The Condorcet Jury Theorem and Judicial Decisionmaking: A Reply to Saul Levmore

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In Ruling Majorities and Reasoning Pluralities, Professor Saul Levmore explores the "division of labor" between the various thresholds of agreement required for collective action — supermajority, simple majority, or plurality rule. His particular emphasis is on the choice between the last two options. To improve our understanding of this choice in various settings, Professor Levmore considers the relationship between two well-known contributions to the study of group decisionmaking, namely, the Condorcet Jury Theorem and the Condorcet Criterion, which have not generally been treated together. This essay explores the relationship between these two insights in the context of judicial decisionmaking. Counterintuitively, the essay demonstrates that while the Condorcet Criterion continues to hold great promise as a tool of decision in en banc appellate courts, the Condorcet Jury Theorem is most appealing in judicial contexts that appear less collegial and thus less like a jury. In contexts in which jurists engage in deliberation and in which they anticipate that their outputs will have precedential effect, the Jury Theorem has little if any role to play. In contrast, the Theorem might prove more useful in evaluating low-level judicial outputs or decisions that otherwise are not expected to be treated as precedent. Thus, common law trial court decisions and civil law court decisions are more likely to be useful benchmarks in a Condorcet Jury Theorem analysis. It is because such courts do not anticipate that their decisions will have the force of

*precedent that they are more likely to be derived from governing legal
texts, and thus more prone to characterizations of accuracy, than are
judicial outputs that are driven by policy concerns and are generated
with the understanding that they will be treated as precedent.*

INTRODUCTION

In *Ruling Majorities and Reasoning Pluralities*,[1] Professor Saul Levmore
inquires as to the proper "division of labor" between the various thresholds of
agreement required for collective action — supermajority, simple majority,
or plurality rule. His particular emphasis is on the choice between the
last two options. To improve our understanding of this choice in various
settings, Professor Levmore considers the relationship between two well-
known contributions to the study of group decisionmaking by the Marquis
de Condorcet, which, surprisingly perhaps, have not generally been treated
together.

Levmore begins his analysis by setting forth the following puzzles:

> Why do appellate courts occasionally engage in plurality
> decisionmaking with respect to their reasoning and, therefore, their
> precedential implications, while insisting that an outright majority
> must agree on the immediate outcome or disposition of the 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.[2]

To provide insights into these and several related questions, Professor
Levmore considers the possible synergies between the Condorcet
Criterion and the Condorcet Jury Theorem.[3] We might frame Professor

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1   Saul Levmore, *Ruling Majorities and Reasoning Pluralities*, 3 Theoretical Inquiries
     L. 87 (2002).
2   *Id.* at 87.
3   The Condorcet Criterion allows a group of sincere decisionmakers who lack a
     first-choice majority candidate to select a single rational, dominant, or at least stable
     outcome, provided that the options can be graded along a single normative dimension
     and that none of the members' preferences are multi-peaked. The Condorcet Jury
     Theorem facilitates meaningful predictions about which option is "correct" based

Levmore's central inquiry as whether these two sets of insights into collective decisionmaking have the potential to serve as complements, such that one picks up where the other leaves off in various institutional settings.

The result is a rich contribution to the literature on collective decisionmaking, one that has the potential to provide the Condorcet Jury Theorem a more prominent role than it has traditionally been accorded in the legal literature.[4] While Levmore states that "[t]o the extent possible, [I] focus on [the] choice [between threshold level of choice] rather than on the framework in which it is found," most of his applications are in a judicial context. That is attributable in part to the context of the symposium in which it was presented, which was concerned with economic analysis of constitutional law. But it is also likely due to the fact that the Condorcet Criterion has been more richly tapped in the study of courts than has the Condorcet Jury Theorem. And a fair reading of Levmore's paper suggests that in a judicial setting, he is more confident of the Condorcet Criterion's occasional weaknesses than he is in the Condorcet Jury Theorem's strengths.

In this brief comment, I will focus primarily on the relationship between these two sets of Condorcet insights as applied to courts. This paper might be better characterized as "inspired by" rather than "responsive to" that of Professor Levmore, and for one reason: for the most part, we are in agreement. Like Professor Levmore, I agree that the Condorcet Criterion — or its doctrinal equivalent, the narrowest-grounds rule — is a useful means of identifying which opinion to follow when an en banc court divides and when no single opinion commands majority support. I also agree that

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upon the size of the group voting over available options, assuming that each decisionmaker is at least 50% likely to select the correct answer. For a more detailed presentation of these ideas, along with appropriate references, see *infra* Part I.

4   To be sure, the Theorem is experiencing something of a renaissance. While this is not the place for a literature review, some recent examples include: Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 Va. L. Rev. 1649 (2000); Michael Abramowicz, *En Banc Revisited*, 100 Colum. L. Rev. 1600 (2000) (using Theorem to propose system of en banc review that employs judges from across circuits, rather than within circuit from which case originated); Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 Stan. L. Rev. 1477, 1498 (1999) (relating Theorem to ability of trial juries to evaluate probable accuracy of trial evidence); Kevin A. Kordana & Eric A. Posner, *A Positive Theory of Chapter 11*, 74 N.Y.U. L. Rev. 161 (1999) (relating Theorem to information pooling among creditors); Jeremy Waldron, *Legislation by Assembly*, 46 Loy. L. Rev. 507 (2000) (speculating about relationship between voter competence and assembly size based upon Theorem). The central point here, though, is simply to observe that this recent plate of articles does not approach the prominent place that the Concorcet Criterion has played in the legal literature.

the narrowest-grounds rule applies only under certain specified conditions and that it does not, therefore, work in all cases. I remain more optimistic, perhaps, about the narrowest-grounds rule than does Professor Levmore, because I believe that we can identify the characteristics of those cases in which it does not apply and then demonstrate that within this limited category, the Condorcet Jury Theorem has little or no role to play.[5]

Professor Levmore himself expresses skepticism about the role that plurality rule (inspired by the Jury Theorem), rather than the narrowest-grounds rule (inspired by the Condorcet Criterion), should play in en banc appellate decisionmaking.[6] He nonetheless does contemplate some role, however limited. While I have less confidence in plurality rule as a means of enhancing the value of output in divided en banc courts, I remain persuaded that the Theorem has been inadequately tapped in evaluating judicial outputs. I will argue that the Theorem might well allow us to make certain claims about the probable validity of lower-level judicial outputs, provided that the Theorem's assumptions are satisfied. The analysis reveals something of a paradox. Because the Jury Theorem assumes that each decisionmaker arrives

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5   I therefore disagree with Professor Levmore, *supra* note 1, at 106 n.37, that the Jury Theorem provides a limited justification for issue voting, of the sort advocated, for example, in David Post & Steven C. Salop, *Issues and Outcomes, Guidance and Indeterminacy: A Reply to Professor John Rogers and Others*, 49 Vand. L. Rev. 1069 (1996); Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 Cal. L. Rev. 1 (1993); David Post & Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 Geo. L.J. 743 (1992). For my more detailed response to some of these ideas, see Maxwell L. Stearns, Constitutional Process: A Social Choice Analysis of Supreme Court Decision Making 97-156 (2000) [hereinafter Stearns, Constitutional Process]; Maxwell L. Stearns, *How Outcome Voting Promotes Principled Issue Identification: A Reply to Professor John Rogers and Others*, 49 Vand. L. Rev. 1045 (1996). *See also* John M. Rogers, *"Issue Voting" by Multimember Appellate Courts: A Response to Some Radical Proposals*, 49 Vand. L. Rev. 993 (1996).

