

Ruling Majorities and Reasoning Pluralities

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This article takes on the puzzle of why many appellate courts insist on an outright (but simple) majority decision as to the immediate outcome or disposition of a case, while tolerating a plurality decision as to the precedential message, or reasoning, attached to a case. Somewhat similarly, pluralities are respected in many political settings but then not, for example, in legislative assemblies. The argument builds both on the Condorcet Jury Theorem and on the problem of dealing with voting paradoxes, or cycles. It links decision rules with the likelihood of cycling and the danger of misconstruing majority decisions.

INTRODUCTION

Why do appellate courts occasionally engage in plurality decisionmaking with respect to their reasoning and, therefore, the precedential implications of their decisions, while insisting that an outright majority must agree on the immediate outcome or disposition of each case? Why do some jurisdictions avoid plurality decisions in their courts but allow pluralities when voting in general elections for their leaders and legislative representatives but then not for issues presented in plebiscites or referenda? Meanwhile, plurality decisions are avoided everywhere in legislative chambers and committees, which normally operate under motion-and-amendment rules, requiring at least a simple majority to support an enactment or proposal. Implicit in these questions about constitutional structure are others. There is the question of

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how to interpret judicial pluralities, as well as the practical question of how and when to put matters — ranging from local bond issues to national currencies to peace proposals — to popular vote.

As we will see, these questions suggest the value of coordinated explorations of (at least) three voting rules. In most decisionmaking frameworks,¹ conclusions might be reached by simple majority, supermajority, or plurality vote.² My aim here is to draw attention to the last of these three, but because what is really at stake is the choice among these options, comparative positive and normative questions are inescapable. Part I touches on these comparative questions by beginning with the division of labor between majority rule and supermajority rule. Part II then adds in plurality voting in an attempt to define the range in which that sort of voting rule is a plausible alternative. The discussion takes on a distinction, or puzzle, that should be of great interest to lawyers; in the United States, at least, courts and other lawmakers may stand divided as to their reasoning, but they must form majorities to deal with the actual parties before them. Part III then expands on this distinction to offer some ideas about broader questions of constitutional structure. Among other things, I suggest that there is untapped potential in plurality voting.

I. MAJORITIES AND SUPERMAJORITIES

A. Simple Majorities

There are many familiar explanations for, or reasons to prefer, simple majority voting. One starting point is the Condorcet Jury Theorem, which tells us that where each voter has more than an even chance of being right on some matter, then the more voters we have, the closer we get to a probability of one getting the matter right by abiding by a simple majority

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- 1 Comparable decisions might be entrusted to judicial panels in one legal system, but then to direct democracy, legislatures, commissions, juries, or other entities (or individuals) in another. Elections may be proportional or not, thresholds may be different, and multiple options may be presented at once (or eliminated). But in all these processes, or frameworks, there are points at which decisionmaking might be undertaken with plurality, majority, or supermajority voting. To the extent possible, I try to focus on this choice rather than on the framework in which it arises.
 - 2 There are other decisionmaking processes, of course. And there are voting mechanisms, like approval voting and some kinds of proportional and transferable voting, that do not easily fit into these three categories. But my aim here is suggestive and positive rather than exhaustive and normative. I do consider the roles assigned to some alternative decisionmaking mechanisms in other work.

vote.³ A group, such as a jury or committee or electorate, does better than an individual. The assumptions rule out the case in which the individual is an identifiable expert.⁴ An obvious implication is that larger groups can do better than smaller ones, where "better" sets aside the costs of decisionmaking and refers only to the chance of a correct group vote. When the assumptions of the Jury Theorem, as I will call it here, are met (so that, among other things, there is a "right" answer to be sought, rather than preferences to be aggregated), it is hard to make the case for anything more than majority voting. The danger of a supermajority requirement is that it may pass up right answers by allowing the minority to prevail, and the minority is, by assumption, less likely to be "right" than is the majority.⁵

The Jury Theorem intrigues some audiences more than others, depending on how its assumptions are understood or applied. Some observers might think it rather useless, because we can never be sure that all or most jurors are more likely than not to be right. Indeed, there might be disagreement as to whether there is an objective way of deciding when we face a question that has a right answer, as opposed to one that is influenced by, or simply serves, voters' preferences. But it goes almost without saying that the more

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- 3 For a first look at the idea, see Duncan Black, *The Theory of Committees and Elections* 159-80 (1958). A technical exposition is found in Hobart Peyton Young, *Condorcet's Theory of Voting*, 82 *Am. Pol. Sci. Rev.* 1231 (1988). It is important to emphasize at the outset that the Jury Theorem is about uncovering the "right" answer — where there is one — and that it says nothing about aggregating preferences. The Condorcet Jury Theorem is discussed in Dennis C. Mueller, *Constitutional Democracy* 158-59 (1996). The Theorem assumes not only the existence of a "right" answer to the question at hand, but also that each voter is equally likely to know the right answer, or at least that each is more likely than not to discern the correct answer, and that we have no way of identifying those who are most likely to be right or even likely to benefit from deliberation. Some of these assumptions can be relaxed without too much damage to the arguments in the present paper.
 - 4 On some issues, an expert will obviously do better than a large, well-meaning group of voters, although even there, adding in enough additional voters, each of whom is more likely to be right than wrong, will eventually improve the stew. It is where a non-expert is more likely to be wrong than right, or where a non-expert does no better than guess, that we most need experts.
 - 5 This is not the place to undertake a survey of democratic theory, but it should be said that the starting point of the discussion does not mean to exclude other reasons, especially "procedural" reasons, for preferring majority rule and for hesitating before deploying supermajority rule. Thus, May's Theorem is a favorite of "procedural democrats" because it shows that where there are two choices, simple majority rule uniquely satisfies a nice set of conditions, including neutrality, anonymity, positive responsiveness, and decisiveness. See Mueller, *supra* note 3, at 159.

one thinks the Jury Theorem useless, the more difficult it is to justify simple majority decisionmaking, especially where losers can describe majority votes as coercive in some way.

Some observers will want to go so far as to say that as a positive matter, given the popularity of simple majority voting in so many contexts, it must widely be thought that there is a large Jury Theorem element in many decisionmaking processes. There are, to be sure, other ways of justifying majoritarianism, but the more we find this decision rule in continued use, the more we might reason that the assumptions appear satisfied rather than ridiculed. Alternatively, we might take a normative leap and judge the Jury Theorem's assumptions plausible in a variety of identifiable settings, in which case we have reason to abide by simple majority rule.

The positive and normative perspectives must come to grips with practices and intuitions that introduce complexity not found in the basic Theorem. What, for example, are we to make of the practice of jury, or even legislative and judicial, deliberation? A Jury Theorem purist might say that the simple result is ruined if voters are given the opportunity to influence one another (as with certain kinds of vote trading), to exhibit herd mentality, or to otherwise allow their own assessments and self-esteem to interfere with the value of numerosity. On the other hand, deliberation has potential value on the Theorem's own terms. Deliberation might reveal the presence of expertise, in which case each voter is no longer to be regarded as equally likely to be right. In turn, useful deliberation might well be encouraged by a rule requiring supermajority agreement. If legislators, jurors, or some other group knows that a simple majority will prevail, then — especially if the issue before them is one that falls easily into a choice between two options — they might impatiently rush to vote. A rule requiring a supermajority decision might in this way encourage deliberation, which, once again, might raise the probability of the group getting the matter right.

There is much to commend this optimistic approach to the question or puzzle of supermajoritarianism, but it is not without difficulties. It avoids the question of why a group whose members are intent on getting something right would unwisely rush to a simple majority vote. If deliberation improves the chance of correctness, then we should expect uncorrupted groups to deliberate when there is expected benefit from deliberation.⁶ The legal imposition of supermajority rule thus implicitly assumes something other

6 This question will continue to arise. If voters want to reach the right answer and they have the means to do so, then the nominal decisionmaking rule might often be irrelevant. Voters might begin with the results of a poll and then vote unanimously for the result suggested by the Jury Theorem. As we will see, this simple device

than a group attempt to get a right answer where the members of the group know that one exists. We may be dealing with selfish motives, some battling among preferences, or something else that removes us from the simple world of the Jury Theorem.

B. Supermajorities

When we move away from juries and some legislative settings, however, we cannot point to deliberation and the danger of rushing voters as an explanation for supermajority requirements. Many constitutions use supermajoritarianism for selected matters, and if we think of bicameralism as a kind of substitute for supermajoritarianism, simple majority rule begins to seem like the exception rather than the rule.⁷

The most innocent and general explanation for supermajoritarianism is contractual. Groups, federations of states, and other collective bodies might not form in the first place if they could not pre-commit to supermajority decisionmaking. The technical way to say this is that these groups fear that others will impose external costs on them, including the cost of defensive political organization.⁸ This approach is not inconsistent with the Jury Theorem; it simply occupies a different space. These contracting parties have fears about matters that the Theorem does not address. When they work with other parties toward a common end and on matters for which there is a right answer, they appreciate the Jury Theorem and welcome simple majoritarianism. But they are anxious about the danger that accompanies governmental power. They fear proposals dealing with redistribution policies or other matters that have more to do with "preferences" writ large than with right answers. Ideally, these parties would like to specify in advance just where they agree to abide by simple majorities, but such specification is difficult.

Even where there is no preexisting, identifiable minority, there is the danger that the power to bind a group with something less than unanimous decisionmaking will itself lead to the imposition of external costs, not

disappears not only when preferences rather than right answers are in play, but also where the group hopes to choose the right answer from multiple choices.

7 Robert D. Cooter, *The Strategic Constitution 185-90* (1999) (showing how bicameralism forces bargaining between chambers, cooperation between majority and minority in order to rule, and consensus legislation); Saul Levmore, *When Are Two Decisions Better than One?*, 12 *Int'l Rev. L. & Econ.* 145 (1992) (describing bicameralism as a particular sort of substitute for supermajoritarianism, superior in its ability to preserve Condorcet winners).

8 Beginning with James Buchanan & Gordon Tullock, *The Calculus of Consent* (1962).

to mention the rent-seeking that can be associated with the threat of exploitation. But this sort of thinking takes us well beyond the innocent Theorem. It suggests that a stable or even temporary majority might redistribute wealth in its own favor and away from a minority or that a majority will force the group as a whole to abide by the majority's preferences where the minority might prefer to do without collective decisionmaking. In these cases, voting is about more than getting something right where each voter is more likely than not to be right. Where voting is about preferences rather than a shared preference for the right answer, it is plain that the Jury Theorem promises nothing.

