dissenting in part).

64. *Id.* at 96 (Harlan, J., dissenting as to jurisdiction); *id.* at 98 (opinion of Blackmun, J.).

65. The law at issue in *Vuitch* was not resuscitated by Dobbs v. Jackson Women's Health Org., 597 U.S. 121 (2022), which overruled *Roe*. The District of Columbia has enacted strong statutory protections for reproductive rights, including abortion. *See* D.C. CODE § 7–2086.01.

66. 369 U.S. 153 (1962). This decision was later overruled, *see* Perez v. Campbell, 402 U.S. 637 (1971), but that does not detract from the discussion here.

Chief Justice Warren and Justice Stewart voted to uphold a Utah financial-responsibility law that allowed judgment creditors to execute a judgment against a bankrupt driver despite their view that the Court lacked jurisdiction to hear the case.[67] Had they not done so, the Court would have been deadlocked: four Justices concluded that the law was valid, but two others thought that the law was unconstitutional;[68] had Warren and Stewart rested on their jurisdictional objection, there would have been no majority for any disposition because one Justice did not participate in the case.[69]

A similar scenario played out in *United States v. Jorn*.[70] The government appealed a trial court's dismissal of a tax fraud case, arguing that the district judge had mistakenly relied on double jeopardy. The Supreme Court split, 4–3, on the merits. Four Justices agreed with the double-jeopardy claim, so they concluded that the second trial could not proceed.[71] Three others found no double-jeopardy problem.[72] The two remaining Justices thought that the Court lacked jurisdiction over the case, but to prevent a deadlock where the rest of their colleagues saw no jurisdictional barrier those Justices joined their four colleagues' position that there was a double-jeopardy violation to provide a clear majority in support of a judgment.[73]

These cases demonstrate a way out of the Ohio situation. The *Adelaide* deadlock could have been avoided had any of the jurisdictional skeptics—Justice Deters, Chief Justice Kennedy, or Justice DeWine—taken the approach of the two jurisdictional dissenters in *Vuitch* and joined either Justice Fischer or Justices

67. 369 U.S. at 174 (Stewart, J., concurring in part); *id.* at 179 (Warren, C.J., dissenting).

68. *Id.* at 182–85 (Black, J., joined by Douglas, J., dissenting).

69. *See id.* at 174 (noting that Justice Whittaker "took no part in the decision of this case").

70. 400 U.S. 470 (1971).

71. *Id.* at 486–87 (Harlan, J., joined by Burger, C.J., and Douglas & Marshall, JJ.).

72. *Id.* at 493 (Stewart, J., joined by White & Blackmun, JJ., dissenting).

73. *Id.* at 488 (statement of Black & Brennan, JJ.).

Donnelly and Stewart in concluding that the statute did not authorize the probate court to grant the application to change the sex marker in a transgender person's birth certificate. No doubt some jurists view jurisdictional questions as matters of principle, but sometimes "it is more important that the applicable rule of law be settled than that it be settled right."[74] We cannot tell why the jurisdictional skeptics declined to provide a fourth vote for a majority decision. Still, we should be able to agree that this was an "unfortunate" result at least from an institutional perspective.[75]

Moreover, the institutional failure went beyond *Adelaide*. In December 2023, more than eight months after that case was argued, the court accepted an appeal in another case involving an application to change the sex marker of a transgender female and ordered that case held pending the *Adelaide* decision.[76] In light of the *Adelaide* deadlock, we might have expected the court to dismiss the other case as a matter of course. And the court did in fact dismiss *In re B.C.A.* as improvidently accepted.[77] But the three justices who would have dispatched *Adelaide* for lack of adversity dissented from what should have been a routine order.[78] And that division generated an unusually personal exchange within the court. Justice Deters, the author of the *Adelaide* opinion that relied on lack of adversity, criticized the majority for "do[ing] a disservice by not allowing B.C.A.'s appeal to proceed."[79] He went on to fault the majority for failing to request supplemental briefing on adversity in this case when the court had

74. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

75. *In re* Adelaide, slip op. ¶ 2 (opinion of Fischer, J.)