6   Thus, Professor Levmore asserts that the *Marks* narrowest-grounds rule is the operational equivalent of the Condorcet Criterion in en banc decisionmaking, Levmore, *supra* note 1, at 112, but notes,

   At the risk of disappointing the reader, I should say that I will not in this paper go so far as to suggest when courts should reverse *Marks* and rely more heavily on plurality reasoning. Although I would suggest a brighter future for pluralitarianism, the starting place is probably in the legislature or in plebiscites.

   Id. at 98. I fully agree that the narrowest-grounds rule is the application of the Condorcet Criterion in en banc appellate decisionmaking, *see generally* Stearns, Constitutional Process, *supra* note 5, at 97-156 (exploring the relationship between narrowest-grounds rule and Condorcet Criterion), but I would suggest that pluralitarianism has little, if any, role to play in this context.

at her answer independently, it might provide a basis for increased reliance upon the outputs of courts that lack the power to create precedent (provided a high level of consensus among those courts), while reducing our confidence in outputs among courts that are accustomed to announcing precedent. This follows because in a common law regime, we cannot know with certainty whether like outcomes are the product of independent reflection or, instead, an endogenous function of the operation of precedent itself.

In Part I, I will briefly review the Condorcet Criterion and the Condorcet Jury Theorem. I will then consider how these concepts apply in various judicial settings. In Part II, I will begin at the top of the judicial hierarchy. I will start with a recent, famous decision from the U.S. Supreme Court, *Bush v. Gore*.[7] This opinion is useful in this context because it is susceptible to two presentations, one of which appears to rest upon a straightforward application of the narrowest-grounds doctrine and the other revealing a paradigmatic breakdown of that rule's assumptions. To be clear, the purpose here is not so much to test the limits of the Condorcet Criterion as it is to test the limits of the Jury Theorem as an alternative rule of decision when the assumptions that underlie narrowest-grounds doctrine break down. I will argue that in this context, reliance upon the Condorcet Jury Theorem as the basis for informing our choice of which opinion expresses the Supreme Court's holding threatens to undermine stable and predictable outcomes and to promote strategic, rather than sincere, decisionmaking. In contrast, Supreme Court decisionmaking is enhanced by the present combination of two rules, outcome voting and the narrowest-grounds rule, even if the latter rule breaks down in some cases.

In Part III, I will offer some brief speculations about the role of the Condorcet Jury Theorem as a means of informing our reliance upon low-level judicial outputs. The analysis reveals that the more a judicial body acts like a "jury," the less the Theorem informs its output. The converse is also true. So viewed, the Jury Theorem might provide a basis for courts at the same level and at a higher level within the judicial hierarchy to assess their confidence level in competing judicial outcomes. But even then, there remains considerable difficulty in knowing whether multiple lower court decisions all pointing in the same direction are truly independent or, instead, are the product of formal or informal decisionmaking practices that render outputs path-dependent or otherwise endogenous. If judicial outputs are not independent, the Condorcet Jury Theorem has little to offer.[8] And of

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7   531 U.S. 98 (2000).

8   Of course, other problems pervade the application of the Condorcet Jury Theorem to lower courts, including whether they are trying to reach a "correct" answer. This problem might devolve to semantics however. If the correct answer is that which

course, there is the inevitable and perhaps unanswerable question of whether legal determinations are ever of the sort that are prone to characterizations of validity, rather than vindication of preference.

I. THE CONDORCET JURY THEOREM
AND THE CONDORCET CRITERION

I will begin with the Condorcet Jury Theorem. Under specified conditions, the Theorem provides that simple majority rule increases the likelihood that a group, or a single decisionmaker relying upon group output,[9] will select the correct outcome. While Condorcet posited the Jury Theorem in the context of simple majority rule over a binary choice, the intuition upon which the Theorem rests has been extended to plurality rule over multiple options.[10]

The Jury Theorem posits that if each decisionmaker has a greater than 50% chance of selecting the correct answer and if none of the members is an expert (or if experts cannot be identified in advance), then the probability of selecting the correct answer increases along with the size of the jury.[11] To illustrate, assume that a group of 100 "jurors" is asked to vote for one of two answers in a secret ballot, where one of the answers is verifiably correct. Assume that 30% know the correct answer and that we can predict that those who do not know are likely to guess randomly, thus dividing evenly over the two answers. While only 30% of the jury actually knows the correct answer,

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the relevant appellate court would reach, then the Jury Theorem might apply even if the appellate court's answer is not normatively right or wrong, but simply a question of policy. A series of independent lower court "predictions" about how an appellate court is likely to rule along a policy dimension can itself be graded in terms of whether they are more or less likely to be "accurate," in which case, the Jury Theorem would apply.

9   Thus, for example, in the popular television program *Who Wants to Be a Millionaire?*, one of the "lifelines" available to players is "ask the audience." In this case, the audience does not select the choice, but the player has the option to poll the audience on one question and then decide whether or not to rely upon the audience's answer. It is worth noting that the audience response is most often correct.

10   *See* Christian List & Robert E. Goodin, Epistemic Democracy: Assaying the Options (Australian Nat'l Univ., Working Paper No. 2000-W9, June 27, 2000) (extending Theorem to plurality rule over multiple options under specified conditions). *See also* Levmore, *supra* note 1, at 119.

11   As Levmore explains, the Theorem rests upon three assumptions: (1) that the question admits of a correct answer; (2) that each person is more likely to be right than not; and (3) that it is not possible to sort out who is more likely to be correct than incorrect in advance. Levmore, *supra* note 1, at 89 n.4.

the probability that any given voter will choose correctly is more than 50%. In addition to the knowledgeable 30%, another 35% will select the correct answer at random, for a total of 65%.

