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I. INTRODUCTION

Spontaneous law is less enamored with simple majorities than is much of formal law, at least in appellate courts, legislatures, the electoral college, and plebiscites, where simple majoritarianism is the common requirement for action. In contrast, young children who are asked to vote on a name for their athletic team are often observed entertaining numerous nominations and then raising their hands as each nomination is called out—with no apparent restriction on the number of times a given little hand may be raised. The winner is the option that attracts the most votes. Experienced adults are often startled when these young voters raise their hands repeatedly, each casting numerous ballots. But in fact, the practice can be understood as a spontaneous example of approval voting.

Among other things, approval voting takes into account more than each voter's first place vote, but it has some trouble measuring intensities. Conventional single-ballot voting can capture more information about intensities simply because it differentiates between each voter's first place selection and all other available choices. There is something to be said for the adult norm of one-vote-per-participant, at least when the task is to select a single winner. But at the risk of skipping over too many intermediate steps, it may be useful to describe the intergenerational voting difference in three ways. First, the children's voting method normally reveals that there is majority support, after a fashion, for more than one team name, while the adults' voting method is likely to find no majority support for any one alternative. Second, the children's method steers clear of any intensely disliked alternative, while adult techniques aim affirmatively to satisfy the greatest number of voters. Finally, the methods chosen by adults are often less vulnerable to strategic behavior, which may be thought undesirable on both fairness and efficiency grounds.

It is, however, often unclear which method favors the organized strategist most. In approval voting, a voter might suggest to allies that they feign disapproval of alternative A in order to elevate the standing of their first choice, B. If voters who prefer A, but do not disapprove of B, behave

*William B. Graham Professor of Law, University of Chicago. I am most grateful for conversations with Henry Smith and with many faculty, students, and alumni at the University of Utah College of Law, where I was fortunate to be the Leary Lecturer in November 2000.
sincerely rather than strategically, then B may win even though most voting systems would and should lead to A rather than B. Young children are more likely to vote sincerely, so that their spontaneous use of approval voting is noteworthy. More experienced voters might signal one another as just described, strategically withdraw a nomination, or simply form coalitions and abide by sophisticated, well-crafted instructions. All these considerations, as we will see, help construct a case for plurality voting in settings where it has not been seen before.

II. PREFERENCES AND RIGHT ANSWERS

A. Condorcet Winners and Preference Aggregation

In some settings, round robin or exhaustive pairwise competitions are an attractive means of determining a winner. Even when no single option enjoys the support of an absolute majority of voters, there may be an alternative that is preferred over every other option in head-to-head competition. Such a winner is called a Condorcet winner, and I will proceed under the assumption that when there is such a winner, it should and will be preferred. Put differently, when there is a Condorcet winner, it is very difficult to make a case for an option other than this alternative.

But an important and sometimes fatal problem is that there is not always a Condorcet winner, and the very process of searching for such a winner exposes the presence of cycling. Imagine, for example, that voters, in or out of a legislature, are considering a school voucher plan. There is no absolute majority for the proposed plan of a $5,000 voucher for every school-age child in the jurisdiction whose family income is less than $30,000. We might imagine, however, that two-thirds of the voters prefer these vouchers over no vouchers, and that two out of three voters prefer vouchers for all school-age children over vouchers for only lower income students. But it is also possible that two out of three voters prefer no

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1 Plurality voting describes a single round of voting in which each voter can cast a single vote for any option. The winner is the alternative receiving the most votes. In circumstances where only two options are available, plurality voting amounts to simple majoritarianism. But plurality voting also permits numerous options, in which case the winner, or the “first-past-the-post,” has simply received the most first-place votes, where voters were not asked for their second- or third-place choices and where it is possible that one or more losing options would have defeated the plurality winner in direct, or “pairwise,” competition. Put differently, when there is a Condorcet winner, it is very difficult to make a case for an option other than this alternative.

2 Named after the eighteenth-century French mathematician.
vouchers over the alternative of vouchers for all children. With such cycling, the procedure or voting mechanism will determine the outcome, and there is no—indeed under certain inoffensive assumptions there can be no—solution to this problem or incoherence.4

I have suggested elsewhere that societies might tend to avoid voter dissatisfaction by suppressing evidence of the cycling preferences.5 Spontaneous law and common intuitions can be said to reflect this observation. Thus, we do not generally hold round robins to determine winners in sporting events, and we would not expect (even) adults to engage in exhaustive pairwise competition in order to choose a name for a soccer team or perhaps a restaurant to patronize for a group dinner. In these settings, a Condorcet winner is unlikely, the search for a Condorcet winner is likely to reveal cycling (as there always is in the absence of such a winner or in a dead heat), and the revelation of cycling might cause despair or frustration regarding the actual choice once it is made.