Despite (or perhaps because of) the difficulty of advance specification, we might imagine a legal and social system that initially used majority voting for factfinding of the kind described by the Jury Theorem, but then switched to supermajority decisionmaking for classes of decisions that seemed to be about preference aggregation or redistribution and so forth. The strategy would be to describe these classes. The delineations might be imperfect but perhaps well worth the occasional exploitation or mis-specification. More elegantly, we could imagine a default rule of supermajority decisionmaking (short of unanimity, no doubt, in order to avoid holdout threats) with an option for the supermajority to vote on a switch to simple majority voting. The fanciful, academic idea is that where the Jury Theorem applies, each voter *wants* to get the matter right. There is, by assumption, nothing in the way of diverse preferences and therefore no reason why anyone should want anything other than to abide by the majority's decision. If the Theorem applies in the matter of assessing whether A is or is not guilty of a criminal act or if it applies in assessing the distance from one point to another with no tools but the naked eye, for instance, then if I seek the right answer, I know that I will do better with a group than as an individual, but that it would be sensible to opt out of any supermajority default position and to instead abide by the simple majority.

One of the things that make the preceding ideas so fanciful is that reality is so unlike the world suggested by these ideas. These ideas do not appear to be the stuff of a successful positive theory of majority versus supermajority decisionmaking. For one thing, we occasionally observe majorities agreeing (or at least attempting to do so) to be bound by a supermajority rule with respect to classes of issues. For instance, a legislature might vote to require a three-fifths vote for a tax hike or for a (strongly) retroactive bill.⁹ But it is rarer to find a constitutionally empowered supermajority ceding

⁹ See, e.g., *Skaggs v. Carle*, 110 F.3d 831 (D.C. Cir. 1997) (finding member of House of Representatives did not have standing to challenge constitutionality of two House

authority to a future simple majority.¹⁰ I suppose we might reason that this supermajority need neither announce nor agree on such an intention. If a Jury-Theorem-appropriate question arises, the voters can simply poll one another informally or use a committee to do so, and then the supermajority can vote as the mere majority has suggested. There is no need for advance agreement, because it will be in the interests of all members of the group to go along with the majority inasmuch as they want to get the matter right and they believe that the Jury Theorem applies. The bigger problem is not with the question of where supermajorities bend to majorities or the other way around, though that is an interesting area of inquiry, but, rather, with the question of where we find constitutions or other devices resorting to supermajorities in the first place. It is, for example, (even civil) juries and, more rarely, legislatures that are forced to use supermajorities — while judges are virtually never pushed in this direction. This alone makes descriptive theorizing with the Jury Theorem a bit hopeless, because among these groups, it is surely the jury that is most often looking for a right answer, and yet it is the group least often pushed by law to simple majoritarianism — which is the Theorem's plain implication for civil cases.¹¹ Legislatures so often deal with preferences and external costs, rather than a right answer, and yet it is these bodies that operate under the rules of simple majoritarianism. This is not to say that we have no explanations for the occasional switches to supermajoritarianism, but the role played by the Jury Theorem seems rather limited.

But my aim here is not to make complete sense of the division of labor between majority and supermajority rules. It is only to hint at the strategy

rules, one requiring three-fifths majority for legislation increasing federal income tax and the other pursuant to which it was not "in order" to consider legislation carrying retroactive federal income tax increase). Many states and cities have supermajority requirements for tax increases.

10 I do not discuss delegation of the normal sort in which a group cedes authority to a much smaller group (or individual) for efficiency, precommitment, or other reasons. But it should be noted that it is unusual for such delegation to convert a supermajority into a majority decision.

11 In criminal cases, the law is obviously hesitant to convict, simply because that conclusion is just barely "right." A higher standard is easy to understand, and one way to encourage confidence in convictions is with a supermajority rule. A unanimous group of twelve that voted for conviction (much less with individual confidence said to withstand the reasonable doubt standard) inspires much more confidence than a simple majority. We might say that the Jury Theorem itself suggests something much more than simple majority rule for criminal cases, but that simple majoritarianism might seem attractive for civil cases where, for instance, the law must simply choose to move money (or not) from one private citizen to another.

such an enterprise might deploy, in order to focus on a third choice, namely, plurality voting.

II. PLURALITIES

A. Judicial Splits and the *Marks* Rule

Majorities and supermajorities can form even where there are multiple options for the decisionmaking group. Imagine, for example, that the question is whether the remedy for a given claim brought by A against B ought to be money damages or injunctive relief or nothing at all (amounting to a decision in favor of B). It is possible and, indeed, often the case that a group entrusted with deciding this question will overwhelmingly prefer one alternative, say money damages of a certain amount.¹² It goes without saying that if we engage in plurality voting but find overwhelming support for one remedy, candidate, or alternative, then we can be especially comfortable with the result.

But what if opinions on an appellate court are divided 1-1-1 (or 4-3-2)? With regard to some issues, the alternatives will appear single-peaked¹³ (perhaps even at one end or the other of an obvious spectrum), and there would be little controversy if we were to accept plurality voting and then construe the majority decision by a rule of interpretation. The "middle" option will provide

12 I add in the unnecessary reference to the question of the amount of money damages in order to flag the problem of discerning when we truly have but one question before us. The significance of these two questions, independent or not, is taken up in *infra* Part III.B.

13 "Preferences are said to be single-peaked if the alternatives under consideration can be represented as points on a line, and each of the utility functions representing preferences over these alternatives has a maximum at some point on the line and slopes away from this maximum on either side" (or not at all). Kenneth A. Shepsle & Mark S. Bonchek, *Analyzing Politics* 84 (1997). The idea is that stable majorities are threatened if a voter might prefer, for example, 100 dollars to be spent on a project, followed by 90, followed by 150, and then followed by 60 (least preferred). The second "peak" of 150 is not implausible; perhaps the vote is on funding for a public building, and the voter least prefers a quick fix maintenance job (60), but otherwise prefers higher quality materials except that the voter is opposed to expenditures on fancy moldings. With these non-single-peaked preferences, cycling can occur. If there is no cycling, then the group either prefers one alternative by an absolute majority or, at least, in pairwise competition with the other alternatives. Such a successful option is known as a Condorcet winner. Readers unfamiliar with these starting points might consult Maxwell L. Stearns, *Public Choice and Public Law: Readings and Commentary* (1997).

the swing vote in these settings, and we might imagine a legal system that allows judges to file such a divided opinion and then to expect a subsequent court, the lower court, the presiding judge on the panel, or an agent of the court to construe the opinion and inform the litigants how the divided opinion actually disposes of their case. All this will seem unnecessarily counterfactual to most readers, because the general practice is to regard such a divided vote as no decision at all (which might well favor B in the above case¹⁴). There is a strong convention, indeed, perhaps a rule of law, that for a decision to have positive force, a majority of the judges must agree on the remedy or immediate disposition.¹⁵ Abstentions are as powerful as dissents. Another reason this example seems counterfactual is that some legal systems use panels of judges only for appeals and the appellate court's task is generally to accept, reject, or reeducate the lower court, perhaps describing the need for further factual inquiry or field-level application of the law. These appellate panels are not asked to engage themselves in such tasks as choosing among many levels of money damages or even between damages and injunctive relief. The appellate panel is asked only to vote to reverse or remand.

The formal rule in federal courts in the United States can be described

14 At the risk of slight confusion or inaccuracy, I have imagined that a 1-1-1 vote will leave things as they are, in effect affirming the lower court.

15 See Ken Kimura, Note, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 Cornell L. Rev. 1593, 1596 (1992) ("One component of the Supreme Court decision is the 'legal rule.' The principle of majoritarianism requires the identification of a 'majority rule' a rule that a numerical majority of Justices explicitly adopt as the law of the land. Absent this majority agreement, a rule should have no binding precedential effect. Any legal rule articulated in a plurality decision that is not a majority rule has been implicitly or explicitly rejected by a majority of the court."). It should be noted, however, that the author of this cited Note can produce only Henry Black, *Handbook on the Law of Judicial Precedents* (1912) (suggesting that decision requires simple majority agreeing on both reasoning and legal rule), as authority for the proposition as declared.

For state court opinions, see *Costner v. A.A. Ramsey & Sons, Inc.*, 351 S.E.2d 299 (N.C. 1987) (holding that where there was no majority of state supreme court voting to either affirm or reverse, the state's court of appeals decision was left undisturbed but stood without precedential value, where supreme court was divided three to two as to the result, with two judges not participating); *People v. Warren*, 615 N.W.2d 691, 697 (Mich. 2000) (holding that decisions without a clear majority holding do not constitute binding authority under the doctrine of stare decisis); *McDermott v. Biddle*, 647 A.2d 514, 524 (Pa. Super. Ct. 1994) (holding that in order for any principle of law expressed in majority opinion to be considered precedent, it must command majority of judges voting both as to disposition and principle of law expressed).

in two parts: (1) a majority must agree on the *disposition* of the instant case (so that on a three-judge appellate panel, the judges cannot split 1-1-1 as to affirming, reversing, and remanding the decision below);¹⁶ and (2) if a majority agrees as to the disposition but splits as to the *reasoning* for this disposition, the precedential character of the decision is determined by subsequent courts under the *Marks* doctrine¹⁷ by looking for the "narrowest" ground common to the earlier majority and concurring opinions.¹⁸

Other rules are possible. As for splits as to reasoning (step 2), American

16 Judicial panels can do more than affirm, reverse, or remand decisions of lower courts. In the federal courts, governing law is that:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 2106. In theory, at least, there can be many proposals as to how to enter an "appropriate judgement ... or order ... as may be just," in which case every appellate court has numerous disposition options. If so, then there might be as many disposition options as there are grounds for such a decision, in which case (as will become apparent) a good part of the argument in this article vanishes. At the same time, there may be more of an argument for some form of plurality voting, though that is an argument I leave for another day. *See infra* Part II.D.1-2. Either way, these comments jump ahead of the argument in the text. My own inclination is to think of dispositions by panels (affirm, reverse, and so forth) as hardly limited in number. But the convention, or, dare I say, requirement, of settling on a majoritarian disposition may be advanced by the secondary convention of discouraging the proliferation of dispositions other than those that affirm, reverse, or remand in straightforward fashion.