The Jury Theorem is not itself directly concerned with the mathematical calculation that gives rise to the 50% probable accuracy assumption. Rather, it begins with the minimum 50% probable accuracy assumption and, from that starting point, posits that the likelihood that the jury will select the correct result is positively correlated with jury size. Properly understood, therefore, the Theorem is not necessarily a strong form endorsement of simple majority rule. It is instead a means of assessing the confidence level associated with a majority's — or, as explained below, plurality's — selection over available alternatives, based upon the size of the voting pool and the probability that each voter will select — wittingly or not — the correct answer.

As Professor Levmore explains, while the Jury Theorem has been illustrated in the context of simple majority rule over two options, its logic applies equally in the context of plurality rule over several options. This follows from the intuition that it is only necessary that some subset of those who are likely to get the correct answer actually know the correct answer, while others choose their answers at random.[12] In either case, those who actually do know the correct answer provide a sufficient "bump" to distinguish that answer from the other option, or options, if those who are not knowledgeable are not expected to coalesce around a single wrong answer.[13]

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12 Professor Levmore explains the point as follows: "If 40% choose [option] four [out of four possible answers] and the other voters sprinkle their selections around the other choices, we can be fairly confident that four is the correct answer." *Id.* at 119. My only addition to Levmore's presentation is that for 40% to select option four, it is only necessary that 20% of the total pool actually knows option four to be the correct response if another 20% of the total pool selects option four at random.

13 This analysis relates to Professor Levmore's suggested empirical question: "Do we think that voters who are likely to be wrong with their first choice are more likely than random to be right in deciding between the two or three leading alternatives?" *Id.* Perhaps an alternative way to frame the question is whether we think that voters who are likely to be distracted by a single wrong answer are more likely to sort themselves randomly when the decoy is removed. In this analysis, the relevant point is not whether the remaining voters are likely to select the correct answer. Instead, it is whether through random sorting, they will help to reduce any statistical anomaly among those who also do not know the right answer, by increasing the number of jurors available to sort randomly over all alternatives, thus ensuring an effective bump for the correct answer. If one wrong answer is a likely target, then from a Jury Theorem perspective, there might be value in asking for second choices precisely because those asked are likely to be wrong, but not in any coordinated manner.

The effectiveness of the bump is positively correlated with jury size because as the size of the jury increases, the possibility that the jurors will coalesce around a single incorrect answer, or fail to sort randomly over all answers, correspondingly decreases.

To illustrate, imagine the group of 100 participants is selecting from four options. Assume that only 20 of the participants know the correct answer. If the remaining 80 are evenly split over all four answers, then the correct answer will receive a plurality of 40, while all other answers will receive 20 each. In this example, more than 50% of the participants are likely to get the answer wrong (60% in fact). With each voter more than 25% likely to get the correct answer out of a choice set of four, the correct answer again receives a sufficient "bump" to justify some confidence that the plurality candidate is correct. In this example, the correct answer receives 40% of the votes, half based upon knowledge that the answer is correct and the other half at random. As before, Condorcet's intuition goes to the confidence level in the outcome as a function of group size. If, instead of 100 jurors, there are only four, there is a possibility that the correct answer will receive two and that two of the three remaining answers will each receive one. If so, the correct answer receives a distinguishing "bump." But there is also a 25% chance that each answer will receive one vote. As the number of participants increases, so too does the ability of those who actually know the correct result to distinguish that choice from those that remain. That is because the larger the pool of persons who do not know the right answer, the more likely it is that they will not, through a statistical anomaly, disproportionately avoid the correct response or disproportionately coalesce around a single incorrect response. It is the randomness of choice among those who do not know the correct answer that allows those who do to distinguish the correct choice. And the larger the jury pool, the more likely it is that the responses of those who do not know will be effectively random.

These very basic starting points appear to support the intuition that simple majority rule over two alternatives and plurality rule over multiple alternatives hold great promise for collective choice in at least some contexts. And yet, as Professor Levmore recognizes, the Jury Theorem "promises nothing" if the relevant choice is between or among policy options giving rise to preferences that are neither right nor wrong.[14]

We will now turn our attention to the Condorcet Criterion. Unlike the Jury Theorem, the Condorcet Criterion might offer some promise even when the relevant choice involves a policy judgment, rather than a pair or group of

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14 *Id.* at 92.

options of which one is verifiably correct.[15] The Condorcet Criterion grows out of the phenomenon of collective intransitivity. This phenomenon arises when three persons confront a choice over three options, none possessing first-choice majority support, and when the aggregate preferences cast along a single normative issue dimension are not single-peaked.[16] Thus, if three individuals are choosing from among options A, B, and C and if the participants rank their ordinal preferences as P1 (ABC), P2 (BCA), and P3 (CAB), unlimited binary comparisons will reveal the following collective intransitivity: ApBpCpA, where p means preferred by a majority. If we change our assumption about the ordinal rankings of P3 from CAB to CBA and again undertake direct binary comparisons, we discover that B is preferred to A (with P2 and P3 defeating P1) and that B is preferred to C (with P1 and P2 defeating P3). Condorcet proposed that absent a first-choice majority candidate, that option that defeats all others in direct binary comparisons should be selected as best. When confronted with intransitive preferences, as in the first example, the Condorcet Criterion does not apply. There is no single option that defeats all others in direct comparisons. Instead, for any given option, another option has majority support, thus producing a cycle. But even absent a first-choice majority candidate, well-disciplined preferences of the sort shown in the second example can generate a Condorcet winner as a stable and rational outcome.

The question then arises where the Condorcet Jury Theorem and the Condorcet Criterion meet. At a surface level, the two sets of insights appear to involve quite similar problems of collective choice. The two hypotheticals that follow reveal that notwithstanding the seeming structural similarities that underlie the problems that the Jury Theorem and the Condorcet Criterion address, the two sets of insights are marked by a significant analytical divide. In the parts that follow, I will extend these insights to explore the significance of the Jury Theorem and the Condorcet Criterion in various judicial contexts.

In the preceding cycling illustration, options A, B, and C can represent virtually anything, including options for which the characterization of "right" or "wrong" would be inappropriate. One might imagine, for example, a choice of the amount to invest in repairing a highway or bridge, with options (in intervals of $100,000) at 1, 2, and 3. Each option could represent

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15 As explained below, this holds only if the decisionmakers agree upon the relevant issue dimension along which the policy issue is to be decided.