In these settings, experienced voters might avoid approval voting, except perhaps in a very informal manner so as to avoid selecting a Condorcet loser,6 because of a well-founded perception that it rewards strategic voting.7 Approval voting is commonly used, after a fashion, where

3We can label the three voters or groups of voters as 1, 2 and 3. Imagine that 1's ranking is LNA, where L is vouchers for lower-income children, N is no vouchers, and A represents vouchers for all students. If 2's ranking is ALN and 3's preference is NAL, then we have a cycle where L>N (L defeats N because 1 and 3 prefer L over N), A>L (A defeats L because 2 and 3 prefer A over L), but (in intransitive fashion) N>A (N defeats A because 1 and 3 prefer N over A). It is relatively easy to imagine real voters having these disparate rankings. Voter 2 seems to like vouchers, and the more the merrier. Voter 1 focuses on the wealth distribution issue and likes vouchers only if they are limited to lower income students. Voter 3 shows us why cycling requires multiple spectra or non-single-peaked preferences. See generally KENNETH A. SHEPSE & MARK S. BONCHEK, ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS 84-91 (1997) (discussing single-peaked preferences). We can explain Voter 2's preferences as reflecting either a concern about tainting lower-income students or a disapproval of disparate treatment based on wealth.

4Readers unfamiliar with these concepts might begin with SHEPSE & BONCHEK, supra note 3, at 39-81 and ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 17-49 (2000).


6There is, after all, no reason to choose an option that loses to all competitors in pairwise competition. Hence, there is reason to ask whether anyone really objects to option A (where A is a team name or perhaps a movie that friends consider attending). A Condorcet loser is likely to be some voter's least favorite choice, while other options will be no one's least favorite.

7Interested readers can see that asking voters to assign points across multiple choices will not solve the problem of strategic voting. See infra Section IV.D.
decisions are made based on audience applause—whether to kill gladiators or request musical encores—and it is noteworthy that these decisions are already framed as binary and thus there can be no cycling.

B. Right Answers, the Jury Theorem, and (Even) Plurality Voting

With rare exception, choosing the name of a team is a question of pure preference aggregation. In other situations, however, there might well be a right answer. In these cases, aggregation serves the function of pooling information contained in the group of voters. Here, the case for simple majority decisionmaking, as opposed to approval voting and many other voting forms, is very strong. There is a famous theorem about this, which I will refer to as the Jury Theorem. Consider, for example, a group or jury asked to vote on tort damages or a question of negligence. The law normally structures the question as an up or down vote, suitable for majority or supermajority rule. In this format, the power of group decisionmaking, which is surprisingly straightforward, furthers the case for majority voting on epistemic grounds. The gist of the Jury Theorem is that if we had thousands of observers, each a bit more likely than not to be right, we would do very well indeed to listen to a majority of them. If most voters are more likely than not to be right, and we cannot identify those experts who are much more likely to be right, then abiding by majority vote will produce the correct answer more often than any other method, with the likelihood of success increasing as the number of voters increases.

It is less obvious that, with some care, we can extend the Jury Theorem to cases where there is a right answer and multiple options exist. With many observers and more than two alternatives, the logic applied to the two-option case can be extended to a decision with multiple options. Sometimes, it will be sensible to abide by plurality voting—that is, go with the option that garners the most votes. Thus, with four options and numerous voters who (all or even mostly) have a greater than one in four chance of selecting the correct answer, the group plurality vote is a good option. While the Jury Theorem originally focused on the question of a defendant’s guilt or innocence, its insight is also useful for cases with no natural binary vote. Therefore, participants interested in reaching the correct answer will also

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8 This theorem is normally (also) attached to the Marquis de Condorcet’s name, but I think the jury idea is much more intuitive than the insoluble paradox bearing his name.


10 I am grateful for discussion with Robert Goodin on this subject.
wish to follow a plurality rule where there are multiple options, so long as the other assumptions are satisfied.

Anyone who has watched the popular television program *Who Wants to be a Millionaire*\(^1\) knows the value of group voting, majority acquiescence, and even plurality inclinations. Each contestant on the game show has a one-time option of seeking advice from the studio audience. Clever contestants resort to this “lifeline” precisely when they face a question dealing with popular culture or some other matter where it is likely that most audience members are not merely guessing or randomly selecting an answer. The program allows respondents in the audience to indicate only their first choices, although contestants might prefer that the audience have the option of abstention (if there is reason to think that self-assessment about knowledge levels is reliable) or, more to the point, the ability to rank the available answers. If, for example, an audience responds 40-38-12-10 respectively to the four proffered choices, A, B, C, and D, a contestant might do well to select B if all twenty-two presumptively incorrect voters (who chose C or D) believe that B is more likely to be correct than A.\(^2\) Put slightly differently, incorrect voters as to the right answer might still be right as to the response that is least likely to be correct, and so forth.

There are, of course, schemes that ask voters for their second and third-place choices, even where the aim of the vote seems to be to find the correct answer and not to aggregate preferences. Votes by sportswriters for awards given to most valuable players and awards voted on by the Motion Picture Academy come to mind. Similarly, there are runoffs in many political systems, but these multi-tiered voting processes may be driven more by ideas about aggregating preferences than by the goal of finding correct answers.