76. 12/26/2023 Case Announcements, 2023–Ohio–4640 (accepting review of *In re* B.C.A., No. 2023–1260, 2023–Ohio–4640). On the timing of this announcement, see *supra* note 17 and accompanying text.

77. 2024–Ohio–5761 (Ohio Dec. 10, 2024).

78. *Id.* at 1.

79. *Id.* ¶ 8 (Deters, J., dissenting).

declined to do so in *Adelaide*.[80] Justice Stewart, who had not written in *Adelaide* but joined Justice Donnelly's opinion in that case, criticized "the head-scratching hypocrisy of the dissenting opinion."[81] Deters shot back that Stewart was acting strategically to "deprive[] the court—including the newly elected justices—of the opportunity to consider issues she previously agreed should be considered."[82] Entirely apart from the tone of this exchange, the court's inability to achieve consensus in the disposition of *B.C.A.* confirms the larger institutional failure in *Adelaide*.

80. *Id.* ¶ 9 (Deters, J., dissenting). It is not clear who opposed supplemental briefing in *Adelaide*, and resolution of that question is unnecessary to addressing the question of institutional failure.

81. *Id.* ¶ 2 (Stewart, J., concurring).

82. *Id.* ¶ 10 n.1 (Deters, J., dissenting). By way of background, Justices Donnelly and Stewart were defeated for reelection in November 2024. Deters, in an extraordinary situation, successfully ran against Stewart instead of seeking reelection to the seat he held when *Adelaide* and *B.C.A.* were decided. He had been appointed to the seat held by then-Justice Kennedy when she was elected chief justice in 2022. *See Joseph T. Deters*, THE SUPREME COURT OF OHIO & THE OHIO JUDICIAL SYSTEM, https://www.supremecourt.ohio.gov/courts/judicial-system/supreme-court-of-ohio/justices-1803-to-present/joseph-deters/. Kennedy's term as an associate justice was due to expire in 2026. *See Chief Justice Sharon L. Kennedy*, THE SUPREME COURT OF OHIO & THE OHIO JUDICIAL SYSTEM, https://www.supremecourt.ohio.gov/courts/judicial-system/supreme-court-of-ohio/justices-overview/sharon-kennedy/. The governor appointed Deters to serve on an interim basis until the 2024 election, when he could have stood for election to the remaining two years of that term. *See* OHIO CONST. art. IV, § 13. Deters decided instead to oppose Stewart for a full six-year term. This was a virtually unprecedented move. The only other time that one member of the Ohio Supreme Court challenged a colleague seeking reelection was in 1962, when Justice Kingsley Taft defeated long-time Chief Justice Carl Weygandt. *See Kingsley Arthur Taft*, THE SUPREME COURT OF OHIO & THE OHIO JUDICIAL SYSTEM, https://www.supremecourt.ohio.gov/courts/judicial-system/supreme-court-of-ohio/justices-1803-to-present/kingsley-taft/; *Carl Victor Weygandt*, THE SUPREME COURT OF OHIO & THE OHIO JUDICIAL SYSTEM, https://www.supremecourt.ohio.gov/courts/judicial-system/supreme-court-of-ohio/justices-1803-to-present/carl-weygandt/. Justice Kennedy and Justice Brunner opposed each other in the 2022 election for chief justice, but neither candidate's term as an associate justice was expiring that year so both would remain on the court regardless of who became chief justice.

***

The *Adelaide* case might stimulate questions about the functions of birth certificates. Those functions have changed over the years. Birth registration initially was regarded as promoting governmental interests in having a large and growing population.[83] Eventually, advocates of birth certificates justified these documents on public health grounds, particularly as useful tools for reducing infant mortality.[84] Meanwhile, birth certificates got important additional support during the campaign to restrict child labor, because those official documents could provide reliable evidence of a young person's age.[85] And the rise of common schools enhanced the importance of birth certificates as documents attesting to children's readiness for public education.[86] Birth certificates got increased support as a result of the difficulty of documenting age for Civil War pension applicants and early recipients of Social Security benefits, to name just two leading public programs.[87]

Some of the new uses of birth certificates benefited individuals as well as government. But the typical birth certificate contained a wide range of information that might have been more useful for statistical purposes than as a source of relevant public information. For example, the standard form included information about the marital status of the parents and the race of the child. Critics complained that listing the marital status of the parents could stigmatize children born out of wedlock, and racial information could be—and was—used to promote segregated schools and bans on interracial marriage.[88] Eventually, most birth

83. SUSAN J. PEARSON, THE BIRTH CERTIFICATE: AN AMERICAN HISTORY 24–25 (2021).

84. *Id.* at 41–44, 97–98, 132–41.