16 For an analysis demonstrating that intransitivity presented as multi-peakedness in a single issue dimension can invariably be translated into uni-peakedness over two issue dimensions, see Stearns, Constitutional Process, *supra* note 5, at 71-77.

an entirely appropriate expenditure depending upon the chosen level of repair. Options 1 and 3 might be a minor and short-term repair versus a complete reconstruction. Option 2 might represent a substantial repair short of reconstruction. If person A is a fiscal conservative, his ordinal preferences might be 1,2,3. If person C is dedicated to completing the best possible repair, his ordinal preferences might be the opposite: 3,2,1. If person B eschews either extreme view (perhaps because he considers a truly short-term repair wasteful, but has other fiscal priorities that are inconsistent with a complete repair), then his ordinal preferences might be either 2,1,3 or 2,3,1. Given these preferences, if the members vote sincerely, then the group as a whole will prefer 2 to either of the remaining alternatives, even though no alternative, including 2, is a first-choice majority winner. While 2 represents a Condorcet winner, it is no more or less "correct" than are the rejected options. The fact that a majority happened to coalesce around 2 when that option was presented against either available alternative proves nothing about its normative superiority to those alternatives. It merely says something about the stability of the outcome in light of the members' ordinally-ranked policy preferences.

Now let us consider a hypothetical that superficially suggests a nearly identical choice. Imagine that instead of three legislators selecting expenditures in $100,000 increments, three anthropologists are dating a pre-historical artifact in 100,000-year increments. As before, the relevant choices are 1, 2, and 3. We might imagine the very same ordinal rankings, with A preferring 1,2,3; C preferring 3,2,1; and B preferring 2, then either combination of the two extreme alternatives. As before, direct binary comparisons will reveal 2 to be the Condorcet winner. But if the true answer is either 1 or 3, then the choice of 2 will have told us nothing about the factual accuracy of the selection (although it might reveal something about the relevant expertise of the anthropologists). Now imagine that one of the three anthropologists (or one-third of a larger pool) is an expert with respect to this type of artifact and that he knows the answer to be 1. If we further assume that the probability of random sorting increases with jury size, then for the reasons set out above, the possibility that plurality voting yields the scientifically correct outcome also improves with jury size.

While these two examples both involve three persons choosing from the same numerical answers in a choice set of three, the purpose of the illustration was to focus on the differences between the Condorcet Jury Theorem and the Condorcet Criterion. In the Part that follows, I will explore these differences in the context of various judicial settings.

II. THE CONDORCET CRITERION AND THE CONDORCET JURY THEOREM IN SUPREME COURT DECISIONMAKING: THE CASE OF *BUSH V. GORE*

Professor Levmore inquires why appellate courts insist upon majority decisionmaking at the disposition stage, but occasionally allow pluralities with respect to reasoning. To consider this inquiry, I will use the United States Supreme Court as an illustrative en banc court. It is important to recognize that the Supreme Court employs two related and complementary rules to govern its output. The first rule is outcome voting. The Court demands a simple majority vote over the relevant judgment options, which are usually affirm and reverse but sometimes include remand. While there have been a small handful of cases in which the Court has appeared split over three options with remand included, in each instance, one of the justices preferring another ruling has acquiesced to produce a common judgment.[17] When the Court faces two judgment options, affirm or reverse, the outcome-voting rule virtually ensures a collective judgment, at least with all nine justices participating.[18] In effect, the outcome-voting rule is a non-Condorcet rule that ensures a collective judgment over issues and outcomes, even when preferences combine to reveal an intransitivity.[19] The more difficult question is how the Court identifies the opinion that expresses the holding when a majority agrees to a single judgment but no single opinion commands majority support.

As stated above, the Supreme Court has adopted a rule of decision that is the doctrinal equivalent of the Condorcet Criterion in cases that fail

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17 I have previously collected these cases, Stearns, Constitutional Process, *supra* note 5, at 355-56 n.162.

18 When the Court is evenly divided (for example, when one member does not participate), it affirms the judgment below, but the ruling is not given precedential value. *See* United States v. Pink, 315 U.S. 203, 216 (1942); Hertz v. Woodman, 218 U.S. 205, 213-14 (1910); Etting v. Bank of the United States, 24 U.S. 59, 78 (11 Wheat. 59, 78) (1826). *See also* Stearns, Constitutional Process, *supra* note 5, at 122-23 and accompanying notes.

19 To determine whether a particular option is a Condorcet winner or the arbitrary product of a voting path, the decisionmaking body must permit at least the same number of binary comparisons as options. Outcome voting limits the number of votes relative to the available resolutions of issues and outcomes, thus ensuring an outcome, but not ensuring that the chosen outcome is a Condorcet winner. For a more detailed explanation and analysis, see Stearns, Constitutional Process, *supra* note 5, at 111-39.

to produce a first-choice majority candidate over three or more proffered rationales across various opinions.[20] The narrowest-grounds rule states:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.[21]

The rule suggests that when the Supreme Court strikes down a law on constitutional grounds, the holding is expressed in that opinion, consistent with the outcome, that would strike down the fewest laws. In contrast, when the Court sustains a statute against a constitutional challenge, the holding is expressed in that opinion that would sustain the fewest laws. Of course, the rule only comes into play when the Court issues a fractured panel decision, meaning one in which no single opinion consistent with the outcome commands the requisite five (out of nine) votes. The intuition is fairly straightforward. In a case striking down a statute, those who would prefer a broader consistent ruling are presumed to prefer a narrower mandate (striking this statute down, but few others) to a ruling that would sustain a challenged statute. Conversely, in a case sustaining a statute, those who would prefer a broader consistent ruling are presumed to prefer a narrower mandate (sustaining this statute but suggesting that others might be subject to future challenge) to a ruling that would strike down the challenged statute.

The narrowest-grounds rule is a judicial codification of the Condorcet Criterion, and as such, it suffers all the usual defects associated with this partial solution to the problems associated with collective preference aggregation. First, it assumes judicial preferences to be generally well behaved (as in the descriptions immediately above). In the somewhat technical language of social choice, this means that the justices' ordinal rankings over the various opinions are all single-peaked and that the opinions themselves can be expressed along a single normative issue dimension. Just as the Condorcet Criterion has little to offer when preferences cycle, so too the narrowest-grounds rule threatens instability depending upon the nature of the collective judicial preferences. Second, the Condorcet Criterion fails to consider the possibility of strategic judicial behavior between and among

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20 As Professor Levmore explains, this rule is employed in numerous other jurisdictions, although some jurisdictions, including Israel, have not adopted it. Levmore, *supra* note 1, at 102 n.29.
21 Marks v. United States, 430 U.S. 188, 192 (1977) (citations omitted).

justices that would allow them to place cardinal weights upon, rather than attaching mere ordinal values to, preferences over available options.