**C. Mixed Questions and the Variety of Voting Rules**

It may be tempting at this point, from both a positive and a normative perspective, to ask first whether a given matter to be decided involves a right answer or an attempt at preference aggregation. If the former, we might expect Jury Theorem thinking to dominate, in which case numerous voters and simple majorities are to be trusted. But, where preferences are at issue, the focus might be on searching for a Condorcet winner. The problem,
however, is that most questions on which we vote involve a mixture of right answers and preference aggregation. This is true for exercises in popular democracy, legislative actions, and especially general elections, which are perhaps the clearest instance of such mixing. Voters may respond to preference questions such as “Which leader will favor the sort of welfare policy that I prefer?” But voters will also respond to questions with right answers, as in “Will one leader’s tax plan cause the sort of business investment this candidate promises?” There may be other types of questions as well.  

It is not surprising, therefore, that there is enormous variety around the democratic world with respect to how elected leaders and representatives are selected. There is, perhaps, as much variety with respect to this aspect of law or lawmaking as with any other. Roughly speaking, it might be said that no two countries are alike in this regard, with scores of significantly different approaches. Winner-take-all pluralities are common in the United States, but it is easy to see why other jurisdictions deploy systems built around proportional representation or use runoffs to achieve absolute majorities and so forth.

In virtually every democracy, crises come in the form of close elections, unshakable incumbents, instability, apparent gridlock, or seemingly hyperactive government. This can, in turn, cause an electorate, or at least its intellectual elite, to contemplate a switch to some other voting scheme, even as another country with just that scheme ponders a reverse switch.

Despite all the variety, there are several ways in which these systems are uniform. Virtually all democracies have legislatures, and once the elected representatives are inside the legislative assembly, they do not use plurality voting, and they do not rank or assign weights or points to their preferences (or assessments of right answers). Nor do they use proportional voting to determine substantive policy. When a tax bill is passed along party lines by a 2-1 margin, for example, we do not find proportional power-sharing, such as two years of majority law for every one year of minority

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13 In particular, there is the possibility that political candidates will compete for votes and maximize their own well being once elected by offering exploitative plans or ideas for externalizing costs. The voter is expected to ask whether a given candidate’s plan will help the voter at the expense of others. The more that legal systems do not check this dysfunction of government, the more we might expect variety in the ways we choose lawmakers. But this complexity is probably unnecessary to explain the remarkable variety found among democratic systems for electing lawmakers.

14 The U.S. electoral college may seem unusual, for example, until one realizes that only a very few democracies use simple, direct election to choose their leaders. Some intermediation, geographic weighting, or runoff schemes are found in most places.
law. Instead, the legislative rule is very much of the winner-take-all kind, where the winner must obtain an absolute majority coalition.

The rule of decision in courts is slightly less universal. There is, once again, enormous variety as to (judicial) appointment, election, and promotion, but there is almost universal convergence on the requirement of an absolute majority coalition for what I call "disposition," or the immediate, enforceable result affecting the litigants. The rule of decision is, therefore, only interesting where the legal system calls for a panel of judges, as is normally the case on appeal and occasionally the case for fact-finding and other initial judgments. If, for example, nine justices hear a case on appeal, we might imagine rules allowing judgments to be entered if there is support by a majority (5-4, for example), supermajority (such that a mere five votes in favor of reversal would presumably fail and leave standing the decision below), or plurality (4-3-2) judgments. There may be a designated tiebreaker (following a 3-3-3 vote). In nearly all jurisdictions, the court must at least reach a simple majority decision. But this rule or norm applies only to dispositions—the judges are free to write opinions giving their reasoning, and in many jurisdictions (and certainly in the United States), plurality decisions based on different reasoning are common. I dwell on this disposition/reasoning distinction—not to mention the very meaning of a split opinion—later, but first it is useful to deal with (and set aside) the supermajoritarian possibility.

D. Supermajorities

The supermajority alternative raises the obvious question of why we see supermajority requirements in some settings and not others. Civil juries, constitutional conventions, treaty ratifications, and local bond referenda would not seem to have much in common, yet supermajorities are well known in all these settings.

Supermajority requirements are not easily defended or explained by the rationale that they raise the level of confidence in decisionmaking or convince more participants as to a decision's importance. To the extent a group searches for a right answer, even a sizeable minority should (as we have seen) be pleased to abide by a simple majority—and sometimes even by a plurality—assessment. In these settings, the voice of the majority is ignored at the risk of passing up perfectly correct decisions. And where a matter of preference aggregation is concerned, a supermajority requirement

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hardly eliminates cycling, and it can eliminate a Condorcet winner where one exists.