17 *Marks v. United States*, 430 U.S. 188, 193 (1977). *See Stearns, supra* note 13, at 126-29 (discussing *Marks* and Median Voter Theorem); Maxwell L. Stearns, *The Case for Including Marks v. United States in the Canon of Constitutional Law*, 17 Const. Comment. 321 (2000) (suggesting that *Marks* doctrine is of sufficient importance to be part of constitutional law curriculum).

18 The *Marks* rule is also used in some state courts both with respect to interpreting state supreme court splits (where its use is not so obvious) and with respect to interpreting U.S. Supreme Court law (where its use seems fairly obvious). *Morgan v. City of Ruleville*, 627 So. 2d 275 (Miss. 1993), and *Singleton v. Endell*, 870 S.W.2d 742, 746 (Ark. 1994), are representative cases.

In *Morgan*, the Mississippi Supreme Court, faced with the question of determining the holding in its previous case of *Presley v. Mississippi State Highway Commission*, 608 So. 2d 1288 (Miss. 1992), applied a *Marks*-like rule to construe a state supreme court decision. There, the Court had held a section of a Mississippi statute unconstitutional, but disagreed over whether to apply its holding retroactively or prospectively. *Morgan*, 627 So. 2d at 278. Four justices joined the opinion advocating prospective application. *Id.* Three judges dissented, arguing that *Presley* should be

courts once treated these plurality-opinion, or no-majority-opinion, cases as useful only for their results; the various strands of reasoning, or "opinions," had no precedential value.¹⁹ The same was true for other common law

applied retroactively. *Id.* One judge dissented to the entire plurality opinion, arguing that the statute was not unconstitutional. *Id.* Applying *Marks* to this plurality, the *Morgan* court held that the narrowest holding in *Presley* was simply that the statute was unconstitutional and that this was the only point that had precedential value. *Id.*

Singleton, on the other hand, applies the *Marks* rule in a state court construction of a U.S. Supreme Court case. In *Singleton*, the Arkansas Supreme Court was faced with the question of whether a convicted criminal is entitled to a hearing to determine whether he is insane and therefore should not be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986). Noting that *Ford* was a plurality decision, the Court proceeded to apply the *Marks* doctrine. *Singleton*, 870 S.W.2d at 746. It first noted that Justice Marshall's plurality opinion expressed his views and those of three other Justices. *Id.* The Court then noted that two Justices dissented on the ground that there is no constitutional right of the insane person not to be executed and two other Justices concurred with the decision of the plurality group on the basis that although there is no Eighth Amendment protection, Florida law had created the right of an insane person not to be executed, but had not provided sufficient procedural safeguards to protect that right. *Id.* Finally, the Court focused on Justice Powell's concurrence, in which he agreed that the Eighth Amendment provides a right for an insane person not to be executed, but expressed a view that would narrow the procedural means a state must provide to protect an insane person from execution. *Id.* Applying the *Marks* doctrine, the Court held that Powell's concurrence described the narrowest grounds on which *Ford* was decided and thus expressed "the law of the land." *Id.* Again, it seems obvious that any court (state or federal) should apply *Marks* when construing a U.S. Supreme Court opinion; the less obvious point is that the same rule applies in the context of state supreme court decisions.

- 19 See Mark A. Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 Duke L.J. 419 (1992). For federal law, see *United States v. Pink*, 315 U.S. 203, 216 (1942) (holding that lack of agreement by a majority of the court on the principles of law involved prevents it from being an authoritative determination for other cases). Nor was that rule regarded as obsolete a generation later. See, e.g., *Wiesenfeld v. Sec'y of Health, Educ. & Welfare*, 367 F. Supp. 981 (D.N.J. 1973) (holding that while a decision by a divided court is as final on all issues of the case as a decision by a unanimous court, the reasoning employed by a plurality does not become law). Note Justice Rhenquist's comment on the value of split opinions:

The true problem with today's [plurality] decision is that it gives no guidance whatsoever to these States as to whether their laws are valid or how to defend them. For that matter, the decision gives no guidance to Consolidated or other trucking firms either. Perhaps, after all is said and done, the Court today neither says nor does very much at all. We know only that Iowa's law is invalid and that the jurisprudence of the "negative side" of the Commerce Clause remains hopelessly confused.

Kassel v. Consol. Freightways Corp., 450 U.S. 662, 706 (1981) (dissenting from

jurisdictions.²⁰ During a later period, the *plurality* opinion (in favor of the disposition agreed upon by the majority coalition) was sometimes treated as useful precedent.²¹ Nor is the *Marks* doctrine necessarily stable. Other proposals arise, and analysis at many levels suggests that the distinction between disposition and reasoning is shaky.

At the risk of disappointing the reader, I must say that I will not now go so far as to suggest when courts should reverse *Marks* and rely more heavily on plurality reasoning. Although I will suggest a brighter future for pluralitarianism, the starting place is probably in the legislature or in plebiscites. In part, the question is less important for judicial panels than for these other decisionmakers, if only because majority coalitions can form to overcome looming plurality rule — and these coalitions are easiest to organize in the context of judicial panels because bargaining costs are low.²²

One way to think about the emergence and potential instability of the *Marks* rule is to try it out on a deceptively simple case. Imagine that a lower court upholds a tax statute against an attack as to its constitutionality. An

a plurality decision overturning an Iowan statute prohibiting certain trucks from traveling through the state). Many state courts also have regarded pluralities as incapable of producing precedent. *See, e.g.*, *Negri v. Slotkin*, 244 N.W.2d 98 (Mich. 1976) (holding that plurality decisions in which no majority of the justices participating agrees as to the reasoning are not an authoritative interpretation binding on the court under the doctrine of *stare decisis*); *Commonwealth v. Cooper*, 278 A.2d 895 (Pa. 1971) (holding that a decision supported by only three state supreme court judges cannot, under Pennsylvania law, be considered a controlling precedent). *See also* *Planned Parenthood of Southeastern Pa. v. Casey*, 947 F.2d 682, 694 (3d Cir. 1991) (stating that the narrowest ground is as binding on lower courts as a nine-justice opinion).

20 Thurmon, *supra* note 19, at 420 n.3.

21 *Id.* at 420 n.6, 448; Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 Colum. L. Rev. 756, 774-75 (1980); *see, e.g.*, *United States v. Berenguer*, 562 F.2d 206 (2d Cir. 1977) (citing plurality opinion in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), as authority for the "inadvertence" requirement for evidence obtained through warrantless searches); *United States v. Cushnie*, 488 F.2d 81 (5th Cir. 1973) (similarly citing plurality opinion in *Coolidge* as authority for the "inadvertence" requirement). *See also* *Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548, 553 (3d Cir. 1985) (holding that although the opinion of less than a majority of the Pennsylvania Supreme Court is not a controlling precedent on an issue of state law, such an issue is not to be ignored by federal court in ascertaining Pennsylvania law, and hence, plurality opinion could be treated as Pennsylvania law where a majority of the Pennsylvania Supreme Court concurred in result and intermediate appellate courts of statewide jurisdiction had treated the plurality opinion as representing the view of the majority of the Supreme Court).

22 I will assume here that transaction costs are lower where there are fewer parties.

appeals panel then votes 2-1 to reverse; the first judge reasons that the statute is unconstitutional because it imposes retroactive burdens and all retroactive burdens violate the Constitution, while the second judge reasons that it is unconstitutional because the particular statute retroactively burdens only members of a discrete minority. Under the *Marks*, or narrowest-grounds, doctrine, the second judge's reasoning is to be taken as the reasoning of the court because it strikes down fewer statutes.²³

Eager readers, experienced in public-choice matters perhaps, will already see the mischief inherent in this rule of construction, which we can associate with *Marks* or the idea of narrowest grounds or (perhaps more accurately) narrowest majority. The best commentators have already noted the problem, though no one suggests (and for good reason) that we would be much better off following a plurality, learning nothing from the divided opinion, or even insisting (as we do for dispositions) that the majority go back to work and agree on its reasons.²⁴ Besides, if we construe majorities for one purpose, we could just as well construe them for the other. It would be useful to uncover a reason to treat reasoning, or precedential impact, as different from disposition.

Plurality decisionmaking is not limited to reasoning by judicial panels, and it cannot, in any event, be so neatly limited by judicial practices or by legislative instructions. Panels are sometimes (and, in some jurisdictions, often) used as trial courts, after a fashion, and we can think of these judicial panels or commissions as powerless when they split (as in 1-1-1), but empowered through majority agreement to impose actual remedies, such as injunctions (including structural relief) or money damages (or no relief). In other kinds of cases, there are obviously other remedies or choices. Thus, a commission might be split three or more ways (with no majority) as to how to allocate an available radio frequency or on the question of what to do with an alleged monopolist.

Finally, it is worth repeating that even where courts are seriously constrained to reach majority decisions when disposing of a case, honest

23 Illustrative cases include *Planned Parenthood of Southeastern Pa.*, 947 F.2d at 694 (stating that when the court splits but the majority strikes down a law as unconstitutional, under the *Marks* doctrine, the authoritative standard will be that which would invalidate the fewest laws as unconstitutional).