Together, the outcome-voting rule and the narrowest-grounds rule improve the fairness and rationality of en banc appellate outcomes. Outcome voting breaks cycles, thus ensuring an outcome even when preferences over issues and outcomes reveal an intransitivity. And the narrowest-grounds rule improves judicial fairness by increasing the probability in a fractured panel case that if one of the opinions is a dominant second choice — or Condorcet winner — that opinion will express the Court's holding. In the discussion that follows, I will assess the potential limitations of the narrowest-grounds rule as it applies to Supreme Court decisionmaking and further consider the role that the Jury Theorem might play when the Condorcet Criterion does not apply. To do so, I will offer two stylized presentations of the now-famous decision *Bush v. Gore*.[22]

In *Bush v. Gore*, the Supreme Court involved itself for the second time in the 2000 presidential election between George W. Bush and Albert Gore. Both Supreme Court cases involved problems that arose due to alleged voting irregularities or peculiarities in Florida.[23] *Bush v. Gore* presented a challenge to a Florida Supreme Court decision that ordered statewide manual recounts of under votes, applying an intent-of-the-voter standard. In addition to claiming that the Florida court ruling ran afoul of a federal statute that provides a safe harbor if the electors are certified by a particular date, December 12,[24] Bush challenged the decision on two constitutional bases. First, he maintained that the Florida Supreme Court order violated the express grant in Article II to state legislatures to establish by statute the rules governing elections for the selection of electors of the President and Vice-President. Second, he claimed that the order violated equal protection by providing a standard that would not be consistently applied across counties within the state or even within particular counties.

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22 121 S. Ct. 525 (2000). For a more detailed analysis of this case from a social choice perspective, see Michael Abramowicz & Maxwell L. Stearns, *Beyond Counting Votes: The Political Economy of* Bush v. Gore, 54 Vand. L. Rev. 1849 (2001). Portions of the discussion here are based upon that article.
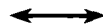
23 In *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 98 (2000), the Court unanimously vacated and remanded the Florida Supreme Court decision to extend the certification period to allow for manual recounts and to correspondingly reduce the contest period, following a razor-thin election outcome in that state.

24 3 U.S.C. § 5 (2000).

Table 1. A Unidimensional Social Choice Model of *Bush v. Gore*

(A) Rehnquist, Scalia, Thomas (concurring)	(B) O'Connor, Kennedy (per curiam)	(C) Souter, Breyer (dissenting)	(D) Stevens, Ginsburg (dissenting)
Florida Supreme Court decision violates Article II and equal protection	Florida Supreme Court decision violates equal protection only; Florida Supreme Court's expressed desire to receive benefit of safe harbor prevents timely remand for corrective remedy satisfying equal protection	Florida Supreme Court decision violates equal protection only; safe harbor provision is not mandatory, thus permitting timely remand for corrective remedy satisfying equal protection	Florida Supreme Court decision does not violate Article II or equal protection

Broad mandate to correct state judicial intervention in elections $\longleftrightarrow$ Narrow mandate to correct state judicial intervention in elections

Table 1[25] provides a stylized breakdown of the various opinions in *Bush v. Gore*. The table presents the various opinions along a single normative issue dimension according to the breadth or narrowness of the Supreme Court's power to scrutinize state court decisions interfering with presidential elections. In this analysis, Chief Justice Rehnquist, joined by Justices Scalia and Thomas, the three justices generally considered to be the most conservative on the present Court, provided the broadest bases for overturning the Florida Supreme Court. These concurring justices based their decision to overrule the Florida Supreme Court on two grounds. First, they concluded in their separate concurring opinion that the Florida court

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25 This table is taken from Abramowicz & Stearns, *supra* note 22, at 1911.

decision violated Article II's delegation to state legislatures by producing a change in the law not dictated by the statute itself. Second, they joined the plurality decision, which found that the intent-of-the-voter standard and the decision to include only under votes[26] in the statewide manual recount violated equal protection.

The per curiam opinion, which was joined by Justices O'Connor and Kennedy plus those in concurrence, relied solely upon an equal protection analysis. This opinion found an equal protection violation based upon the subjective standard and the decision to include only under votes. While the equal protection problem had the theoretical potential to be cured by announcing a more specific standard governing the recount and by demanding the inclusion of excluded ballots on recount, the per curiam majority did not allow for that possibility. Instead, because the date for certification was upon the Court and because the Florida Supreme Court had previously determined that the state legislature had sought the benefit of the federal statute's safe harbor provision, the per curiam authors determined that timing considerations prevented a recount.[27] The leftmost dissenting justices in Table 1 (those immediately to the right of the double vertical line separating those who voted consistently with the case outcome from those in dissent[28]), Justices Breyer and Souter, agreed with the per curiam authors that the manual recount order might present an equal protection problem. In their view, however, to the extent that equal protection was implicated, any defect could be cured through a corrective order on remand. Finally, the rightmost dissenting justices, Stevens and Ginsburg, found no violation of Article II or equal protection.

It is important to note that *Bush v. Gore* did not actually produce a fractured panel decision. Instead, Table 1 depicts a stylized account of the various opinions to produce a paradigm of when the Condorcet Criterion — or the narrowest-grounds rule — operates properly in the context of en banc appellate court decisionmaking. To complete the analysis, we must

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26 Under votes are those ballots for which the machine count did not identify any selection for President. Over votes are those discarded ballots on which more than a single option was selected for President.

27 While the per curiam announced a remand, this was likely due to the Supreme Court rule demanding a remand, rather than outright reversal, when the Supreme Court overturns a decision of a state court. *See* Richard H. Fallon et al., Hart and Wechsler's The Federal Courts and the Federal System 507-09 (4th ed. 1996).

28 To be clear, I am using the terms "leftmost" and "rightmost" with reference to justices' locations in Table 1 and not as a proxy for political ideology.

make some fairly modest assumptions that allow us to treat the case as the functional equivalent of a fractured panel case.

First, we will assume that the concurring justices wanted to provide two independent bases for overturning the Florida Supreme Court decision, one grounded in Article II and the other in equal protection. Second, we will assume that Justices O'Connor and Kennedy wanted to produce a victory for Bush, but that they were disinclined to do so based upon a ruling that was tantamount to overturning a state court construction of state law. As a result, they were disinclined to support the concurring justices' Article II analysis, but were willing to accept a basis for overruling that did not rest upon rejecting the Florida Supreme Court's construction of Florida law. In addition, we assume that Justices O'Connor and Kennedy were unwilling to join the liberal Breyer/Souter opinions that would have invited the possibility of a further recount, which might eventually have produced a victory for Gore. By necessary implication, O'Connor and Kennedy also were not willing to go farther, as did Stevens and Ginsburg, and find no constitutional defect at all in the Florida court ruling.