Supermajorities are likely best explained on a case-by-case basis. For instance, they are often used to limit the imposition of external costs. Voters might fear that majorities will allow governments to grow in order to take inefficient or purely redistributive actions at the expense of either a minority or a poorly organized majority. In the long run, however, even efficient interventions may prove inefficient once rent-seeking costs are taken into account.16 We normally think of citizens or constitutional framers as guarding against the externality problem by imposing, for example, precommitments as to compensation for losers or provisions that some subjects are ultra vires for the government. But another such tool is the supermajority vote, even though it comes at the expense of giving holdout power to minorities and blocking some Condorcet winning alternatives.

Other supernajorities are explained in a more localized fashion. Thus, we might explain a supermajority requirement with respect to referenda regarding local bond issues as responding to the fear that some proposed public projects will favor the organized few, who go to the polls when “their” projects are at issue, over the silent taxpayers. Another intuitive, subject-specific explanation applies to juries. We might expect civil juries to be governed by a simple majority rule, if only because we ask these jurors to find right answers, and the Jury Theorem tells us that simple majoritarianism is the best rule. Burden of proof considerations might suggest that a plaintiff should lose if the plaintiff’s case cannot attract a supermajority, but the fact that we regard close decisions with disfavor is surely puzzling. A unanimous jury of members, each barely more likely than not to get a matter right, obviously has a much higher likelihood of being right than a closely divided jury,17 but it is not as if the divided jury’s minority is more likely to be right than its majority. A key argument for supermajoritarianism in this context is probably based on the rather unexciting idea that a simple majority rule might allow juries to rush to judgment after taking an initial straw ballot.18 However, this view is alleviated in some jurisdictions, where a simple majority decision becomes acceptable only after deliberation has

16I refer to the costs expended in order to encourage or discourage governmental action. See Cooter, supra note 4, at 68–75 (explaining rent-seeking costs).
18See Levmore, supra note 15, manuscript at 26.
occurred for a certain amount of time. The simple majority approach is further supported by the observation that panels of arbitrators normally operate by majority vote. It would seem senseless to force a panel of arbitrators to reach a unanimous decision, and we certainly do not expect private parties to agree ex ante to be bound only by unanimous arbitration panels.

In other settings, we can explain supermajoritarianism as the cost of an initial pooling arrangement, perhaps as a device to prevent the imposition of certain external costs. For example, sovereign states may agree to enter a union only if there is some supermajority constraint on the ability of the whole to interfere with the will of a part. Citizens of these parts may simply distrust the preferences of other members, prefer to retain control over many things themselves, or fear that a mere majority will impose taxes, obligations, or regulations that overburden their own kind. There are several ways to guard against these problems, but a supermajority rule is fairly simple and perhaps especially attractive where each member state recognizes that, even if the union misses some Condorcet winners, the member state can continue to pass desirable legislation on its own.

III. DIVIDED COURTS

A. Narrowest Grounds and Discerning Majority Reasoning

I turn now to voting on judicial panels. Imagine an appellate court, perhaps the United States Supreme Court, splitting 4-2-3. We have already seen that we demand a majority for disposition, yet, we tolerate splits as to reasoning and, therefore, the stated precedential value of a case. The current American norm, though not quite the universal practice, is to abide by the

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19 For this and some further discussion of jury deliberation, see id., manuscript at 19 n.33.
20This argument is an extension of Saul Levmore, Bicameralism: When are Two Decisions Better than One?, 12 INT’L REV. LAW & ECON. 145, 155-59 (1992) (comparing supermajoritarianism with bicameralism).
21My focus is on judicial panels, although the analysis is the same for administrative panels, commissions, military tribunals, and so forth. In part IV, I return to legislative chambers.
22Some federal courts still follow old practice and derive no precedential value from these split decisions. See, e.g., Wiesenfeld v. Sec’y of Health, Educ. & Welfare, 367 F. Supp. 981, 988 (D.N.J. 1973) (“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.”). Many state courts also regard pluralities as incapable of producing precedent. See, e.g., Negri v. Slotkin, 244 N.W.2d 98, 100 (Mich. 1976) (“Plurality decisions in which no majority of the justices participating agree as to the reasoning are not an authoritative
narrowest-majority-grounds rule, also known as the Marks doctrine, in interpreting such a divided court. If the groups of Four and Two (or any other coalition) agree on a disposition of the case, with the Three dissenting, then we have a clear disposition; the precedential impact, or reasoning, is then that of the Four or Two, depending on which is deemed narrower, or more likely to be agreeable to the other subgroup found in the majority coalition. If, for example, the majority affirms an opinion that finds a statute unconstitutional, the narrower grounds are normally said to be that reasoning that would invalidate the fewest other statutes. However, examples must be investigated one at a time. A possibility that does not seem to occur to many judges is that of no narrowest grounds. Thus, while we might say the narrowest-majority-grounds rule asks us to look for a Condorcet winner, we are left with the possibility of a case that has split a court because there is simply no Condorcet winner with regard to the reasoning. Note, in passing, that we do not ask our courts for a supermajority decision—and this may be explained or justified by the idea that we like to think these courts look for right answers rather than preference satisfaction.