24 See Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. Rev. 123, 133-34 (1999) (discussing the tally of votes on the Supreme Court in producing judgments); Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 Cal. L. Rev. 1, 7-11, 26-27 (1993) (discussing collegial adjudication as a collective enterprise and pointing out the various ways a court can construe a split opinion in a subsequent case).

disagreement as to reasoning has a way of invading the disposition step, albeit in unrecognized fashion. If a majority votes to remand but this majority is split as to the reasons for the remand, the lower court on remand must essentially construe the various decisions.²⁵ It is then a bit fanciful to say that a majority of the appellate panel agreed on a disposition. The superficial rule may require majority agreement as to disposition, but the assembling of this majority may be no more than a formality from the perspective of the lower court (not to mention the litigants), which must decide what is or is not constitutional or some other such thing. The import of the appellate decision is in the details of the various (nonmajoritarian) instructions, explicit or not as the case may be. Indeed, the lower court may be just as interested in the reasoning of the dissenters as in the reasoning of those who concurred in the "majority" decision, inasmuch as the lower court has its eye on the next round of review when the old dissenters may well turn out to be part of a new majority.²⁶

25 See, e.g., *Anker Energy Corp. v. Consolidation Coal Co.*, 177 F.3d 161 (3d Cir. 1999) (noting that *Marks* is meaningful only where one opinion is truly narrower than another); *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997) (questionable finding of narrowest grounds); *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325 (4th Cir. 1996) (applying the *Marks* rule to interpret the split opinion in 44 *Liquormart Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996) (eight justices in three separate opinions concluding that keeping alcohol prices high to keep consumption low is unconstitutional, but disagreeing on whether the price ban would advance the state's goal of temperance or whether the objective could be reached by taxes or other means)); *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994) (concluding that Justice Souter's opinion was the narrowest in *Barnes v. Glen Theater, Inc.*, 501 U.S. 560 (1991) (four separate opinions upholding an Indiana statute prohibiting public nudity)); *Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. 1994) (discussion of the *Marks* rule, how to interpret plurality opinions, and the precedence of plurality opinions); *Campbell v. United States*, 962 F.2d 1579 (11th Cir. 1992) (concurrence construes Justice O'Connor's opinion as the narrowest in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (O'Connor upholding a statute restricting abortion because it imposes no undue burden)); *Planned Parenthood of Southeastern Pa.*, 947 F.2d at 682 (exhaustive statement of *Marks* rule with application to Supreme Court's abortion jurisprudence, but little recognition of the possibility of a nonexistent "narrowest" grounds); *Schultz v. City of Cumberland*, 26 F. Supp. 2d 1128 (W.D. Wis. 1998) (using *Marks* to construe *Barnes*, *supra*); *Nakatomi Invs., Inc. v. City of Schenectady*, 949 F. Supp. 988 (N.D.N.Y. 1997) (trying to derive a controlling standard from the plurality and concurring opinions in *Barnes*, *supra*); *Commonwealth Edison Co. v. United States*, 46 Fed. Cl. 29 (2000) (relying on narrowest-grounds plurality that special assessment is a tax rather than a taking).

26 Note that the majority coalition's members face something like final offer arbitration in the lower court. This lower court, or other future interpreter, is likely to

B. Misunderstanding the Majority's Decision

A subsequent court can surely misconstrue an earlier judicial panel's preferred disposition if the panel is permitted (by the convention of that jurisdiction) to split in a way that avoids a majoritarian statement of the result. Misconstruction can pertain to reasoning as it does to disposition, but it is useful to see the problem in both contexts, or stages, especially because there is a tendency to treat reasoning — which is, in large part, the precedential value of the case — and disposition differently.

A legal system can push a seriously divided court to reach a majority disposition, force (or allow) it to say it cannot decide the case, or construe a split vote in a way that uncovers a simple majority for some result. Under American law, civil and criminal juries — which are normally asked to reach supermajority decisions — are pushed to the first two of these alternatives,²⁷ and so perhaps it is not surprising that we similarly avoid the third option where judicial panels are in use.

Imagine, for example, that a five-judge panel is entrusted with a criminal sentencing decision and that it divides as follows: two judges think the penalty should be 25 years of imprisonment, one favors 10 years, one favors 8 years, and the last votes for 0 years. The plausible choices for a judgment are: 25, because it attracted the most votes; 10, because a majority can be construed as favoring at least 10 (or, equivalently, because a different majority can be construed as favoring no more than 10); no decision, in which case we might empanel different judges to try again; allow a lower court decision (if any) to stand; or empanel the same judges to try again — which is to say refuse by convention or law to accept this split among the five jurists. Most American observers will predict that we choose the last of these options, forcing the court (albeit, in the United States, rarely of size five) to reach a simple majority judgment.²⁸ I think it is almost fair to say that

feel compelled to choose as the narrowest grounds one of those reasons articulated by a member of the majority coalition. Cutting only slightly in the other direction is the fact that the matter might return to the once-divided court.

For a decision that struggles with the narrowest-grounds idea, see *Anker Energy Corp.*, 177 F.3d at 161 (finding a split decision useful only in its immediate disposition of an (unconstitutional) statute).

27 In the criminal context, juries in some jurisdictions are famously pushed with instructions and threats. See Paul Marcus, *The Allen Instruction in Criminal Cases: Is the Dynamite Charge About to Be Permanently Defused?*, 43 Mo. L. Rev. 613 (1978). But the idea in the text is simply that the same systems that encourage and push juries to reach agreement are likely to push judges (who need only simple majorities) to do the same.

28 Again, at the risk of repetition, I think that such a system allows for one of the other options by allowing splits as to reasoning, inasmuch as future courts or lower courts

some jurisdictions go with the second option, construing a majority in favor of 10,²⁹ but most go with the last (or at least some version of the "no decision" option), and none accepts 25 years, or the plurality decision.³⁰

If we were to construe the majority's decision — somewhat along the lines followed by the *Marks* doctrine with respect to the court's reasoning, but transported here to the matter of the court's immediate disposition — and we³¹ seek the narrowest *result*, or disposition, supported by a majority, we would almost surely settle on 10 years, listed here as the second plausible option. This construction is so likely to be correct that it is almost too academic to insist that a court behave itself, play marbles under the rules set out for it, and return a judgment signed by an outright majority. It is almost insulting to poll the panel in pointed fashion, asking for raised hands as to whether the panel really prefers 10 over 25, 10 rather than 8, and 10

may understand the choice as to sentence based not on this court's judgment but on its opinions or reasoning. The more this is so, the more the two strands of the discussion in this section collapse into one.

29 An interesting example in Israeli law is the Courts Law (Consolidated Version), 1984, § 80, 38 L.S.I. 271 (1983-84):

(a) Where the judges of a court panel have differing opinions, the opinion of the majority shall prevail.

(b) Where there is no majority for any one opinion in a civil matter, the view of the senior judge shall prevail.

(c) Where there is no majority for any one opinion in a criminal matter (1) the court shall examine whether there is a majority opinion over any finding of fact, element of the offense or any other issue requiring the decision to acquit to convict, and shall decide accordingly; (2) should there be no majority opinion over the type of punishment or its extent, the more severe view shall be joined to the more lenient view, closest to it; should the views be divided over the severity of a certain punishment or its measure, the view of the senior judge shall prevail. Under (c)(2), we would combine the 25 and 10 for a sentence of ten years, thus reaching the "narrowest grounds."

Compare Military Justice Law, 1955, § 392, 9 L.S.I. 184 (1954-55) (forming the narrowest majority where there is no majority on a military tribunal by decreeing that the supporter of the most severe sentence shall be deemed as joining in the second most severe sentence decision); *with* Administrative Tribunal Law, 1992, § 41, S.H. 90 (stating that the opinion of the chair prevails where a panel of three or more members produces no majority).

30 Unless, perhaps, 25 is the result favored by the voter with tie-breaking authority. I have not found a jurisdiction with such a rule, but it is not unimaginable. We have already seen that in a civil matter, the law of Israel apparently resolves a 1-1-1 division by following the senior judge. *See* Administrative Tribunal Law, 1992.

31 We might imagine the frontline decisionmaker to be a lower court, a prison warden, or even a clerk of the court.

rather than 0. Yet it is possible that a coalition favors 10 in this non-cycling manner, but that pride and polling methods, or even perceptions based on the way questions have been framed, have kept judges from revealing their second choices, and there is, therefore, something to be gained from explicit pairwise competition.

In the absence of these questions, and honest responses to them, we may misconstrue the majority. A narrowest-majority rule is not always easy to apply — if only because it suggests that there is always such a majority when, in fact, none may exist. Worse, there may be a majority and we may misconstrue it. As for the first of these troubles, the judge who votes for 0 may truly regard 25 years as preferable to 8 or 10. This judge may think the defendant should be set free because of some procedural problem, for instance, but if there is to be punishment, the judge regards the crime as equal to or worse than others that have produced 25-year sentences. If this judge attaches great value to consistency, then it is plausible that the judge's preference ordering across the four options is 0-25-10-8. Meanwhile, it is plausible that the judges who vote for 10 and 8, respectively, simply rank options relative to their proximity to their first choices. The 0 option is better than 25, and so forth. Now we have a majority preferring 25 over 10 (or 5), a majority preferring 10 over 0, but a majority preferring 0 over 25.

Students of public choice will understand this example as a reminder or warning that the *Marks* doctrine is in most trouble, or is in fact incoherent, when there is no Condorcet winner, which is to say when there is an underlying voting paradox. There is no stable majority, and the search for a narrowest one is futile. The narrowest-majority rule presupposes a single spectrum of a kind that does not produce cycling.³² These judges cycle "because" the illustration slips in the value of consistency, as a way of explaining why most but not all judges prefer alternatives as they are "closer" to their first choices. But cycling is easily brought about once a second value or spectrum is introduced. In any event, courts that look to apply the narrowest-majority rule do not usually share this understanding of instability

32 To be fair, courts recognize this to a degree when they insist that the *Marks* rule is applicable "only where one opinion can be meaningfully regarded as 'narrower' than another and can represent a common denominator of the Court's reasoning." *Rappa v. New Castle County*, 18 F.3d 1043, 1057 (3d Cir. 1994) (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc)). This common denominator can occur even in the dissent. See *Am. Trucking Assoc. v. Larson*, 515 F. Supp. 1327, 1338 (1981) (finding Rehnquist's dissent from a plurality to be "the narrow view").

or the voting paradox.³³ Courts can find a majority where there is none, so to speak.

There will be cases where the problem is obvious enough so as to trouble even those who do not know to look for it. Returning to the case of injunctive relief versus damages (and imagining that we were to accept split disposition decisions), if one judge prefers an injunction, another votes for damages, and a third supports the status quo (no relief for claimant), then it is perhaps easier to see that a *Marks*-style decision for money damages is on shaky ground. It is true that injunctive relief is normally thought to be stronger than — or even to include — damages. Indeed, from a bargaining point of view, a decision for one party and against another might lead the latter to bargain for the right to act as before, and the extracted payment will normally need to be greater if the adversary has secured a "property right" in the form of the injunction and a lesser payment if the court has merely awarded money damages. But there are many areas of law where some judges find money damages inappropriate or where punitive damages might come into play or where there is some other reason to think that a judge might (but will not necessarily) prefer injunctive relief, no relief, and money damages in that I-N-M order. In an antitrust case, for instance, the defendant might well prefer some injunctive relief to damages, and it is often hard to say what order the judges or commissioners would assign to the options available for disposing of the case. If the other judges prefer M-I-N and N-M-I, respectively, then there is no narrowest-majority rule, for there is no Condorcet winner; I defeats N but loses to M, and so it goes for each option.