Based upon these assumptions, we can see that Justices O'Connor and Kennedy had fairly little room to maneuver if they were seeking to produce a judgment overruling the Florida Supreme Court decision without resting that decision on Article II. They were bounded on the left by the concurring jurists' Article II analysis and bounded on the right by an equal protection analysis that admitted of a cure upon remand. Only by grounding their analysis in the much criticized equal protection analysis, but finding that the factual peculiarities associated with the timing of the decision were such as to preclude a remand, could they produce the desired narrowest-grounds result. While the per curiam analysis has been roundly criticized, even by those who favor the result, the fact remains that it represents a likely stable outcome in this case because it is a Condorcet winner.[29] But the fact that the per curiam position is a probable Condorcet winner certainly does not prove that it can meaningfully be characterized as "correct." In fact, among those supporting the result, most rest their analysis upon Article II, which garnered the minority support of only three justices.[30] And of course, among those most critical of the decision, Justices Stevens and Ginsburg, who found no basis for a constitutional violation, embraced the correct view.

In this very limited context of a decision that can be cast along a single

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29 For relevant authorities, see Abramowicz & Stearns, *supra* note 22, at 1870 and accompanying notes.
30 *See id.* at 1870.

normative issue spectrum — here, the breadth or narrowness of the bases for Supreme Court intervention into state court decisions affecting the selection of electors of the President and Vice-President — the Condorcet Criterion holds greater promise as a rule of decision because the narrowest views of two justices (O'Connor and Kennedy) represent a more stable resolution of the case than do the plurality views embraced by three (Rehnquist, Scalia, and Thomas). Whether or not the views embraced by the concurring justices are analytically sounder than those of O'Connor and Kennedy, plurality voting does not give us a meaningful guidepost of what the Court will do in the future in cases presenting similar issues. Nor does it provide a basis for identifying which of the opinions carries the implicit support of a majority (or of multiple overlapping majorities) of the deciding Court. And if we were to group the dissenting justices into a single camp of four (assuming, as seems plausible, that Souter and Breyer would prefer the Stevens and Ginsburg opinion to the O'Connor and Kennedy opinion), then we would again discover that strength in numbers proves elusive in the limited context of appellate court decisionmaking. Here, a plurality of four embraces a position on the judgment that a majority rejects.

Even in this fairly straightforward context, we can see the trouble that an alternative plurality-decision rule might produce. With such a rule in place, justices in the median position might have an incentive to shift to the dissenting side if, for example, they find that position more palatable than the more extreme, but consistent, position of those in concurrence. Such maneuvering might encourage the concurring justices to accommodate in an effort to produce a majority in the median position, but there is certainly no guarantee of that result. The more important point is that the narrowest-grounds rule makes this all unnecessary. Certainly those in the median position will prefer to be in a majority because a majority is required to establish binding precedent that the Court itself will be presumptively obligated to follow in future cases.[31] But with the narrowest-grounds rule in place, the median justice can secure the holding without regard for any strategic accommodation and thus he or she lacks an incentive to move to the right or left of his or her preferred position.

The analysis thus far has assumed that the various opinions, while lacking a first-choice majority candidate, can be cast along a dominant normative

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31 The narrowest-grounds rule imposes an obligation upon lower courts when there is no majority opinion.

issue spectrum.[32] This might be true as a general matter, but certainly it is not true as a universal one. I will now relax this assumption and consider the implications of casting *Bush v. Gore* along two dimensions. This analysis will assume that while Chief Justice Rehnquist and Justices Scalia and Thomas signed onto the per curiam analysis, they did so based upon strategic considerations. This assumption is not difficult to defend. First, beyond the opening sentence in which the concurring justices acquiesce in the per curiam's equal protection analysis, the concurring opinion rests entirely upon Article II grounds. Second, as a general matter, the concurring justices embraced a conservative equal protection jurisprudence, which appears to be in some tension with the per curiam analysis.[33] And finally, the per curiam opinion itself provides a fact-specific disclaimer that itself might be the product of a compromise between Justices O'Connor and Kennedy and their more conservative concurring brethren.[34] If we assume that the concurring justices did not embrace the equal protection analysis on the merits but, instead, joined for strategic reasons, then we can depict the resulting relationships between and among the various opinions in Table 2[35] as follows:

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32 Notice that the opinions can be so cast even if the case presented more than a single legal issue, for example, Article II and equal protection.

33 For a contrary view providing a conservative defense of the per curiam's equal protection analysis, see Nelson Lund, *The Unbearable Rightness of* Bush v. Gore, 22 Cardozo L. Rev. (forthcoming 2001).

34 The per curiam opinion stated: "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." 121 S. Ct. 525, 532 (2000).

35 This table is taken from Abramowicz & Stearns, *supra* note 22, at 1927.

Table 2. *Bush v. Gore* in Two Dimensions with Asymmetrical Preferences

	Florida Supreme Court ruling should be reversed on the basis of equal protection	Florida Supreme Court ruling should not be reversed on the basis of equal protection
Florida Supreme Court ruling should be reversed on the basis of Article II		(A) Rehnquist, Scalia, Thomas
Florida Supreme Court ruling should not be reversed on the basis of Article II	(C) O'Connor, Kennedy	(B) *Souter, Breyer,* Stevens, Ginsburg

Table 2 depicts *Bush v. Gore* on the assumption that the various camps embraced their first-order preferences, failing to employ any strategic accommodation. Based upon the foregoing assumption, the concurring justices embraced only the Article II analysis as a ground for reversing the Florida Supreme Court, while Justices O'Connor and Kennedy embraced only the equal protection analysis as a ground for reversal. Within the dissenting box, the names Souter and Breyer are in italics to reflect the fact that while they preferred to affirm, they did find an equal protection problem, albeit one that could have been cured on remand. Unlike Table 1, Table 2 presents the issues in *Bush v. Gore* along two dimensions. It is a familiar anomaly that in a case of this sort, majority issue resolutions push in the opposite direction from the outcome resolution.[36] Thus, one majority — the per curiam justices (excluding the concurring justices who joined only for strategic reasons) plus the dissenters — determined that the Florida Supreme Court decision should not be overturned based upon a violation of Article II. And another majority — the concurring justices and the dissenters (totaling five if we exclude Souter and Breyer) — determined that there was no

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36 For commentary that considers the implications of this phenomenon, see *supra* note 5 and accompanying references.

violation of equal protection. Presumably all nine deciding justices agreed that absent a violation of either Article II or equal protection, there was no basis upon which to reverse the Florida Supreme Court. And yet, a third majority — those in concurrence plus O'Connor and Kennedy — voted to reverse.