B. Misconstruing and Falsely Construing (Judicial) Majorities

By way of example, imagine a statute providing that contingency fees charged by lawyers may not exceed twenty percent of the judgment or settlement received by a client/plaintiff. Imagine further, a suit, brought by an unsuccessful plaintiff or attorney, challenging the statute. Following a loss at trial, the plaintiff appeals to a panel of nine judges. Four judges ("the Four") vote to strike the statute and reverse the lower court, reasoning that the cap would discourage meritorious suits and therefore violate the right to Due Process. Two judges ("the Two") agree on a reversal, saying that the statute unfairly interferes with freedom of contract. Finally, three judges ("the Three") vote to affirm the lower court, with these judges arguing that

interpretation binding on this Court under the doctrine of stare decisis."); Commonwealth v. Cooper, 278 A.2d 895, 897 (Pa. 1971) (holding that decision supported by only three state supreme court judges cannot, under Pennsylvania law, be considered controlling precedent); But see Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d 682, 694 (3d Cir. 1991) (stating that narrowest-ground is as binding on lower courts as nine-justice opinion).

23Following the decision in Marks v. United States, 430 U.S. 188, 193 (1977) ("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,'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n. 15 (1976))).
the legislature ought to be afforded wide latitude. The lower court is of
course reversed, and the statute invalidated, because there is a (6-3) majority
for this disposition.

It is possible that a related matter will arise before a subsequent court,
which raises questions concerning the precedent set out by the earlier court.
The later court might say that the narrowest-grounds doctrine points to the
reasoning set out by the Four because that line of argument will lead to the
fewest invalidations of statutes. Indeed, it is plausible that the Two’s
freedom of contract argument would, if treated as binding authority, cause
the invalidation of a large number of price regulations and associated
statutes. But of course, this interpretation in favor of the Four’s reasoning
might misconstrue the Four-plus-Two majority coalition (as to disposition).
The Four might in fact agree with the Two about freedom of contract, but
the Two might not share the Four’s view of Due process or of the likely
effect of the statutory cap on the mix of meritorious and frivolous suits.
Perhaps the Two do not think that Due Process has much to do with the
number of suits a legal rule encourages, or perhaps they simply disagree
with the implicit empirical claim about discouraged lawsuits. This is not to
say that the later, interpreting court would do better deciding that the
reasoning of the Two is the narrowest ground it seeks to identify. It is even
easier to see that the Four might not agree with the Two; the latter’s
reasoning will, after all, invalidate more statutes, and all things equal, this
seems like an error to be avoided. One question is whether such errors are
avoidable; another is whether there are yet other types of errors to be
avoided.

The subsequent, interpreting court, not to mention parties who plan
their affairs and hope to predict judicial sentiment, might also falsely
construe the narrowest-grounds majority because there is, in fact, no stable
winner. Consider, for example, that the Two might rank the three identified
reasoning options as F-L-D, where F is the freedom of contract argument,
L is the legislative leeway notion, and D is the Due process argument
against the cap for fear of discouraging meritorious lawsuits. Meanwhile,
the four might rank the options as D-F-L, preferring to strike everything that
discourages meritorious suits before supporting the freedom of contract
argument. And the Three might rank the options as L-D-F, wishing most to
leave state regulation alone, but otherwise more concerned about the risk of
discouraging good suits than with freedom of contract. With these rankings,
there is no narrowest reasoning, and any interpretation or attempt to apply
the Marks rule chases a false hope.
C. Abiding by Judicial Pluralities

But I am not simply emphasizing that the *Marks* rule must be used with care and that there is the risk of misconstruction and false construction (as I have labeled these problems) when interpreting a split vote. A more novel alternative is that whether or not there is either a true narrowest majority (supporting one line of reasoning in support of the majority’s disposition) or cycling (and therefore no reasoning majority to be found) perhaps we should favor the reasoning of the Four, as a plurality, because of the Jury Theorem. This argument in favor of the method most likely to find the right answer is not entirely fanciful. These judges are lawyers, after all, and they may be significantly more likely than not to be right about the question of whether the statute will discourage meritorious suits. Put differently, it is curious, and perhaps misguided, to look for the narrowest grounds when this is most readily translated into a quest for a Condorcet winner. The Condorcet winner argument is strongest where preference aggregation is at stake, but judges normally think of themselves as in the business of finding right answers rather than satisfying or aggregating preferences. Where there is a right answer to be found, there is a decent case for abiding by the plurality, even though a different option may be able to win all its pairwise competitions. There is, to be sure, an argument for asking a large group to make pairwise evaluations, but in cases where an incorrect voter is unlikely to be any good with his or her other rankings, the plurality is superior to the option that looks like a Condorcet winner. In any event, the best strategy, in lieu of the plurality, is probably to ask all the judges—dissenters included—to compare the two (or more) arguments supporting the majority disposition. This is not what the *Marks* doctrine does; by looking for the narrowest grounds in support of the majority, it excludes (and certainly does not ask for) information about the dissenters’ views as to which of the majority-supporting grounds is “right.”