The narrowest-majority rule can, somewhat counterintuitively, be in trouble also — and perhaps more so — where there *is* a Condorcet winner. If the second judge most prefers to avoid injunctive relief (perhaps because this is regarded as overly intrusive or too difficult to monitor) and therefore holds preferences of M-N-I, as is probably more common than the first example's M-I-N, then N is a Condorcet winner. This judge prefers N over I, as of course does the judge who most prefers N. The latter judge prefers N over M as well, as does the I-N-M judge, who might seek to avoid fueling private actions with the prospect of money or who might regard money

33 The "second spectrum" complexity is compounded, after a fashion, by the occasional practice of a judge signing on to two opinions, where there is plurality reasoning. If "narrowest grounds" means that those who subscribe to one reason surely subscribe to another (if offered pairwise comparisons with the dissent, for example), then it should be unnecessary to sign on to two opinions. See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (finding Justice Souter in two opinions on a divided court).

damages impossibly difficult to calculate. With these three judges (I-N-M, M-N-I, N-M-I), we have three distinct first-place choices, but a Condorcet winner in the form of N. As everyone's first or second place choice, it is likely that N would and should emerge as the winner, regardless of how we count votes. But the narrowest-majority rule might well react to these diverse first-place choices with a remedy of M or with a conclusion that M is to be preferred in the next case that resembles the present one. M might well seem like the right compromise, inasmuch as injunctive relief is normally regarded as a stronger form of a decision in favor of the claimant than mere money damages are.³⁴ But such a decision in favor of M would actually miss the fact that a stable majority prefers N or no relief at all. In short, the narrowest-majority rule may well produce the Condorcet winner most of the time, but it can sometimes "falsely construe" an unstable choice to be a majority decision, and it can (even) sometimes "misconstrue" the panel, finding the wrong result as it bypasses an existing Condorcet winner. I return to this distinction below.

While these dangers are not generally recognized, the analytic points (and analogous conclusions) are well known in the context of plurality voting in general elections. Plurality voting can easily miss a Condorcet winner, as when a candidate of the left battles one on the right and a "moderate" third candidate gets fewer votes. The moderate may well be a Condorcet winner, though many electoral systems will award the office to the first past the post, who might even be a Condorcet loser. Even systems that undertake the expense of a runoff election do not check for a Condorcet winner. France, for example, uses a runoff between the top two first-round candidates in its presidential elections, unless one has received an absolute majority.³⁵ But it is easy to imagine an election in which L garners 46% of the vote, R receives 44%, and M receives 10%, but 54% prefer M over R and 56% prefer M over L. The runoff scheme denies

34 See Saul Levmore, *Unifying Remedies: Property Rules, Liability Rules, and Startling Rules*, 106 Yale L.J. 2149, 2154-55 (1997).

35 U.S. Const. art. VII (requiring absolute majority for election of President and providing for a second ballot between the top two candidates if no absolute majority is obtained in the first ballot). The example that follows in the text gives the third-place vote-getter less than 12.5% of the first-round vote in order to make the example work not only for a typical runoff scheme, of which the French presidential election is an example, but also for that used for the *Assemblée Nationale*, where runoffs include any candidate with more than 12.5% in the first ballot. Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* 11 (1994).

this choice of M, although it allows M's supporters to choose, as it were, between the other two candidates — even as they vote sincerely. In any event, most electoral systems do tolerate plurality voting (with or without these runoffs), though some kinds of representation encourage two-party systems and therefore tolerate but discourage plurality voting. These systems thus run the same risk as do judicial panels with split opinions. Legislative practices, built as they are around motion-and-amendment voting, are notable in this regard; a Condorcet winner is bound to emerge if one exists.³⁶

C. Bargaining around the Rule

In actual practice, these plurality rules may not miss camouflaged Condorcet winners so easily. Judges who participate in split opinions (as to reasoning or disposition) will be aware of the way in which these multiple opinions are to be construed. If the jurisdiction follows the narrowest-majority rule, then a judge who predicts that this rule will lead to a misapplication or misconstruction of the judge's own preferences can either write an opinion that warns off future interpreters or, better yet, bargain with other judges in order to produce a clear, majority opinion. There is no need to wait for misconstruction, because our judge has the power to form a clear coalition in the first place.³⁷

36 An idea noticed and discussed in William H. Riker, *Liberalism Against Populism: A Confrontation Between the Theory of Democracy and the Theory of Social Choice* 69-73 (1988). See also Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 Va. L. Rev. 971, 1012-21 (1989).

37 This is as good a place as any to note that there are obvious links between the discussion here, regarding the disposition-reasoning distinction (not to mention the possibility that bargaining can reduce purposeful distinctions), and the question of whether we should ask judges to vote on the *issues* presented in cases they consider as opposed to the *outcomes* (normally in the form of dispositions). Indeed, in some sense, or simply some cases, the issue-outcome distinction is the same as the reasoning-disposition difference. One argument for abiding by outcome voting is that strategic (or passionate) judges might not respond sincerely when asked about issues, so that we might as well ask about those things that are less susceptible to strategic behavior. Somewhat similarly, we might elicit more information by giving judges greater freedom as to their stated reasoning, because a constraint (such as a required majority reasoning) might induce strategic responses. I will not explore this line of analysis much further.

A more obvious connection is made through the observation that (setting aside strategic behavior) we might prefer issue voting on Jury Theorem grounds. Indeed, the judges on a panel might themselves reason that when a decision depends on multiple issues, the simple majority is the best way to decide each issue and everyone — including a majority that would have individually come to a different outcome — should be pleased to abide by the result that is reached following issue voting,

To continue with the earlier example — which, for illustrative purposes, deals with a disposition rather than with reasoning — if a three-judge panel is divided among injunctive relief, money damages, and no relief, but the injunction-preferring judge actually favors no relief over money damages (I-N-M), while the others are N-M-I and M-N-I, the first judge can either write an opinion explaining why money damages are least favored or else can "bargain" with the second judge for a single, joint opinion. This opinion might be written in favor of N, but might provide dictum suggesting that future developments in the law or different facts might lead the same writers to decide a similar case in favor of remedy I.

I refer to this idea or process as one of bargaining around the narrowest-majority rule, although it might not be *around* the rule at all. Inasmuch as N is the Condorcet winner in this example, defeating both I and M in head-to-head competition, it might be fair to say that N is truly the narrowest-majority — indeed, the only majority — decision, but that the bargain and the written opinion are necessary tools in order to avoid later interpretations that might misconstrue M as the (more intuitive) majority decision. An important aspect of this example is that the coalition is stable. The third judge is unable to strike a deal with the first in favor of M and is unwilling to strike a deal in favor of I.

It can also be misleading to refer to this process as *bargaining* among judges. The discussion thus far has allowed for, or even supported, the notion that judges might try to find a "right" answer, along the lines of the Jury Theorem, rather than advance their own agendas or preferences. A sensible analysis would allow for numerous possibilities; judging is sometimes about preferences, sometimes about the common search for right answers, at times about power struggles among personalities, and so forth. But the trading discussed here is relevant for most of these motivations. If a judge sees that the narrowest-majority rule is in danger of settling on M, but knows that N is preferred to M by a majority, then a judge seeking the right result, and with some faith in the group (along the lines of the Jury Theorem), may act now in order to prevent an error later on. For this result to hold, all we need to add to the conventional Jury Theorem is the assumption that each

whether such voting is formal or informal. Put this way, I think the case for issue voting is a good one. *See generally* Kornhauser & Sager, *supra* note 24, at 30-33 (calling for a reexamination of the Supreme Court's historical norm of case-by-case, rather than issue-by-issue, voting); David Post & Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 Geo. L.J. 743, 745 (1992) (arguing for issue-by-issue voting as a superior means of guiding lower courts).

voter (or even the average voter) is more likely than not to rank any pair of options correctly. The Theorem starts with the idea that voters are choosing between two options and that each is more likely than not to be right. But now we have a situation with three choices. If a majority coalesces around one option, then we can be even more confident that this group is right.³⁸ If the group is hopelessly split when responding with their first choices, we can now ask whether there is value to the ordering beyond these first choices. It seems reasonable to assume that yes, the same group that is relied on when it agrees on, or at least produces a solid majority in support of, a first choice can be relied on to compare any two choices.

No doubt, it is possible that the preceding step is in error and that voters who are reliable in picking a correct answer are unreliable when it comes to ranking any two options. Once we know a group is split on the first choice, we may update our assessments of their judgments and guess that there is no value to the rest of their selections. If we are choosing among preferences, then we surely should take these second choices into account. But if we are searching for a right answer, then we might discount the judgment of a group that could not agree, or muster an unambiguous majority, when reporting first choices. There is more that could be said here, but I think it reasonable to end this line of inquiry and to suggest that in most settings we will value second choices (and more). And if this is the case, then the discussion can continue so long as we understand the idea of bargaining around the rule to include not only the satisfaction of preferences but also exchanges of information in a manner that encourages the group, or its subsequent interpreters, to reach the right answer where one exists.

With all this in mind, we can revisit the unstable case as when, for example, the three judges can be described as: I-N-M, M-I-N, and N-M-I. We may again see a 2-1 opinion in favor of N (or any alternative) that is the product of an explicit or implicit coalition, and we may be unable to discern not only whether this is a question regarding which the Jury Theorem applies, but also whether (assuming no right answer) it is a true Condorcet winner or merely the result of superior bargaining (by the third judge), insufficient communication, procedural maneuvering, manipulative law clerks, deferential judging (based on personality or perceived precedents), or any of a number of other factors. Nor is there much reason for the judges to stay silent and rely on future courts to discern a narrowest majority. They can predict such a future divination (because M is normally thought to be

38 Thus, the more persons in a lineup including a criminal suspect, the more impressive it is if the witness picks the person suspected by the police.

a step toward I), but by assumption here, a majority does not much like that outcome. I suppose it is possible that judges are content to leave things open for future misinterpretation on grounds that future courts will regard these narrowest-majority precedents as relatively weak precedents. There is some evidence of that.³⁹ A judge who is willing to trade away a middling compromise for a one-in-three chance of victory might be happy to produce the weakest possible precedent in order to leave room for future victory. Most obviously, if each judge is confident (inconsistent as that may seem), then each might think the future will bring about his or her first-place choice. Again, this provides a reason not to bargain now for one's second choice. All this depends, of course, on the notion that future courts are more likely to abide by clear 2-1 majority decisions than narrowest-majority interpretations of 1-1-1 splits.

