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## Reasoning and Precedents in Appellate Courts

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Imagine that on an appellate panel facing two questions, Judge *A* thinks that a petitioner has standing in a case, but that this petitioner should lose on the merits because of the way a statute or precedent is understood. Judge *B* thinks there is no standing but argues that if there were standing, petitioner should prevail on the merits. Judge *C* thinks there is standing and also thinks petitioner should prevail on the merits. “Outcome voting” asks each appellate judge about affirming or reversing the lower court opinions on these matters. Here, *A* and *B*, if asked as individuals, think petitioner should lose – Judge *B* because of the standing problem and Judge *A* because of a judgment regarding the merits. Under “issue voting,” we would instead poll the panel issue by issue, asking first whether a majority thinks there is standing, and then inquiring how a majority – and it could well be a different majority – rules on the next issue, in this example, the merits of the case. In the example set out here, there would be a vote for standing (*AC* combined) and then a positive vote on the merits (*BC*), and petitioner would win because of these distinct 2-1 votes. But under the practice of outcome voting, which is the usual practice in American jurisdictions,<sup>1</sup> *AB* combine to produce a loss for the plaintiff. Critically, the *Marks Rule* says that the holding, or precedential value, of a fractured court should be viewed as that position representing the narrowest grounds offered by the concurring judges (as to the outcome of the case).<sup>2</sup> Here, the rule leaves *C* out of the group when it comes to writing the majority decision; it is against petitioner, because of *A* and *B*’s judgments (though they decide against petitioner on different grounds) and *C* dissented from that result, or outcome.

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<sup>1</sup> David G. Post & Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multi-Judge Panels*, 80 GEO. L.J. 743 (1992) (noting that the Supreme Court typically engages in outcome voting though there are some exceptions); Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1 (1993) (attributing the American norm of outcome voting to the longstanding British rule and then proposing that judges conduct a vote whether to follow issue or outcome voting).

<sup>2</sup> See *Marks v. U.S.*, 430 U.S. 188 (1977) (“A fragmented Court decision stands for the ‘position taken by those members who concurred in the judgments on the narrowest grounds.’”). Richard M. Re, *Beyond the Marks Rule*, 132 HARV. L. REV. 1943 (2019) (noting that plurality views are sometimes set aside when it comes to precedential value, unless the Marks Rule is called upon). See, e.g., *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 81 (1987) (treating a plurality’s view as nonbinding because it “did not represent the views of a majority of the Court”). Still, the Marks Rule often has bite, and it is not limited to the interpretation of Supreme Court cases. Professor Re collects cases that apply the Marks Rule, and these include circuit court and state court decisions. *Id.*, at 1955-56.

The Marks Rule emerged regarding the precedential value of a Supreme Court decision, but it is applicable and easier to explore in the context of 3 rather than 9 decisionmakers. A majority might agree not just 2-1, but 3-0, on the outcome, but for very different reasons, and again the Marks approach tells later courts, and especially lower courts, how to interpret the decision. Sometimes a judge, like *C*, has great confidence in her thinking about one issue and the reasoning behind it. If *C* wants to influence later courts about standing doctrine, *C* will be tempted to switch her position as to the merits of the case, in order to be in the majority as to the outcome. The court will then be 3-0 against plaintiff, and *C* can be included in the decision-making and precedent-setting process. *C* can help form the evolving law of standing. *C* might feel perfectly good about this switch because *C* is going along with the majority as to the outcome of the case, and then also helping to form a legitimate authority as to the law of standing.<sup>3</sup>

This problem with interpreting precedent is not quite the same as the more familiar question of interpreting a statutory ambiguity by discerning the legislative intent of those, in the majority, who enacted a given statute. “Congress is a they not an it,” because different legislators are likely to have had different reasons for supporting a statute.<sup>4</sup> But one can restrict statutory interpretation to the words of the text, whereas a majority judicial decision is normally an affirmance or reversal rather than an agreement about the precedential value of the decision. Still, a search for the “narrowest grounds” of a majority of judges has much in common with the search for a single legislative intent.