The potential for plurality voting, at least as to reasoning, is more dramatic but on shakier ground when the plurality is in dissent. Imagine that the Two and the Three form a majority for a given disposition, and that the Four dissent, presumably as to disposition as well as to reasoning. It is possible that the reasoning of the Two, or of the Three, is indeed an

24 The game-show analogue is to consider a situation where the studio audience is divided 40-30-20-10 among four options. Imagine that the question asks for the square root of 3 with suggested answers (a) 1.732 (b) 1.414 (c) 3.143, and (d) 4. In this situation, those who choose (c) or (d) seem sufficiently clueless or easily distracted such that a contestant, who cannot do the calculation on the spot, should probably attach little significance to their votes as between (a) and (b).
appropriate narrow ground, such that all five voters in the majority would agree on the particular reasoning. But again, it is also possible that cycling would occur or that we would misconstrue the direction of likely agreement within the Two-plus-Three group. Here, the Jury Theorem approach gives some pause. The straightforward thing to do would be to go with the reasoning of the Three because this group is slightly more likely to be right than the Two. But why not trust the Four? This plurality offers our best hope for getting the matter right, and yet there is the annoying problem that they constitute the dissent. My own inclination is to do as some jurisdictions do in all split cases and declare that the case has no precedential value at all.\(^2\) In any event, the easier claim is that given a disposition favored by a Four-plus-Three, a Four-plus-Two, or a Four-plus-One coalition, the Jury Theorem makes a strong case for allowing the Four to determine the precedential value. This is true even where a later interpreter perceives a narrower ground within the smaller subgroup.

In short, when a panel is divided such that there is no simple majority for any line of reasoning, there may be noncycling preferences that are hard to discern, there may be cycling among preferences, and there may not be preferences at all, but rather a right answer before us. In these circumstances, there is a good argument to be made for plurality decisionmaking. Typically, but not necessarily, this plurality will be a group of four on a panel of nine, or a group of three on a panel of seven.\(^2\)

IV. PLURALITY VOTING OUTSIDE THE JUDICIARY

A. Legislative Pluralities

I have suggested that we allow pluralitarianism some room to grow. As implied by the opening example in this Lecture, pluralities are common in informal settings, and there is often something to be learned from private, spontaneous arrangements. It is interesting that informal law avoids the very decision methods that formal law converges upon. Thus, it is extremely rare to find an insistence on majority (rather than plurality) disposition or motion-and-amendment voting\(^2\) anywhere other than in judicial chambers.

\(^{25}\)See supra note 22.

\(^{26}\)When there is a panel of three, the plurality and simple majority are the same and construction problems cannot be avoided by following the plurality, as the division with respect to reasoning will be 1-1-1.

\(^{27}\)The expression refers to up or down voting, normally by simple majority, so that the status quo is favored until some alternative musters majority support. A parliamentary rule system might be chosen in advance in order to control the process of perfecting the proposal that is before the group. If there are three options, A, B, and C, someone might move the
groups that follow parliamentary law, and other continuing, formal organizations.

On the other hand, we do use plurality voting in some formal settings. It is significant, and completely unsurprising, that pluralities determine the winner in each presidential primary—although other candidates may be awarded delegates because these are not necessarily winner-take-all competitions. Note the presence of five features. Pairwise competition would be unwieldy because there are multiple options and dispersed voters. Second, a Condorcet winner is also unlikely to be present, so the very advantage of pairwise competition is absent. Third, the question for the voters involves a mix of preferences and right answers; the right answers extend not only to policy matters, but also to the question (with a right answer) of who can win in the general election. Fourth, there are numerous voters (as well as options) so that strategic voting is difficult. Finally, in an important sense, no single vote is final; votes are open to future interpretation, much like a judicial panel’s reasoning, as opposed to its disposition. In the case of primary elections, the future interpreters are the voters in other states’ primaries and the candidates themselves, who can withdraw and support running mates.

Legislative decisionmaking is an area where pluralitarianism has untapped potential. The motion-and-amendment method allows the committees and the chair, speaker, or other officer to control the agenda and often determine the order or pattern in which pairs of options are compared by vote. If there is a Condorcet winner, this can be quite efficient, with the Condorcet winner appearing one way or the other unless the chair has the power to rule this alternative out of order or otherwise to prevent its consideration. But if there is cycling (and no Condorcet winner), then the power to control procedure is critical, and the result is not so much democratic—except that the group may have selected the chair—as dictatorial and ripe for rent seeking.28

By way of comparison, plurality voting in the legislature can generate the advantage promised by the Jury Theorem, at least where the body considers something with a right answer. And where preferences are at stake, plurality voting avoids pairwise competition—and thus avoids

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28Rent seeking refers to the fact that interest groups and other parties will try to influence the outcome, in this case by influencing the chair. The process of seeking this influence can itself be wasteful, not to mention undemocratic.
delegation of power to the chair or other agenda setter. Plurality voting does present the danger of strategic coalitions by voters, but at least these coalitions can be overturned by future legislatures when there is dissatisfaction with the earlier results.