D. Disposition versus Reasoning

1. *A Robust Distinction*

If we are to make progress toward a positive theory, we need to explain the distinction between disposition and reasoning. It is not only on judicial panels that we try to force a majority decision — as to disposition but not reasoning — out of a divided panel. We allow or even encourage these panels to display their disagreements as to reasoning for future construction (or misconstruction), but we do our best to extract a majoritarian disposition. Similarly, if a civil or criminal jury is divided, we strongly encourage the members to deliberate further and to reach a decision at whatever supermajority level (and level of confidence) the law imposes. We do not ask these jurors for their individual dispositions in order to have the judge or

39 See, e.g., *Texas v. Brown*, 460 U.S. 730, 737 (1983) (plurality opinion) (stating that a plurality opinion declaring that only when evidence was discovered "inadvertently" could it be seized pursuant to the plain view exception to the Fourth Amendment's warrant requirement is "not a binding precedent" and is merely "the considered opinion of four Members of this Court" that should be "the point of reference for further discussion of the issue"); *King v. Palmer*, 950 F.2d 771, 782 (D.C. Cir. 1991) (en banc) ("When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be.") (discussing Justice O'Connor's concurrence in part and concurrence in the judgment in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) (overturning a 100% contingency award under a fee-shifting statute) (4-1-4)). See also John F. Davis & William L. Reynolds, *Judicial Cripples: Plurality Opinions in the Supreme Court*, 1974 Duke L.J. 59, 72 (1974); Novak, *supra* note 21.

a future jury construe their likely (super)majority disposition. On the other hand, we do not ask them to agree on their reasoning. Most jurisdictions allow these jurors to be interviewed about their reasoning and deliberation, so that future parties and their attorneys can construe, or misconstrue, the winning coalition.

This difference between disposition and reasoning survives the leap to other voting groups and lawmakers. Legislatures and their committees vote in up-or-down fashion on proposals, and no agreement as to reasoning is required for a bill to become law. Again, there are attempts to construe the "intent" of the legislature after the fact, and this encourages legislators to bloat the legislative record, but public choice enthusiasts understand that there may be no single or even coherent legislative intent. It may go too far to say that legislative intent is impossible,⁴⁰ if only because large majorities sometimes are single-minded, but the point is that we find an important distinction between disposition, on the one hand, and intent and reasoning, on the other.

Nor could we even fathom encouraging agreement as to reasoning in general elections. Millions of voters may support one party or politician rather than others, but we rarely try to do much with their reasoning. Indeed, we think of successful politicians as adroit in securing support from different constituents for disparate, unrelated, or even inconsistent reasons. Occasionally an election is sufficiently focused on a single topic so that the winner is said to have a mandate on some issue. But even this conclusion seems to follow the support of a supermajority as much as it does the centrality of a given issue.

Finally, the same is true for a general election that avoids intermediation between voters and issues. Some jurisdictions use plebiscites, so that we have the electorate's up or down decision or advice on some matter, but again, such a vote is about a disposition and not about reasoning. It would seem foolhardy to try to discern the majority's will as to its reasons. It might be convenient to know the majority's will and to discern it from a vote. After all, new circumstances may arise, as when the electorate was misinformed or when exogenous facts change after the plebiscite. But in these situations, there is chaos or perhaps an attempt to poll the electorate all over again. Construing the old majority's reasoning is plainly perilous.

40 Kenneth A. Shepsele, *Congress Is a "They" not an "It": Legislative Intent as Oxymoron*, 12 Int'l Rev. L. & Econ. 239 (1992).

2. *Misconstruction versus Arbitrary Resolution*

If the members of a panel are divided as to the first choice regarding disposition, there is some chance that they nevertheless generate a Condorcet winner. But of course there is also a chance that they do not generate such a winner, so that their disposition selections cycle. If there is cycling and we insist on a majority decision, then either procedural practices will matter (where we might consider seniority and many other things to be part of procedure) or there will be long-term trades or arbitrary dispositions or vague remands or some other means of reaching a decision — even though there is no underlying stable, majority decision. Stability might then be imposed by conventions that favor precedent. And if we do not insist on seeing a majority disposition out of this split panel, but we do allow future interpreters to construe the decision of this first, cycling court, then the future will likely bring about some reconstructed disposition, even though such a decision will be false. It will be false in the sense that there was no stable majority to be revealed, but the future interpreter has reason to "find" one. We might say that in a situation where procedural rules or arbitrary rules or tosses of coins might have produced a winner, we allow a future interpreter to do the work for us. Indeed, there is something to be said for making the agenda-setter (as it is sometimes called) a party that is rather remote from the earlier, split, cycling panel. An optimist might say that a future court, or other interpreter, is something of a randomizing agent, with some possibility of using the advantage of time gone by to see arguments or applications not apparent to the first panel.⁴¹

And if there is a Condorcet winner in the first place, but we do not insist on seeing it emerge or we allow the judges (who are divided on their first choices) to remand with vague instructions, then there is some chance that future interpreters will correctly discern this winner, or disposition, and some chance that they will misconstrue it. This is the distinction offered in Section II.B. above.

My argument is now fairly simple, though peppered with small leaps of faith. One step involves the idea that the universe of splits as to (first choices regarding) reasoning is more likely to reflect cycling majorities than is the universe of splits as to disposition. One way to defend this pivotal conjecture is with the observation that a panel, consisting, let us imagine,

⁴¹ Of course, any advantage from the passage of time must be balanced against the uncertainty imposed by a practice allowing the first court to announce its split and offer no majority disposition.

of three judges, normally has three disposition choices: affirm, reverse, or remand. There are obvious nuances, but thinking of these options as limited to three is useful, fair, and, if anything, ungenerous to the larger argument advanced here. In contrast, when the panel seeks a majority regarding its reasoning, there are often many more options. Each judge might have a single most-preferred reason or best combination of reasons, but the search for a Condorcet winner can take a group to new options. Just as the judges might find that some compromise between two reasons or some third novel reason might be each judge's second choice and therefore easily preferred in head-to-head competition with any other proffered reason, they might also find (time and deliberation permitting) that the introduction of new alternatives divides coalitions and generates cycling and instability. Generally speaking, the introduction of new alternatives is the easiest way to turn stability into instability, and so it is quite plausible that if the rules permit unlimited introductions in the reasoning phase, so to speak, but two or three or four alternatives in the disposition phase, we should anticipate more instability with regard to reasoning than with respect to disposition.

There are two reasons why this might not be so and why disposition rather than reasoning might trigger more cycling. The first is that there will be times when one goal or consideration dominates all others, so that judges' reasoning will fall along a single spectrum and only rarely lead to cycling. Judges might differ as to disposition and be divided among the three available options, but they will be more agreeable as to reasons. In these cases, cycling is more likely with respect to disposition. It is difficult to provide examples, and this difficulty suggests why I do not give too much weight to this first reason, however logically possible it may be. Even where there is an overriding element to many voters' reasoning, the diversity is in the application. All judges might agree that the right approach to a legal question is to find the legal rule that reduces the court's docket or promotes the right to privacy or saves on legal fees or whatever, but there can be wild disagreement (in non-single-peaked fashion) as to whether this end is promoted by affirming, reversing, or remanding. Still, other things equal, the more there is agreement as to the "reason" for a disposition, the less likely is cycling. But because cycling remains possible even with agreement on a reason (or "grounds" for a decision) and because it is common for there to be more reasons than disposition options, we should be comfortable with the idea that there is more likely to be a Condorcet winner as to disposition than as to reasoning.

The second reason to hesitate about the claim that there is more cycling with respect to reasoning than with respect to disposition is that the narrowest-grounds rule associated with *Marks* limits the inquiry to the

reasoning supporting the "majority's" disposition decision.⁴² Our future interpreter is not asked to construe the narrowest precedential statement that would have appealed to a majority of the panel. Instead, the search is for the narrowest argument that works for — and, presumably, is at least partially articulated by — the winning disposition coalition. There may be more entries in the field of narrowest grounds than in the set of available dispositions, but the number of voters is normally smaller when we deal with reasoning, because we are limited to those who formed the majority coalition as to disposition. Note that in some cases, this point is strong enough to mean that the *Marks* rule as applied to majorities cannot be falsely construed, because there can be no cycling — as when two judges form the necessary majority. In this special case, the future interpreter might well misconstrue the judges' own shared view as to which are the broader and which the narrower grounds, but the point is that these judges do not agree as to the reasoning itself, so that the worst (and best) the interpreter can do is to choose in a way that breaks a tie.⁴³ Put plainly, in the case of real misconstruction, we should expect that judges who could divine the future interpreter's misconstruction would agree in advance to save the day in favor of their preferred option. But in the case of false construction, as in the case of misunderstanding the judges' views as to the narrower ground with a 1-1 division as to reasoning, these two judges would not agree — at least *ex post* — to take the decision away from the interpreter. One judge will be pleased by the interpreter's "error." At the risk of confusion, I will add that even if we switch gears and think of the voting (not as a matter of judicial preferences but) as a Jury Theorem matter, these divided judges will be pleased to employ the future tiebreaker.

Although this second reason is interesting, it is of little concern, I think, precisely because it is most important with a split among three judges. With more judges than that on a panel, the decrease in the number of voters that is caused by looking not at the whole panel but only at the "majority's" opinions does not reverse the usual intuition that cycling is more likely with respect to reasoning than to disposition. The large number of reasons will dominate. But with a panel of three and just two judges in the majority coalition, reversal is more likely — and yet we can be more confident that the judges will bargain around the rule. In short, we might say that a divided panel of three is forced to reach majority agreement as to disposition because

42 *Marks v. United States*, 430 U.S. 188, 193 (1977) ("the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds ...").

43 Note that in some cases, we may wish that we had asked the judges to set out their plurality (or majority) reasoning before voting on disposition.

we fear that otherwise a future interpreter will misconstrue their opinions. A Condorcet winner might be missed, so we force the group to examine the various alternatives in order to encourage the members to reveal the presence of a stable 2-1 winning disposition. Divided or not, the panel of three is not forced to agree on a majority line of reasoning, or precedential impact, because it is much more likely that they will then simply produce an arbitrary or unstable result. If they are, indeed, cycling, we would prefer for an outsider to choose among them. If they are not cycling, we are relatively confident that they will overcome bargaining costs and announce their reasoning in unified (or at least 2-1) fashion so as to avoid this future misconstruction.