In this model, neither the O'Connor/Kennedy position nor the concurring position can be described as "narrower." Instead, they simply rest along different analytical dimensions. While not all cases that rest along more than a single dimension have this feature, in this case, multidimensionality is coupled with asymmetry. Asymmetry arises when two camps resolve each of the two dispositive issues in opposite fashion, but nonetheless reach the same judgment.[37] In addition, the dissenters resolve one issue in favor of the other two camps, but achieve an opposite judgment.

The purpose here is not to revisit this familiar paradox, but to explore its implications for the Condorcet Criterion, on the one hand, and the Condorcet Jury Theorem, on the other. Even in the context of a fractured panel decision in which the Condorcet Criterion fails to provide a basis for finding a stable and dominant opinion that expresses the holding, the Condorcet Jury Theorem does not provide a meaningful alternative rule of decision. If the opinions rest along more than a single dimension and admit of asymmetrical preferences, absent some form of strategic voting there is no dominant issue dimension. Instead, there are three overlapping majorities, resting along two competing dimensions that point in irreconcilable directions. If the Court were to defer to issue majorities, then the result would be to affirm the Florida Supreme Court (favoring Gore). Separate majorities found no violation of equal protection or of Article II. As Professor Levmore suggests, we might imagine deliberation as a means of encouraging the justices to recognize the absence of either alternative basis for overruling.[38] But certainly in this case, it would be hard to imagine this affecting the outcome.

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37 There is a third case category, involving multidimensional and symmetrical preferences. In this category, of which *Board of Regents v. Bakke*, 438 U.S. 265 (1978), is an example, those who embrace opposite views of the two substantive issues achieve opposite outcome resolutions, while a camp that achieves a partially favorable issue resolution for each of the other camps provides a partially favorable judgment. When these conditions are met, the position affording each camp a partial victory is rather obviously a Condorcet winner. One can only posit intransitive preferences by engaging the implausible assumption that one of the camps that embrace an extreme position on both issues would prefer an opposite extreme position on both issues leading to an opposite judgment, to a favorable resolution of one issue, leading to a partially favorable judgment. So viewed, this category is, for all relevant purposes, like the uni-dimensional case, in that it yields a stable Condorcet winner when the *Marks* analysis is properly applied.

38 Levmore, *supra* note 1, at 107.

Even if every camp remains in position and if the Court employs outcome voting, then the result will be to overrule, thus favoring Bush, a result consistent with the ideal points of a majority (albeit a split majority) of the deciding Court. And notice that we get this result with no strategic maneuvering among the justices. In this sense, *Bush v. Gore* stands as the exception that proves the rule favoring outcome voting as a rule of judicial decision (answering Professor Levmore's first puzzle), because it inhibits strategic accommodation that can undermine predictability regarding future Court rulings. Only by allowing issue resolutions to control the outcome would we generate an incentive among the justices to change their positions. In that case, the justices in camps A or C would have to move to each other's box to secure a majority for overruling. Otherwise, separate issue majorities would produce a result favoring camp B.

In fact, the Rehnquist camp did acquiesce in the per curiam equal protection analysis. In this case, the decision to do so did not alter the judgment of the Court.[39] But a decision that rests the judgment on majority resolutions of underlying issues might encourage this sort of strategic accommodation as a general rule. If justices care more about outcomes than issues, such a rule would demand strategic accommodation to ensure the common majority rationale that would then be required to support the desired holding. Unlike the narrowest-grounds rule, which reduces incentives for such strategic accommodation (other than to secure a majority precedent rather than a mere narrowest-grounds holding), deference to majorities on *reasoning* rather than on *judgment* would invite such strategic accommodation as a routine matter.

Of course one might imagine a context in which the resolution of a particular issue can be described as right or wrong, or at least more or less plausible. On three known occasions, one or more justices have switched votes when confronted with a case presenting multidimensionality and asymmetry. In *Pennsylvania v. Union Gas Co.*,[40] Justice White conceded to a contrary majority that determined that Congress had intended to abrogate state sovereign immunity, to reach the Eleventh Amendment question whether Congress has the constitutional power to do so. In *Arizona v. Fulminante*,[41] Justice Kennedy conceded to a contrary majority that determined that a confession was coerced, to reach the constitutional question whether harmless error applies to the admission

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39 Michael Abramowicz and I have elsewhere speculated that the concurring justices joined the per curiam to ensure the appearance of a united front in this high-profile case controlling the outcome of a presidential election. Abramowicz & Stearns, *supra* note 22.

40 491 U.S. 1, 56-57 (1989).

41 499 U.S. 279, 313-14 (1991).

of a coerced confession. And in *United States v. Vuitch*,[42] Justices Harlan and Blackmun conceded to a contrary majority that determined that the Supreme Court had jurisdiction in an appeal from a conviction for abortion under a statute that applied only in the District of Columbia, to reach the constitutional question whether the statute in question was unconstitutionally vague.[43] In each of these three cases, the issue over which one or more justices conceded to a contrary majority might reasonably be characterized as sufficiently technical as to admit of a "right" answer. So viewed, the Jury Theorem might find reflection in this group of cases. That said, if these issues are so characterized, one wonders why the sitting group of present justices — as opposed to, say, the weight of academic commentary or of all lower courts that have addressed the issue — is necessarily the optimal jury. Perhaps this is what Justice Stevens had in mind when in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[44] he relied upon the fact that of the fifteen justices to address the issue since *Roe v. Wade*,[45] eleven have found in favor of a right to abort. And yet, it is obviously difficult to maintain that the abortion question is other than one of legal policy, rather than one of verifiable correctness, making Stevens' implicit appeal to the intuition that underlies the Jury Theorem appear strained. Moreover, even in the vote-switch cases described above, one could aptly characterize each issue as devolving to a question of policy, rather than a technical resolution of a pure legal issue.

The analysis thus far has shown the limited conditions within en banc appellate panels under which the narrowest-grounds rule breaks down. If one assumes that the narrowest-grounds rule should properly apply in those cases in which the relevant assumptions for finding a Condorcet winner are met, then the analysis further reveals the rather limited opportunities for introducing the Condorcet Jury Theorem as an alternative rule of decision in this context. But the argument has gone further. I have also argued that in the limited contexts in which the assumptions that underlie the narrowest-grounds rule do not apply, namely, those cases characterized by multidimensionality and asymmetry, the Condorcet Jury Theorem also does not provide a normatively compelling rule of decision. Instead, a switch to the plurality-based rule would invite strategic incentives that would undermine the predictability of appellate outcomes. In the next Part, I will show that the Jury Theorem might well have more robust implications in evaluating the outputs of lower-level courts.