B. Pluralities and Single Subjects: The Separation Dilemma

Return, for illustrative purposes, to our earlier voucher example, where there was cycling among the alternatives of no vouchers, vouchers for lower-income students, and vouchers for all students. That question was typical in that it involved an inexorable mix of right answers and preferences. Motion-and-amendment voting will find a Condorcet winner if one exists, while plurality voting might well miss it. But it may be more useful to focus on the question of when to allow the piling on of additional alternatives (which can increase the chance of cycling, but also perhaps, reveal a desirable Condorcet-winner option) and when to separate decisions that may or may not be intertwined. In the voucher case, for example, the number of options can quickly be expanded by introducing different funding levels (that is, vary the value of the voucher), conditions on recipient families and schools, and varying terms for the program as a whole. The question is whether to vote on these matters separately; both separation and the introduction of additional options can be used as strategic tools.

If, for example, one group moves to require that any voucher plan be funded annually at a level yielding $15,000 (or, alternatively, $1,000) per student, this may encourage votes for (or against) the no-voucher alternative. If the two voucher options can be endlessly subdivided as different dollar amounts (or other conditions) are attached, the likelihood of finding a putative Condorcet winner drops and the power of organized groups and strategic voting coalitions grows. Even so, I think it plausible that the more we think there is no Condorcet winner, the more plurality voting may offer a useful alternative, both because it can capture information from the group (Jury Theorem style) and weaken the power of the chair or other agenda-setter.29

The idea of separation, or division, of some issues for a series of votes is itself an interesting area for further exploration. The strategic value of separation may be minimized with a rule that, if one party moves to separate out issues, an opposing party may decide the order in which the voters consider them. Either way, at some level of abstraction, separation is

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29But I do not attempt to prove this proposition here. For the present, I aim only to offer the idea that plurality voting may be superior to the legislative decisionmaking rules we know.
inevitable, as known by readers familiar with single-subject requirements. Any proposal for plurality voting is therefore really a suggestion for some hybrid of plurality and motion-and-amendment, or limited pairwise, voting. Put differently, the importance of framing means that most issues can be broken down into questions to be decided with a mix of binary and plurality choices. Consider, for instance, a legislature trying to decide whether to store certain toxic wastes at sites in Kansas, West Virginia, or Colorado. Imagine a 40-30-30 division within this legislature, which is empowered by its own rules to switch to, or otherwise engage in, plurality voting. The Jury Theorem tempts us to think that the right answer is Kansas. But it is possible that if we framed the question as whether, given testimony about chemical breakdowns, the toxins should be stored in a mountainous region, there might well be a 60-40 affirmative vote. Indeed, the mountain-nonmountain choice might be a purer Jury Theorem sort of question than the question about specific states, where preferences and other variables loom larger.

C. Pluralities for Plebiscites

Plurality voting might be an especially useful innovation with respect to large-scale referenda or other plebiscites. Consider any of a number of modern peace proposals, offered to voters in a region, country, or pair of neighboring countries, either for ratification or nonbinding "advice" to political leaders. The more we insist (as does current practice) on a single proposal with an up or down vote, the more power is given to the drafters

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30 In a state with a single-subject constraint on legislation or initiatives, logrolling is (allegedly) constrained by a prohibition on bills or propositions with unrelated subjects. Of course, there is room for interpretation as to when subjects are related, or germane. Thus, we can expect courts to permit legislatures to enact budget bills with (arguably) many subjects because fiscal constraints often put all spending and taxing into one subject. For an example of court flexibility, see Kennedy Wholesale, Inc. v. State Bd. Of Equalization, 806 P.2d 1360, 1366 (Cal. 1991) (concluding that tobacco-related bill is valid, even where some of its spending measures are not directly tobacco-related). The point in the text is that, in some sense, all law is intertwined so that votes can always be dependent on the results of other votes, and yet there must be some order to the voting or one omnibus piece of law. I leave this problem for another day.

31 Again, I do not intend to resolve this matter here, but rather claim to suggest the nature of a future inquiry. There may be no neutral principle to control the separation question. As such, plurality voting does not, on its own, solve the problem of agenda-setting power. An agenda-setter might do just as well in control of the "procedural" question of germaneness, or in control of when to allow issues to be separated out for independent votes. At the same time, plurality voting might provide for incremental improvement, both in terms of removing power from the agenda-setter and capturing information held by numerous voters.
who can vary the terms because of their first-mover advantage. Moreover, such a proposal, even when formally ratified, generally requires future interpretation by political representatives and other parties. Finally, these voters are numerous, dispersed, and not easily organized to vote strategically. All these factors suggest the utility of plurality voting where voters might be offered four or five options and the opportunity to choose among them.