There is much to be said about the battle between issue and outcome voting, and in many cases the message ought to be that given the possibility of cycling, and paying attention to Arrow’s Theorem, there is often no stable resolution to the dispute, and even no reason to think that one rule leads to more unattractive and strategic vote switching by judges.<sup>5</sup> But the focus here is on the more general question of how to think about the *reasons* for each voter’s conclusion when we are aggregating votes. The question is important not only for appellate courts but also with respect to juries, large-scale elections, elected representatives, corporate boards, and even medical and personal decisions. For example, if a supermajority of jurors is required for a finding of liability,

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<sup>3</sup> This was essentially the argument made by (or we can impute to) Judge Thomas Ambro in *Hanover 3201 Realty v. Village Supermarkets*, 806 F.3d 162 (3d Cir. 2015). In an issue voting jurisdiction, there will also be vote-switching temptations, but the choice between issue and outcome voting is not the subject of this essay.

<sup>4</sup> Kenneth A. Shepsle, *Congress is a “They” not an “It”: Legislative Intent as Oxymoron*, 12 *International Rev. L. & Econ.* 239 (1992). Note that Shepsle’s point is not that a single intent cannot exist, but rather than it may not exist.

<sup>5</sup> Cycling is normally associated with aggregating preferences, and here the analysis aggregates what are said to be correct answers rather than preferences. This distinction, whether valid or not, is left for future work. This is hardly the first association of nearly inevitable cycling with judicial decisions, which are ostensibly about finding right answers. See Frank Easterbrook, *Ways of Criticizing the Court*, 95 *HARV. L. REV.* 802 (1982).

what if 4 jurors give a single reason for their votes that is orthogonal to the reasoning of the other 5 jurors in the supermajority, and these 5 come to their conclusion for different reasons? Perhaps more significantly, what if every juror who votes for a conviction in a criminal case does so for a different reason? Each might listen to the reasoning of the others and shrug a shoulder, saying it is just 50% likely that what is heard from other jurors in deliberation is right or wrong. In the case of medical procedures, what should a patient do if 5 doctors were consulted on an important matter, and 2 doctors said to avoid surgery, but 3 said to submit to the surgery – but for 3 different reasons, or at 3 different hospitals, and each doctor belittles the colleagues’ thinking? An apparent majority favors surgery, but a plurality favors no surgery *if* we take reasoning as the important basis of an important decision. The well-known Condorcet Jury Theorem exalts the wisdom of the crowd; a majority of independent voters, each more likely than not to get something right rather than wrong, should be trusted and especially so as the number of voters increases. The logic applies to plurality voting as well as to majority voting.<sup>6</sup>

The problem with this logic, and the novel point advanced here, is that virtually every outcome can derive from many reasons, and these reasons can be further divided into sub-reasons, also with right and wrong answers. It is therefore rare for there to be unambiguous majorities or pluralities. A majority can go in one direction with respect to a given reason, where there is a right answer, while a different majority can agree or disagree on the outcome based on these or other reasons. Ten divided by 5 equals 2 no matter how one goes about it, or for whatever “reason” the decision-maker, or fifth-grader, thinks it so, but when a defendant is found to be negligent by a majority, and by the preponderance of the evidence, it is likely that as we dig down we find many individual and non-majoritarian reasons for the conclusion.

Imagine, for instance, that a large majority of the 50 applicants accepted to two prominent law schools, *X* and *Y*, choose *X* over *Y*, but they do so for many different reasons. It is plausible that when we look at the disparate reasons for matriculation, we find that a plurality of 18 out of the 50 thought that the probability of obtaining a federal clerkship was the most important reason to select one law school over the other, and that School *Y* placed the highest percentage, and even the highest absolute number, of its eager graduates in such clerkships.<sup>7</sup> These 18 are among 20 who

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<sup>6</sup> See Christian List & Robert E. Goodin, *Epistemic Democracy: Generalizing the Condorcet Jury Theorem*, 9 J. POLI. PHIL. 277 (2001). Extending Condorcet’s theorem to plurality voting is straightforward, as these authors show. A plurality winner, *A*, need not be pitted against competitors *B*, *C*, and *D*, but need only defeat them in pairwise competition, which is easy for the plurality winner. My argument in the text suggests that this is not at all straightforward if *B* and *C* share some reasoning.