85. *Id.* at 166–75.

86. *Id.* at 165–66.

87. *Id.* at 45–46, 165, 241–44.

88. *Id.* at 213–20, 225–30. Birth certificates also played a significant role in promoting white domination of Native Americans. *Id.* at 148–56.

certificates came to have two versions: a full version containing details about legitimacy and race, which was kept in the relevant government offices but not released to the public, and a shorter version that omitted such sensitive information.[89]

This history suggests the mutability of birth certificates, at least for some purposes. And that history might influence how we think about efforts by transgender persons to change the sex marker on their birth certificates. Of course, that history does not necessarily control how a specific birth certificate statute should be interpreted, but it might inform public discussion on the subject and the political debate that is now unfolding.

Returning to the *Adelaide* case, the Ohio Supreme Court's failure to achieve a majority in support of any judgment might have a small bright side for advocates of transgender rights. Because there was no judgment, the court of appeals' ruling was left intact. The applicant lost her case, but the precedential weight of that defeat is correspondingly less than would have been true had the state's highest court made the ruling. At the same time, the high court's inability to render any judgment in *Adelaide* has left probate judges adrift without guidance and increasingly reluctant to approve changes in the sex marker on birth certificates of transgender applicants even when some of those judges had been willing to do so before *Adelaide*.[90]

Perhaps the General Assembly could amend the statute to allow for correction of sex markers on birth certificates, as Justice Donnelly suggested. This does not seem like a realistic prospect, at least in the near term. Only days before *Adelaide* was decided, the legislature passed a bill that would effectively require students at all Ohio educational institutions to use single-sex

89. *Id.* at 234–39, 247–48, 270–81.

90. *See* Renee Fox, *Ohio County Probate Court Judges Weigh In on Unequal Access to Birth Certificate Changes*, WOSU (Dec. 11, 2024, 5:00 AM), https://www.wosu.org/politics-government/2024-12-11/ohio-county-probate-court-judges-weigh-in-on-unequal-access-to-birth-certificate-changes.

bathrooms based on sex assigned at birth; that determination could be based on a birth certificate "issued at or near the time of the individual's birth."[91] This restrictive rule suggests deep legislative skepticism about transgender people. But the temporal reference to birth certificates also implies that at least some legislators believe that existing law does permit transgender persons to get the sex marker on their birth certificates changed long after they were born.[92] And that raises questions about the meaning of the statute at issue in *Adelaide*. The Ohio Supreme Court's failure to achieve a majority in support of any judgment in that case might lead another transgender applicant to try again and to invoke the language in the bathroom bill in support of the application.

That possibility should not obscure what happened in *Adelaide*, though. The Ohio Supreme Court had the responsibility to decide that case with a majority in support of some judgment, and the court failed to do so.

---

91. Am. Sub. S.B. 104, 135th Gen. Assemb. (Ohio 2024) (enacting Ohio Rev. Code Ann. §§ 3319.90 (elementary and secondary schools), 3345.90 (institutions of higher education) (West)). This measure applies only to bathrooms designed for multiple occupancy and contains limited exceptions for single-occupancy and so-called family facilities, but the single-sex rule apparently covers the overwhelming majority of restrooms at Ohio educational institutions. OHIO REV. CODE ANN. §§ 3319.90(A)(3), (B)(1); 3345.90(A)(1), (B) (West).

92. The governor signed this measure into law a week after the *Adelaide* decision was released. *See* Haley BeMiller, *Ohio Gov. Mike DeWine Signs Bill to Restrict Bathroom Access for Transgender Students*, COLUMBUS DISPATCH (Nov. 27, 2024, 12:44 PM), https://www.dispatch.com/story/news/politics/2024/11/27/ohio-gov-mike-dewine-signs-transgender-bathroom-ban/76484404007/.