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42 402 U.S. 62 (1971).
43 *Id.* at 93 (Harlan, J.); *id.* at 97-98 (Blackmun, J.). For a more detailed discussion of these cases, see Stearns, Constitutional Process, *supra* note 5, at 129-41.
44 505 U.S. 833, 912 n.1 (1992).
45 410 U.S. 113 (1973).

III. THE CONDORCET JURY THEOREM IN LOWER COURTS

While I am skeptical that the Jury Theorem plays a role in the context of appellate court decisionmaking, I remain more optimistic about its role in assessing the quality of lower court outcomes, at least under certain conditions. The relevant conditions, I will argue, are most likely to hold in early common law trial courts and within civil law courts. We might also imagine a hybrid context of intermediate appellate decisionmaking, although there it becomes difficult to sort out precisely whether the relevant conditions should be presumed to apply.

I will begin with early common law courts, by which I mean courts given the authority to decide cases subject to appellate review, but without any expectation that the decisions they issue will have broad precedential impact. In part, this expectation is a function of technology. In an earlier era, the publication of written opinions was expensive, and private recorders who offered the service were generally interested in higher-level courts. Even with the publication of opinions, we might imagine relatively narrow circulation. Certainly the wide dissemination of substantial trial court output is a relatively modern phenomenon, both at the federal and state levels.

Similarly, in civil law trial courts, there is a lowered expectation of precedent, albeit for a somewhat different reason. The formal premises upon which civil law courts operate eschew precedent in favor of general principles set out in the legislative code. The expectation is that courts will apply the code principles and that like-minded jurists, applying a proper reasoning process, should arrive at substantially the same outcome. Certainly this grossly overstates the differences between common law and civil law courts, and I am not here to defend the premises against the practice of civil law courts. Nor is this the place to provide a detailed comparison of civil and common law regimes. But it is noteworthy that even modern civil law practice substantially differs from modern common law practice in the length of opinions. While fairly long opinions are commonplace in common law courts, civil law court opinions often run no longer than a paragraph or two. This cannot be a coincidence, and it appears likely that the length of opinions is correlated with the expectation that others will rely upon them for future legal guidance.

In early common law courts (and civil law courts), trial judges held a lower expectation that their outputs would establish a precedent than is the case today. In addition, and relatedly, the reduced availability of precedent encouraged a greater level of independent judicial analysis on questions presented, at least relative to a modern common law regime. The

consequence is somewhat ironic. The reduced expectation of establishing a precedent — and thus the greater independence of judicial analysis on like questions of law — lends credence to the notion that multiple data pointing in a common direction on those questions improve our appreciation for their quality. If we assume some common predicate underlying the task of judging — for example, promoting economic efficiency, furthering *ex ante* expectations, reducing the administrative costs of the judicial system — then the very fact that the decisionmakers expect not to establish precedents improves the value of their collective output as a kind of precedent.

We might imagine any number of interested scholars or legislative drafters looking to a large number of trial court outputs for guidance on particular questions of law. This might characterize early drafters of uniform laws, early legal scholars publishing legal treatises, the drafters of a civil code, or even the beginnings of the law and economics enterprise. In each case, those examining the large number of decisions under review could have had some degree of confidence that the outputs that they were evaluating had been independently derived. While I do not imagine that such individuals understood the Condorcet Jury Theorem, I do suspect that they exhibited some confidence in the strength of numbers when most of the judges whose opinions they reviewed had expressed like views of common legal problems. It is here, I believe, that the Condorcet Jury Theorem holds the greatest promise in evaluating judicial decisionmaking.

In contrast, as courts increasingly anticipate that their outputs will be regarded as establishing precedent, their incentive to write more detailed opinions that others might follow increases. And judges further appreciate that if they expect other judges to follow their opinions, they in turn must exhibit some respect for the opinions of others.[46] While I have no doubt that this is a cost-effective method of collegial court adjudication, it nonetheless compromises a critical premise of the Jury Theorem. The expectation that opinions establish precedents and the corresponding incentive to follow the opinions of others render judicial output endogenous and possibly path-dependent and thus no longer independent. The fact that more courts than not achieve a like outcome on similar facts when the first court to address a question carries more weight tells us much less about the value of the output than when all outputs were independently derived in early common law, or

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46 For two articles that cast similar insights in game theoretical terms, see Erin O'Hara, *Social Constraint of Implicit Collusion?: Toward a Game Theoretic Analysis of Stare Decisis*, 24 Seton Hall L. Rev. 736 (1993); Eric *Rasmussen, Judicial Legitimacy as a Repeated Game*, 10 J.L. Econ. & Org. 63 (1994).

civil law, courts. As a consequence, legislative codifications, restatements of law, and civil codes, if based upon early low-level judicial outputs might themselves have a substantive normative foundation in the Jury Theorem.

We might also imagine one hybrid context that mixes elements of precedent and independent analysis. It is worth observing that in federal practice, separate circuits are not expected to follow each other's precedents, although they are expected to follow precedents internally. Similarly, district courts at the same level are not expected to follow each other's precedents. In both cases, the court one level up in the judicial heirarchy — the Supreme Court above the circuit courts and the circuit courts above the district courts — has the benefit of an increased likelihood that the outputs below are independently derived. The ready availability of published opinions on like cases makes this a less robust proving ground for the Jury Theorem than early common law and civil law courts are, but it is a more likely context for the Jury Theorem than are en banc appellate panels. At a minimum, the Jury Theorem might provide a partial positive account for these common judicial practices.

While each of these potential applications deserves fuller treatment, the point here is simply to underscore that several features of federal judicial practice appear, at surface level, to facilitate a result that might be informed by the Condorcet Jury Theorem. The hierarchal structure of the judicial system might itself facilitate the ability of each court up the hierarchy to seek support in the independently assessed views of multiple decisionmakers below. This might provide a partial explanation for why district court decisions are not presumed binding on other judges on the same level court and why the circuit courts of appeals abide precedent internally but not externally. In each instance, the rules (in addition to whatever other purposes they might serve) promote some level of independence in assessing the legal questions presented to the court. A still greater application might be historical. The Theorem might well inform the reliance of early drafters of restatements, civil codes, and early state law drafters, upon the common law.

CONCLUSION

Professor Levmore has provided a provocative analysis of the Condorcet Jury Theorem across multiple decisionmaking settings. This reply has held less ambitious objectives. My goal has been to assess the role of the Theorem in various judicial decisionmaking contexts. In the end, I agree that the Theorem has not been fully tapped in this context. But counterintuitively,

perhaps, I would suggest that the less collegial the body — or the less it resembles a jury — the more the Jury Theorem has to offer. While this might come as a surprise to modern legal scholars, I expect that the insight might have been regarded as intuitive to legislators of an earlier generation.