<sup>7</sup> Note that the example introduces a question that might be about applicants’ preferences rather than their search for a correct answer. The difference if any is taken up shortly. In any event, the example could just as well have been one where the applicants all agree that a high bar-passage rate makes for a good law school (that, at least, is or will be a fact, and they may share that preference), but then disagree about what causes a high rate (that is a reason) and the likelihood that past experience predicts future bar-passage rates. Alternatively, we can imagine that every student prefers the clerkship opportunity, but they disagree on the

choose School *Y*. Meanwhile, 30 of the applicants choose School *X*, but they do so for 15 different reasons, and they have no opinion at all about the reasoning of the 18.<sup>8</sup> If we first took a vote on the most important thing to consider in selecting a school, clerkship success would have won with a plurality. If we move on, as the outcome system does, and as Condorcet seems to require, additional admitted students ought now to attend School *Y* because the wisdom of the crowd has informed them that the clerkship factor is most important.<sup>9</sup> Indeed, students who previously leaned toward *X* might now rationally switch to *Y*.

Returning to the important point here, one justification for the American practice of favoring outcome over issue voting on judicial panels (but not with respect to some jury decisions<sup>10</sup>) could be that a majority vote on an issue can also be subdivided into many smaller issues. In that case, the cleanest unambiguous majority is found when voting for one outcome over another, where there are only two choices – like affirm or reverse. Note that further digging down might again reverse things. Those who first chose *Y* because of the clerkship factor, might have done so for several different reasons. Some because a clerkship provides a path to later opportunities; some because the clerkship numbers reflect an attentive faculty; and some because clerkship success indicates that informed observers regard *Y*'s education as superior. There may be no majority at this level of investigation, and combined with the views of those who chose *X*, a different ambiguous majority could suggest a different decision, or outcome.

The problem goes to the heart of majoritarian decision-making. Oddly, a 2-1 decision may be less convincing, and certainly more confusing, than a 1-0 opinion.<sup>11</sup> The majority may not really be much of a majority, but rather something that emerges from the way reasons and outcomes are framed. A 2-1 reversal of a lower court's judgment is quite likely not one made by an unambiguous

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right answer to the question of whether clerkship success rate is the most important thing to look for in their education.

<sup>8</sup> If the “no opinion” escape clause (from the claim that a majority apparently disagrees with one voter's reasoning) is unsatisfying, we might think of claims that depend on observations that other voters simply have not experienced. Thus, a group might like one school because of its superior admitted students' weekend, while other voters have no opinion simply because they did not attend the event. Similarly, some judges or jurors might have reasons based on individual experiences that their peers simply did not enjoy.

<sup>9</sup> Applicants differ, of course, and might not share a single goal, in which case the wisdom-of-the-crowd thinking does not apply. But we might imagine that all agree that the clerkship fact is highly correlated with other features they do value.

<sup>10</sup> Elizabeth A. Larsen, Comment, *Specificity and Juror Agreement in Civil Cases*, 69 U. CHI. L. REV. 379 (2002) (discussing case law on the requirement that jurors agree on the specific reason for a verdict, including *Stoner v. Williams*, 46 Cal. App. 4<sup>th</sup> (1990), which held that jurors considering a set of seven possible fraudulent acts did not need to all agree on which one of the acts had been committed in order to find for the plaintiff as long as a supermajority (minimum 9) thought that at least one had been committed – agreeing as to the verdict and elements is good enough).

<sup>11</sup> A 1-0 opinion is as clear as it gets. A 2-1 decision, may be 1-1-1 as to its reasoning, and then it is often the case that each reason has two judges in opposition.

majority with respect to anything that will be used as precedent, and it will often be nothing more than a 1-1-1 set of approaches followed by some combinatorial gymnastics in order to obtain a majority outcome.<sup>12</sup> This is especially the case if we continue to dig down about judges' thinking and reasoning. It might be sensible to latch onto a majority decision as to an outcome, but then avoid finding any precedential implication when there is no stated majority as to the reasoning of this group. Another approach – and perhaps one found but unstated in practice – is to add the lower court's thinking into the calculus. These four judges might give us a 2-1-1 plurality as to reasoning, and then make precedent more meaningful. Of course, the opposite might appear; what seemed to be a majority on the appellate court as to reasoning as well as outcome, might now look like something less than that, unless the idea is to count the lower court's reasoning – but not to count that judge's views quite as much as that of any appellate judge.