The argument is simpler for large panels. We try to force majority opinions as to dispositions because we fear that we will otherwise misconstrue the majority. There may really be a Condorcet winner, of course, even though there is a complete split as to first choice. Nine voters choosing among three options can obviously cycle, but there is also a good chance that they will not. But once reasoning is introduced, the possible compromises and alternatives are so numerous that we might regard cycling as significantly more likely. Now our conventions encourage majority agreement if possible, but where no single line attracts a simple majority, it is perhaps much more likely that there will be cycling (than in the choice among available dispositions). The critical idea, then, is that we are more inclined to force majority agreement the more we fear otherwise missing a Condorcet winner.

III. FROM JUDICIAL PANELS TO COMMON PLURALITIES

A. Legislatures, Committees, and Broader Electorates

The foundation is now in place for an aggressive, optimistic, and positive theory of plurality voting in the judiciary and elsewhere. The more voters there are, the more difficult it is likely to be to bargain around the rule in favor of Condorcet winners and for self-protection against unattractive future construction. And the more options there are, the more likely there is to be cycling rather than such a majoritarian winner. If we put these two notions together, we can sort out some common practices. Section III.B. will turn from the descriptive to the predictive, with some observations and suggestions about plebiscites.

In the first place, and at the risk of naive simplicity, only judges impart precedent.⁴⁴ Committees, legislators, and the voting public all feel free to

44 Although it is interesting to read some of the best work on the meaning and

change course at will and to treat past decisions as mere signals. These groups all vote on dispositions rather than reasons. We know now that a new way to think about this difference between courts and most other bodies is that legislators and voters in general elections could not possibly vote on their reasoning because there are too many options (and thus logistical problems) and also (therefore) too great a likelihood of cycling. The electorate might like to guide future interpreters, for all sorts of questions will arise between election days. But there is little point in looking for a Condorcet winner as to the reason a population voted for a given Republican, Democrat, Proposition, or other such thing. We could not sensibly aggregate votes on a precedent even if we wanted to do so. The same is probably true for legislatures. Committees, on the other hand, could vote on reasoning as well as disposition, for they are often small enough and equipped to look for possible Condorcet winners. But they have no need to establish precedent. Precedent is a tool of delegation, as when courts seek to guide lower courts or other courts looking for an indication of the law of a given jurisdiction. Committees have no such audiences.⁴⁵

Note the dynamic effect of voting on reasoning as precedent. Courts are nearly unique in offering their reasoning in such formal fashion, and therefore they are different in that disposition decisions may be affected by bargains over reasoning. Judges know that their reasoning forms precedent, and so in organizing majority coalitions as to dispositions, these stated reasons are an important currency for bargaining. On a divided court, a judge who seeks a partner for disposition purposes has mostly the reasoning to offer. A swing voter can wait to see the proposed reasoning of the other judges and can easily influence the content of the reasoning or precedential message.

Apart from the shadow cast by this interesting second currency, judicial voting as to dispositions is much like legislative and committee voting. The judges do not engage in formal motion-and-amendment voting, but given the small number of options and voters, it is as if they do so. Coalitions do not form around a remand, for example, unless it is plain that there is no clear majority preferring reversal (or affirmation). It is easy for the members of the panel to check out the possibility of a Condorcet winner,

point of precedent, thinking instead of legislatures, commissions, or international organizations at every point that judicial panels are the authors' intended subjects. See, e.g., Frederick Schauer, *Precedent*, 39 *Stan. L. Rev.* 571 (1987).

45 It is also possible that committee members are likely to have more reasons than judges, and this can cause more cycling, as discussed earlier. But inasmuch as we have no need for another, speculative explanation as to the judiciary-committee distinction, I will not pursue this possibility.

although there is room for some bluffing and strategic voting.⁴⁶ In all these arenas, the advantage of this sort of up-or-down voting is that it will generate a Condorcet winner if one exists. Even large legislatures will find Condorcet winners through repeated pairwise comparisons.

Although this sort of legislative (and judicial) practice is universal, it might be a mistake to make it seem inevitable. We can barely imagine a world where legislatures sometimes switch to plurality or other voting, much as courts do as to reasoning. But that is a topic for another, more normative project. The present effort is positive in character, and here it is appropriate to emphasize that we (apparently) encourage forced majorities where we think, or the more we think, that there is a Condorcet winner to be found and where we fear that plurality voting (or some other alternative) will produce misconstruction.

Where no Condorcet winner is likely, there is, as already suggested, some benefit to be derived from a (less manipulative) future interpreter. That tool is also common in the legislative arena, both in the form of future legislatures and courts' construing legislative gaps.⁴⁷

In some countries, plurality votes are used for legislative (which is usually to say parliamentary) elections, and these plurality votes translate into multiple parties. But then these parties cannot enact laws with plurality legislative votes, but must form simple majorities. Much has been written about proportional representation and its alternatives, but this is not the place to add to that literature. The point thus far is simply that plurality votes of this sort do not really amount to plurality lawmaking, because the lawmakers or political parties must assemble real majorities for legislative action.

Legislative committees are like judicial panels in their ability to find Condorcet winners and to bargain for such winners (or at least to ensure that Condorcet losers do not emerge) when they fear future interpreters — or, in the committee case, other sources of legislative proposals. Moreover, given that their proposals must pass legislative muster, it would be surprising if committees were to use plurality voting. We should expect committees to look like miniature versions of the legislatures that empower them.⁴⁸

46 See Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 Mich. L. Rev. 2297 (1999).

47 And I have deferred the possibility of identifying categories of cases for which plurality voting might be introduced in the legislature precisely, or partly, where cycling seems likely.

48 I would not press the analogy too far. If a legislature requires a supermajority vote for some matter, should we expect gatekeeping committees to require the same supermajority for passage? Yes, on grounds of miniaturization, as suggested in the

B. Plurality Plebiscites

The preceding Section was cautiously positive, suggesting that the world we know might be better explained, or understood, through the lenses offered here. In contrast, as we focus on large-scale votes, it becomes apparent that there is not only room for innovation, but also grounds to predict more of a future for plurality voting.

Imagine, by way of illustration, that millions of voters are asked to approve a peace plan or secession proposal. To the extent that we think there is a right answer, that most voters are more likely than not to get the matter right, and that we have no unbiased way of identifying experts, we know from repeated discussion of the Jury Theorem that a majority vote seems right. But this is not quite correct. The Theorem contemplates two options, as when a jury chooses between conviction and acquittal. In fact, one way to think about the law's strategy of pushing a jury to reach a supermajority decision is that if the jury has three viable options — acquittal, conviction, and deferral (to the prosecutor or to another jury, say) — then the jury might split three ways and the system's Jury Theorem underpinnings will begin to corrode.⁴⁹

In the case of large-scale plebiscites, it is most unlikely that a matter can be reduced to an up-or-down vote without introducing a great deal of bias, not to mention influence for the drafters who design the terms and language of the plebiscite. In some sense, this drafting "problem" is well known, though it is recognized in the context of thinking of the plebiscite as a matter of preferences rather than as a question with a right answer.⁵⁰ To

text. But no if we are concerned about holdouts and rent-seeking behavior directed at these few voters. The answer is even more vague if we take into account the committee's interest in seeing its proposals pass. Indeed, to the extent that the committee is really assessing a question with a right answer, namely, whether the legislature will pass the proposal in question — by whatever margin the matter requires in the legislature — a simple majority vote is obviously right. But to the extent that the committee is a delegated agency, meant to economize on overall decisionmaking costs, the miniaturization argument is powerful, and we should see a supermajority committee vote where a supermajority legislative vote will be needed. Overall, we might expect variety. Closer to home, my own law faculty requires a serious supermajority for some matters, and convention has it that a committee does not proceed with a recommendation that a mere majority of the committee favors. When I was on a law faculty that abided by simple majorities, committee recommendations were sometimes by a bare majority. This small sample of experiences illustrates the miniaturization idea.

49 In other words, it is easier to imagine that "pushing" the jury leaves intact the belief, or assumption, that most members are more likely than not to get it right.

50 The question is whether direct democracy helps or hurts organized interest groups.

the extent that the matter up for decision has a right answer, it seems unwise to limit the large vote to two options.⁵¹ Even if the gatekeeper, or drafter, is unbiased and as eager as anyone to find the correct answer, it is too easy to imagine the gatekeeper unintentionally eliminating the best answer.

Moreover, the voters cannot really show us the right answer, as it were, because they do not know what plan will be followed if they vote no. This problem can be overcome with a form of succession voting. At great cost, the legal system could promise a series of plebiscites as necessary. Voters would first be asked to vote up or down on Proposal A, but they would know the content of, say, Proposals B through E that would be offered in turn until one is approved. As long as we are prepared to believe that at each stage, these voters are more likely than not to get the question right, the problem can be handled. That we do not proceed in this manner can be blamed on the obvious expense of multiple plebiscites.

But why not offer all the proposals at once? If we are serious about the applicability of the Jury Theorem, then it is no stretch at all to say, for example, that where each voter is more than 20% likely to choose correctly among five choices, then the more voters we employ, the more likely we will get things right if we abide by the group's *plurality* selection.⁵² This result may seem startling at first, but it is more obvious from some angles than others. If thousands of jurors witness an event (a large car screeching

See Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 Chi.-Kent L. Rev. 707 (1991) (questioning claims that a rationally self-interested racial minority is better served by a representative system than by direct lawmaking systems and suggesting that it is easier for a racial minority to pass advantageous legislation in a plebiscitary than in a representative process); Julian N. Eule, *Representative Government: The People's Choice*, 67 Chi.-Kent L. Rev. 777 (1991) (responding to Baker and arguing against the idea that a racial minority is better served by direct lawmaking systems); William H. Riker, *Comment on Baker, "Democracy and Discrimination: A Public Choice Perspective,"* 67 Chi.-Kent L. Rev. 791 (1991) (arguing that because parliamentary procedures allow all motions any member wishes to bring out to enter the voting at some point, while a pressure group can control agenda-setting in a plebiscitary procedure, an interest group gets its best outcome in the representative system and its worst outcome in the plebiscite system).

51 At the risk of citing the obvious, state laws that address the question do require drafting in a form that elicits only an up or down vote. *See, e.g.,* Cal. Election Code §§ 13120 (West 2000) (requiring "yes" or "no" voting on referendum measures); Colo. Rev. Stat. Ann. §§ 1-40-115(2) (West 2000) (same).