D. On Ranking Schemes

I have tried, thus far, to set aside the possibility of going beyond plurality voting, following the first-past-the-post style, to permit either proportional results in some cases or ranking systems in others. In the peace proposal context, for instance, there is obviously a case to be made for offering voters the opportunity to rank the options, or at least indicate their judgments beyond the question of first choice. But the opportunity to rank or assign weights also creates the possibility that strategic coalitions may be formed to undercut sensible preference aggregation. An organized group might advise its members to rank the favored option first, but then to give an artificially low ranking to a threatening alternative. In contrast, plurality voting—though also vulnerable to strategic voting—requires the strategist to convince adherents to cast their only vote for something other than their first choice. I suspect this is much harder to accomplish.

This intuition about strategic cooperation is reflected in the fact that we find ranking, in the form of point systems, only very rarely in political elections, and yet often for such things as awarding prizes in Olympic competition. Athletic performances are particularly well suited to voting-by-ranking because of several features. First, they are perceived as (ideally) involving right answers and not preferences. As we have seen, there is a case to be made that the pairwise assessments of informed voters, in collective pursuit of a right answer, can sometimes be useful, even if they are “wrong” regarding first choices. We might be interested in a judge’s

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22In principle, if voters recognize that “right answers,” rather than preferences, are at issue, they will not be tempted to behave strategically because they should appreciate the value of group decisionmaking along the lines of the Jury Theorem.

23An earlier example, see supra note 24, offered a situation where incorrect voters appeared uninformed and therefore useless in Jury Theorem terms with respect to the task of finding the correct answer as between the two leading choices. But imagine now the question as: Which city is the greatest distance from New York? (a) Miami, Florida; (b) Topeka, Kansas; (c) Oklahoma City, Oklahoma; or (d) New Orleans, Louisiana. The audience is consulted and is split 25-13-30-32. The contestant might sensibly wish that the rules permitted asking those who favored (b), or (a) and (b), to help decide. Topeka is not an
comparison of skaters C and D, even if this judge is the only one to have put skater F ahead of C and D. Second, ranking systems are more attractive the more we can control strategic misassessments. It is common for judges in the skating arena, for instance, to jettison outliers. In other settings, such as voting for the most valuable player awards in certain sports, the publication of votes may serve to control strategic rankings. Finally, ranking is especially convenient when we seek to determine multiple prizes, as we do in Olympic competition, but not in most primaries or plebiscites. All three of these considerations suggest that ranking systems may do more harm than good—and that they do not dominate simple plurality voting—in most voting situations.

V. CONCLUSION

It is sometimes wise to give up the quest for a Condorcet winner because we can discern that no Condorcet winner is likely to be present, because the quest itself comes at the cost of over-delegation to agenda-setters, or because the situation is one with a right answer and so that there is a superior way—plurality voting—to find this answer. In these situations, conventional legislative procedures and party politics associated with large-scale elections provide the appearance of majoritarianism. One cost of this majoritarianism is the exclusion of many alternatives from consideration. I have suggested, albeit rather implicitly, that to the extent we have faith in political authorities, we may be better off allowing them to construe pluralities, knowing they can be held accountable for their interpretations of divided votes.

This Lecture began with some thoughts about how we might link the manner of voting to the question of whether the matter at issue involves a right answer or preference aggregation. Of course, we recognize that most absurd answer, nor a mere guess, as far as the contestant can tell. It is simply unlikely to be correct given the Jury Theorem strategy. The contestant needs help to see that Oklahoma City is, in fact, far enough west to make it the correct answer.

34Consider “voting” in response to surveys aimed at eliciting “reputation” scores used for ranking law schools. The dean, faculty member, or even alumnus of law school Y might be tempted to rank Y in the first quintile, but place law school H or C in the second quintile in order to make Y look better when the scores are combined. The central authority might have a policy of eliminating a given ballot if only a small percentage of voters have agreed with the ballot-marker’s assessment of his or her own school, or evaluation of competitors’ schools. Our strategic voter may have declined to bump H down to the lowest quintile, precisely to avoid the likely strategy of disqualifying extreme outliers. Note that rankings are useful here because the central authority or compiler seeks to award more than a single prize. Note also that we seek a “right answer” but fear the presence of obvious preferences for winning.
of us are unable to separate situations with right answers from those where we simply have strongly or weakly held preferences. If the goals of getting things right and satisfying our preferences (or aggregating them) could be separated, then when the right answers were at stake, we might try to learn to be good losers, taking comfort in the power of a large group to get things right. My suggestion has been that when preferences and correctness are hopelessly intertwined, we might nevertheless be more receptive to plurality rule. However, even this conclusion requires that we have some faith in the group’s ability to get things right, which in turn requires some confidence in such things as the educational system. We tend to associate passion for politics with civic virtue of a sort, but, at some point, equal respect for others and recognition of group power suggest that losing is better than it is cracked up to be.