Once we go down the rabbit hole of reasons beneath reasons (as introduced here in the example of admitted students), it is fair to question the precedential value of even a 3-0 (or 9-0) decision, even where the 3 appear at first blush to agree about their reasoning. If we dig down into the reasoning, we might once again find no majority at all. And if this skeptical view is adopted, the very notion of precedential value is in question – and this threatens predictability and other values. One way to steer free is to reason that as the size of the majority increases, it becomes more likely that there is indeed majority agreement about the reasoning that produced the majority's opinion. Presumably, there is a finite number of reasons that will motivate the decision-makers, and eventually a large percentage will agree on at least one of those reasons. In addition, the greater the number of voters, the more likely it is that within the large majority many are correct and that there is at least a smaller majority as to the reason for the decision regarding the outcome.<sup>13</sup>

If there is to be a coherent view of precedent, when in reality as we dig down we are unlikely to find majority agreement as to reasoning, it might be wise for judges and other “voters” to delegate some decision-making – in this case the announcement and interpretation of the “reason” for an outcome – to a single person. The intermedia or single author can then evaluate the arguments offered by colleagues (or by judges on earlier courts), the relative expertise they have, and the importance of a solid precedent, before announcing the court's reasoning – even when this is not exactly a product of majority decision-making. Again, and in practice, courts and committees (when asked for their reasoning) might do this unofficially, but it is difficult to know how often this is the case. We often find ourselves agreeing with a group and keeping silent about the reason for agreement. There is every reason to think that judges do the same, even though the important precedential value of a case is at stake. Judges might sign on to an opinion, but we do not know

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<sup>12</sup> For a period, the practice was to regard plurality opinions as establishing no precedential value. See Richard M. Re, *Beyond the Marks Rule*, 132 HARV. L. REV. 1942, 1998 (2019).

<sup>13</sup> If 9 out of 10 doctors agree that a patient should undergo a particular surgical procedure, it is more likely that as many as 6 (a majority) agree on the reason for this right answer than if only 6 recommend surgery.

whether their reasoning is shared, or whether one or more of them put the value of having an unambiguous precedent above the value of revealing his or her reasoning.

It must be emphasized that this novel argument refers to matters where we think there is a correct decision to be found rather than an amalgamation of preferences. It assumes that there is a correct answer to most of what judges do. In comparison, if among 10 friends looking to dine together on a special occasion, 7 prefer restaurant *Q* and 3 want the group to go to restaurant *R*, it is of little significance that the 7 prefer *Q* for 5 different reasons, such as individually preferred entrees, while the 3 prefer *R* for a single reason, be it *R*'s convenient location or its chocolate cake. At one level, the 3 constitute a plurality at the level of (first order) reasoning, but here we are trying to maximize utility or find a Condorcet winner<sup>14</sup> (or preserve friendships) and, intensity of preferences aside, going along with the 7 is almost always the correct thing to do where preferences are concerned, and especially so if this is a one-off get-together.<sup>15</sup> Put differently, even a plurality might be wrong about its reasoning where a right answer is concerned, and this puts the right answer in doubt, but it is hard to be wrong about a preference – so long as we set aside the problem of preferences formed on the basis of misconceptions about facts.

An important conclusion here is that knowledge comes with an inconvenience. It can be sensible to avoid digging down; majority decision-making and precedential value look good if we avoid thinking about the nature of the reasons used and given for a vote or other decision. But another conclusion is that we ought to recognize the importance of assessing the likelihood that a group of voters is or is not likely to share the reason for a decision. At times it is probably of no consequence whether decision-makers share their reasoning. But in the case of precedential value, it should matter a great deal. Majorities are not as reliable as they seem, even if they are better than any alternative in head-to-head competition.

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<sup>14</sup> An option that would defeat every alternative in head-to-head competition.

<sup>15</sup> For obvious reasons, the discussion sets aside the possibility of measuring intensity of preferences with something like an auction, cross-payments among the friends, or insistent expressions.