52 *See* Christian List & Robert E. Goodin, *Epistemic Democracy: Assaying the Options* (Australian Nat'l Univ. Working Paper No. 2000-W9, June 27, 2000) (Condorcet Jury Theorem generalized to plurality voting over many options).

down a street following an explosion, for example) and there is a right answer ("How many people were in the car?") and most witnesses have a greater than one-in-five chance of getting it right, then we might do well to ask them to choose between one, two, three, four, and five, for example. If 40% choose four and the other voters sprinkle their selections around the other choices, we can be fairly confident that four is the correct answer.⁵³ In some sense, our fact-finding question is whether we should proceed with plurality voting along these lines or instead force the question into a format with up-or-down voting. The latter approach not only requires more votes, which can be unwieldy, but also empowers the drafter in a way that is unlikely to promote unbiased truth-finding.

A subtle problem with plurality voting in this (Jury Theorem) context is that we may be eager for second-place judgments. If there is (by assumption) a correct answer that these voters are more likely than random to identify, then the question is whether a voter who is extremely likely to be wrong can add value by passing judgment on the choice among other alternatives. If, for example, a vote is 40-30-10-10-10 on a matter regarding which the Jury Theorem applies, it is very unlikely that the 10s are right. But by the very assumptions of the Jury Theorem, these incorrect voters might be thought perfectly useful in deciding whether the first or second option is more likely to be correct.

This raises a kind of empirical question: Do we think that voters who are likely to be wrong with their first choices are more likely than random to be right in deciding between the two or three leading alternatives?⁵⁴ Any answer is plausible, I think. An affirmative answer helps make the case for sequential up-or-down votes or for a plurality vote followed by a runoff or two. A negative answer strengthens the case for plurality voting. We can add to this the idea that if the question at hand truly contains two or more subsidiary

53 Note that we might prefer isolation rather than deliberation, in order to avoid biases, herd effects, and the like. For a different intuitive approach, think of two witnesses who identify person #3 in a lineup of five persons of reasonably similar appearances. Is this more or less impressive than 40 out of 100 witnesses choosing #3, with the other 60 evenly spread among the other subjects in the lineup? And what about 100 witnesses who are offered a choice between two suspects in a lineup, with 60 pointing to one and 40 identifying the other? The plurality can be much more impressive than a simple majority, which, in turn, can be more reliable than a small number of (unanimous) voters.

54 Note that in most situations, if we take this second poll, the voters will know the results of the first vote. I will assume that we need not worry about any bias or valuable information this knowledge introduces.

questions with right answers, then second-place information is very likely to be valuable.⁵⁵

Finally, an answer that is question-specific encourages us to empower a future interpreter. For example, witnesses might be divided between those who think there were four persons in the passing car and those who insist on two. But if a substantial (but minority) group voted for five, we might think that this makes it more likely that there were four rather than two, because we might interpret these voters as seeing "many" persons in the passing car.

I turn now to the case for plurality voting where the Jury Theorem is not the issue but, rather, where we deal with preferences. To be sure, many important issues involve a mixture of truth-finding and preference satisfaction, but it is helpful to tackle these components individually.⁵⁶ We might, for instance, imagine a vote, and even a plebiscite, on affirmative action or reparations or refugee resettlement or terms of secession. These sorts of issues are likely to raise subsidiary questions with right answers ("Is peace more likely if we do x?" "Will we adjust reasonably well to an influx of millions of returning people?"). But there are also subsidiary questions of self-interest and wealth redistribution for many voters, so that there are preferences questions mixed in with some of those that bear right answers. In any event, there are important

55 Imagine that we ask voters, in this case, witnesses, whether the person fleeing the scene was A, B, C, or D. They divide 40-30-20-10. It is possible that the right way to go about it from a Jury Theorem perspective would be to ask first whether the fleeing suspect was more than six feet (or 1.8 meters) tall and then to ask whether the fleeing suspect had on a red cap. When we frame the matter as a single, plurality question, some voters choose D because they focus on the cap, say, discounting their knowledge about height. A and B might be the two suspects with the correct cap, and we are eager for those voters who were incorrect as to the cap to inform us about the height question in order to choose between A and B. This suggests a new explanation for deliberation. We hope that jurors who see that a larger number of their peers settle on one answer to a first question will then help the group on the second question. In this sense, the jurors can bargain around the rule of plurality voting.

56 I do not mean to imply that these two components exhaust the field. Plainly, we can have a question that has a right answer, while we find it impossible to identify or deploy voters who are more likely than not to get it right. In principle, we should separate out such questions and agree (by majority vote) to defer to experts. But if we add the assumption that we cannot identify in advance those matters that fall into this category, then there is room for disagreement as to how to proceed. A purist might say that this question of how to proceed is itself a matter of preferences, perhaps of the risk-taking kind, but then we have the question of what to do when many members of the group cannot order their own preferences or cannot do so except at great cost.

questions that are heavily (if not entirely) about preferences, with no separable component to which the Jury Theorem applies.

Motion-and-amendment voting is famously effective at uncovering a Condorcet winner, if one exists. But motion-and-amendment voting, or exhaustive pairwise competition, is also inconceivable with a very large group. We might be able to offer millions of voters a one-time choice among six alternatives, but it is extremely costly to inform voters and to hold elections in a manner that allows for the fifteen head-to-head polls that six choices requires.⁵⁷ Plurality voting — with no bargaining around the rule to exclude alternatives (as is reasonable to assume with a large number of voters) — can easily miss such a winner, as when voters' second choices can combine to defeat all alternatives.

Moreover, plurality voting — as well as any form of voting that tries to elicit information about multiple options — runs the risk of strategic voting. Some voters might organize and guess correctly that if they focus their votes on their second-favorite option, they will combine with other voters to get this choice. Meanwhile, other voters may be too dispersed to do the same with their second choices, or they may misassess the distribution of preferences and organize around the wrong option. Large-scale plurality voting can easily miss a Condorcet winner — as can non-exhaustive pairwise voting (and succession voting).

We are left with many choices, but I will focus on three. The first is to avoid large-scale votes. Unsurprisingly, many countries do not hold plebiscites, and many constitutions give no role to them. This increases the reach of the legislature, judiciary, executive, or other decisionmaking mechanism. Each of these mechanisms has its own shortcomings in discerning and aggregating the preferences of the population, if those are at stake, and in discerning the right answer, if there is one.

A second choice is to allow one of these other decisionmakers, often subject to political pressure and other feedback, to frame a question for an occasional up-or-down plebiscite. With respect to both preferences and right answers, this can be valuable, but there are obvious flaws. From a public choice point of view, we might say that it is possible that this is the best we can do in the real world and it is likely that it accomplishes something useful. After all, the plebiscite gives us a bit of information, and this bit

⁵⁷ With options ABCDEF, we need to compare A with five alternatives (AB, AC, and so forth), B with four (non-A) alternatives, and so forth, so that we need fifteen votes. More generally, we are looking for how many combinations of size 2 (because these are pairwise combinations) there are in a group of n elements. $n!/2!(n-2)!$ provides the number of combinations, so that with n of 5, we have $120/12 = 10$.

can be very useful in both democratic and decisionmaking terms. If the task is not to find a Condorcet winner and not to find the correct answer, but to see whether a given option, X, is better than the status quo, S, then this familiar form of decisionmaking is not bad. Voters may be dissatisfied that they did not have the opportunity to vote for Y, and they may even recognize that they would have voted for Y over X. But dissatisfaction is likely to be more energetic when there are multiple choices and the electorate can observe cycling among XYZ (and agenda-setter influence) or when there is a Condorcet winner that could not emerge. In these cases, there is more salience than when the Condorcet winner is suppressed much earlier and never examined in a public vote. When voters are asked in a plebiscite to approve X or not (and be left with the status quo, S), it is harder to find out after the fact that they favored Y. Even if Y is made apparent by communicative pundits or opposition politicians, optimists will point out that had Y been on the ballot, it would have been subject to the same blistering attacks that greeted X and voters might have turned down Y had they focused their critical attention on it. These sorts of preferences and limited comparisons give new meaning to the observation that the grass always seems greener on the other side. In short, the plebiscites we know do have many flaws, but a kind of incrementalist argument in their favor.

There is some irony in all this, inasmuch as these plebiscites deal with major matters. We normally think of incrementalist decisionmaking as appropriate where there is repeated opportunity to crawl to improvement. Still, as a positive matter, plebiscites may empower agenda setters, and perhaps certain interest groups, but they do offer the prospect of majoritarian, incremental improvement. We can be somewhat confident that the majority prefers the proposed and passed change to the status quo. Our major hesitation is that the voters are almost necessarily partially informed; they do not know what will happen next if the proposal is turned down.

The third option is, of course, plurality voting (or some version of it⁵⁸). If it is sensible to allow judges to divide among multiple options as to their reasoning and to empower future interpreters to construe these judges' narrowest grounds, if any, then it might also be sensible to allow other groups to do the same. Voters might divide among five options for a new bond issue

58 I have carefully avoided approval voting and, more generally, extended discussion of various forms of plurality voting. These methods raise the risks associated with strategic voting. But the major reason for the omission is that I aim here to focus attention on truth-finding versus preference satisfaction and on disposition versus reasoning, rather than on the possibility of an exhaustive comparison of voting methods.

or even a peace proposal, and we might then permit a different decisionmaker to construe their votes. This is a startling proposal, in part because it is not as if the voters themselves would be the later interpreters. A divided court empowers a successor peer court or a lower court — but this lower court is subject to appellate review. Our voters would normally be empowering some agent that seems less reliable and less reviewable.

An exhaustive, normative paper would obviously require much more than this. But I stop here, with a mere suggestion about plurality voting, because my aim is quite positive in nature. I think we can finally understand the common practices of judicial panels, and I think we can also understand why plebiscites are unusual and why there is some possibility of evolution in the direction of plurality voting in such large-scale decisionmaking. I think it plausible that we will find some experimentation with plurality plebiscites in the future. It is even possible that such plurality voting will be accompanied by a provision for a runoff vote or other mechanism aimed at avoiding majoritarian dissatisfaction. Much as some countries engage in plurality-style primary elections to select candidates for general elections and then fashion their general elections as head-to-head competitions, so too we might find that strategy used for issues rather than (just) persons. There will be no guarantee of finding right answers or Condorcet winners, but the question is either whether we can do better than we do at present or whether we can make voters feel better than they presently do. The idealist and the cynic might join in preferring plurality voting.

